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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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In The Matter of the Personal Restraint of:

GAIL GABRIEL,

Petitioner.

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BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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## I. INTRODUCTION

This case presents the same issue raised in State v. Berg, COA #60729-4-I (2008), where this Court found that the jury instructions were inadequate in that they exposed the defendant to multiple punishments for the same offense in violation of his right to be free from double jeopardy, and, because this issue is based solely on one of the six grounds listed in RCW 10.73.100, it is exempt from the one-year limitation of RCW 10.73.090.

### A. RELEVANT FACTS

1. Procedural Facts. Gail Gabriel was originally charged in the King County Superior Court with rape of a child in the first degree alleged against Christina Henry (Count I), rape of a child in the second degree alleged against Monique Brooks (Count II), and sexual exploitation of a minor alleged against Monique Brooks (Count III). On the day of trial the Prosecutor charged two additional identical counts of rape of a child in the second degree alleged against Monique Brooks (Counts IV and V). Mr. Gabriel was acquitted on Count III, and was sentenced on Counts I, II, IV, and V. See Appendix C.<sup>1</sup>

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<sup>1</sup>The Appendices (A-C) are attached.  
See Appendix Index at end.

During deliberations the jury quired that they did not see a difference in the two counts (IV and V), and the Court's response was to re-read all of your instructions. See Appendix B. The Court did not give a "separate and distinct act" instruction or otherwise require that the jury base each charged count on a "separate and distinct" underlying event, and the missing language potentially exposed Mr. Gabriel to multiple punishments for a single offense. See Appendix A.

2. The Court's Instructions To The Jury Were Inadequate In That They Exposed Mr. Gabriel To Multiple Punishments For The Same Offense, In Violation Of His Right To Be Free From Double Jeopardy. The relevant instructions provided to the jury are as follows:

There are allegations that the Defendant committed acts of sexual intercourse against Monique Brooks on multiple occasions, as charged in Counts II, IV, and V. To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

See Appendix A (Instruction #15).

A separate crime is charged in each count. You must decide each count separately. Your verdict

on one count should not control your verdict on any other count.

See Appendix A (Instruction #16).

To convict the defendant of the crime of Rape of a Child in the Second Degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;
- (2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than Monique Brooks; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count IV. On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count IV.

See Appendix A (Instruction #12).

To convict the defendant of the crime of Rape of a Child in the Second Degree, as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;
- (2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

- (3) That the defendant was at least thirty-six months older than Monique Brooks; and  
(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count V.  
On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count V.

See Appendix A (Instruction #13).

None of the preceding instructions specifically state that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count. As a result, the instructions allowed the jurors to base a conviction on counts IV and V on a finding that a single underlying event occurred. This implicate Mr. Gabriel's right to be free from double jeopardy.

B. GROUND FOR RELIEF

A petitioner is entitled to relief if he is under "restraint" as RAP 16.4(b) defines that term,<sup>2</sup>

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<sup>2</sup>

RAP 16.4(b) provides:

A petitioner is under a "restraint" if the petitioner has limited freedom because of a

and if the petitioner's restraint is unlawful for one or more of the reasons set forth in RAP 16.4(c).<sup>3</sup>  
In re Davis, 152 Wn.2d 647, 670, 101 P.3d 1 (2004).

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2(Con't)

court decision in a civil or criminal proceeding, the petitioner is confined; the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

<sup>3</sup>Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

Mr. Gabriel is serving a term of confinement for his criminal convictions, RAP 16.4(c)(6), and as set out below, his conviction was obtained and sentence imposed in violation of the Constitution of the United States and the Constitution and laws of the State of Washington. RAP 16.4(c)(2).

1. Standard of Review. In order to obtain collateral relief, the petitioner must demonstrate either (1) actual and substantial prejudice arising from constitutional error, or (2) non-constitutional error that inherently results in a "complete miscarriage of justice." In re Cook, 114 Wn.2d 802, 803, 792 P.2d 506 (1990).

Where a petitioner makes a prima facie showing that this standard has been met, he should be given an evidenciary hearing to establish his claims. RAP 16.11; RAP 16.12.

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3(Con't)

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

BRIEF IN SUPPORT OF PETITION-6

2. This Petition is Timely Filed. While the general rule is that a "collateral attack" on a judgment and sentence must be filed within one year of the date the judgment becomes final, RCW 10.73.090 is subject to the following exceptions:

The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution.

RCW 10.73.100(3).

In the present case, the petition is based solely on this exception, RCW 10.73.100(3), where the jury instructions were inadequate in that they exposed Petitioner to multiple punishments for the same offense.

3. Petitioner Contends That One Of The Two Convictions For Second Degree Rape of a Child Must Be Reversed Because The Trial Court's Instructions Allowed The Jury To Find Him Guilty Of Both Counts Based On A Single Act in Violation Of His Right To Be Free From Double Jeopardy. "The right to be free from double jeopardy ... is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn.App. 357, 366, 165 P.3d 417 (2007)

(citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9). See also, State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

Here, as in Borsheim, supra, Petitioner asserts that the jury instructions allowed the jury to base a conviction on more than one identical count on a single underlying event, thereby exposing him to multiple punishments for a single offense, which implicates his right to be free from double jeopardy.

Jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Watkins, 136 Wn.App. 240, 241, 148 P.3d 1112 (2006)(quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Challenges to jury instructions are reviewed de novo, within the context of the jury instructions as a whole. State v. Berg, supra (citing State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006)).

As explained in State v. Borsheim, supra:  
"[A contention] asserting that all jurors must agree on the same act underlying any given count

has to do with jury unanimity and the right to jury trial. [A contention] asserting that the jury could not use the same act as a factual basis for more than one count has to do with the right against double jeopardy; at least in the context here, to use one act as the basis for two counts is to convict twice for the same crime." Borsheim, 140 Wn.App. at 366 n.2 (quoting State v. Ellis, 71 Wn.App. 400, 404, 859 P.2d 632 (1993)).

In Borsheim, 140 Wn.App. at 366, this Court held that where multiple counts of sexual abuse are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count was required. This Court reiterated the rule articulated in State v. Hayes, 81 Wn.App. 425, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996), where the court concluded that the jury was properly instructed on multiple counts of sexual abuse occurring within the same charging period because the "to convict" instructions for each count clarified that each count was based on "an occasion separate and distinct from that charged

in [the remaining counts]." Borsheim, 140 Wn.App. at 368 (citing Hayes, 81 Wn.App. at 431 n.9)

In Borsheim, the "to convict" instructions did not contain this language, and this Court held that the remaining instructions did not cure the defect. 140 Wn.App. at 367. While noting that the unanimity instruction adequately informed the jurors that they had to be unanimous on the act that formed the basis for any given count, this Court concluded that this instruction did not "convey the need to base each charged count on a 'separate and distinct' underlying event." Id. Nor was this Court convinced that the instruction stating that "a separate crime is charged in each count" informed the jury that each "crime" required proof of a different act. Id.

Further, even though the "to convict" instruction stated that the elements must be proved "as to each count," this Court noted that it did not state that the elements of sexual intercourse requires a finding of "a 'separate and distinct' act of sexual intercourse for each count on which a conviction is rendered." Id.

Similarly, in State v. Berg, *supra*, this Court found that the trial court's instructions subjected Berg to double jeopardy by allowing the jury to find him guilty of two counts of molestation based on a single act.

In Berg, the trial court gave two separate but identical "to convict" instructions for both counts of child molestation that stated in relevant part:

To convict the defendant of the crime of child molestation in the third degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between March 1, 2007 through May 6, 2007, the defendant had sexual contact with AA.

The Court also instructed the jury:

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on any count of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

The Court further instructed:

"A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

State v. Berg, *supra*.

This Court found in Berg, and in Borsheim, that the trial court did not give a "separate and distinct act" instruction or otherwise require that the jury base each charged count on a "separate and distinct" underlying event, and as in both Berg and Borsheim, the missing language potentially exposed them to multiple punishments for a single offense. This Court reversed and ordered the trial court to vacate the counts in violation of double jeopardy.

In the present case, Petitioner's double jeopardy issue is similar to the double jeopardy issue raised in State V. Berg, supra, and State v. Borsheim, supra, where the double jeopardy violation at issue resulted from omitted language in the instructions. The trial court did not give a "separate and distinct act" instruction or otherwise required that the jury base each charged count on a "separate and distinct" underlying event, and that missing language potentially exposed Petitioner to multiple punishments for a single offense.

This Court said in Berg, supra, that our courts have recognized that "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." State v. Berg, supra (citing State v. Aumick, 126 Wn.2d 422, 431, 894

P.2d 1325 (1995)). Rather, it is the judge's "province alone to instruct the jury on relevant legal standards." Berg, supra (citing State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)).

In the present case, Petitioner-Gabriel's conviction on Count IV or V should be vacated because as this Court held in State v. Berg, supra, and State v. Borsheim, supra, the remedy for the double jeopardy violation is to vacate the additional identical count. Berg, supra (citing Borsheim, 140 Wn.App. at 371).

C. CONCLUSION

For the foregoing reasons Petitioner-Gabriel's conviction in violation of double jeopardy should be reversed and vacated.

DATED this 26 day of March, 2009, at Aberdeen, in Grays Harbor County, Washington.

  
\_\_\_\_\_  
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