

NO. 38585-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

PETRONILO CIFUENTES-VICENTE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Diane Woolard, Judge

APPELLANT'S BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in prohibiting defense counsel from cross-examining the father of the complaining witness about his bias against Mr. Cifuentes and how that bias may have impacted the complaining witness.

2. The trial court violated article IV, section 16 of the Washington Constitution by instructing the jury, that the testimony of the alleged victim need not be corroborated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause requires that a criminal defendant be allowed to cross-examine an essential State's witness as to bias. The trial court refused to allow defense counsel from cross-examining the father of the complaining witness about his bias against Mr. Cifuentes and how that bias may have impacted the complaining witness. Did the trial court violate the Confrontation Clause and deny Mr. Cifuentes a fair trial?

2. Article IV, section 16 of the Washington Constitution prohibits judges from commenting on the evidence. A trial court violates this provision when it instructs the jury as to the weight that should be given certain evidence. Did the court commit constitutional error in instructing the jury, over Mr. Cifuentes objection, that it could convict him based on the uncorroborated testimony of the alleged victim?

C. STATEMENT OF THE CASE

a. Convictions, sentence, appeal.

A Clark County jury found Mr. Cifuentes guilty of two counts of first degree child molestation and one count of first degree rape of a child as charged in a second amended information. CP 84-86, 113, 115, 117. He was sentenced within his standard range. CP

154-167. He now appeals each and every portion of his judgment and sentence.

b. A contested jury instruction.

During trial, the State proposed, and Mr. Cifuentes objected to, the giving of jury instruction 5. 5RP 671, 767. The court gave instruction 5 nevertheless. It reads:

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 94.

c. Trial Testimony. Mr. Cifuentes came to America from Guatemala sometime in 1995 or 1996. 2RP 192. He stayed for a time with his first cousin, Pantaleon Ramos-Gonzalez (“Mr. Ramos”), and his family. 2RP 192-202. Mr. Ramos’ oldest child is a daughter, N.R., born on August 28, 1993. 2RP 191. How long Mr. Cifuentes stayed with the Ramos family was a central issue in the case. 4RP 598. Mr. Cifuentes testified that it was for no more than a few weeks. 4RP 615. Mr. Ramos, his wife Lucrecia Ramos-Figueroa (“Mrs. Ramos”), and N.R. testified that he was with them for years and in three consecutive apartments. 2RP 192-202; 3RP 258-60; 3RP 338. Both the prosecutor and the defense attorney had certain documents admitted into testimony. See Exhibits

(Supplemental Designation of Clerk's Papers.) No one document clarifies where Mr. Cifuentes lived from February 26, 2000 to December 1, 2001, the period during which the State alleged that the abuse occurred. CP 84-86. See Exhibits (Supplemental Designation of Clerk's Papers.)

N.R. testified that Mr. Cifuentes abused her several times in his bedroom when she was seven years-old. 3RP 354-359. It started with Mr. Cifuentes taking her into his bedroom in an apartment he shared with her family. Id. He would remove her shorts and pants and cup her vagina with his hand. Id. There was one time when he licked her vagina and at least three other times that he inserted his penis into her vagina. Id. The abuse ended when Mr. Cifuentes moved out. Id. She did not tell her parents about this for many years because she felt embarrassed and did not know how they would react. 3RP 361.

When she was in eighth grade, she told her best friend, N.G., that she had been abused by her uncle. 3RP 367; 5RP 749. In ninth grade, N.R. began skipping classes and had problems concentrating on her school work. 3RP 368. She drew the attention of advocate for college-bound students who, in turn, alerted her parents. 3RP 452-463. Ultimately, N.R. revealed to

her mother that she had been abused by her uncle. 3RP 274. CPS was notified which prompted a criminal investigation. 3RP 463; 4RP 464. As part of the criminal investigation, N.R. was directed to do an evaluation and physical examination with a pediatric nurse practitioner. 3RP 405-426. The nurse practitioner did not find any physical evidence of physical abuse. 3RP 425.

d. Mr. Cifuentes' defense and excluded evidence of bias.

Mr. Cifuentes testified and adamantly denied ever having sexually abused N.R. or having lived with her and her family for any extended period of time. 4RP 597, 598-608, 615. Mr. Cifuentes called several witnesses to say that he did not live with the Ramos family during the charged period. 4RP 542-589. When Mr. Ramos testified, Mr. Cifuentes attempted to ask him about the bad blood between them. 2RP 229. The court sent the jury out of the courtroom. 2RP 230. Outside the presence of the jury, the court learned that Mr. Ramos had for years thought that Mr. Cifuentes and Mrs. Ramos had had an affair. 2RP 232-33. At times, Mr. Ramos had accosted Mr. Cifuentes and acted aggressively toward him. 2RP 232-33. Mr. Cifuentes had witnesses to testify to Mr. Ramos aggressive behavior and hostility over the alleged affair. 2RP 232-33. When the prosecutor objected, the court refused to

allow Mr. Cifuentes to challenge Mr. Ramos and to present his defense that Mr. Ramos was lying about everything to include where Mr. Cifuentes had lived from February 2000 to December 2001 and, of course, Mr. Cifuentes' consequent lack of access to N.R. 2RP 229-243. When Mr. Cifuentes testified, he tried to explain that he had problems with the Ramos family and why, but the court refused to let him explain the historical bad blood. 4RP 608.

e. The prosecutor uses his closing argument to take advantage of the court's exclusion of the bias testimony.

Repeatedly during his closing remarks, the prosecutor argued that N.R. must be telling the truth because Mr. Cifuentes did not present any evidence to explain why N.R. would lie:

And as [Mr. Cifuentes] said on the stand, doesn't know why she would have said that. 5RP 795.

What motive do they have to come in and say this? You would have to believe if this did not occur, that the mother and the father and [N.R.] and [N.'s] friend all somehow sat down and put this together. 5RP 796.

Is there some reason for [N.] to, seven years later, to come forward with this? 5RP 800.

This, despite the prosecutor knowing the answer to the questions and being responsible for successfully objecting and keeping the jury from hearing Mr. Cifuentes' answer.

D. ARGUMENT

1. The trial court erred in excluding all evidence of the complaining witness's father's bias against Mr. Cifuentes.

a. The Confrontation Clause requires that a criminal defendant be allowed to cross-examine an essential state witness as to bias.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." U.S. Const. amend 6. The right extends to defendants in state proceedings through the Fourteen Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L. Ed 2d 923 (1965). Article 1, section 22 of our state constitution similarly affords the defendant the right "to meet the witnesses against him face to face." Const. art. 1 § 22.

"The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974). Cross-examination is important not only to test the

witness's memory, but to impeach his or her credibility. Id. at 316. Impeachment may be achieved through a variety of means, including "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Id.

Both the confrontation clause and the rules of evidence require that an accused be permitted to cross-examine a witness for bias. State v. Dolan, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003). Bias is always relevant "as discrediting the witness and affecting the weight of his testimony." Davis, 415 U.S. at 316 (citing 3A. J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)). Cross-examination of a witness about statements or conduct that tend to show bias or prejudice is "generally a matter of right," and although "the scope or extent of such cross-examination is within the discretion of the trial court," a defendant "should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility." State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing State v. Peterson, 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970)).

A criminal defendant "states a violation of the Confrontation Clause by showing that he was prohibited from engaging in

otherwise appropriate cross-examination designed to show a prototypical form or bias on the part of the witness.” Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). “A trial court’s denial of a criminal defendant’s right to adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment right of confrontation,.” Robert H. Aronson, The Law of Evidence in Washington, § 607.04[2] (4th ed. 2005) (citing Davis, 415 U.S. at 314; Roberts, 25 Wn. App. at 834).

b. Extrinsic evidence of the complaining witness’s father’s bias must be admitted.

Not only must a defendant be allowed to cross-examine a witness about statements indicating bias, but he must be able to introduce extrinsic evidence of such bias through, for example, testimony of other witnesses. United States v. Abel, 469 U.S. 45, 49-52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); State v. Spencer, 111 Wn. App. 401, 404, 45 P.3d 209 (2002); 5A K. Tegland, Washington Practice, Evidence § 607.7 at 321 (4th ed. 1999). “Prejudices based upon race, cultural background, or the like can undoubtedly be brought out” through both cross-examination and extrinsic evidence. Tegland, § 607.8 at 324-25, § 607.9 at 330-31.

A party “would be unlikely to even challenge the admissibility of such evidence to show bias.” Tegland § 607.8 at 325 n.8. An accused “should be afforded broad latitude in showing the bias of opposing witnesses.” Spencer, 111 Wn. App. at 411. Indeed, a criminal defendant “enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses.” Tegland, § 607.7 at 230 (citing State v. Knapp, 14 Wn. App. 101, 504 P.2d 898 (1975); State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970)). It is an error of constitutional magnitude to deny an accused the right to establish a witness’s bias through the testimony of another witness. Spencer, 111 Wn. App. at 408.

Bias is not to be confused with character for untruthfulness which may not be proved through extrinsic evidence. ER 608(b); See, State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984) (“ER 608 does not govern all impeachment situations. Character for truthfulness is only one basis for challenging a witness’s credibility.”); Abel, 469 U.S. at 55-56 (rejecting circuit court’s conclusion that extrinsic evidence of bias was inadmissible under Federal Rule 608(b)).

The rule for bias evidence is also different from the rule for evidence of prior inconsistent statements. Under ER 613(a), before

admitting extrinsic evidence of a prior inconsistent statement, the court may require that its contents be disclosed. In contrast, extrinsic evidence of statements or other conduct may be introduced to prove *bias* even if the defendant did not ask the purportedly biased witness about the alleged statements while the witness was on the stand. Spencer, 111 Wn. App. at 410. It is sufficient to give the declarant an opportunity to explain or deny the alleged statements or bias after introducing the evidence. Id. at 404; State v. Huynh, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).

c. The trial court here improperly excluded all of Mr. Cifuentes' efforts to cross examine Mr. Ramos, the complaining witness' father, about his bias against Mr. Cifuentes. The State and the trial court here confused the rules for bias evidence with the rule for character evidence, and as a result denied Mr. Cifuentes his constitutional right to establish the bias of the complaining witness's father.

By its Motion in Limine 7, the State sought to prohibit the questioning of witnesses in exploring motive or bias. CP 75. At the hearing on the motion, the State argued that the court should "prohibit questions exploring motive or bias when there is not a witness to rebut it." 1RP 77. Mr. Cifuentes objected, arguing to

the court that the State's request was "impossible to practically implement" and that it didn't make any sense. 1RP 78. The court offered some thoughts on the Motion and the State explained its position as follows:

THE COURT: It gets back to the character evidence of witness and how it is that we talk about that. Isn't that what you're saying?

MR. FARR:¹ Well, kind of. I think the – it – because what happens is individuals can ask a question of a witness, you went out the door, didn't you, and the witness says no, and there's nobody the counsel has to support that they actually went out the door. So you shouldn't be able to ask a question and wave a scent for the jury that you have no proof to substantiate.

1RP 78. The court decided to reserve on its ruling. 1RP 78.

The court returned to Motion in Limine 7 when Mr. Cifuentes attempted to cross-examine Mr. Ramos about issues of potential bias. Initially, the court overruled the State's relevancy objection when Mr. Cifuentes asked Mr. Ramos if he has any sort of bias or prejudice against Mr. Cifuentes. 2RP 229. When the father answered, "No", Mr. Cifuentes asked the father if he ever suspected that he, Mr. Cifuentes, was having an affair with his wife. The prosecutor objected. 2RP 229. The court sustained the objection and sent the jury out. 2RP 229-30. A long discussion

¹ Kimberly Farr is the prosecutor.

ensued. Mr. Cifuentes argued strenuously that he had the right to explore any prejudice and bias Mr. Ramos had against him. He said Mr. Ramos' suspicion over the affair was "over a long period of time, all the years that they have known each other." 2RP 232-33. Mr. Cifuentes had witnesses ready to testify to witnessing the Mr. Ramos' suspicions and seeing Mr. Ramos take aggressive action against Mr. Cifuentes. 2RP 232-34. Ultimately, the court ruled that Mr. Ramos' bias toward Mr. Cifuentes was not relevant and it did not let Mr. Cifuentes explore Mr. Ramos' bias. Consequently, the jury did not get to factor in whether Mr. Ramos' was testifying truthfully and free of the bias created by his suspicion about the affair.

The trial court was incorrect in failing to allow the question about the affair and in not allowing extrinsic evidence to support the proof. As discussed above, character evidence and bias evidence are different, and are subject to substantially different rules of admissibility. Able, 469 U.S. at 55-56; Petrich, 101 Wn.2d at 573. Thus, the trial court was plainly in error when it precluded Mr. Cifuentes from introducing extrinsic evidence of bias.

d. The error was not harmless beyond a reasonable doubt.

The exclusion of evidence offered to establish the State's witness's bias is presumed prejudicial. Spencer, 111 Wn. App. at 408. The appellate court must reverse "unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." Id. A reviewing court determine whether the exclusion of bias evidence is harmless beyond a reasonable doubt by considering several factors, including the importance of the alleged biased witness's testimony to the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. Van Arsdall, 475 U.S. 684.

Here, an analysis of the Van Arsdall factors reveals that the trial court's exclusion of the bias evidence was not harmless beyond a reasonable doubt. Mr. Ramos' testimony was central to the State's case. He gave the detailed account of where the family had lived and how Mr. Cifuentes had shared three apartments with the Ramos family and always paid his rent in cash leaving no paper trail during these alleged times living with the family.

There was only one eye-witness to the alleged events, N.R. Both sides did what they could to bolster or defeat the testimony of N.R. The focus of the dispute was over whether Mr. Cifuentes lived with the family during the charging period, from February 26, 2000 to December 1, 2001, thereby giving him access to N.R. No independent witness or even family friends testified for the State that Mr. Cifuentes lived with the Ramos family for a long stretch of time and in different three apartments. Significantly, Mr. and Mrs. Ramos gave differing accounts as to why Mr. Cifuentes stopped living with the family. Mr. Ramos testified that Mr. Cifuentes left because he simply said that he did not want to live there anymore. 2RP 203. Mrs. Ramos said that Mr. Cifuentes left after her husband told him to get out. She wanted him out because he and another man who were living with them made too much of a mess, leaving the bathroom too dirty to be safe for the children. 3RP 267.

In Roberts, the exclusion of bias evidence was held not harmless even though two eyewitnesses who saw the entire event in question testified, consistently with the alleged victim, that the defendant forcibly raped the alleged victim at knifepoint. Roberts, 25 Wn. App. at 832, 835-36. The court still found that the case “stands or falls” on the jury’s belief or disbelief of essentially one

witness,” and that therefore “that witness’ credibility or motive must be subject to strict scrutiny.” Id. at 834.

In Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 LED 2d 513 (1988) the court similarly found that the exclusion of bias evidence was not harmless because the testimony of the alleged victim “was central, indeed crucial, to the prosecution’s case.” Olden, 488 U.S. at 233. The defendant’s theory of the case was that the alleged victim lied about having been raped by the defendant out of fear of jeopardizing her relationship with her boyfriend. The Court found that a reasonable jury might have received a significantly different impression of the alleged victim’s credibility had defense counsel been permitted to ask about the boyfriend. Id. at 232.

If the exclusion of bias evidence was not harmless in Roberts and Olden, it is certainly not harmless here. As in those cases, Mr. Cifuentes’ theory was that he had not lived with the family during the charged time period, consequently had no ready access to N.R., and that N.R. and her family were not telling the truth. Had the jury known that N.R.’s father was angry with Mr. Cifuentes over an alleged affair with his wife, and could have considered that anger in weighing the credibility of the witness and

the impact on N.R. and her family, the result could have been different. The improper exclusion of bias evidence was not harmless. Mr. Cifuentes' convictions must be reversed.

2. Jury instruction 5 constituted a judicial comment on the evidence in violation of article IV, section 16 of the Washington Constitution.

a. The Constitution prohibits judges from influencing the jury by commenting on the evidence presented at trial. Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. "Because the jury is the sole judge of the weight of the testimony, a trial court violates this prohibition when it instructs the jury as to the weight that should be given certain evidence." In re Detention of R.W., 98 Wn. App. 140, 144, 988 P.2d 1034 (1999).

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to this discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

A jury instruction constitutes an impermissible comment on the evidence if the judge's attitude toward the merits of the case or the court's evaluation relative to the disputed issues is inferable from the instruction. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." Id.

The court reviews the propriety of jury instruction de novo. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

b. The trial court improperly commented on the evidence when it instructed the jury that it could convict Mr. Cifuentes based on the uncorroborated testimony of the alleged victim. Instruction 5 states, "In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated." CP 94. This instruction violated the constitutional prohibition on judicial comments.

The State's argument that the instruction was a correct statement of the law is unavailing. Legal correctness is a necessary but insufficient precondition to the giving of an instruction. State v. Budinich, 117 Wn. App. 336, 562 P.2d 1006 (1977). The

instruction must also refrain from implying that the jury should credit certain evidence. Lane, 135 Wn.2d at 838.

As in this case, the court in Budinich explained to the jury how much of each type of evidence was sufficient to convict. The court did so by providing the following instruction:

Where a person is accused of larceny, proof of recent possession of property alleged to have been stolen is not of itself sufficient to justify a conviction of larceny.

The possession of recently stolen property when possession of such property is coupled with slight corroborative evidence of other inculpatory circumstances tending to show guilt is sufficient to convict.

Budinich, 117 Wn. App. at 337. The court held that even though the above instruction was an accurate statement of the law, "it is not an appropriate instruction for the guidance of the jury in its function as trier of the issues of fact." Id.

The fact that property possessed was recently stolen is relevant and material circumstantial evidence. Its significance is an appropriate subject for argument by counsel, but it is a factual matter which, by express constitutional mandate, may not be commented upon by a trial judge.

Id. at 338 (citing Const. art IV, § 16). As in Budinich, although instruction 5 was a correct statement of the law, it was also an impermissible comment on the evidence.

Another case that shows an instruction may be a correct statement of the law but also an impermissible comment on the evidence is State v. Woldegiorgis, 53 Wn. App. 92, 765 P.2d 920 (1988). There, the court approved the trial court's refusal to give the following instruction in a first-degree murder case:

However, time alone is not enough. The evidence must be sufficient to support the inference that the defendant not only had time to deliberate, but that he actually did so.

Id. at 94 The above instruction correctly states the law of premeditation. See State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986). But the court held the instruction was "unnecessary and unwarranted as a comment on the evidence." Woldegiorgis, 53 Wn. App. at 94.

In another case, the court reversed a conviction where the trial court had instructed the jury:

You are not to draw any conclusions or inferences whatsoever from the absence of a breathalyzer test result in this case nor are you to speculate on the reasons for the absence of such a test result.

Kirkland v. O'Connor, 40 Wn. App. 521, 522, 698 P.2d 1128 (1985).

The court held the instruction constituted an impermissible comment on the evidence because "it was possible that the jury understood the instruction to mean it was not to consider that the

evidence might be insufficient without a Breathalyzer test result.”
Id. at 523. Similarly here, it was possible that the jury understood Instruction 5 to mean it was not to consider that the evidence might be insufficient without corroborative physical evidence or eyewitness testimony.

The court approved an instruction similar to the one given here in State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978), and this Court followed Malone in State v. Zimmerman, 130 Wn. App. 170, 121 P.3d 1216 (2005).² But Malone is over 30 years old and the Zimmerman court reluctantly upheld the instruction based on a 60-year-old supreme court case. Zimmerman, 130 Wn. App. at 172, 181 (citing State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949)).

More recent authority indicates that the “no corroboration necessary” instruction is an improper comment on the evidence. The Washington Pattern Jury Instructions do not contain the instruction, and the Washington Supreme Court Committee on Jury Instructions recommends against such an instruction:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a

² review granted and remanded on other grounds, 157 Wn.2d 1012 (2006), reaffirmed, 135 Wn. App. 970.

charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11WPIC § 45.02

The court disapproved the converse of Instruction 5 in State v. Mellis, 2 Wn. App. 859, 470 P.2d (1970). There, the defendant, who was charged with rape, requested the following instruction:

A charge such as that made against the defendant in this case is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

Mellis, 2 Wn. App. at 862. The court held that the trial court properly refused to give the instruction, because giving it would violate article IV, section 16. Id. “Such a cautionary instruction as requested amounts to an open invitation to the jury to question the testimony of the complaining witness.” Id.

Here, the cautionary instruction given amounted to an open invitation to the jury to credit the testimony of the complaining witness. It is therefore just as unconstitutional as the rejected instruction in Mellis. The court may neither invite the jury to question certain testimony nor invite the jury to credit certain

testimony. Instruction 1 properly advised the jurors that they were “the sole judges of the credibility of the witnesses” and the sole judges of “what weight is to be given to the testimony of each” witness. CP 89. The addition of Instruction 5 constituted an unnecessary and unconstitutional comment on the evidence

c. The remedy is reversal and remand for a new trial.

A judicial comment on the evidence in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). Reversal and remand is required unless the record affirmatively shows that no prejudice could have resulted. Id.

This Court should reverse Mr. Cifuentes’ convictions because the State cannot show absence of prejudice. The statements of N.R., whether given during her testimony or offered through the hearsay testimony of her friend, N.G., or the nurse practitioner were the only evidence presented against Mr. Cifuentes. Although the State attempted to collect medical evidence, there was none to collect. And there was no eyewitness other than N.R. The court essentially instructed the jury not to worry about the absence of such evidence, thereby undermining

Mr. Cifuentes' repeated assurance of absolute innocence. The prosecutor made the trial court's giving of Instruction 5 all that much worse when he argued in closing that N.R.'s uncorroborated testimony trumped all other testimony:

Instruction Number 1 tells you, the only evidence you are to consider consists of the testimony. And why is that? Well, there's another instruction specifically concerning this, and that is Instruction Number 5. In order to convict a person of sexual assault against a child such as this, corroboration is not required. And that's because people don't do these things where you can catch them.

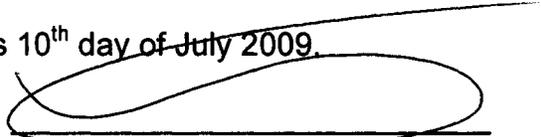
5RP 799.

Under these circumstances, the error was prejudicial and reversal is required.

E. CONCLUSION

For the foregoing reasons, Mr. Cifuentes' convictions should be reversed.

Respectfully submitted this 10th day of July 2009.



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