



INTEROFFICE MEMORANDUM

TO: File DATE: 10/18/16

DEFT NAME: Javier Cuenca
CASE NO: F14-25626, F14-25627, F14-25629
and F16-14811

FROM: Laura Adams
Assistant State Attorney RE: Case disposition

INTRODUCTION

On Tuesday, October 11, 2016, defendant Javier Cuenca pled no contest to 2 counts of Felony Battery, reduced offenses from his original charges. He was sentenced to 2 years of reporting probation with the following conditions: he was given credit for the 4 months that he spent in jail on these charges; he must attend mental health counseling at least once per month by a licensed mental health professional; he can have no contact with the 4 victims; he cannot do any activity that would put him in a position of authority over minors; he must make a \$1,000 contribution to the Denise Moon Fund (a crime victim's fund) and he cannot reside in a setting where there are any minors. The defendant will be eligible for early termination of his probation on June 17, 2017 if he has successfully completed all conditions of his sentence and has had no violations (technical or substantive) of his probation. If the defendant violates his probation, he faces up to 10 years in prison.

It should be noted that in the course of the investigation and prosecution of this case, it was apparent that the defendant used his position of trust as a basketball coach to fondle, leer at, and intimidate a number of teenaged boys. However, the State had to negotiate a sentence which is less than what the defendant deserves due to factors beyond the control of the State, law enforcement, and the victims. For example, there was a limited amount of evidence available to prove the defendant's guilt beyond and to the exclusion of every reasonable doubt (i.e., the reports of abuse were delayed; the defendant denied the claims to law enforcement; there was no physical evidence; and no eyewitnesses to the abuse). Moreover, the law which applies to fondling children only protects those who are 15 years of age and younger; a number of the boys who came forward were 16 years old when the abuse occurred. Additionally, although there appeared to be a pattern of abuse which occurred to at least 6 victims, each victim's case would have to be tried individually; there was no guarantee that a judge (or appellate court) would allow all the victims to testify in any 1 case against the defendant. In fact, there was a good possibility that the court would NOT allow all of the victims to testify in any one case, which would leave a jury in the dark about how often this abuse had occurred. Finally, although they were credible and cooperative in these cases, each of these boys understandably expressed his preference NOT to have to testify about the humiliating things the defendant did to them.

For these reasons, there was a reasonable possibility that the defendant could be found “not guilty” by a jury. Were that to happen, the defendant would likely have used his acquittal(s) to try to “prove” the boys were liars, and to possibly return to coaching teenaged boys and repeat this conduct. Thus, in order to try to ensure that the defendant would never again be placed in such a position of trust and authority, the State negotiated the plea specified above, despite the fact that his conduct was so egregious and abhorrent. The plea offer was discussed with each of the victims and/or their parents, as well as the investigators who handled this case. They were all in agreement with this disposition.

FACTS OF THE CASES

Case Number F14-25629

The first victim (hereinafter Victim 1) to make an allegation against the defendant did so in the autumn of 2013, when Victim 1 was a student at [REDACTED]. He reported that during the prior school year, when he was 15 years old, the defendant was constantly asking him if he (Victim 1) was engaged in sexual activities with his girlfriend. Victim 1 stated that the defendant would ask for explicit details about his girlfriend and indicated that if Victim 1 trusted him (the defendant) then Victim 1 would confide such personal matters to him. Victim 1 said that in February of 2013, the defendant told him to drop his shorts, so he (the defendant) could look at look at Victim 1's penis. The defendant stated that he was doing so in order to check Victim 1's "virgin line." The defendant told several of the victims in these cases that it was necessary for him to do that, to ensure that they were not having sex. The boys naively believed the defendant's claim that having sex would leave a visible mark on their private parts. The defendant said he was only doing this because he supposedly wanted to make sure they were being focused on school and basketball, and not on girls. Victim 1 did in fact expose himself to the defendant, but after this incident occurred, Victim 1 realized he had been taken advantage of, and reported the matter to his family and the police. Victim 1, like other victims in these cases, also stated that the defendant had offered him a performing-enhancement substance called Anavar or Anvar.

This matter was investigated by the School Board Police Department. In the course of that investigation, the SBPD was not able to find any corroborating witnesses. Additionally, when the defendant found out that Victim 1 had told others about this incident, he pressured Victim 1 to recant the allegations and began a smear campaign against Victim 1. The defendant denied Victim 1's allegations of telling Victim 1 to expose himself. He also denied offering or providing any steroids or similar substances to students. Under the pressure of being ostracized by other students, Victim 1 recanted the allegations.

At the conclusion of their investigation (in February 2014), the SBPD had insufficient evidence to prove the defendant committed a criminal offense, so their investigation was closed. However, the SBPD did discover that in fact, the defendant had engaged in highly inappropriate conversations with Victim 1 regarding sexual matters. For example, the defendant had sent a text message to Victim 1 accusing him of having sex by saying "you get your meat wet. Then lie." The defendant claimed that he was only speaking to Victim 1 in a way that he thought would resonate with a teenaged boy. Nevertheless, he was found to have violated the School Board's Standards of Ethical Conduct and ultimately lost his job at [REDACTED]. The defendant then stopped coaching at [REDACTED] and began to be involved with the [REDACTED] basketball team. Victim 1's family hired an attorney to file a lawsuit for the abuse committed by the defendant when he was an employee of the school board.

The case remained closed until the fall of 2014. A new investigation into the defendant's conduct was initiated at that time, when in September 2014, the Hialeah Gardens Police Department received an anonymous letter alleging that the defendant had abused a number of other boys. The Hialeah Gardens detective who was assigned to follow up on these allegations was unable to substantiate the information contained in the letter, so his case was closed on September 29, 2014. However, only days later, on October 3, 2014, the detective was contacted and advised another victim had come forward. An expanded investigation was then conducted by the School Board Police Department, Hialeah Gardens Police Department, and the Miami-Dade Police Department. During that expanded investigation, Victim 1 was re-interviewed, and confirmed that the abuse he originally reported did in fact occur. He explained that he only recanted the allegations because he felt pressured to do so by the defendant and his other teammates. Victim 1 provided sworn testimony to the police, to this prosecutor, and in deposition, which all was consistent about the defendant's conduct.

Case Number F16-14811

The second victim to come forward (Victim 2) was the youngest of the victims. He knew that Victim 1 had made some allegations against the defendant, and had heard that Victim 1 was suing the defendant and/or school board, but did not know the details of the allegations or of Victim 1's recantation. When they were both at a basketball tournament, Victims 1 and 2 started talking about the defendant, and Victim 1 confided in Victim 2 what the defendant had done to him. At that point, Victim 2 stated he realized that Victim 1 must be telling the truth, because the defendant had done something similar to him. Victim 2 contacted school officials that he trusted, and told them what the defendant had done. On October 3, 2014, one of those coaches contacted the Hialeah Gardens Police detective that had done the investigation on the anonymous letter mentioned above, since he was familiar with that detective and reported what Victim 2 had said.

Victim 2 was interviewed by Hialeah Gardens Police Department Detective A. Lopez on October 6, 2014. At that time, Victim 2 was 16. Victim 2 described how when he was 13 years old, in the summer between his 7th and 8th grade year, the defendant had touched Victim 2's genitals. He stated that when it occurred, the defendant was his math teacher at [REDACTED]. He said that after that incident, the defendant had left [REDACTED], and went to teach at [REDACTED]. Since Victim 2 remained a student at [REDACTED] he did not see much of the defendant after that. Victim 2 said that he had really trusted the defendant and hoped that the defendant would be able to help him be a great basketball player so he could get a college scholarship. He stated that the defendant had said he would get Victim 2 steroids, but that Victim 2 would have to be "checked" to see if he was "ready" for them. Victim 2 explained that "checking" him would involve the defendant touching and looking at his genitals.

Victim 2 continued and stated that a year earlier, when he was in the 10th grade, the defendant started coaching at [REDACTED] (Note that the defendant started coaching at [REDACTED] after he was forced to leave [REDACTED] due to the misconduct he engaged in toward Victim 1). He explained that when the defendant started coaching [REDACTED] students, he "brought" a number of [REDACTED] students with them. As a result of those other students transferring from [REDACTED] to [REDACTED] Victim 2 was not able to play as often, since the new kids on the team were considered to be better basketball players than he was. He said that the defendant would offer to "help" Victim 2 to "develop" and said he would need to look at Victim 2's genitals. Victim 2 stated that one of the incidents occurred while he was at the defendant's house and the defendant had him lie down, and the defendant started fondling him. That incident, and other incidents with the defendant, occurred after Victim 2 turned 16. The only incident Victim 2 could indicate happened when he was less than 16 was the incident when he was 13 years old.

Victim 2 was forensically interviewed and provided consistent information, and also gave a sworn statement to the Miami-Dade Police Department. He also provided consistent information in his deposition. The police did not originally arrest the defendant for his actions against Victim 2 because the only incident which occurred prior to him turning 16 had occurred a few years earlier, and there were 3 other victims who could testify that the abuse happened closer in time when they were still less than 16. Thus, the defendant was initially arrested for his conduct toward those other 3 victims. However, in the summer of 2016, while the defendant was being prosecuted for molesting 3 other victims, the defendant's bond was revoked and he was held in jail for violating a court order to have no contact with the victims. While the defendant was in jail for those 3 cases, the police arrested the defendant for molesting Victim 2.

Victim 3 is the victim who was most severely abused and manipulated by the defendant. Victim 3 had been a student at [REDACTED] and was coached by the defendant. During Victim 3's 9th grade year, he was 15 years old, and his family suffered several losses. First, Victim 3's grandmother passed away. Later that school year, the home of Victim 3's family burned down and his family had to stay in a shelter. The defendant offered to allow Victim 3 to live with him, allegedly so that it would be easier for Victim 3 to continue to go to the same school, and stay on the same basketball team. Victim 3's family agreed to that offer. By the spring of Victim 3's 9th grade year, however, his family had to move away from Miami so that his father could find work. Once again, the defendant offered to let Victim 3 stay with him even after his family left town. Victim 3's mother did not like the idea of letting Victim 3 stay with the defendant, but she did not want to make Victim 3 have to change schools, teams, and have his whole life uprooted; so she agreed.

Victim 3 stated that when he was living with the defendant, he would engage in a lot of inappropriate behavior, like walking in on him when he was in the shower. At the end of his 9th grade school year, Victim 3 was unhappy with his living arrangements with the defendant, and went to live with his family in [REDACTED]. Over the course of that summer, Victim 3 had a birthday and went from 15 years of age to 16 years of age. The defendant repeatedly reached out to Victim 3 and his parents, and essentially begged them to let Victim 3 come back to live with him for the 10th grade school year. By that time, Victim 3 had decided he wanted to go to school with his friends, and play on the basketball team he knew, so he and his family agreed to let him move back in with the defendant.

Once Victim 3's school year began is when the defendant switched from coaching at [REDACTED] to [REDACTED]. The defendant had Victim 3 transfer to [REDACTED]. Victim 3's mother said she did not give the defendant permission to switch her son's school, but that she felt very grateful that he was "helping" her son, so she did not make a big deal of this. According to Victim 3, it was in his 10th grade year (2013-2014) that most of the abuse occurred with the defendant. Victim 3 described how the defendant would offer him a steroid called Anvar, and would "check" his penis/testicles by touching his private parts. However, Victim 3 did not tell anyone about the ongoing abuse he was suffering by the defendant until the other boys' allegations were known.

Victim 3's abuse was discovered when the father of Victim 3's best friend (hereinafter referred to as "the Witness") learned that the defendant had apparently molested Victims 1 and 2. The Witness advised that he had allowed his son (Victim 4) to transfer to [REDACTED] (where the defendant would be coaching) during the 2013-2014 school year because to his knowledge, the defendant had not engaged in any misconduct while at [REDACTED]. On October 1, 2014, when the Witness discovered that the allegations made by Victim 1 were apparently true, and he heard about Victim 2's allegations, the Witness was furious that he and other parents were not given more information about the nature of the investigation into the abuse of Victim 1. The Witness also was deeply concerned for Victim 3's well-being because he knew that Victim 3 had been living with the defendant. The Witness picked up Victims 3 and 4 from [REDACTED] and transferred them from that school. He also said that Victim 3 could stay with his son, rather than the defendant. When the defendant realized this, he started calling the witness and Victim 3 repeatedly.

On that afternoon, the defendant was crying on the phone to the Witness, and begging to speak with Victim 3. The Witness did not want to allow that to happen, as he feared it would greatly upset Victim 3. The Witness took Victims 3 and 4 to Victim 4's home. The defendant showed up at that house, still begging to speak with Victim 3. Victim 4's parents made contact with the mother of Victim 3 and advised her of what was happening. Victim 3's mother said she would agree to let Victim 3 speak to the defendant. During that conversation, according to Victim 3, the defendant begged Victim 3 to stay quiet about what had been happening. Nevertheless, despite the pressure put upon him by the defendant, Victim 3 did tell the police at the Hialeah Gardens Police Department about the abuse; he also provided a sworn statement to the Miami-Dade Police Department; he provided this prosecutor with sworn testimony about the abuse; and he was deposed by the defendant's attorney and provided consistent information.

The case involving Victim 3 was arguably the strongest case when the defendant was arrested, because of the extreme vulnerability of Victim 3 (his family had to move out of town after their house burned down, and Victim 3 had to depend on the defendant for a place to live, and trusted that the defendant would help get him a basketball scholarship so he could one day attend college), and because the abuse had occurred for the longest period of time with him. Moreover, the defendant's conduct when this information was discovered (crying on the phone to the Witness) certainly helped to corroborate the notion that the defendant had been abusive toward Victim 3.

As was noted earlier in this memorandum, the defendant spent approximately 4 months in jail while these cases were pending, based upon the defendant violating the court's order that he have no contact with any of the victims in these cases. In June of 2016, this prosecutor was contacted and advised that the defendant was speaking with Victim 3 on a regular basis. Victim 3 confirmed this information. He explained that after he found out he was not going to be offered a scholarship at a college he was hoping to attend, he felt desperate and did not know who to turn to for help. Thus, he called the defendant. He said after he told the defendant about this problem, the defendant began to speak with him several times a week, and that these conversations had been going on for over a month. A motion to modify or revoke the defendant's bond was filed, and after he heard the testimony of Victim 3 (which was corroborated by statements the defendant made to one of Victim 3's coaches), the judge revoked the defendant's bond and held him in custody up until the day this case was resolved. The fact that Victim 3 contacted the defendant while this case was pending did not help strengthen the State's case.

The defendant's attorney filed a demand for a speedy trial, and the cases were set to be tried in November of 2016. The plan was to try Victim 3's case first. However, that did not turn out to be a viable plan, because during the 2 years that this case was pending, some of the details of the abuse were less clear to Victim 3. In preparing for this trial, when this prosecutor spoke with Victim 3 to verify his age when the abuse started, and how often it occurred, Victim 3 could not be 100% certain that the defendant actually physically touched him or made Victim 3 expose himself until *after* the summer of his 9th grade year, when he had turned 16 years of age. As noted previously in this memorandum, Florida law provides that touching a child's genitals (with or without the child's "consent") is a felony only if the child is under the age of 16. It should be noted that in his sworn statement with the Miami-Dade Police Department, Victim 3 initially stated he believed that he was 16 when the abuse started, but then he corrected himself (after going off the record with the investigators) and said it began when he was 15. Although it is entirely plausible that the defendant did start to touch/look at Victim 3's private parts before Victim 3 turned 16, the State did not have sufficient evidence of that to prove it beyond a reasonable doubt. Thus, Victim 3's case was not suitable for a felony trial.

Case Number F16-25627

The case involving Victim 4 came about when his father (previously referred to as "the Witness") learned about the allegations that had been made by Victims 1-3. The parents of Victim 4 invited a number of the other basketball players who had been coached by the defendant, and their parents, to gather together to figure out exactly how many boys the defendant had molested. (The defense claimed that this was collusion among the victims and their families, although there is no evidence that anyone was pressured to make these allegations). After that meeting, the Hialeah Gardens Police Department was contacted and Victim 4 related that he had also been taken advantage of by the defendant.

Victim 4 (who was 17 at the time of the disclosure) stated that when he was in the 9th grade (and 15 years old), and a student at [REDACTED] the defendant had asked him on several occasions to expose his penis to him so he (the defendant) could see if Victim 4 had a "virgin line." Victim 4 refused the defendant's requests on several occasions, but one time he did let the defendant see his penis. Victim 4 said the defendant reached out to touch his penis, but he (Victim 4) pushed the defendant's hand away and did not let the defendant touch him. Victim 4 said he never told anyone about this until he learned about the allegations with the other boys.

CASE ANALYSIS AND CONCLUSION

In addition to the police learning about the defendant's conduct toward Victims 1-4, who were apparently 15 and 16 years of age at the time the defendant engaged in inappropriate sexual behavior toward them, 2 other boys came forward to indicate the defendant had touched their private parts, but they said it only occurred after they had turned 16. Thus, the defendant could not be charged with any Lewd or Lascivious felonies under F.S. 800.04 because that law only applies to children under the age of 16.

Each case which was filed against the defendant, when examined alone, had significant evidentiary challenges. None of the victims reported the abuse right away. Victim 1 had previously recanted the allegations. Victim 2 had an arguable motive to be upset with the defendant because when he brought other basketball players from [REDACTED] to [REDACTED] Victim 2's playing time on the basketball court was curtailed. When this case was about to go to trial, Victim 3 was unable to state with certainty if the defendant had molested him before he turned 16 years of age. Victim 4 was consistent in his description of the defendant's conduct, but the offense committed against Victim 4 (which did not include actually touching him) was less egregious than the offenses committed against Victims 2 and 3. Moreover, the defendant denied the allegations to the School Board Police Department when he was investigated initially for his actions with Victim 1; and he invoked his right to remain silent when he was arrested in October 2014. Some of the victims' families had consulted with attorneys about filing a law suit, which the defense claimed was because they were only looking for money. Moreover, most of the victims and their families had met to discuss these allegations before they were reported to the police.

Without a doubt, the strongest "evidence" against this defendant was the fact that so many of these victims had come forward against him. These boys held the defendant in the highest regard, as he was not only their coach; he would constantly call and text them; contact them on social media; he was involved in their family's lives; and held himself out as someone that could help them get college scholarships. They – and their families – trusted the defendant completely. Unfortunately, each victim's case was a separate and distinct one; the victims' cases could not be tried all together. The Williams Rule law does allow a child victim of sexual abuse to testify as a corroborating witness to another victim's testimony, but with significant limitations. In order for such evidence to be admitted, a judge has to make a finding that there is "clear and convincing evidence" that the abuse occurred, and that admission of the other victims' testimony would not unfairly prejudice the jury against the defendant. Also, when a trial judge does allow multiple witnesses to testify to corroborate one victim's testimony, it is not uncommon for the appellate court (if a conviction is obtained) to find that such testimony was too prejudicial, and to vacate the conviction.

Because of the difficulties with these cases, this prosecutor spoke at length with the detectives, their lieutenant, as well as the victims and/or their parents, about the possibility that a jury might find the defendant not guilty. All those consulted were in agreement that the most important outcome for these cases would be to prevent the defendant from ever again being placed in a position of authority and trust over children. Thus, a settlement was made with the defendant in which he pled no contest to 2 counts of Felony Battery, and he was placed on probation with the conditions specified at the beginning of this memorandum. When the victims and their parents were contacted after the defendant's plea was accepted by the court, they all expressed relief that the case was over, and that the boys did not have to endure a trial which would require them to talk in an open courtroom about the way the defendant abused and humiliated them. A copy of the plea colloquy transcript was ordered for the file.

It should be noted that if the defendant successfully completes his probation, he could have eligibility to have these cases sealed from his record. However, it is highly unlikely that his record will ever be sealed, because the judge has the discretion to decide whether to seal a criminal case. In this case, the importance of keeping these offenses on the defendant's record is great, in order to keep the defendant from coaching children again. This prosecutor personally told the defendant, in the presence of both of his attorneys, that the State will vigorously oppose any motions to seal this case from his criminal record.