

No. 64103-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

BARRY MICHAEL CAUDLE,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court impermissibly commented on the evidence in the "to convict" jury instruction, in violation of article IV, section 16 of the Washington Constitution.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court impermissibly comments on the evidence if a jury instruction resolves a disputed issue of fact that should have been left to the jury. In a multiple acts case, where the prosecution elects a specific act and seeks to identify the specific act by reference to corroborating facts, the "to convict" instruction must be framed in a way that does not impermissibly comment on the evidence establishing those facts. In this multiple acts case, did the "to convict" instruction impermissibly comment on the evidence where it assumed as an undisputed fact that on a day sometime during the charging period, an incident occurred in the "downstairs family-TV room"?

C. STATEMENT OF THE CASE

The State charged Barry Caudle with one count of rape of a child in the first degree, RCW 9A.44.073. CP 21. The information alleged the crime occurred sometime between June 1, 2000, through August 31, 2001. CP 21.

At the jury trial, sixteen-year-old K.A.G. testified as to two discrete incidents of alleged rape. According to K.A.G., one day, when she was around seven or eight years old, she was sitting on the couch in the family room watching television, when she sat on Mr. Caudle's lap. 3/23/09RP 54-55. Mr. Caudle unzipped her pants, put his hand under her underwear, and penetrated her vagina with his finger. 3/23/09RP 54, 57-58. A couple of months later, when the family was on vacation at Ocean Shores, Mr. Caudle took her and two of her brothers swimming in the swimming pool. 3/23/09RP 60. As she sat on Mr. Caudle's lap on the step of the pool, he touched her private parts and penetrated her vagina with his finger. 3/23/09RP 60. She did not tell anyone about these incidents for several years. 3/23/09RP 59, 64, 74-78, 86-87, 91.

K.A.G. could not remember when the incidents occurred and testified only that she was seven or eight years old at the time. 3/23/09RP 55, 60. The parties stipulated that if the alleged incident occurred, it occurred during the charging period, sometime between June 1, 2000, and August 31, 2001.¹ CP 20; 3/25/09RP 13.

¹ Defense counsel entered the stipulation in order to ensure that Mr. Caudle would not be subject to the indeterminate sentencing statute, RCW 9.94A.507, which applies only to crimes committed after August 31, 2001. See Former RCW 9.94A.712(1)(a)(i) (2001).

The jury did not receive a "unanimity" instruction telling them that all 12 must agree that the same underlying act of rape was proved beyond a reasonable doubt. Instead, the State chose to elect the act it was relying upon—the incident in the family room.² CP 32. The prosecutor did not inform the jury of the State's election in closing argument, however. Instead, the trial court instructed the jury in the "to convict" instruction that to convict Mr. Caudle the jury must find, "[t]hat during a period of time intervening between June 1, 2000 through August 31st, 2001, the defendant had sexual intercourse with K.A.G. (downstairs family-TV room incident)." CP 32.

The jury found Mr. Caudle guilty as charged. CP 18, 52.

D. ARGUMENT

THE "TO CONVICT" JURY INSTRUCTION
IMPERMISSIBLY COMMENTED ON THE EVIDENCE BY
ASSUMING AS AN UNDISPUTED FACT THAT AN
INCIDENT OCCURRED IN THE DOWNSTAIRS FAMILY/TV
ROOM SOMETIME DURING THE CHARGING PERIOD

1. Article IV, section 16 of the Washington Constitution

precludes a trial court from instructing the jury that matters of fact have been established as a matter of law. Article IV, section 16 of

² The trial court admitted the allegations about the Ocean Shores incident under the "lustful disposition" exception to ER 404(b). 3/16/09RP 17-19, 23.

the Washington Constitution affirms that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Article IV, section 16 prohibits a judge from "'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing the jury that 'matters of fact have been established as a matter of law.'" State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). Where the alleged judicial comment involves a jury instruction on an element of the offense, the judge's personal feelings about the element need not be expressly conveyed to the jury; "it is sufficient if they are merely implied." Levy, 156 Wn.2d at 721 (citing State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968)). Thus, any remark in a jury instruction that has the effect of suggesting that the jury need not consider an element of the offense qualifies as a judicial comment. Levy, 156 Wn.2d at 721.

Because judicial comments on the evidence are expressly prohibited by the Washington Constitution, they are manifest constitutional errors that may be challenged for the first time on appeal. Levy, 156 Wn.2d at 719-20. The Court of Appeals reviews

challenged jury instructions de novo, within the context of the jury instructions as a whole. Id. at 721.

2. In a multiple acts case where the State elects the act on which it is relying by referring to corroborating facts, the jury instructions may not comment on those facts. In “multiple acts” cases, that is, where the State alleges multiple acts of similar misconduct and any one of them could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). That is because criminal defendants in Washington have a constitutional right to an expressly unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

This constitutional right to a unanimous jury verdict includes the right to a unanimous finding beyond a reasonable doubt that the defendant committed one criminal act charged. Coleman, 159 Wn.2d at 511-12.

To ensure jury unanimity in a multiple acts case, either the State must elect the particular criminal act upon which it will rely for conviction, or the trial court must instruct the jury that all 12 of them

must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Thus, either an election by the State or a unanimity instruction is necessary to assure a unanimous verdict on one criminal act. Coleman, 159 Wn.2d at 512.

Where the State elects the act upon which it will rely, and refers to corroborating facts in order to identify the specific act, the court must avoid instructing the jury in a manner that implies those facts have been established as a matter of law. State v. Eaker, 113 Wn. App. 111, 53 P.3d 37 (2002), rev. denied, 149 Wn.2d 1003, 67 P.3d 1096 (2003). The State bears the burden to prove beyond a reasonable doubt that the particular act elected actually occurred, and that it occurred during the charging period. Id. at 118-19. Thus, to instruct the jury that the corroborating facts have been established as a matter of law is tantamount to instructing the jury that they need not find an element of the crime. Id.

In Eaker, the defendant was charged with one count of first degree rape of a child based on allegations he had oral sex with his half-brother on several occasions between January 1, 1988, and December 31, 1991. Id. at 112. The jury did not receive a "unanimity" instruction. Instead, the State elected to rely on one

alleged incident and referred to corroborating facts to identify the incident. The "to convict" jury instruction stated that in order to convict Eaker, the jury had to find:

That on or between the 1st day of January, 1990 and the 31st day of December, 1991, the defendant had sexual intercourse with [M.F.] while [M.F.'s] parents were on vacation on the day that Judy Russell was babysitting [M.F.] and took him to his house at 1325 Isaacs Street, Walla Walla[.]

Id. at 118.

The Court of Appeals concluded the instruction was an improper comment on the evidence, because it resolved a disputed issue of fact that should have been left to the jury. Id. (citing Becker, 132 Wn.2d at 65). Specifically, the instruction improperly commented on the evidence because it

assumes as an undisputed fact that on a day sometime between January 1, 1990 and December 31, 1991, Judy Russell served as a babysitter for M.F. and took him to his house on Isaacs. Even if we assume that Ms. Russell did babysit for M.F., and that she returned him to the house on Isaacs, this event may or may not have occurred between January 1, 1990 and December 31, 1991. The instruction is misleading in that it suggests that if a juror concludes that the specified act of abuse occurred on the day that Ms. Russell was babysitting for M.F., that juror need not also make a determination that the day Ms. Russell babysat fell sometime between January 1, 1990 and December 31, 1991.

Id. at 118.

The court rejected the State's argument that the instruction was proper because it required the jury to determine whether any of the alleged corroborating facts took place, and because the corroborating facts served only to identify the specific act elected. Id. at 119. The court explained that the jury was required to find: (1) that the criminal act took place; (2) that it took place on the day that Ms. Russell babysat for M.F.; and (3) that this day occurred between January 1, 1990, and December 31, 1991. Id. Because the instruction did not make clear that the jury must make these three separate findings, it was an impermissible comment on the evidence. Id. The instruction assumed as an undisputed fact that there was a day where Judy Russell served as a babysitter for M.F. and took him to his house on Isaacs, and that the day occurred sometime during the charging period. Id.

3. The "to convict" jury instruction in this case was an impermissible comment on the evidence. This case cannot be distinguished from Eaker and thus the "to convict" instruction was an improper comment on the evidence by the trial judge. Here, as in Eaker, Mr. Caudle was charged with a single count of rape of a child in the first degree based on more than one alleged incidents of rape. 3/23/09RP 54-58, 60. Also as in Eaker, the jury did not

receive a "unanimity" instruction and instead the State elected the act it was relying upon by referring to corroborating facts. Finally, just as in Eaker, the trial court instructed the jury in a manner that implied the corroborating facts had been established as a matter of law, and that they occurred sometime during the charging period.

The "to convict" instruction stated:

To convict the defendant of the crime of rape of a child in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between June 1, 2000 through August 31st, 2001, the defendant had sexual intercourse with K.A.G (downstairs family-TV room incident);

(2) That K.A.G. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That K.A.G. was at least twenty-four months younger than the defendant; and

(4) That this act 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.

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.

CP 32 (Instruction No. 7).

As in Eaker, the "to convict" instruction compounded in a single element factual allegations in a manner that suggested some

of the allegations were, in fact, true. The instruction implied the jury need not make separate findings that (1) an incident occurred in the family room; (2) it amounted to a rape; and (3) it occurred during the charging period. The instruction implied an incident in the family room actually occurred and that it occurred during the charging period. Although Mr. Caudle stipulated that *if* an incident occurred, it occurred during the charging period, he did not stipulate that any incident occurred in the family room, that the family room incident amounted to a rape, or that it occurred during the charging period. CP 20; 3/25/09RP 13. The instruction improperly commented on the evidence by implying the jury need not make these three separate findings.

The Washington Pattern Jury Instruction Committee recognizes and warns against the danger of improperly commenting on the evidence in the jury instructions in a multiple acts case. Had the judge and the prosecutor used the recommended pattern instruction, they would have avoided the error that occurred in this case. The WPIC committee recommends the following instruction in a multiple acts case where the State chooses to elect the act it is relying upon:

WPIC 4.26, Jury Unanimity—Several Distinct Criminal Acts—Election to Specify a Particular Act

In alleging that the defendant committed (name of crime), the [State] [County] [City] relies upon evidence regarding a single act constituting *[each count of]* the alleged crime. To convict the defendant *[on any count]*, you must unanimously agree that this specific act was proved.

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115 (3rd ed. 2008). The committee warns that caution is needed

when more specifically identifying the act in the jury instructions:

If the instruction needs to more specifically identify the particular occurrence, then care should be taken to make sure that the instruction does not constitute a comment on the evidence. In particular, the instruction should be drafted so as to avoid compounding in a single element complicated factual allegations in a manner that suggests that some of the allegations are, in fact, true.

Id. at 115-16. The committee cites Eaker in support of this recommendation. Id.

In sum, because the "to convict" instruction implied the jury need not make all of the factual findings required, it was an impermissible comment on the evidence by the trial judge in violation of article IV, section 16.

4. The comment on the evidence was not harmless, because the witness's credibility was central to the case. Judicial comments are presumed prejudicial and to overcome the presumption, the record must affirmatively show that no prejudice could have resulted. Levy, 156 Wn.2d at 722, 725. The State bears the burden to show the defendant was not prejudiced. Id. at 723.

A comment on the evidence implying that certain facts are true is harmless only where the jury could have reached no other conclusion. In Levy, for instance, the "to convict" instruction for the charged crime of first degree burglary instructed the jury it must find that "on or about the 24th day of October, 2002, the defendant, or an accomplice, entered or remained unlawfully in a building, *to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA.*" State v. Levy, 156 Wn.2d at 716. The instruction was an impermissible comment on the evidence, because it expressly named White's apartment as a "building," which was an element of the crime, and suggested to the jury they need not consider this element. Id. at 721-22. But the error was harmless, because "the jury could not conclude that White's apartment was anything *other* than a building." Id. at 726.

Where, on the other hand, the jury might question the credibility of a witness's testimony establishing a particular element, a jury instruction that implies the element has been established as a matter of law is not harmless error. In State v. Jackman, 156 Wn.2d 736, 740-41, 132 P.3d 136 (2007), the "to convict" instructions in a prosecution for several counts involving illegal activity with minors, designated the victims by their initials and included their birth dates. The instructions were impermissible comments on the evidence, because "the fundamental basis for the offenses was the fact that the victims *were minors*." Id. at 744. By stating the victims' birth dates in the instructions, the court conveyed the impression those dates had been proved to be true. Id. at 745. Moreover, the error was not harmless, because although Jackman did not dispute the victims' birth dates, he did not admit or stipulate to their ages. Id. at 745. Further, the credibility of the victims was at issue, because they testified they had lied to Jackman about their ages at the time of the offenses, and the jury therefore could have chosen not to believe their testimonies about their birth dates. Id. at 744 n.7.

Similarly, in Eaker, the jury instruction implying that the corroborating facts the State was relying upon were true, was not

harmless, because the complainant's credibility was at issue. State v. Eaker, 113 Wn. App. at 120-21. Indeed,

M.F.'s credibility was central to the State's case. M.F. gave conflicting evidence as to when the alleged act of abuse occurred. At the very least, Jury Instruction No. 5 bolstered M.F.'s credibility in that it assumed that there was a day when Ms. Russell returned M.F. to the house on Isaacs and this day fell between January 1, 1990 and December 31, 1991. Based on the facts and evidence in this case, we cannot conclude beyond a reasonable doubt that the impermissible comment on the evidence did not contribute to the verdict.

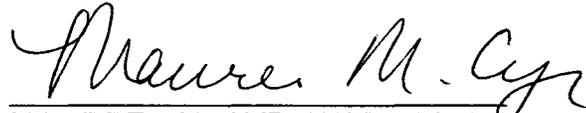
Id.

In this case, as in Eaker and Jackman, the record does not affirmatively show that the improper comment on the evidence in the jury instruction was harmless, because the complainant's credibility was at issue. Her credibility was, in fact, the central issue in the case. In closing argument, defense counsel argued K.A.G.'s testimony about the TV room incident was not credible. 3/25/09RP 29-32. He challenged her memory and perception of the incident and suggested the event never occurred. Because the witness's credibility was the central issue and the jury might have questioned whether the incident ever occurred, the comment on the evidence was prejudicial and requires reversal of the conviction.

E. CONCLUSION

Because the trial judge impermissibly commented on the evidence in the "to convict" instruction and the error is not harmless, the conviction must be reversed.

Respectfully submitted this 25th day of January 2010.

A handwritten signature in cursive script that reads "Maureen M. Cyr".

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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