State v. Givens

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UNPUBLISHED OPINION

Elijah Givens appeals his conviction and sentence for one count of luring. We affirm but remand with instructions for the trial court to strike the specific community custody conditions that are unrelated to the crime of luring.

FACTS[1]

On the afternoon of September 23, 2007, Elijah Givens bought a couple of beers and went to John Ball Park, located in Vancouver, Washington, to drink them. He did not want the police to hassle him, so he squatted by the fence, in the corner of the park, to drink his beer. He was near a tree, some bushes, and a sign.

Givens noticed several children playing in the park. In particular, he recognized one boy, C.J., age 5, from the Share House, a local shelter. C.J. rode up on a scooter, said hello to Givens, and started climbing the nearby tree.

Meanwhile, a 14-year-old girl, B.T., was baby-sitting three young children-D.V.W., age 9; T.W., age 6; and C.K., age 8-at the park. She noticed Givens because he was calling out to the children she was watching, asking them to "come here, come here, come play with me; come here, come here, I want to talk to you." RP (Dec. 21, 2007) at 45. B.T. could not see Givens from the bench on which she was sitting, so she got up and walked over toward the corner of the park, following the sounds of Givens's voice. After repositioning herself closer, she saw Givens and noticed he was drinking beer.

B.T. asked Givens to stop talking to the girls. Givens said he would, but a few minutes later he starting calling the girls. Again, B.T. asked Givens to not talk to the girls. And again, Givens said he would. But a few minutes later, he called out to the girls once more. B.T. called 911 dispatch. On the 911-dispatch recording, B.T. reported that an older black man in the corner of John Ball Park called out twice to the three girls she was baby-sitting. She kept an eye on Givens until the police officer arrived.

Officer Millard of the Vancouver Police Department responded to the scene. When he approached, Givens was angry, incoherent, smelled of alcohol, and had slurred speech. Officer Millard cited Givens for open alcohol in public. After speaking with the girls, surveying the scene, and speaking with Givens, Officer Millard arrested Givens.

On September 27, 2007, the Clark County Prosecuting Attorney charged Givens with three counts of luring. see RCW 9A.40.090(1). Givens waived his right to a jury trial, and the case proceeded to a bench trial.

B.T., D.V.W., T.W., C.K., and C.J. testified at trial, in addition to others. T.W. testified that she did not remember the incident in the park. Similarly, C.J. had little-to-no recollection of the incident.

C.K. testified that she remembered Givens from the park. She testified that Givens was behind a trash can and calling to her and her friends to "come over here and play with us-with [Givens]," and that he did this more than twice. RP (Dec. 21, 2007) at 91-92. She also remembered that B.T. called the police because of the incident. RP (Dec. 21, 2007) at 92. D.V.W. testified that she remembered a man in the park that "told us to come here." RP (Dec. 21, 2007) at 111. Then, according to D.V.W., the man "told us to come and play with him". RP (Dec. 21, 2007) at 111. And then before he left he said "I'll give you some candy." RP (Dec. 21, 2007) at 112. D.V.W. could not remember what the man looked like, but she did remember that he was drinking over by the fence. Neither D.V.W. nor any of the other witnesses reported to the police on the date of the incident that Givens offered the kids candy.

The trial court found Givens guilty on one count of luring and not guilty on the other two counts. Specifically, it found that Givens was in an area obscured by public view because he was in an area on sloping terrain behind some trees, bushes, and a large wooden sign. From that area, Givens called out to D.V.W. more than once to come over and play with him. D.V.W. was a minor. And Givens did not have D.V.W.'s mother's permission to come into contact with her daughter.

The trial court sentenced Givens to 120 days' confinement with 12 months' community custody. This timely appeal follows.

ANALYSIS

I. Sufficiency of the Evidence

Givens first contends that the State failed to present sufficient evidence to support his luring conviction. Givens's argument is unconvincing.

In an appeal based on the sufficiency of the evidence, we inquire "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). We need not be convinced of the truth of the charge; rather we must be convinced that on the evidence in the record, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Jones, 63 Wn. App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028 (1992). For the purposes of a challenge to the sufficiency of the evidence, Givens admits the truth of the State's evidence. Jones, 63 Wn. App. at 707-08.

Givens contends that there was insufficient evidence to establish luring because (1) his acts did not amount to enticement and (2) he did not invite the child into an area obscured from or inaccessible to the public.

A person commits the crime of luring if the person:

(1)(a) Orders, lures, or attempts to lure a minor . . . into any area or structure that is obscured from or inaccessible to the public . . .;

(b) Does not have the consent of the minor's parent or guardian . . .; and

(c) Is unknown to the child.

RCW 9A.40.090. The term "minor" refers to a person under the age of 16. RCW 9A.40.090(3)(a).

Neither RCW 9A.40.090, nor chapter 9A.40 RCW, explicitly define the terms "lure" or "luring," but Washington case law has determined that a commonly understood use of the word is to "entice." State v. Dana, 84 Wn. App. 166, 172, 926 P.2d 344 (1996), review denied, 133 Wn.2d 1021 (1997). "Moreover, the connotation of the word 'lure' amplifies that meaning by implying that one who lures another leads that person into a course of action that is wrong or foolish under the circumstances." Dana, 84 Wn. App. at 172. Luring is not an invitation alone; enticement, by words or conduct must accompany the invitation.[2] Dana, 84 Wn. App. at 176.

In Dana, Division One upheld the defendant's luring conviction. Dana, 84 Wn. App. at 179. It held that the defendant's verbal invitation to the minors to enter his car while he exposed his genitals constituted luring for the purposes of the statute. Dana, 94 Wn. App. at 179. It was of no consequence that the act of exposing his genitals did not entice the minors. Dana, 94 Wn. App. at 179.

Givens attempts to distinguish Dana, arguing that his statement essentially amounted to a mere invitation and not an enticement. But his argument is unconvincing.

Here, the trial court was very clear in its oral decision. It found that Givens attempted to entice D.V.W. by asking her to come over to him and play. It based this conclusion on D.V.W.'s testimony, the babysitter's testimony, and the investigating officer's testimony. Indeed, even Givens testified that he had called D.V.W. over to play with him and possibly the scooter that was nearby. According to the trial court, for a child of D.V.W.'s age, the prospects of playing with someone and/or playing with a scooter constituted enticement. We agree. See Dana, 84 Wn. App. at 179.

Likewise, there was sufficient evidence to establish that Givens attempted to lure D.V.W. to an area obscured from or inaccessible to the public. Again, during its oral decision, the trial court went into great detail to describe where Givens was during the incident. It found, based on testimony and

numerous photographs, that the area was obscured from public view. Significantly, the babysitter had to change her position at various times during the incident to see Givens. In fact, when an investigating officer arrived on the scene, he could not see Givens because Givens was sitting in an area beyond recessed terrain, obscured from most viewpoints by bushes, a sign, and a garbage can. The trial court found the officer's testimony credible and relied on the photograph exhibits of the area. Viewing the evidence in the light most favorable to the State, there was sufficient evidence supporting Givens conviction. See Dana, 84 Wn. App. at 179.

II. Crime-Related Community Custody Prohibition

Givens next contends that the trial court exceeded its authority by imposing community custody conditions not directly related to the crime of luring. Givens is correct.

Under RCW 9.94A.700(5)(e), the legislature has authorized the trial court to impose crime-related prohibitions. "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). We review whether a community custody prohibition is crime-related for abuse of discretion. Autrey, 136 Wn. App. at 466. Additionally, we review the trial court's finding that the community custody prohibition is crime-related for substantial supporting evidence. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), review denied, 163 Wn.2d 1025 (2008).

The trial court convicted Givens of one count of luring, an unranked felony offense. See RCW 9.94A.515. Therefore, the trial court was authorized to impose a sentence including up to one year of confinement and up to one year of community custody. RCW 9.94A.505(2)(b). RCW 9.94A.505(2)(b) specifies that the community custody term is "subject to conditions and sanctions as authorized in RCW 9.94A.710(2) and (3)." RCW 9.94A.710(2)(a), in turn, provides that community custody conditions shall be the same as provided in RCW 9.94A.700(4), and may include the conditions authorized in RCW 9.94A.700(5).

Here, Givens challenges several conditions, including two conditions relating to controlled substances and drug activity. A sentencing court may prohibit an offender from possessing non-prescribed controlled substances, regardless of whether the crime was drug related. RCW 9.94A.700(4)(c). But no other drug-related conditions are authorized unless they are directly related to the circumstances of the crime. There is no evidence that controlled substances played any role in Givens's offense. In fact, there is no mention of controlled substances anywhere in the record. Therefore, the trial court erred in mandating that Givens "not frequent known drug activity areas or residences," and "notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed." CP at 75. Based on the record before us, these conditions are invalid and must be stricken.

In addition, Givens challenges community custody conditions that the trial court imposed relating to

sexual deviancy treatment, plethysmograph testing, and pornography. Chapter 9A.44 RCW defines sex crimes in Washington. The trial court convicted Givens, however, of luring under RCW 9A.40.090. Luring is not a sex offense. See State v. Kissee, 88 Wn. App. 817, 821, 947 P.2d 262 (1997). Moreover, there was no allegation, finding, or evidence that Givens's offense was sexually motivated. Accordingly, based on the record before this court, the conditions relating to sexual deviancy treatment, plethysmograph testing, and pornography are invalid and must be stricken.

III. Findings of Fact and Conclusions of Law

Finally, Givens contends that the trial court failed to address his statutory defense in its written findings of fact, or conclusions of law, or in its oral ruling. He therefore insists that to complete a meaningful review, this court must first remand for the trial court to enter findings and conclusions regarding Givens's defense.

Under the luring statute, it is an affirmative defense, which the defendant must prove by a preponderance of the evidence, that his actions were reasonable under the circumstances, and that he did not have any intent to harm the health, safety, or welfare of the minor. RCW 9A.40.090(2).

Unquestionably, CrR 6.1(d) requires the trial court to enter findings of fact and conclusions of law following a bench trial. The purpose of this requirement is to enable review of the questions raised on appeal. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). When the trial court completely fails to enter findings and conclusions after a bench trial, the only remedy is remand for entry of the same. Head, 136 Wn.2d at 624. Nevertheless, we may apply a harmless error standard to findings of fact and conclusions of law that contain errors. State v. Banks, 149 Wn.2d 38, 43-46, 65 P.3d 1198 (2003). An error is harmless when it appears beyond a reasonable doubt that the challenged error did not contribute to the verdict obtained. Banks, 149 Wn.2d at 44.

Here, Givens acknowledges that the trial court entered findings of fact and conclusions of law. But he maintains that the trial court's failure to enter specific findings or conclusions as to his asserted statutory defense precludes meaningful appellate review. We disagree.

Despite opportunity, Givens did not object to the trial court's findings of fact and conclusions of law when it entered them. And if a party fails to object to an alleged error before the trial court, the party cannot raise the issue on appeal. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). The record reveals that Givens's counsel reviewed the findings and conclusions and explicitly declined to object. In fact, Givens's counsel even stated that even if he had not seen the findings, Givens was eager to move forward and would have likely waived any potential objection. Thus, Givens failed to preserve this error for appeal. Accordingly, we need not address it.

Nevertheless, we choose to address this issue and Givens's argument fails. Significantly, Givens does not assert any errors specifically regarding his defense on appeal. He does not argue that he proved

by a preponderance of the evidence that his actions were reasonable under the circumstances and he did not have any intent to harm the health, safety, or welfare of the minor victim. See RCW 9A.40.090(2). Had he raised this error on appeal, then perhaps the trial court's failure to include a specific finding of fact or conclusion of law regarding his statutory defense may have been prejudicial. But such is not the case here.

The trial court's failure to enter findings or conclusions specifically regarding Givens's affirmative defense has no bearing on the alleged errors he appeals, i.e., sufficiency of the evidence for luring, community custody prohibitions, and ineffective assistance of counsel by failing to properly impeach two witnesses and failure to contact a minor witness immediately after the incident (discussed below). This conclusion is inevitable, particularly given that substantial evidence supports the findings and conclusions related to the challenged errors on appeal. See Dana, 84 Wn. App. at 179.

In sum, Givens failed to object to the findings of fact and conclusions of law before the trial court. He has, therefore, failed to preserve this issue for appeal. Nevertheless, the trial court's failure to enter specific findings of fact and conclusions of law regarding Givens's affirmative defense is harmless. See Banks, 149 Wn.2d at 43-46. The failure does not affect our review on appeal. Accordingly, we need not remand for entry of findings and conclusions as to Givens's defense. See Banks, 149 Wn.2d at 43-46.

IV. Statement of Additional Grounds (SAG)[3]

Givens's SAG raises several additional issues.[4] None of which is meritorious, and only one warrants discussion here. Givens claims his counsel's performance was ineffective, depriving him of his Sixth Amendment right to effective representation.

To establish the claim of ineffective assistance, Givens must show that under an objective standard of reasonableness, that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 693, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). He need only show a reasonable probability that the outcome would have differed sufficient to undermine confidence in the outcome in order to demonstrate prejudice. Strickland, 466 U.S. at 693-94. Givens must make a showing as to both prongs and must also overcome a strong presumption that his counsel's conduct was effective. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics may not form the basis of an ineffective assistance of counsel claim. McFarland, 127 Wn.2d at 335-36.

Givens contends that his counsel's performance was deficient because he failed to impeach the child victim and Officer Millard, both of which Givens claims made prior inconsistent statements. He also contends that this counsel was deficient for failing to obtain a statement from another minor witness immediately after the incident. These contentions are unconvincing.

First, it does not appear that the minor witness's statement in her deposition was inconsistent with her trial testimony. Second, the record does not include Officer Millard's police report; thus, this court is unable to verify whether the police report statements contradicted trial testimony. Third, there is no evidence in the record indicating when Givens's trial counsel first contacted the defense's minor witness. Because matters outside the record cannot be addressed on direct appeal, Givens does not overcome the strong presumption that his counsel's performance was effective. McFarland, 127 Wn.2d at 336, 338 n.5.

And most notably, Givens fails to demonstrate how these alleged deficiencies prejudiced the trial outcome. In other words, he has not established the second prong of the Strickland test. Thus, Givens's ineffective assistance of counsel claim fails. McFarland, 127 Wn.2d at 335.

Affirmed, but remanded to strike the invalid community custody conditions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.

1. The facts are undisputed.

2. In Dana, Division One found RCW 9A.40.090 sufficiently definite to inform a reasonable person of what conduct it proscribes. Dana, 84 Wn. App. at 172.

3. RAP 10.10.

4. In his SAG, Givens contends that (1) the State presented insufficient evidence to support his conviction and (2) the trial court erroneously imposed community custody conditions unrelated to his conviction. These are the same issues his counsel raised and we need not address the same issues multiple times.