

64103-4

64103-4

NO. 64103-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BARRY CAUDLE,

Appellant.

2010 MAR 24 PM 4:15
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MICHAEL J. PELLICCIOTTI
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUES</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL HISTORY | 1 |
| 2. TRIAL FACTS | 2 |
| 3. COURT RULINGS | 5 |
| C. <u>ARGUMENT</u> | 6 |
| 1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE | 6 |
| 2. THERE WAS NO PREJUDICE | 14 |
| D. <u>CONCLUSION</u> | 18 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Becker, 132 Wn.2d 54,
935 P.2d 1321 (1997)..... 7

State v. Eakler, 113 Wn. App. 111,
53 P.3d 37 (2002)..... 7, 9, 12, 15

State v. Hartzell, 153 Wn. App. 137,
221 P.3d 928 (2009)..... 7

State v. Jackman, 156 Wn.2d 736,
132 P.3d 136 (2007)..... 16, 17

State v. Levy, 156 Wn.2d 709,
132 P.3d 1076 (2006)..... 7, 14

State v. Pirtle, 127 Wn.2d 628,
904 P.2d 245 (1995)..... 6

Constitutional Provisions

Washington State:

Const. art. IV, § 16 6

Rules and Regulations

Washington State:

ER 404 5, 8, 13

Other Authorities

11 Washington Practice Series: Pattern
Jury Instructions Criminal (3rd ed. 2008)..... 13, 14

WPIC 4.26..... 13

A. ISSUES

1. A jury instruction improperly comments on the evidence when it resolves a disputed issue of fact that should have been left for the jury. In its jury instructions, the trial court specified which of two incidents was the charged offense in a way that was not disputed by the parties. Did the trial court comment on the evidence?

2. Even when a trial court improperly comments on the evidence, there is no reversible error if there was no prejudice. Here, the incident referenced in the jury instructions was not disputed by the parties and did not mislead the jury as to an element of the offense. Was there prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Defendant Barry Caudle was charged by amended information with Rape of a Child in the Second Degree – Domestic Violence. CP 21. It was alleged that sometime between June 1, 2000, and August 31, 2001, Caudle digitally penetrated 8-year old K.A.G. CP 2, 21.

The trial was held and a jury found him guilty as charged. 1RP¹ 1; CP 18. The trial court sentenced Caudle to a standard range sentence. CP 52-57; 6RP 17. Caudle now appeals his conviction. CP 63.

2. TRIAL FACTS

K.A.G. was about 6 years old when her mother, Louanne, married Wally Caudle in 1999. 2RP 7-8, 27. Wally's son, Barry Caudle, who is about 10 years older than K.A.G., became her stepbrother at that time. 2RP 8, 12. Her mom and stepdad each had three children from previous marriages. 2RP 7-8. K.A.G.'s mom, stepdad, and all of the children, moved into a new house in Auburn, Washington, in the summer of 2000. 2RP 13, 41.

There were two levels to the house. 2RP 17. Upstairs had the kitchen, living room, bathroom, and bedrooms. 2RP 17. Barry's bedroom was upstairs. 2RP 44-45. There was also a downstairs portion of the house that had a family room with a TV, sofa, and bedrooms. 2RP 17, 42. K.A.G.'s bedroom was

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (03/16/09); 2RP (03/23/09); 3RP (03/25/09); 4RP (04/24/09); 5RP (Sentencing 05/29/09); 6RP (Sentencing 07/31/09).

downstairs. 2RP 43. K.A.G. and other family members would regularly watch TV downstairs, while sitting on the sofa. 2RP 42.

One night when K.A.G. was asleep in her downstairs bedroom, she awoke to a chill. 2RP 43-44. Her blanket was being lifted off the lower portion of her body by Barry. 2RP 45-47. Barry had a flashlight focused below K.A.G.'s waist. 2RP 45-47. K.A.G. would usually sleep wearing a nightgown without underwear. 2RP 17-18, 47. K.A.G. was confused and did not know what to do. 2RP 48. She eventually went back to sleep after the incident. 2RP 48. K.A.G. was scared and did not tell anyone. 2RP 50. K.A.G. was about 7 or 8 years old at the time; Barry was about 17 or 18. 2RP 8, 12, 55.

Weeks later K.A.G. and Barry were on the sofa watching TV downstairs at their house. 2RP 53-54. K.A.G. was on Barry's lap, and Barry began stroking K.A.G.'s leg. 2RP 54. K.A.G. felt uncomfortable. 2RP 55-56. Barry started to unzip K.A.G.'s pants and put his hands onto her private parts, eventually taking his hand under her underwear. 2RP 57-58. Barry then digitally penetrated K.A.G.'s vagina. 2RP 59-60.

A couple months later, the family went to Ocean Shores, Washington. 2RP 60. They all wore swimsuits. 2RP 60-61.

K.A.G. felt safe from Barry with the other brothers there. 2RP 61. At one point, while she was on Barry's lap sitting in a swimming pool under the water, the other brothers went off to play. 2RP 61. Upon being left alone, Barry again digitally penetrated K.A.G.'s vagina. 2RP 60, 64.

K.A.G. felt ashamed, and avoided contact with Barry around the house from that point on. 2RP 65-66. Sometime later, Barry moved out, but would regularly return home. 2RP 68. Over the next few years, K.A.G. would try to keep from being alone with him. 2RP 69-70.

K.A.G. did not share these incidents with anyone until years later, at age 14, when she confided in her best friend from school. 2RP 36, 48, 71. K.A.G. was worried about the consequences for K.A.G. and her family if she told anyone else. 2RP 73-74.

About a year or two later, Barry was again living in the house. 2RP 22-23, 27. In May 2007, 14-year old K.A.G. was looking for a contact lens on the ground when Barry touched her skin near the bottom of her back. 2RP 27, 75-77. She went to her room crying. 2RP 75-76. Her mom came to comfort her, which is when K.A.G. told her of the earlier molestation. 2RP 19-21, 27,

75-76. Her mom and stepdad made Barry move out of the house.
2RP 22-23, 78.

3. COURT RULINGS

Before trial, the State amended the information from two counts of Rape of a Child -- based on the downstairs incident and the swimming pool incident -- to one count based just on the downstairs TV-room incident. 1RP 2-5; CP 5-6. The swimming pool incident was admitted only to show Caudle's lustful disposition per ER 404(b). 1RP 17-19, 23.

By amendment the State narrowed the charging dates, as well. 1RP 2-5; 2RP 27; CP 21. Defense stipulated to the jury that if any offense occurred, it happened during this tighter timeframe. 3RP 79-80; 4RP 4, 12-3; CP 20. This stipulation protected Caudle from a potential indeterminate sentence, which would have applied with a longer charging period. 3RP 79-80; 4RP 4, 12-3; CP 20.

After trial, Caudle attempted to bring a motion² for a new trial based, in part, on language in a jury instruction that Caudle claimed was an improper comment on the evidence. In denying the motion,

² Caudle brought a motion to extend time to file a motion for a new trial. He was represented at that hearing with both his trial attorney and a new attorney who was substituting in and bringing the motion. 4RP 3-5.

the trial court found that the parties had agreed on the language in question and that the language did not reference an element of the offense. 4RP 4-5.

C. ARGUMENT

1. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE.

Caudle claims the trial court improperly commented on the evidence in its "to-convict" jury instruction when it specified the "downstairs family-TV room incident" as the charged offense. Appellant's Brief at 9-10. He argues that through this instruction the trial court violated Wash. Const. Article IV, § 16, by impermissibly instructing the jury on a matter of fact. However, because the trial court's clarification in the jury instruction did not resolve a disputed issue of fact, there was no comment on the evidence.

The validity of jury instructions is a question of law reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Article IV, § 16 of the Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been

established as a matter of law. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

An instruction is improper if it resolves a disputed issue of fact that should have been left for the jury. State v. Eakler, 113 Wn. App. 111, 118, 53 P.3d 37 (2002) (citing State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997)). Any remark “that has the potential effect of suggesting that the jury need not consider an element of an offense” could qualify as a judicial comment. State v. Hartzell, 153 Wn. App. 137, 221 P.3d 928 (2009) (citing Levy, 156 Wn.2d at 721). Whether a trial court improperly comments on the evidence depends on the facts and circumstances of each case. Eakler, 113 Wn. App. at 117-18.

The jury instruction at issue here involves the trial court’s specification that the “downstairs family-TV room incident” was the charged offense. CP 32. In full, 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 of 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).

In addition to the downstairs incident, there was also the swimming pool incident. Both were potential criminal acts where Caudle had sexual intercourse with K.A.G. during the dates charged. Because the trial court admitted the pool incident as 404(b) and not a separate criminal act, the court needed to instruct the jury that the downstairs incident was the only charged offense.

While the record did not capture any trial discussion regarding the instructions, it does indicate that both parties agreed

on this instruction language.³ 4RP 4. Moreover, defense argued in closing to the jury that “you are not here to deliberate on those particular [pool and flashlight] incidents. The only incident you are here to deliberate on is the living room incident, the TV incident.” 3RP 29.

This undisputed instructional language did not comment on any of the elements: (1) that Caudle had sexual intercourse with K.A.G. between June 1, 2000 and August 31, 2001; (2) that K.A.G. was under 12 years old and unmarried to Caudle; (3) that K.A.G. was 24 months younger than Caudle; or (4) that the act occurred in Washington. CP 32. As such, the jury instruction was proper.

Caudle relies on State v. Eakler to support his claim that the trial court commented on the evidence. 113 Wn. App. at 118-19. Eakler was charged with First Degree Rape of a Child for demanding and receiving oral sex several times from an 8-year old

³ The trial court responded to the post-trial claim by Caudle’s new attorney that the jury instruction was an improper comment on the evidence. The trial court said:

When everybody agreed on the language in terms of, I think it’s the couch incident or something, I don’t think there was any argument that they weren’t on the couch together. How is there even an argument that that is a comment on the evidence?

4RP 4-5.

half-brother, M.F. Id. at 113-14. M.F. testified that the last rape happened when his parents were on vacation and he was babysat by Judy Russell, who eventually took M.F. to stay with Eakler at their house on Isaacs Street, where the criminal act occurred. Id. at 113.

However, M.F. told detectives various versions of his story. This included confusion at what location, how often, and when the alleged rapes occurred. Id. at 113-14. M.F. gave conflicting stories about whether this last incident occurred in 1988 or maybe 1986. Id. at 114. Even evidence by detectives from accident reports disputed the timeframe given by M.F. Id. at 114-15. Eakler testified that he never molested M.F. and also challenged M.F.'s timeframe. Id. at 115.

Eakler moved to dismiss because there was evidence that the last act of abuse was arguably committed before the statute came into effect in 1988. Id. The trial court denied the motion. Id. Eakler then objected to the use of the State's proposed instruction with which the trial court instructed the jury. Id. The trial court's "to-convict" instruction included the following:

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 Russel[] was babysitting [M.F.] and took him to his house at 1325 Isaacs Street, Walla Walla[.]

Id. at 118 (emphasis added).

Eakler had disputed these emphasized facts through his testimony, the victim's inconsistent statements, and law enforcement testimony. Id. at 114-15. In particular, he challenged the timeframe of the alleged rapes, which the trial court factually settled through this instruction. Id. at 114-18.

The Court of Appeals found that when the State elects a specific criminal act in the "to-convict" instruction it must be "framed in a way that does not impermissibly comment on the evidence establishing these facts." Id. at 119. This Court stated that the trial court's instruction improperly commented "on the evidence because the instruction 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 [Street.]" Id. at 118. This instruction therefore resolved the disputed fact that the offense occurred during the alleged timeframe, an element of the offense. Id. at 118.

The trial court in the present case did not resolve any disputed facts for the jury, especially related to the date of the crime

as in Eakler. Despite this, Caudle relies on Eakler to claim that the instruction in our case similarly resolved disputed issues that there was an incident downstairs, that it amounted to rape, and that the rape occurred during the charging period.

First, there was no dispute between the parties that there was an incident downstairs. The parties even appear to have agreed on the jury instruction language to this fact. See 4RP 4-5; supra n. 3. Second, this language contained no express or implied factual conveyance by the court that there had been a rape.⁴ CP 32. Third, the language did not imply that the criminal act occurred within the dates alleged. Even if it had commented on the offense date, the parties stipulated to the fact that the alleged incident occurred between the dates charged.⁵ CP 20. Thus, the instruction resolved no disputed issues, and therefore did not comment on the evidence.

⁴ At the post-trial hearing on this matter the trial court concluded:

I don't think there was any argument that they weren't on the couch together. . . [S]itting on a couch isn't a statutory element of the crime of rape of child. . . The Court didn't say, the incident when he raped her on a certain day. . . That would be a little different.

4RP 4-5.

⁵ "Both parties stipulate that this alleged incident occurred between June 1, 2000 and August 31, 2001." CP 20.

Caudle also argues for the first time on appeal that the trial court should have used the jury unanimity instruction of WPIC 4.26⁶ to specify what incident was before the jury.

However, WPIC 4.26 would not clarify for the jury that they were only to consider the downstairs family room incident and not the swimming pool incident. After all, the swimming pool incident was not a charged offense, and was only admissible pursuant to ER 404(b) to show Caudle's lustful disposition toward K.A.G. 1RP 17-19, 23. It would be improper to use the criminal act of the swimming pool incident to convict him of his current charge. Thus, the use of WPIC 4.26 in this context would be wrong.

The court properly followed the WPIC by specifying the downstairs incident in a way that "avoid[ed] compounding in a single element complicated factual allegations in a manner that suggests that some of the allegations are, in fact, true."

11 Washington Practice Series: Pattern Jury Instructions Criminal

⁶ Washington Pattern Jury Instruction Criminal 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.

WPIC 4.26.

115-16 (3rd ed. 2008). Instead, the trial court in our case fully specified the incident before the jury without adding unnecessary or disputed facts. The court clarified that the issue before the jury was different from the downstairs bedroom incident or swimming pool incident. It makes sense why Caudle would agree to this language at trial. See 4RP 4-5; supra n. 3. It allowed for clarity of the charged offense without drawing attention to the other evidence of abuse. The instruction used by the trial court was proper.

2. THERE WAS NO PREJUDICE

But if the trial court's jury instruction was improper, it did not prejudice Caudle. Judicial comments are presumed to be prejudicial; however, the State may prove a defendant is not prejudiced if the record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 725. This is because even if a trial court lists a fact in a jury instruction, the court does not necessarily convey that the fact has been accepted as true. Id. at 726-27. Where no rational juror could be misled by an instruction, there is no prejudice. See Id.

The jury instruction did not factually comment on any element of the offense in this case. See supra § C.1. Even if the

instruction had commented on the timeframe element of the offense, as in Eakler, it is harmless here because the parties stipulated that the alleged incident occurred during the timeframe alleged. CP 20. Thus, without a judicial comment on an element of the offense, there is no prejudice to Caudle.

Caudle instead relies on Eakler to claim that the victim's credibility was central to the case, and thus any comment on the evidence was not harmless. See Eakler, 113 Wn. App. at 120. Caudle argues that K.A.G.'s credibility was at issue and points to the fact that in "closing argument, defense counsel argued K.A.G.'s testimony about the TV room incident was not credible." Appellant's Brief at 14 (citing 3RP 29-32).

In Eakler, it was not harmless for the trial court to take the facts as testified to by victim and present them as true in a jury instruction. 113 Wn. App. at 120. However, that jury instruction included facts testified to by the victim that were disputed by Eakler through his testimony and the testimony of law enforcement. Id. at 114-15. Thus, in Eakler, the comment on the evidence clearly bolstered the victim's testimony. Id. at 121. Unlike Eakler, our jury instruction does not resolve such conflicting testimony. See supra § C.1.

Caudle focused on the lack of medical evidence, detailed recollection by K.A.G., eye witness corroboration, and timely reporting by K.A.G., among other issues, to argue that her claim of rape during the downstairs incident was speculative and doubtful. 3RP 29-32.

While Caudle did challenge whether a rape occurred, there was no argument that he and K.A.G. were together in the downstairs family room. See 4RP 4-5; supra n. 3. In fact, unlike Eakler who objected to the State's proposed instruction, Caudle agreed with this language. Id. Defense even maintained to the jury that the "only incident you are here to deliberate on is the living room incident, the TV incident." 3RP 29. Thus, the language of the instruction was undisputed as to what factual issues the jurors would need to resolve.

Caudle also cites State v. Jackman for the premise that there can still be prejudice resulting from a comment on the evidence even if the factual matter was not challenged at trial. 156 Wn.2d 736, 740-41, 132 P.3d 136 (2007). However, in Jackman, our State Supreme Court found there was prejudice

when the trial court gave the birth date of the victim in a jury instruction, when an *element* of the offense was that the victim was a minor. Id. at 744-45. The Supreme Court said that even if it was not disputed at trial, factually resolving this element by the trial court removed a fact that should have been left for juror consideration, and thus the record does not affirmatively show that no prejudice could have resulted. Id. at 745.

In our case, as discussed above, the jury instruction does not comment on an element of the offense. The undisputed general credibility claim now raised by Caudle is not the same as when a court factually resolves an element of the offense. Jackman is inapposite.

Given the agreement as to the language of this instruction, it did not improperly bolster the credibility of K.A.G. In a case where the instruction language and testimony are all undisputed, and the language does not affect an element of the offense, the instruction would not mislead a juror's factual consideration of the case. The record affirmatively shows that no prejudice could have resulted.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Caudle's conviction.

DATED this 24th day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

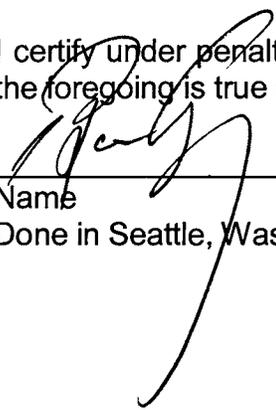


By: _____
MICHAEL J. PELLICCIOTTI, WSBA #35554
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. BARRY MICHAEL CAUDLE, Cause No. 64103-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington

08/24/10

Date