State v. Vanderpool

119 Wash.App. 1051 (2003) | Cited 0 times | Court of Appeals of Washington | December 18, 2003

Concurring: John a Schultheis, Stephen M Brown

UNPUBLISHED OPINION

Steven L. Vanderpool appeals his conviction and sentence for first degree child molestation. He contends the court improperly admitted his confession to police and failed to grant a motion for mistrial, erred in failing to instruct jurors on lesser included offenses, and improperly ordered an exceptional sentence. He raises two other issues in his statement of additional grounds for review. We affirm.

Mr. Vanderpool's sister, Tina Younger, reported to police that she had seen him kneeling beside a bed where 3-year-old CB was sleeping in August 2001.[1] CB's penis was exposed, his underwear off to the side, and his legs open. Police found the top of a butter container, with a glob of butter on it, on the bed near where the child was sleeping.

Mr. Vanderpool later admitted to police that he had touched the child's penis. He was charged with first degree child molestation. A jury found him guilty, and the court ordered an exceptional sentence of 300 months of confinement.

We first consider whether the court erred in admitting Mr. Vanderpool's statements to police. The appellate record does not contain written findings of fact and conclusions of law with respect to the CrR 3.5 hearing. See CrR 3.5(c). However, the court's oral findings provide an adequate basis for reviewing its decision. See In re Detention of LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986) (reviewing court may look to oral ruling if written findings are inadequate). At the end of the CrR 3.5 hearing, the court held:

Based on the testimony of Officers {Glen} Ball and Officer {Stanton} Howard, I find that they had contact with the defendant on August 22, '01, some time early morning hours, 5 a.m. in the morning. Mr. Vanderpool was taken to the police station. He was not handcuffed. He went into an interview room at Officer Ball's direction. Officer Ball got together the paperwork he needed, came in with the forms -- which will be Exhibit A --read the Miranda[2] Rights to Mr. Vanderpool -- having ascertained that he could not read or write -- and read each right, stopped and made sure that Mr. Vanderpool understood each of them. And when he was satisfied, Mr. Vanderpool did put a check mark by the right.

He also read the waiver form to Mr. Vanderpool and made sure that he understood that as well. And although Mr. Vanderpool can't read or write, he can sign his name and he did so to the waiver form.

He also further indicated that he understood each right. He never asked for an attorney; never indicated that he wanted to stop the questioning. And it seemed to be, according to Officer Ball, that he wanted to get his story told.

There are no promises or coercion.

The defendant indicated he had not slept, that he used methamphetamines in the past 24 hours; however, he seemed coherent and not jittery. Although, he appeared to be worried. He did not demonstrate, what the officers would call, drug-influenced behavior. He freely and voluntarily waived his rights under Miranda and agreed to talk to Officer Ball.

After that occurred, Officer Ball was preparing to reduce the statement for the confession to writing. Officer Howard came in. Officer Ball re-advised Mr. Vanderpool of his rights and again understood -- he said he understood. And the written statement was then taken.

There were no signs of substance abuse or being under the influence. He did not appear to be paranoid and did not appear to be flighty. He did appear to be focused as to what was going on and seemed to understand what was going on.

Mr. Vanderpool doesn't remember what time he was arrested and he can't remember if he confessed before or after the advisement of rights. He said that Officer Ball said he couldn't help him if he didn't talk to him and Officer Ball did indicate that he had been on Metro.

I'll make those as findings. I find, however, that the defendant did voluntarily and knowingly waive his rights under Miranda and agree to speak with the officer and so the statement will be deemed to be admissible.

Report of Proceedings (RP) (Jan. 25, 2002) at 53-55.

A trial court's determination on the 'ultimate issue of 'voluntariness'' is a legal determination, subject to independent, de novo review. Miller v. Fenton, 474 U.S. 104, 110, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1990), cert. denied, 502 U.S. 853 (1991); but see State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988) (when 'there is substantial evidence from which the trial court could find by a preponderance of evidence that a confession was given voluntarily, the trial court's determination of voluntariness will not be disturbed on appeal'). However, a trial court's subsidiary factual determinations after a suppression hearing will be overturned only if they are not supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994); see State v. Broadaway, 133 Wn.2d 118, 129-31, 942 P.2d 363 (1997).

Here, because Mr. Vanderpool has not assigned error to the trial court's factual determinations, they are verities on appeal. See Hill, 123 Wn.2d at 644. Moreover, they are supported by substantial evidence presented at the CrR 3.5 hearing. Mr. Vanderpool nevertheless appears to challenge the court's determination on the legal issue of voluntariness, which this court reviews de novo.

To be admissible, a defendant's statement must have been made 'freely and without inducement or compulsion.' State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144 (1986). The court must examine the totality of circumstances to determine whether a confession was voluntary. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984); State v. Riley, 19 Wn. App. 289, 297-98, 576 P.2d 1311, review denied, 90 Wn.2d 1013 (1978).

Mr. Vanderpool contends his statement was involuntary in light of the totality of the circumstances, including his drug use, sleep deprivation, and mental problems.[3] However, a defendant's drug use, mental disability, and sleep deprivation do not automatically establish a confession was involuntary. State v. Hutchinson, 135 Wn.2d 863, 885-86, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999); State v. Aten, 130 Wn.2d 640, 644, 927 P.2d 210 (1996); Ortiz, 104 Wn.2d at 484-85. The critical factual issue is whether, under the circumstances, the defendant was able to knowingly, intelligently, and voluntarily waive his rights. Hutchinson, 135 Wn.2d at 885-86.

Officer Ball twice advised Mr. Vanderpool of his rights and carefully explained each right individually. The officers testified Mr. Vanderpool was coherent and focused; understood what the interview was about; and showed no signs of sleep deprivation, mental disorder, or substance abuse or intoxication. In light of this evidence, the court properly found the statements were not involuntary.

We next consider whether the court erred in denying Mr. Vanderpool's motion for a mistrial. During the first trial in this matter, which ended in a mistrial, Officer Ball had testified Mr. Vanderpool told him he was HIV (human immunodeficiency virus) positive. During the second trial, defense counsel moved to exclude HIV evidence as unduly prejudicial. The prosecutor noted she had referred to that evidence in her opening statement. The court held:

Let me indicate for the record, there has been no prior motion in limine with reference to the HIV in the prior trial or in this case. {The prosecutor's} remark during opening statement is, therefore, not out of bounds.

The motion has been made at this point, so I will grant it. So, the reference of HIV positive is not to be touched upon.

RP (May 29, 2002) at 72. Defense counsel did not request a mistrial.

Later, Officer Ball testified:

Q. Did the defendant indicate to you in any way that he did not understand what you were telling him?

A. No. He had made a remark -- As part of my interview I asked him if he had ever been advised of Miranda before and he advised me that, yes, that he had.

RP (May 29, 2002) at 180. Defense counsel moved for a mistrial. The court denied the motion, holding the testimony did not 'unduly prejudice' Mr. Vanderpool. RP (May 29, 2002) at 181. Mr. Vanderpool contends in part that the court should have granted a mistrial because of the prosecutor's reference to HIV during opening statement. But it is apparent from the record that defense counsel did not request a mistrial or even a curative instruction on this ground, either during the opening statement itself or later during trial. To preserve the issue for appeal, a party ordinarily must move for a mistrial or request an instruction to cure the improper argument by opposing counsel. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); State v. Riley, 69 Wn. App. 349, 354, 848 P.2d 1288 (1993). 'Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.' State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). A party's failure to move for a mistrial 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.' Swan, 114 Wn.2d at 661.

In addition, the jury is presumed to have followed the court's instruction to disregard attorneys' comments that were not supported by the evidence. See State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Even if Mr. Vanderpool did not waive the issue by failing to request a mistrial at the time, there is no basis for reversing the conviction on this ground on appeal.

Defense counsel did request a mistrial after the officer testified Mr. Vanderpool told him he had been advised of his Miranda rights before. Although he cites no authority and does not explain the basis for his contention that the testimony was improper, he apparently argues the testimony was indirect evidence of prior bad acts.

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. State v. Greiff, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). A court 'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.' State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). Here, the trial court concluded in the context of the trial that the officer's testimony was not unduly prejudicial. The conclusion is supported by defense counsel's failure to request that the court instruct jurors to disregard the testimony. The court did not abuse its discretion by denying the motion for mistrial.

Mr. Vanderpool's argument fails to explain specifically how the prosecutor's statement or Officer Ball's testimony prejudiced him. There is no basis for reversing the conviction.

We next consider whether the court erred by failing to instruct the jurors on a lesser included offense. At trial, the State requested an instruction on attempted first degree child molestation as a lesser included offense. Defense counsel vigorously opposed such an instruction:

Your Honor, the situation here is we've all rested. My decisions on my client's testimony were based on the conclusion of the State's case after she had rested. And based on that resting and my decisions, we decided that this did not warrant an attempt, that my client had never made any substantial step, had never made any steps, was not going to ask the jury for an attempt. And, therefore, we made the tactical decision about whether or not he was gonna testify. We didn't figure that it was necessary to put him on the stand to testify because there was no evidence that he had actually committed this offense. Otherwise, we're faced back in a situation where he's now prejudiced because he's unable to testify.

RP (May 30, 2002) at 253. The court declined to include the State's proposed instruction.

'An attempted crime is a lesser included offense of the crime charged and the jury may convict a defendant of attempting to commit a crime charged, even though attempt was not specifically charged.' State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992); see RCW 10.61.010. Mr. Vanderpool was entitled to an instruction on the crime of attempted first degree child molestation. However, lesser included offense instructions are required only when they are requested. State v. Hoffman, 116 Wn.2d 51, 112, 804 P.2d 577 (1991). The Supreme Court has rejected the contention Mr. Vanderpool raises here:

We are here asked to hold that trial courts must sua sponte instruct on all lesser included offenses over the express objections of the defendants. That is not the law of this state, and we decline to so rule.

Id. at 111.

Mr. Vanderpool not only failed to request an attempt instruction, but he also vigorously opposed it. His contention on appeal that the court should have overridden his own request is without merit.

We next consider whether the court erred by ordering an exceptional sentence. The standard range sentence for Mr. Vanderpool is 149-198 months. In ordering an exceptional sentence, the court entered the following findings:

1. The victim was a 3-year-old developmentally disabled child who was asleep when the defendant molested him. The victim was particularly vulnerable.

2. The defendant has convictions for Indecent Liberties, Assault 2nd degree, Assault 3rd degree, Possession of Cocaine, Failure to register as a sex offender, and numerous gross misdemeanor and

misdemeanor offenses. The defendant has admitted that almost all of his legal problems have been caused by alcohol. He used alcohol a few days prior to his arrest and methamphetamine the night he was arrested. Defendant has terminated two counseling programs. Defendant failed to successfully complete three chemical dependency treatment programs. Defendant's 12/17/01 Eastern State Hospital evaluation concluded that the defendant 'is a substantial danger to other persons and does present a substantial risk of committing criminal acts jeopardizing public safety or security, diagnosing the defendant as having, among others, Polysubstance Dependence and Antisocial Personality Features.'

3. Defendant is an intravenous drug user who admits to having Human Immunodeficiency Virus or HIV, an infection.

Clerk's Papers at 22-23. From these findings, the court concluded the standard range was clearly inadequate and an exceptional sentence was justified by (1) the victim's particular vulnerability; (2) Mr. Vanderpool's clear danger to the public; and (3) Mr. Vanderpool's conduct was more serious than contemplated by the Sentencing Reform Act of 1981 because he had the ability to infect the child with HIV.

A defendant may appeal an exceptional sentence on any of three grounds. See State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). First, he may contend the sentencing court's reasons for imposing the sentence are clearly erroneous because they are not supported by the record. RCW 9.94A.585(4)(a); Tili, 148 Wn.2d at 358. Because Mr. Vanderpool has not assigned error to the court's findings, they are verities on appeal. See State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Mr. Vanderpool nevertheless appears primarily[4] to challenge the court's finding that CB was particularly vulnerable. He contends that because the child was asleep during the incident, he was not victimized in any way. But several cases have held that a sleeping victim may be particularly vulnerable. See State v. Ross, 71 Wn. App. 556, 565, 861 P.2d 473, 883 P.2d 329 (1993), review denied, 123 Wn.2d 1019 (1994); State v. Hicks, 61 Wn. App. 923, 931, 812 P.2d 893 (1991); State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989). A victim also may be particularly vulnerable because of a disability, if the defendant knew or should have known of the disability and if the disability makes the victim more vulnerable than a nondisabled person would have been. State v. Jackmon, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989). A developmentally disabled child's inability to communicate clearly may make him or her more vulnerable than a nondisabled child would be. As a relative and guest in CB's parents' home, Mr. Vanderpool at least should have been aware of the disability. The court's finding of particular vulnerability is supported by the record and thus is not clearly erroneous.

Second, a defendant may contend the court's reasons, as a matter of law, do not justify an exceptional sentence. RCW 9.94A.585(4)(a); Tili, 148 Wn.2d at 358. Mr. Vanderpool appears to concede that an exceptional sentence is justified by a victim's particular vulnerability, RCW 9.94A.535(2)(b); the defendant's future dangerousness, State v. Pryor, 115 Wn.2d 445, 454-55, 799 P.2d 244 (1990); and by

conduct that is more egregious than typical for the crime, State v. Owens, 95 Wn. App. 619, 626, 976 P.2d 656, review denied, 138 Wn.2d 1015 (1999).

Third, a defendant may contend the sentence actually imposed is clearly excessive or clearly too lenient; this contention is reviewed for abuse of discretion. RCW 9.94A.585(4)(b); Tili, 148 Wn.2d at 358. Mr. Vanderpool argues his sentence is equivalent to a sentence for second degree murder. Even assuming this were true (which Mr. Vanderpool has not established by citation to authority), he has failed to explain why it is an abuse of discretion. In light of the valid factors supporting a standard range, there is no basis for concluding the court abused its discretion by entering an exceptional sentence of 300 months.

In a statement of additional grounds for review, Mr. Vanderpool contends he was denied a speedy trial. The information was filed on August 24, 2001. A competency examination was ordered on September 14, and the court found Mr. Vanderpool competent on December 21. This period is excluded from the speedy-trial period pursuant to CrR 3.3(g)(1). The speedy-trial period was extended to February 19, 2002, and trial began on February 11. The court ordered a mistrial on February 13, and a new speedy-trial period began pursuant to CrR 3.3(d)(3). Mr. Vanderpool then waived his speedy-trial right and agreed to a 90-day continuance on March 22. This period is excluded from the speedy-trial period pursuant to CrR 3.3(g)(3), 3.3(h)(1), and 3.3(j). The trial began on May 20, which was within this period.

Mr. Vanderpool also contends the trial was continued because a police officer was unavailable. The record does not establish a factual basis for this argument. However, such a continuance would be proper, in the absence of any substantial prejudice to Mr. Vanderpool's defense, pursuant to CrR 3.3(h)(2). The record does not support Mr. Vanderpool's contention that his right to a speedy trial was violated.

Mr. Vanderpool also contends he was not permitted to present 'some of my witnesses.' Statement of Add'l Grounds for Rev. The record does not support this contention, nor has Mr. Vanderpool identified specifically what evidence the witnesses would have provided or how he was prejudiced by their absence from trial. See State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (only prejudicial error is ground for reversal). He thus has not established a basis for reversing the conviction.

Finally, Mr. Vanderpool's statement contends he was denied a fair trial because of the failure to examine CB. It is not clear whether Mr. Vanderpool complains that a physical examination was not done, or whether he complains that the child was not called as a witness at trial. In either case, however, he has not demonstrated how he was prejudiced. The State alleged only that Mr. Vanderpool pulled the child's penis out of his underwear, and it is not apparent what relevant evidence a physical examination would reveal. Also, the record shows the child at the time of trial was only 4 years old and developmentally disabled. Even if he was competent to testify, see RCW 5.60.050, he was asleep at the time of the incident. It thus is not apparent what relevant evidence the

child could have provided. Again, Mr. Vanderpool has failed to establish prejudice, and reversal is not required. See Smith, 106 Wn.2d at 780.

The conviction and sentence are affirmed.

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

Kato, J.

WE CONCUR:

Brown, C.J.

Schultheis, J.

1. Mr. Vanderpool and Ms. Younger are cousins of TB, the child's father. They were staying temporarily at TB's home at the time of the incident at issue here.

2. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3. Although Mr. Vanderpool relies on portions of a mental evaluation conducted by doctors at Eastern State Hospital, the report was not admitted into evidence at the CrR 3.5 hearing. At any rate, although the report concluded Mr. Vanderpool does suffer from several mental disorders or diseases, it found he was competent to stand trial and had the capacity to understand his actions. The report did not address Mr. Vanderpool's mental condition specifically at the time of his statements to police.

4. Mr. Vanderpool also appears to contend there was no support in the record for the court's finding that he admitted being HIV positive. However, the pretrial competency evaluation twice refers to claims by Mr. Vanderpool that he has AIDS (acquired immune deficiency syndrome) or is HIV positive. See RCW 9.94A.530(2); State v. Handley, 115 Wn.2d 275, 281, 796 P.2d 1266 (1990) (sentencing court not limited to facts proven at trial).