



**TABLE OF CONTENTS**

- A. Appellant’s Assignment of Error.....1
- B. Issue Pertaining to Assignment of Error.....1
- C. Evidence Relied Upon.....1
- D. Statement of the Case.....1-3
  - 1 & 2. Procedural History & Statement of Facts.....1
  - 3. Summary of Argument.....1-3
- E. Argument.....3-9
  - 1. THE TRIAL COURT DID NOT ERR BY NOT GIVING A UNANIMITY INSTRUCTION ON COUNT FOUR, RAPE OF A CHILD IN THE SECOND DEGREE, BECAUSE S.B., THE VICTIM, PRESENTED TESTIMONY WHICH FACTUALLY DISTINGUISHED THAT CHARGE FROM COUNTS ONE THROUGH THREE.....3-9
- F. Conclusion.....10

**TABLE OF AUTHORITIES**

**1. Table of Cases**

State v. Bobenhouse, 143 Wash.App. 315,177 P.3d 209 (2008).....3, 4  
State v. Camarillo, 115 Wash.2d 60, 794 P.2d 850 (1990).....2, 4, 8  
State v. Grisby, 97 Wash.2d 493, 647 P.2d 6 (1982).....4  
State v. Guloy, 104 Wash.2d 412, 705 P.2d 1182 (1985).....2, 4, 5, 8  
State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).....2, 5  
State v. Rodriguez, 121 Wash.App. 180, 87 P.3d 1201 (2004).....4  
State v. Vander Houwen, 163 Wash.2d 25,177 P.3d 93 (2008).....7

**2. Court Rules**

RAP 10.3(b).....1

A. ASSIGNMENT OF ERROR

1. Appellant was denied his right to a unanimous jury in violation of his constitutional rights under Wash. Const. art. 1, § 22; U.S. Const. Amend. 6.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Should the trial court have given a unanimity instruction on count four, rape of a child in the second degree, when S.B.<sup>1</sup>, the victim, presented testimony which factually distinguished that charge from counts one through three?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as “RP.” The Clerk’s Papers shall be referred to as “CP.” The Appellant’s Brief shall be referred to as “AB.”

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts York’s recitation of the procedural history and facts and notes that this case was heard before the Honorable James B. Sawyer, II, in Mason County Superior Court.

3. Summary of Argument

A unanimity instruction on count four was unnecessary in York’s case because S.B., the victim, gave testimony which clearly separated the

four charges of rape of a child in the second degree. S.B.'s testimony that she had sex with York at Cindy York's house between five and six additional times clearly separated the incidents in counts one through three from count four. The additional five to six sexual encounters that York had with S.B. constitute the specific "act" that Petrich requires, and allowed the jury to properly convict York on count four. Had York been charged with four identical counts of rape of a child, then his argument regarding a unanimity instruction might have greater merit.

If an instructional error occurred it was harmless beyond a reasonable doubt under Guloy and Camarillo, because S.B. testified that the additional sex York had with her occurred between five and six times in a room of Cindy York's house and: (a) she detailed the type of sexual intercourse that York had with her on prior occasions, namely that his penis went into her vagina; (b) there was no conflicting testimony about whether York had had sex with S.B. on the five to six additional times; (c) S.B.'s testimony was unimpeached; and (d) S.B.'s testimony was clear enough so that any reasonable juror could chronologically separate the additional sex charged in count four from that specified in counts one through three.

---

<sup>1</sup> The juvenile victim will be referenced by her initials only in the State's brief.

Additionally, York indirectly argues sufficiency of the evidence in his footnotes throughout his brief. That issue was not assigned error and should not be considered by the Court. York's continuous, subsidiary argument in footnotes involving: (a) a comparison of facts from his mistrial with his second trial; (b) his thoughts on S.B.'s credibility; (c) trial strategy; and (d) theories regarding charging alternatives, is not only improper but irrelevant to this appeal, especially because error was not assigned. See AB 2-13: footnotes 3-14. The judgement and sentence of the trial court is complete, correct and should be affirmed.

#### E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY NOT GIVING A UNANIMITY INSTRUCTION ON COUNT FOUR, RAPE OF A CHILD IN THE SECOND DEGREE, BECAUSE S.B., THE VICTIM, PRESENTED TESTIMONY WHICH FACTUALLY DISTINGUISHED THAT CHARGE FROM COUNTS ONE THROUGH THREE.

The trial court did not err by not giving a unanimity instruction on count four, rape of a child in the second degree, because S.B., the victim, presented testimony which factually distinguished that charge from counts one through three.

To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act. State v. Bobenhouse, 143 Wash.App. 315, 325, 177 P.3d 209 (2008). The State

must elect the act it relies on for a conviction, or the court must instruct the jury that all members must agree on the same underlying act when multiple acts relate to one charge. State v. Camarillo, 115 Wash.2d 60, 63, 794 P.2d 850 (1990). The failure to instruct the jury on the required unanimity is reversible error unless the failure is harmless. Bobenhouse, 115 Wash.2d at 325.

The jury is presumed to follow the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Rodriguez, 121 Wash.App. 180, 184-185, 87 P.3d 1201 (2004).

Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wash.2d at 425.

Constitutional error is presumed to be prejudicial and the State bears the

burden of proving that the error was harmless. Guloy, 104 Wash.2d at 425-426.

As York correctly asserts in his brief, specific testimony was given by S.B. regarding counts one through three: Count one involved the January 9, 2007, incident in the woods; count two, the incident in the woods “about a month earlier”; and count three, where S.B. awoke in York’s basement room and found him unzipping her pants. AB 11; RP Vol. III 284: 17-20; 286: 1-3 (count one); RP 288: 13-25; 289: 3-22 (count two); RP 289: 23-25; 290: 1-25; 291: 1-13 (count three). York’s recitation of S.B.’s testimony is also correct regarding the number of “other times” that she had sex with York at Cindy York’s house, as S.B. stated, “about, I don’t know, probably five, six” times. AB 5; RP Vol. III 291: 9-15. A unanimity instruction was unnecessary, however, because the jury could have used the additional “other times” that S.B. had sex with York as the specific act required under Petrich to convict him of rape of a child in the second degree as charged in count four. RP Vol. III 291: 9-15; State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

Instruction No. 13, which addressed the fourth count of rape of a child in the second degree, reads as follows:

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 between the period of the 23<sup>rd</sup> day of January, 2007, and the 31<sup>st</sup> day of December, 2007, the defendant had sexual intercourse with [S.B.];
- (2) That [S.B.] 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 older than [S.B.]; and
- (4) That the acts 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 65; RP Vol. IV 418: 24-25; 419: 1-17.

It was for the jury to decide whether York committed a fourth count of rape of child in the second degree for the additional sex he had with S.B., aside from that charged in counts one through three which were clearly separate and distinct in time.

What York confuses in his brief is the difference between testimony and evidence with argument. The State's closing argument on count four in particular with York's case should be considered just that;

argument. The trial court explained to the jury the difference between argument and evidence through Instruction No. 1 which reads:

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court. CP 65.

S.B.'s testimony constituted the evidence in York's case, and not the State's closing argument. Had York been charged with four identical counts of rape of a child in the second degree, then his argument here might be more persuasive.

York's reliance on State v. Vander Houwen is misplaced not only because it is factually and procedurally dissimilar (unlawful big game hunting versus rape of a child), but also because Vander Houwen "was charged under 10 different cause numbers," where "[u]nder each cause number he was charged with two counts." Vander Houwen, 163 Wash.2d 25, 38, 177 P.3d 93 (2008). As the Court in Vander Houwen stated, the "only evidence distinguishing one dead elk from another was testimony that the State found .270 caliber slugs in two of the elk." Vander Houwen, 163 Wash.2d at 38. York, by contrast, was charged with four counts of rape of a child under a single cause number, and the State carefully differentiated each of the four separate counts by way of information, testimony, evidence and argument.

The State correctly recalled S.B.'s testimony in her closing, as she argued to the jury that S.B. "...talked about a pattern, ladies and gentlemen." RP Vol. IV 430: 2-3. S.B.'s own testimony clearly demonstrates that York raped S.B. according to pattern, as she testified how York would first ply her with alcohol and then have sex with her. RP Vol. III 296: 13-15. Part of this pattern involving S.B. also involved threats, as York said on at least one occasion after raping her, "you better not tell anyone or I'm not gonna see your brother again." RP Vol. III 297: 8-9. S.B. was also clear that York "had sex" with her as she had described during the five or six additional times in the room at Cindy York's house. RP 291: 7-15.

Under Guloy and Camarillo, if any instructional error occurred in York's case it was harmless beyond a reasonable doubt because the jury had ample evidence that York raped S.B. as charged in count four. As the Court in Camarillo reasoned, they affirmed the conviction in that case because:

There was no uncertainty on the part of the jury regarding the type of sexual contact; there was no conflicting testimony about what had occurred on the three occasions to be charged; the boy's testimony was unimpeached; and there was no attendant confusion as to dates and places on the part of the victim. The error was harmless beyond a reasonable doubt. Camarillo, 115 Wash.2d at 72.

This is comparable to York's case, because S.B. testified that the "other times" that York had with her occurred between five and six times in a room of Cindy York's house. RP Vol. III 291: 9-18. S.B. had previously detailed the general type of sexual intercourse that York repeatedly had with her, namely that his penis went into her vagina. RP Vol. III 286: 1-3.

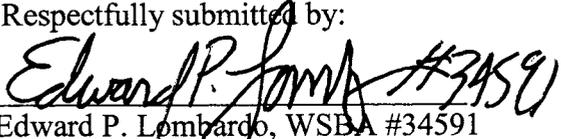
There was also no conflicting testimony about whether York had sex with S.B. on these five to six additional occasions, and while Cindy York testified, S.B.'s testimony was not impeached. RP Vol. IV 386-399. S.B. could not pinpoint the specific dates when this additional sex occurred, but her testimony was clear enough so that any reasonable juror could chronologically separate it from each of the other three incidents that were charged in counts one through three. As the jurors had been informed through Instruction No. 13, if they had a reasonable doubt as to any one of the elements in count four, their duty was to acquit. CP 65. If an instructional error occurred in York's case, it was harmless beyond a reasonable doubt.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 6<sup>TH</sup> day of MARCH, 2009

Respectfully submitted by:

  
Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Burleson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 RICHARD E. YORK, )  
 )  
 Appellant, )  
 \_\_\_\_\_ )

No. 38185-1-II

DECLARATION OF  
FILING/MAILING  
PROOF OF SERVICE

BY  
STATE OF WASHINGTON  
DEPUTY  
09 MAR -9 AM 8:36

COURT OF APPEALS  
DIVISION II

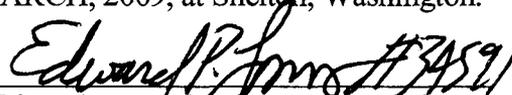
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, MARCH 6, 2009, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Kira T. Franz, Attorney at Law  
Nielsen, Broman & Koch  
1908 East Madison Street  
Seattle, WA 98122

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 6<sup>TH</sup> day of MARCH, 2009, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34591