

original

~~NO. 78388-8~~

35545-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

JOHN ROACH

Appellant.

157433 0110060
09 OCT 10 PM 7:51
E

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, PIERCE COUNTY

The Honorable Brian Tollefson, Judge

APPELLANT'S OPENING BRIEF

SUZANNE LEE ELLIOTT
Attorney for Appellant

705 Second Ave.
Suite 1300 Hoge Building
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 7

 1. *Where the statute defining second degree assault of a child requires actual battery, is it err for the trial court to give an instruction that permits the jury to find the defendant guilty even if no actual battery occurred?*..... 7

 2. *Where a witness testifies to statements the child victim allegedly made to her, did the trial court err in prohibiting the defense from cross-examining her about her bias and motive to lie, including evidence of her previous efforts to “coach” the child into accusing the defendant of assault?* 10

D. CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297
 (1973)..... 11

Crane v. Kentucky, 476 U.S. 683, 90 L. Ed. 2d 636, 106 S. Ct. 2142
 (1986)..... 10

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). 11

Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674
 (1986)..... 12

Greene v. Lambert, 288 F.3d 1081 (9th Cir. 2002) 10

Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513
 (1988)..... 11

Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) 10

State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993)..... 8

State v. Brooks, 25 Wn. App. 550, 611 P.2d 1274 (1980)..... 12

State v. Buss, 76 Wn. App. 780, 887 P.2d 920 (1995)..... 12

State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980) 12

State v. Robbins, 35 Wn.2d 389, 213 P.2d 310 (1950)..... 12

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)..... 9

State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*,
 148 Wn.2d 1009, 62 P.3d 889 (2003)..... 12

<i>State v. Walden</i> , 67 Wn. App. 891, 841 P.2d 81 (1992).....	8
<i>State v. Williamson</i> , 84 Wn. App. 37, 924 P.2d 960 (1996).....	9
<i>United States v. Scheffer</i> , 523 U.S. 303, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998).....	10

Statutes

RCW 9A.04.110.....	7
RCW 9A.36.021.....	1, 7
RCW 9A.36.130.....	1, 7

A. ASSIGNMENT OF ERROR

1. The trial judge erred in giving Instruction No. 7 (quoted in full below).
2. The trial judge erred in forbidding defense counsel to question a witness on her bias and motive to testify against the defendant.

Issue Pertaining to the Assignment of Error

1. Where the statute defining second degree assault of a child requires actual battery is it err for the trial court to give an instruction that permits the jury to find the defendant guilty even if no actual battery occurred?
2. Where a witness testifies to statements the child victim allegedly made to her, did the trial court err in prohibiting the defense from cross-examining her about her bias and motive to lie, including evidence of her previous efforts to “coach” the child into accusing the defendant of assault?

B. STATEMENT OF THE CASE

John Roach was charged in Pierce County Superior Court with one count of assault of a child in the second degree in violation of RCW 9A.36.021(1)(a) and 9A.36.130(1)(a). CP 16. The assault was alleged to have occurred on August 10, 2004. The information also contained an

allegation that this was an act of domestic violence. *Id.* The complaining victim was Z.R., Roach's son.

On August 14, 2004, shortly before her weekend visit was to end, Deborah Roach (hereinafter Deborah) brought her son, Z.R., to the hospital and said that she had observed bruises on him. She told the staff that Z.R. had reported that the bruises were caused by his father, John Roach. At the time Deborah Roach was the non-custodial parent. Z.R. had been living with his father for about a year and visited with his mother on weekends. RP 805, 832. Deborah admitted that she took Z.R. to the hospital because she did not want him returned to Roach. RP 831. It is undisputed that the parents had been involved in a lengthy and acrimonious divorce and child custody battle.

By the time of trial, Z.R. had given a number of conflicting statements about how he had been bruised. Moreover, after the allegation was made but before trial, Z.R. was placed with his mother, not his father. RP 893. Nine months elapsed between his father's arrest and the trial. *Id.* As a result, Roach wanted to admit evidence that Deborah had previously made unfounded allegations that he had assaulted Z.R. on other occasions. He submitted an offer of proof that established that Deborah admitted to others that she made three prior allegations that Roach had assaulted Z.R. CP 25. In May, 2002, Z.R. told health care workers that his mother told

him a secret – she wanted “to kill his daddy.” CP 77. In June 2002, Deborah brought Z.R. to the emergency room where she appeared to prompt him into accusing his father of hitting him. CP 80-82.

Roach argued that this evidence demonstrated that Z.R.’s differing recitations of what caused the August 2004 bruises were a product of his mother’s coaching. He also argued that the evidence went to the issue of Deborah’s bias and motive to lie. The trial judge ruled that the evidence of the previous referrals to CPS and previous unfounded allegations against Roach by Deborah were not admissible. RP 380-83, 385-92.

Prior to trial the judge determined that Z.R.’s statements to others about the event would be admissible pursuant to the child hearsay statute. CP 120-22. Thus, statements from Z.R. to Peggy Emery, Shelly Silvas, Lori Van Slyke and Deborah Roach were admitted at trial.

Shelly Silvas testified that she was a preschool teacher at School Kids Club House where Z.R. attended daycare. RP 440-44. On August 11, 2004, she and other employees observed bruises on Z.R. RP449. She saw bruising on his shoulder. RP 453. She did not see bruising on his face. Id. He also had a scratch on his face. RP 452. Z.R. told her “daddy did it with the keys.” RP 456. She testified that she believed some of the bruises on Z.R. were in different stages, which to her meant that the bruises had been inflicted at different times. RP473. She also stated that

children were very impressionable at Z.R.'s age and that adults need to be careful what is said to them in an abuse investigation. RP 476.

Peggy Emery also testified that Z.R. told her his father had hit him with keys. RP 859-868.

Lori Van Slyke testified that she was a crisis intervention social worker. RP 523. On August 14, 2004, she interviewed Z.R. after he had been brought into the emergency room with a bruise on his face. RP 526. She asked Z.R. how the bruises to his body happened and he said his father did it. RP 528. He made no mention of being hit with keys. RP 529.

Cornelia Thomas is the child forensic interviewer for Pierce County. RP 663. She interviewed Z.R. on August 17, 2004. RP 682. Z.R. showed her a bruise on his shoulder. RP 702. He told her that his dad hit him and caused the bruise. RP 703. Z.R. said he was hit with a fist. RP 704. He told her that when his father hit him, his fist was closed. RP 705. Z.R. identified two other places on his body where he said his father had hit him. RP 706-07. Z.R. then told her that his father put flour and syrup on his head and forced him to sleep in it. RP 711, 716. He alleged that his father spit on his face. RP 712. Finally, he said he had been kicked in his back by his father. RP 718. He also told the interviewer

that his father had the shoes on when he kicked him. RP 721. Z.R. also said that his father gave him a bloody nose. RP 725. See also CP 55-63.

Deborah denied taking the children to the emergency room shortly before her visitation expired. RP 814. She said she didn't remember any bruises on her son's face. Deborah denied telling the police that she immediately noticed the bruises on the face and arms of Z.R. RP 820. Deborah did not recall how she got Z.R. to take off his shirt to see the bruises. RP 823. She said that after Roach was arrested, the guardian ad litem tried to have the children taken away from her. RP 830.

During her testimony, Deborah stated that she did not recall coaching Z.R. about what to say about the bruising. RP 835. Defense counsel argued that this opened the door to impeaching her with the previous records regarding her participation in other unfounded reports to CPS that Roach had abused Z.R. RP 836-840. He noted that Z.R. had given varying stories about what had happened to him. For example, he told his daycare teachers his father had hit him with some keys but, after a visit with his mother, he changed his story and said that his father had hit and kicked him. RP 844.

The defense again submitted an offer of proof as to when and where he believed Deborah had previously prompted her children to make false allegations. RP 884-888. Deborah denied remembering any of these

incidents. When defense counsel asked to put in other evidence regarding these incidents or to confront her with the documentation, the judge denied the request. RP 889. The judge said that because Deborah said that she did not remember these incidents, she could not be cross-examined about them. When defense counsel argued that her denials went to “credibility” the judge said: “I am not inclined to allow you to explore any of these issues in front of the jury.” RP 890.

Z.R. testified that in August 2004 his dad was mad because he’d lost his keys. RP 899. He said that his dad had put flour and syrup in his hair. RP 900. He said that his father had also kicked him when he was on the floor. RP 901.

Bill Harrington, the guardian ad litem for the Pierce County Superior Court testified. RP 1045-46. He was assigned to the Roach family on May 20, 2003. RP 1052. Harrington spent 200 hours working with the family. RP 1053. Harrington testified that at the time of the incident Deborah’s reputation for truth and veracity in the community was very bad.

The jury convicted Roach as charged. CP 147-48. The trial court imposed a standard range sentence. CP 164-72. This timely appeal followed. CP 183-84.

C. ARGUMENT

1. *Where the statute defining second degree assault of a child requires actual battery, is it err for the trial court to give an instruction that permits the jury to find the defendant guilty even if no actual battery occurred?*

Assault of a child, second degree is defined as follows:

A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

Commits the crime of assault in the second degree as defined in RCW 9A.36.021, against a child; . . .

RCW 9A.36.130(1)(a). Second degree assault is defined as follows:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

Intentionally assaults another and thereby recklessly inflicts substantial bodily harm . . .

RCW 9A.36.021(1)(a).

Substantial bodily harm means:

. . . bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part of organ, or that causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

In this case the trial judge gave the following definition of assault:

INSTRUCTION NO. 7

An assault is an intentional touching or striking of another person with unlawful force, that is harmful or

offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 136.

The problem with Instruction 7 in this case is that assault of a child as defined by the statute, quoted above and charged here, requires *actual battery*. In the abstract Instruction 7 is correct. Assault is not defined by statute. Consequently, Washington courts rely on the common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another {attempted battery}; (2) an unlawful touching with criminal intent {actual battery}; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm {common law assault}. *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993) (quoting *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)).

But under the facts charged here, Instruction 7 is not only wrong, it also permitted the jury to convict Roach even if it did not find an actual battery that inflicted substantial bodily injury. On the one hand, the jury was told that even if the State proved only an attempted battery or only put Z.R. in “apprehension” of injury, an assault had occurred. This would be simply insufficient to convict under the statute charged. Worse yet, Instruction 7 informed the jury that a finding of assault was permissible even if the contact was only “offensive” without regard to whether or not injury was done. Such a finding clearly would not suffice to support a second degree assault of a child charge.

When an information alleges only one means of committing a crime, it is constitutional error for the court to instruct the jury on a different, uncharged means, regardless of the strength of the evidence admitted at trial. *State v. Williamson*, 84 Wn. App. 37, 42, 924 P.2d 960 (1996). Courts presume that an instructional error is prejudicial unless the State meets its burden of affirmatively showing that the error was harmless. *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997).

Here the State cannot demonstrate that the instructional error was harmless. Z.R. gave several statements. Some of these statements could have supported a charge of actual battery, e.g., that his father kicked him. Other statements, however, would have supported only a finding of

attempted battery, e.g. his father was mad, or simply an offensive touching (putting flour and syrup in his hair). For this reason, this Court must reverse the conviction and remand for a new trial.

2. *Where a witness testifies to statements the child victim allegedly made to her, did the trial court err in prohibiting the defense from cross-examining her about her bias and motive to lie, including evidence of her previous efforts to “coach” the child into accusing the defendant of assault?*

The right to “a meaningful opportunity to present a complete defense” is rooted in the Due Process, Compulsory Process and Confrontation clauses of the federal constitution. *Crane v. Kentucky*, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986); see also *Greene v. Lambert*, 288 F.3d 1081 (9th Cir. 2002) (preclusion of Dissociative Identity Disorder violated defendant’s right to present a defense to charge of indecent liberties). That right is not unlimited: “State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused’s right to present a defense so long as they are not ‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *United States v. Scheffer*, 523 U.S. 303, 308, 140 L. Ed. 2d 413, 118 S. Ct. 1261 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987)) (emphasis added). But, “these circumstances, where

constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Supreme Court has “found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused.” *Scheffer*, 523 U.S. at 308.

State law privileges must give way to a defendant’s right under the confrontation clause to explore a witness’ bias. *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), the trial court abused its discretion by precluding cross-examination of an alleged victim to show she fabricated a rape charge in order to protect her relationship with her live-in boyfriend. The victim was white and her boyfriend was black. The trial court felt that this evidence might prejudice the jurors against the victim. This had failed to accord the proper weight to the right to confrontation. *Id.* at 231.

The Kentucky Court of Appeals did not dispute, and indeed acknowledged, the relevance of the impeachment evidence. Nonetheless, without acknowledging the significance of, or even advertent to, petitioner’s constitutional right to confrontation, the court held that petitioner’s right to effective cross-examination was outweighed by the danger that revealing Matthews’ interracial relationship would

prejudice the jury against her. While a trial court may, of course, impose reasonable limits on defense counsel's inquiry into the potential bias of a prosecution witness, to take account of such factors as "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that [would be] repetitive or only marginally relevant," the limitation here was beyond reason.

Id. at 232, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Under Washington law a witness may be examined as to particular facts tending to show the nature and extent of her hostility. *State v. Robbins*, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); *State v. Brooks*, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980); *State v. Jones*, 25 Wn. App. 746, 610 P.2d 934 (1980). "Cross-examination to show bias, prejudice or interest is a matter of right." *State v. Buss*, 76 Wn. App. 780, 787, 887 P.2d 920 (1995). The Washington appellate courts have recognized the Supreme Court precedent cited above holds that the Sixth Amendment may be violated when a witness' bias, credibility, prejudice or hostility is excluded. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003).

In this case Deborah's bias and motive were key in evaluating the Z.R.'s claim that his father had assaulted him. Z.R. was with his mother when he made the accusation. His allegations changed over time. His mother had previously made unfounded allegations against Roach. And,

Z.R. had been with his mother for nine months before trial. Roach was entitled to explore these subjects with Deborah while she was on the stand.

The trial court's failure to permit Roach to do so denied him a fair trial.

D. CONCLUSION

For the above stated reasons this Court should reverse Roach's conviction and remand the matter to the trial court for further proceedings.

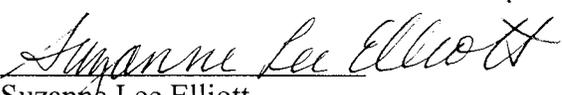
Respectfully submitted this day of 9th day of October 2006.



Suzanne Lee Elliott
WSBA 12634

CERTIFICATION OF SERVICE BY MAIL

I declare under penalty of perjury that on October 9, 2006, I placed a copy of this document in the U.S. Mail, postage prepaid, to Appellate Unit, Pierce County Prosecuting Attorneys Office, 930 Tacoma Avenue South, Room 946, Tacoma, WA 98402-2102.


Suzanne Lee Elliott