IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LYN ROGER CHRISTIAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11634 Trial Court No. 3PA-11-1533 CR MEMORANDUM OPINION No. 6540 — November 8, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Beverly W. Cutler and Gregory Heath, Judges.

Appearances: Sharon Barr, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

A jury convicted Lyn Roger Christian of multiple counts of first-degree and second-degree sexual abuse of a minor and two counts of first-degree indecent exposure

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

for molesting two young girls: nine-year-old K.S. (whose mother Christian was dating at the time of the abuse) and eight-year-old A.K.H. (K.S.'s friend).[1]

On appeal, Christian argues that Superior Court Judge Gregory Heath erred when he denied Christian's motion for an *in camera* review of various records regarding the girls and their families, including records of the Office of Children's Services (OCS). Judge Heath ruled that Christian's discovery motion lacked a sufficient evidentiary foundation. But the judge granted Christian leave to cure this defect and to renew the motion.

After the judge issued this ruling, Christian did not file a renewed discovery motion, even after newly discovered evidence at his trial revealed an obvious case-specific justification for further discovery. Because Christian did not renew his discovery motion, he failed to preserve his objection to Judge Heath's ruling for appellate review.

Christian also argues that two counts in his indictment alleging that he contacted or penetrated K.S.'s genitals with spray from a shower head were not supported by the evidence at trial. We conclude that the evidence was sufficient to support Christian's convictions on these counts.

Background facts

Christian dated K.S.'s mother Bridget from June 2008 until February 2009. K.S. turned nine years old in December of 2008. During the approximately eight-month-long relationship between Christian and Bridget, Christian molested K.S. multiple times.

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[1] AS 11.41.434(a)(1) (sexual abuse of a minor in the first degree); AS 11.41.436(a)(2) (sexual abuse of a minor in the second degree); AS 11.41.458(a)(1) (indecent exposure in the first degree).

K.S.'s best friend A.K.H. lived near K.S. and often visited K.S.'s house. During one visit, Christian asked A.K.H. (in K.S.'s presence) to touch his exposed penis, and she did so. After that incident, A.K.H. never returned to K.S.'s house.

Sometime during the fall of 2010 or early 2011 — around K.S.'s eleventh birthday — K.S. disclosed the sexual abuse to her mother. K.S.'s mother did not report this abuse to the police, but instead retained a counselor for K.S. Then, in March of 2011, the police received a report of harm. K.S.'s mother assumed that K.S.'s counselor made this report. Under the authority of a *Glass* warrant, the mother conducted a taped telephone conversation with Christian, during which Christian made admissions regarding his sexual abuse of K.S.

Before trial, Christian's defense attorney requested production for *in camera* inspection by the superior court of "all records of the families of the alleged victims" possessed by OCS. In this motion, the defense attorney argued that the records might reveal that the two girls had accused others of sexual abuse, and had then confused those persons with Christian; or that other members of the two girls' families might have been investigated for different incidents; or that the girls might have made false statements to investigators.

The defense attorney also requested an *in camera* inspection of the girls' school records. He speculated that the two girls might have revealed something to school authorities about the charged assaults, or that the children might even have accused school authorities of sexually abusing them, or that school authorities might have punished the children for lying.

Judge Heath denied Christian's motion without prejudice. The judge ruled that "[i]f the defendant wants the court to reconsider its ruling, the defendant must specify the records sought including the dates and location of the records. Furthermore, the defendant must describe case-specific relevance . . . ."

Christian's case was later reassigned to Superior Court Judge Beverly W. Cutler. At a hearing shortly before trial, Judge Cutler stated that "the door's open to file anything, even on an expedited basis, that you believe is supported in good faith by the law and the facts to try to obtain whatever you believe you're entitled to prepare for trial."

Then, on the third morning of trial, the prosecutor notified Christian's defense attorney of newly discovered evidence. The prosecutor had learned that A.K.H.'s mother, Kristi H., had filed a report of harm with OCS in the fall of 2008. As Kristi H. would later testify at trial, she had discovered a pink penis-shaped vibrator in A.K.H.'s backpack. When Kristi H. asked A.K.H. about this, A.K.H. answered that K.S. had given her the vibrator.

A.K.H.'s mother immediately spoke with K.S., who claimed that Christian had given her the vibrator as a gift, and that her mother was aware of this. K.S. also told Kristi H. that she had watched pornography with her mother and Christian. Concerned about these allegations, Kristi H. filed a report of harm with OCS. (The record is silent about what OCS did in response to this report.)

Christian's defense attorney immediately told the judge that he would alter his theory of defense to incorporate Kristi H.'s new disclosure. But the defense attorney did not renew his earlier request for discovery of OCS and school records in light of this newly discovered evidence.

During his summation, the defense attorney ascribed significance to K.S.'s disclosure to Kristi H. regarding the pink vibrator and the pornography that K.S. had viewed. The defense attorney hypothesized that after K.S. disclosed these matters to Kristi H., K.S. became concerned that her disclosure might lead authorities to remove her from her mother's custody. The defense attorney argued that to avoid this outcome, K.S.

and A.K.H. falsely accused Christian of molestation to deflect the attention of the authorities away from K.S.'s mother.

The jury rejected this defense and found Christian guilty on all counts.

Christian failed to preserve the discovery issue for appellate review

As we have just explained, Judge Heath ruled that Christian's pretrial motion for an *in camera* inspection of the girls' school and OCS records lacked an evidentiary foundation. The judge invited Christian to correct this deficiency in a renewed discovery motion, but the defense attorney did not renew the motion.

Then, on the third day of trial, the prosecutor informed the court and the defense that A.K.H.'s mother had filed a report of harm with OCS in the fall of 2008. This newly discovered evidence dramatically altered Christian's ability to provide the court with justification for an *in camera* inspection of the confidential records. Christian could now point to an OCS document with specificity, and could argue a case-specific theory of relevance in support of his request for an *in camera* review of the girls' OCS and school records — the theory that K.S. and A.K.H. acted preemptively to shield K.S.'s mother from scrutiny by the authorities.

But Christian's attorney did not employ this newly discovered evidence to renew his discovery motion — even though Judge Cutler had signaled that she would be receptive to such a motion. The defense attorney instead elected to argue the implications of the newly discovered evidence to the jury without the support — or the rebuttal — that discovery might have afforded this defense argument.

On appeal, Christian argues that a renewed discovery motion would have inevitably failed, because the defense still could not have complied with Judge Heath's "impossible standard" for judicial inspection of confidential records. We disagree. Judge Cutler was now assigned to the case, and she was apparently willing to grant

further discovery. But Christian did not obtain a ruling from Judge Cutler after newly discovered evidence came to light that significantly enhanced Christian's discovery prospects. He thus failed to preserve this issue.[2]

The evidence was sufficient to convict Christian of sexually abusing K.S. with a stream of water from a shower head

Christian argues on appeal that the State presented insufficient evidence to convict him of sexually contacting and sexually penetrating K.S. using water from a detachable shower head. First-degree sexual abuse of a minor requires "sexual penetration," which is defined *inter alia* as "an intrusion, however slight, of an object . . . into the genital or anal opening of another person's body."[3] Second-degree sexual abuse of a minor requires "sexual contact," which is defined as "knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast."[4]

At trial, K.S. testified that Christian instructed her not to lock the bathroom door when she was bathing. Christian repeatedly entered the bathroom when K.S. was bathing, locked the door, and then touched her labia and clitoris. K.S. testified that Christian also used the stream of water from a detachable shower head to stimulate her genitals. She testified that at first, Christian would direct the shower spray to her back, but that at some point he directed the spray to her genitals:

> *A*: [Christian] would like get [the shower head] down and, like, he — he would, like, spray the water like on me . . . at first it wasn't where I didn't like — where I still felt

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[2] *See Moreno v. State*, 341 P.3d 1134, 1139 (Alaska 2015).

[3] AS 11.41.434(a)(1); AS 11.81.900(b)(60)(A).

[4] AS 11.41.436(a)(2); AS 11.81.900(b)(59)(A).

uncomfortable with being undressed, but it wasn't like anywhere — it was like my back and stuff.

Q: And that's how at first it started out, was just doing it like on your back and did it ever go somewhere that made you uncomfortable?

A: My vagina.

During cross-examination, K.S. implied that Christian taught her to masturbate using the shower spray:

Q: Okay. And I think you said when [Christian] squirted you, you said that he squirted you on the back with it?

A: Yes.

Q: Okay. And basically, you squirted yourself . . . in the private area?

A: Not when he was there.

Q: Oh, so you would do that when he wasn't there?

A: Yes, because I — before I met him, I didn't know any of this. And I think that I shouldn't have.

On redirect the prosecutor revisited this topic:

Q: [W]hen you talked about using the shower . . . was that after [Christian] did or . . . before [Christian] did it?

A: After.

K.S. was later recalled to the stand for further testimony:

Q: And the time that he used the shower on you, did that go where your clitoris is, or was it just like other places?

A: Like back, . . . but I was in the bathtub.

Q: What do you mean?

A: In the bathtub.

Q: I think last time you said that it . . . started out on your back and moved.

A: Yeah, it moved to inappropriate places like . . .

Q: What inappropriate places did the water go?

A: Like my butt.

Q: Okay. Was it just your butt, or anywhere else?

A: No, it was just my butt.

Q: All right.

A: And my back.

Christian argues on appeal that there was (1) insufficient evidence to prove contact with or penetration of her genitals by the water spray; (2) insufficient evidence that Christian knowingly engaged in either act; and (3) insufficient evidence that, under the facts of this case, water was an "object" within the meaning of the first-degree sexual abuse statute. Christian argues that K.S. was unclear whether water from the shower head either touched or penetrated her vagina or anus.

We assess the sufficiency of the evidence, and reasonable inferences to be drawn from that evidence, in the light most favorable to the jury's verdict.[5] We then determine whether fair-minded jurors exercising reasonable judgment could conclude that the State had proved the charge beyond a reasonable doubt.[6] We do not independently weigh the evidence or the credibility of witnesses.[7]

K.S. testified that Christian would "at first" spray water, not on places where she "felt uncomfortable," but rather on her "back and stuff." The prosecutor

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[5] *Spencer v. State*, 164 P.3d 649, 653 (Alaska App. 2007).

[6] *Id.*

[7] *Morrell v. State*, 216 P.3d 574, 576 (Alaska App. 2009).

followed up by asking: "[D]id it ever go somewhere that made you feel uncomfortable?" K.S. responded, "My vagina."

On appeal, the parties disagree as to the antecedent of the pronoun "it" — that is, whether K.S. was referring to *water* first hitting her back and then flowing toward her genitals, or to *spray* first hitting her back and then spray that was redirected toward her genitals, in sufficient proximity to penetrate her genital opening.

We acknowledge that K.S.'s testimony was somewhat contradictory on the point. Her testimony that the water only went to her back and butt seemingly contradicts her previous testimony that Christian sprayed her vagina after spraying her back. But we conclude that jurors could reasonably interpret K.S.'s testimony, viewed in its entirety, to signify that Christian used the shower head to stimulate K.S.'s genitals. The jury could reasonably conclude beyond a reasonable doubt that Christian used the shower spray to sexually penetrate K.S.

Water spray as an object

During its deliberation, the jury asked for clarification of the jury instruction defining sexual penetration: "Can the [penetrating] 'object' be water from a shower head?" Over a defense objection, Judge Cutler responded, "Yes, if you so determine."

First-degree sexual abuse of a minor requires "sexual penetration," which is defined *inter alia* as "an intrusion, however slight, *of an object* . . . into the genital or anal opening of another person's body."[8]

On appeal, Christian concedes that if water is sufficiently pressurized, it can be employed as an "assaultive object." But Christian argues that on the facts of this case,

[8] AS 11.41.434(a)(1); AS 11.81.900(b)(60)(A) (emphasis added).

Christian was merely rinsing K.S.'s back with a normal strength shower, and so not employing water as an object. But Christian construes the facts of the case in his own favor.

Viewing the facts in the light most favorable to upholding the jury's verdict,[9] the evidence at trial established that Christian held the shower head close enough to K.S.'s genitals that the pressure of its spray was robust enough to penetrate K.S. Under such circumstances, the water from the spray could be an "assaultive object."

We note a final issue in this case. The record reflects that the judge intended to merge Christian's second-degree sexual abuse of a minor conviction (Count 10) for spraying water on K.S.'s genitals with his first-degree sexual abuse of a minor conviction (Count 9) for penetrating her genitals with the water. But the judgment incorrectly states that Count 10 merged with a different count, Count 3. We direct the superior court to correct the judgment to reflect that Count 10 merged with Count 9 rather than with Count 3.

Conclusion

We AFFIRM Christian's convictions, but we direct the superior court to correct the judgment form.

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[9] *See, e.g.*, *Spencer*, 164 P.3d at 653.