

NO. 39147-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

EDWIN DAVID CORBETT,

Appellant.

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

The Honorable Vicki L. Hogan, Judge

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BRIEF OF APPELLANT

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
PIERCE COUNTY  
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STATUTES, RULES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. Appellant was denied due process when the trial court erred by limiting defense cross-examination of a state's witness.
2. The prosecutor committed prejudicial misconduct by implying that she alone was capable of evaluating the case.
3. The trial court exceeded its jurisdiction by imposing a sentencing condition not related to the convictions.
4. There was insufficient evidence to prove three of the four offenses.
5. Appellant's right to be free from multiple punishments for the same conduct was violated when the court failed to instruct the jury that it must find beyond a reasonable doubt separate and distinct acts to support each charge.

Issues Presented on Appeal

1. Did limiting cross-examination of the complainant's father about his unstable living situation deny Appellant his right to due process?
2. Did the prosecutor commit prejudicial misconduct by implying

that she alone was capable of evaluating the case?

3. Did the trial court exceed its jurisdiction by imposing the sentencing condition that Appellant have no contact with his two teenage sons, a condition not related to the convictions?

4. Did the state fail to prove its case where the complainant could not identify with certainty the object in her mouth on three of four incidents discussed?

5. Was Appellant's right to be free from multiple punishments for the same conduct violated when the court failed to instruct the jury that it must find beyond a reasonable doubt separate and distinct acts to support each charge?

B. STATEMENT OF THE CASE

SUBSTANTIVE FACTS

This case is about a seven year old child<sup>1</sup> telling her mother six months after alleged sex abuse occurred that Mr. Corbett put his penis in her mouth for 2-3 seconds on several occasions during a candy tasting game and during a karate lesson; and then waiting for another one and a half years to add more details about the alleged incidents RP 264, 307, 313, 304, 206. The complainant, her mother Ms. O'Herin, and her brother lived with Mr. Corbett

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<sup>1</sup> To protect her identity, the child is referred to as "the complainant".

for seven months. RP 270, 343. During that time, the complainant did not get to see her mother enough and was upset that Mr. Corbett and not her mother was the primary caregiver. RP 333-34, 388-89, 450-51.

During her testimony, the complainant testified inconsistently that she played the candy tasting game which involved closing her eyes and guessing the flavor of a ring pop Mr. Corbett put in her mouth. RP 396. Ms. O'Herin was aware of this game and initially nothing out of the ordinary occurred during the game. Id. The complainant testified that during one incident, Mr. Corbett put a hard candy in her mouth and then something soft which felt like skin. RP 400. According to the complainant, several days after the first instance of feeling something like skin in her mouth, Mr. Corbett again played the game with her and put first candy and then something soft in her mouth. RP 407-08. The complainant's eyes were closed during this second incident as well as during the first incident. RP 401, 408.

The complainant testified that Mr. Corbett played the game a third time in the bathroom. RP 411. The complainant did not know what the soft thing was but thought it was Mr. Corbett's penis. RP 406, 463, 469.

During another occasion, Mr. Corbett taught the complainant how to concentrate. He told the complainant to close her eyes and then he put

frosting on his finger and put his finger in her mouth, and then the soft thing. RP 304, 413-14. The complainant 's eyes were closed during this incident. RP 415. The complainant testified that on one occasion, Mr. Corbett repeated the same routine with the karate lesson, but taped cotton balls onto her eyes. The complainant could see Mr. Corbett's penis though the cotton balls during this incident. RP 433-36.

According to the complainant the soft thing in her mouth never moved, was in her mouth for 2-3 seconds and always felt the same. RP 436, 462, 471. The complainant corrected her testimony and stated that the candy game only occurred on two occasions with the soft thing in her mouth, not three times as she erroneously testified to during the preliminary hearing. RP 495. The complainant's testimony varied about the frequency of the game. RP 395, 436, 465. The complainant was adamant that Mr. Corbett never threatened her RP 410.

The complainant was inconsistent about what if anything Mr. Corbett put on the soft thing. Initially she testified that she could not remember if anything was on it. RP 411. Later she testified that there was frosting on it. RP 414. She never remembered whipped cream or chocolate, just frosting and this is what she told her mother. RP 472.

Ms. O'Herin and Christina Farmer, the complainant's friend testified that the complainant told them the game was played with whipped cream and chocolate. RP 306, 503, 505.

The complainant never complained about this alleged behavior while the family lived with Mr. Corbett. RP 305, 341. After the initial disclosure to her mother six months after the alleged incidents, the complainant waited one and a half years to tell her friend Christina Farmer. RP 313. During this time frame, the complainant went to counseling to deal with her feelings about her parents divorce and never said anything to her counselor about Mr. Corbett's behavior regarding these incidents. RP 323, 453.

#### C. ARGUMENT

1. MR. CORBETT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED WHEN THE JURY CONVICTED HIM OF FOUR SEPARATE COUNTS OF RAPE OF A CHILD IN THE FIRST DEGREE WITHOUT A JURY INSTRUCTION THAT DIRECTED THE JURY THAT IS MUST FIND "SPERATE AND DISTINCT" ACTS TO SUPPORT EACH COUNT.

Mr. Corbett's right to be free from double jeopardy was violated when the jury instructions did not require the jury to find separate and distinct acts to support each of four separate charges of rape of a child in the first degree. The

to-convict instructions indicated that Mr. Corbett was charged with four counts of rape of a child in the first degree occurring between January 1, 2005 and August 31, 2005 and each to-convict jury instruction listed the same time frame and the same act, “the defendant had sexual intercourse with J.O.”. CP 16-18. The jury instructions put Mr. Corbett at risk for being punished multiple times based on a single act.

The jury instruction language necessary to protect against the risk of being convicted for multiple counts of the same crime includes language that expressly requires the jury to find that there were “separate and distinct” acts to support each charge. *State v. Borsheim*, 140 Wn.App. 357, 366-67, 165 P.3d 417 (2007). The trial court’s failure to include the “separate and distinct” language in any of the jury instructions exposed Mr. Corbett to double jeopardy. *State v. Borsheim*, 140 Wn.App. at 366-68.

Challenges to jury instructions are reviewed de novo, within the context of the instructions as a whole. *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008). “The right to be free from double jeopardy is the constitutional guarantee protecting a defendant against multiple punishments for the same offense.” *Borsheim*, 140 Wn.App. at 366, citing U.S. CONST. amend. V; WASH. CONST. art. I, § 9.

Because jury instructions “ ‘must make the relevant legal standard manifestly apparent to the average juror,’ “ *Id.* (quoting *State v. Watkins*, 136 Wn.App. 240, 241, 148 P.3d 1112 (2006)), the right to be free from double jeopardy is violated when “it is not manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense.” *Berg*, 147 Wn.App. at 931 (citing *Borsheim*, 140 Wn.App. at 367).

In *Borsheim*, and *Berg* the Court of Appeals held that where the State charged multiple counts of the same crime within the same charging period, the failure to instruct the jury that each conviction must be based upon a separate and distinct act allowed the jury to unanimously find that only one act had been proven beyond a reasonable doubt, and to base multiple convictions on that single act, in violation of the prohibition against double jeopardy. *Berg*, 147 Wn.App. at 931-35; *Borsheim*, 140 Wn.App. at 366-70.

In Mr. Corbett’s case, he was charged with four counts of rape of a child in the first degree. Each count alleged the same broad charging period January 1, 2005 through July 31, 2005, and alleged the same act “sexual intercourse”. CP 16-18. The court’s instructions, in *Berg* held inadequate to protect against double jeopardy violations, provided greater differentiation between the counts than the instructions in Mr. Corbett’s case. Both sets of

instructions omitted the requirement that the jury base each conviction upon a separate and distinct act. The relevant jury instructions from *Berg* are as follows:

To convict the defendant of the crime of child molestation in the third degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between March 1, 2007 through May 6, 2007, the defendant had sexual contact with A.A.

....

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on any count of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

The court further instructed: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count."

*Berg*, 147 Wn. App. at 934. The relevant jury instructions from Mr. Corbett's case are as follows: jury instructions 10-13 provided:

....

To convict the defendant of the crime of rape of a child in the

first degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 1<sup>st</sup> day of January, 2005 and the 31<sup>st</sup> day of August, 2005, the defendant had sexual intercourse with J.O:

(2) That J.O. was less than 12 years old at the time of the sexual intercourse and was not married to the defendant:

(3) That the defendant was at least twenty-four months older than J.O.; and

(4) That the acts 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 36-39 (Jury instructions 10-13). Jury instruction 11 was identical except that it indicated Count II. Jury instruction 12 indicated count III and jury instruction 13, indicated count IV. Id.

Jury instruction 5 provided:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 31.

Instruction 6 provided:

In alleging that the defendant committed Rape of a Child in the First Degree, the State relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant of any count, you must unanimously agree that this specific act was proved.

CP 32.

None of the preceding instructions specifically stated that a conviction on each charged count must be based on a “separate and distinct” underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count. Therefore, the instructions allowed the jurors to base a conviction on all four counts on a finding that a single underlying event occurred. This was error under *Berg*, 147 Wn. App. at 931 and *Borsheim*, 140 Wn. App. 366-67.

It is well settled that in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury “that they are to find ‘separate and distinct acts’ for each count.” *State v. Hayes*, 81 Wash.App. 425, 431, 914 P.2d 788 (1996); quoting, *State v. Noltie*, 116 Wash.2d 831, 846, 809 P.2d 190 (1991). In Mr. Corbett’s case, multiple counts of sexual abuse were alleged to have occurred within the same charging period. Thus, pursuant to the rule stated in *Hayes*, and affirmed in *Borsheim* and *Berg* the jury must be instructed that “separate and distinct” acts must support each separate count. *Id.* In Mr. Corbett’s case, no such instruction was proposed by the State and none was given by the trial court.

Moreover, the instructions actually given the jury did not cure this defect. Instruction #6 did not adequately inform the jurors as to the need for jury unanimity regarding which act formed the basis for any given count because it did not specify that the jury need find more than a “single act”. The instruction also failed to convey the need to base each charged count on a “separate and distinct” underlying event. Similarly, although instruction 5 stated that “a separate crime is charged in each count,” neither this instruction, nor any other, informed the jury that each “crime” required proof of a different act. Finally, even though instructions 10, 11, 12, and 13 the “to convict” instructions, stated that “as charged in Count” “I”, “II”, “III”, and “IV”, “each of the elements of the crime must be proved”, these instructions do not state that the first such element, that “the defendant had sexual intercourse with J.O,” requires a finding of a “separate and distinct” act of sexual intercourse for each count. CP 36-39.

The error in omitting an instruction addressing this double jeopardy concern is further compounded by the fact that instructions 10, 11, 12, and 13 and 6, confusingly describe a single incident for all four identical counts and state that the jury need only find a single act for each count, rather than separate and distinct acts. Read together, the instructions given by the trial

court neither contained the “separate and distinct act” instruction expressly required by the rule articulated in *Hayes*, nor made the need for a finding of “separate and distinct acts” manifestly apparent to the average juror. *Borsheim*, 140 Wn. App. at 368.

In *Borsheim*, the trial court compared the to-convict instructions provided in *State v. Ellis*, 71 Wash.App. 400, 401-02, 859 P.2d 632 (1993) where the court provided four separate “to convict” instructions for two counts of child molestation and two counts of child rape and the dates for the incidents were separate and distinct. In *Borsheim*, the trial court provided a single “to convict” instruction, encompassing all four identical counts and listed the elements of the charged crime once. The unanimity instruction in *Borsheim* unlike the unanimity instruction in *Ellis*, did not contain the somewhat helpful but ultimately inadequate “for each count” language set forth hereunder.

Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.].

Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt *for each count*.

*Ellis*, 71 Wash.App. at 402, 859 P.2d 632 (emphasis added).

The Court in *Borsheim* held that although the instruction in *Ellis* adequately instructed the jury with regard to the concern for jury unanimity, it did not adequately instruct the jury with regard to the concern of double jeopardy. *Borsheim*, 140 Wn. App. at 369.

In Mr. Corbett's case as in *Borsheim*, the unanimity instruction did not contain the "for each count" language, thus it also failed to protect jury unanimity. *Id.* The Court in *Borsheim* held insufficient to protect against double jeopardy, the standard boiler plate instruction which provided, "A separate crime is charged in each count. You must decide each count separately." *Borsheim*, 140 Wn. App. at 370; citing, *Ellis*, 71 Wash.App. at 402, 859 P.2d 632. The Court in *Borsheim* distinguished *Ellis*, on grounds that in *Ellis* the unanimity instruction instructions were held only "marginally" adequate when viewed as a whole, considering both the separate and separately worded "to convict" instructions, as well as the "for each count" language of the unanimity instruction. *Borsheim*, 140 Wn. App. at 370, citing, *Ellis*, 71 Wash.App. at 402-07, 859 P.2d 632.

The Court in *Ellis* recognized a double jeopardy instruction and a unanimity instruction are separate and distinct concepts which should be described "in separate instructions, or at least in separate sentences."

*Borsheim*, 140 Wn. App. at 370, quoting, *Ellis*, 71 Wash.App. at 407, 859 P.2d 632.

In Mr. Corbett's case as in *Borsheim*, there were no instructions which required the jury to base each conviction on a different act and the language determined to be marginally adequate in *Ellis* was absent in both *Borsheim's* and Mr. Corbett's case. Under the rule expressed in *Hayes*, the jury instructions in *Borsheim* and in Mr. Corbett's case "allowed the jury to unanimously find that one act of sexual intercourse had been proved beyond a reasonable doubt, and to base all four convictions on that single act." This error violated Mr. Corbett's right to be free from double jeopardy- multiple punishments for a single offense. *Borsheim*, 140 Wn. App. at 370.

In *Borsheim*, the Court upheld a single count of rape and remanded for dismissal of the other three counts. The same result is required in Mr. Corbett's case. Here, the jury found a single act beyond a reasonable doubt, not four.

*State v. Berg*, is also on point. The Court in *Berg*, held that the jury instructions on multiple counts of child molestation violated Mr. Berg's right to be free from double jeopardy where the instructions did not expressly state that the jury must find that separate and distinct acts supported each

conviction. *Berg*, 147 Wn.App. at 936-37. The jury in *Berg* was instructed that a separate crime was charged in each count and that the jury must unanimously agree as to which act was proved in order to convict “on any count”. The Court held this was inadequate to protect against double jeopardy. *Berg*, 147 Wn.App. at 936-37.

The Court also held that the State cannot cure through argument a double jeopardy violation that arises from defective jury instructions. *Id.* at *Berg*, 147 Wn.App. at 935-36. “[O]ur courts have recognized that the jury should not have to obtain its instruction on the law from arguments of counsel. Rather, it is the judge’s province alone to instruct the jury on relevant legal standards.” (internal quotations and citations omitted). *Berg*, 147 Wn. App at 935-36, quoting, *State v. Kier*, 164 Wn.2d 798, 802-05, 194 P.3d 212 (2008) (Kier’s second degree assault conviction merged into his first degree robbery conviction and the prosecutor’s argument in closing argument could not alter the manner in which the defendant was charged and the jury instructed). “The information is not evidence”, nor is the prosecutor’s closing argument. *Kier*, 164 Wn.2d at 808, 812..

In *Berg* the court reversed three of four convictions for delivery of a controlled substance and held that it is irrelevant that the information or

closing arguments sought to distinguish the acts alleged because the jury does not have a copy of the information and closing argument is not the law of the case. *Berg*, 147 Wn.App. at 935-936.

As in *Berg*, during closing argument in Mr. Corbett's case, the prosecutor, argued that "we heard about four distinct counts" RP 842. The complainant said in happened "more than five, happened less than ten. That's what she told Cornelia." RP 843. The state later argued: "We have two counts in which Jade said it was a candy game, taste test game" . . . and we have two counts of what he called karate, and one of which she had her eyes blindfolded or cotton balls on, the other one which she did not. " RP 846-47.

During her testimony, the complainant testified inconsistently that she played the candy game three times and the karate game once and later that she played the candy game twice and the karate game more than once. RP 436, 465. The complainant was not sure what was in her mouth the first time and second time. RP 463. As in *Kier*, the prosecutor's somewhat misleading closing remarks were not sufficient to establish separate and distinct acts, because neither the evidence nor the instructions required the jury to accept the case as the State argued.

Because the absence of a "separate and distinct act" instruction

exposed Mr. Corbett to multiple punishments for a single offense, the remedy is remand for vacation of three of the charges. *Berg*, 147 Wn.App. at 935; *Borsheim*, 140 Wn.App. at 371.

In Mr. Corbett's case, all four convictions may have been based on a single act of rape of a child in the first degree, thus only one charge may stand. Based on the precedent established in *Borsheim* and *Berg*, Mr. Corbett requests this Court remand for reversal and dismissal with prejudice three of the four counts and remand for re-sentencing with a corrected offender score based on a single conviction.

2. THE SENTENCING COURT EXCEEDED ITS JURISDICTION BY IMPOSING SENTENCING CONDITIONS UNRELATED TO THE OFFENSES CHARGED.

As part of any sentence, the court may impose an order that 'relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals {.}' RCW 9.94A.120 (20). As part of a community placement order, the court may prohibit the offender from 'direct or indirect contact with the victim of the crime or a

specified class of individuals{.}' RCW 9.94A.120(9)(c)(ii). And the court may impose other 'crime-related prohibitions{,}' RCW 9.94A.120(9)(c)(v), which prohibit 'conduct that directly relates to the circumstances of the crime for which the offender has been convicted{.}' RCW 9.94A.030(11).

The appellate courts review sentencing conditions, including crime-related prohibitions, for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993) (quoting D. Boerner, *Sentencing in Washington*, sec. 4.5, at 4-7 (1985)). A court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Hays*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

The statute requires that sentencing conditions 're{late} directly to the circumstances of the crime{.}' RCW 9.94A.120(20); *State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000). For example in *State v. Riles*, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), the Supreme Court upheld a condition that Riles have no contact with minors after Riles anally raped a six-year-old boy, finding the prohibition reasonable for protecting the public, 'especially children.' *Id.* But in a companion case where the victim was a 19-year old woman, the court struck a similar restriction, reasoning that there had been no showing that children were at risk and needed special protection from the

defendant. *Riles*, 135 Wn.2d at 349-50.

Similarly, in *State v. Julian*, 102 Wn. App. 296, 306, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001), an order prohibiting unsupervised contact with minors under 18 years old was directly related to Julian's molestation of a four-year-old. But the court had no authority to proscribe Julian's use of alcohol because there was no apparent connection between alcohol and the crime. *Julian*, 102 Wn. App. at 305.

The prohibitions imposed in *Riles* and *Julian* were designed to protect potential victims. But where the State cannot show that the defendant poses a threat to those the order aims to protect, the court lacks authority to restrict contact. *Letourneau*, 100 Wn. App. at 441-42. In *Letourneau*, the court struck an order denying the defendant any contact with her biological children. Letourneau protested the denial of her fundamental right to raise her children. *Letourneau*, 100 Wn.2d at 438. Competing with this interest was the State's compelling interest in preventing harm to Letourneau's children. *Letourneau*, 100 Wn. App. at 439. The court found that the State had failed to prove that the restriction was reasonably necessary to prevent Letourneau, who had molested a 13 year old student, from sexually molesting her own children. *Letourneau*, 100 Wn. App. at 439. The court explained, 'There must be an

affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention.’ *Letourneau*, 100 Wn. App at 442.

In Mr. Corbett’s case, there was no criminal history to consider. There was no history of any crimes, much less sex offenses against children. The court did not explain its reasons for imposing a no contact order with all minors, but rather just accepted the state’s recommendations, which also were not accompanied by any articulated reasoning. There was no evidence that Mr. Corbett would pose a danger to his two teenage sons. Further, the State did not show that the condition was reasonably necessary to protect the sons from molestation. Nor did the state provide any evidence that contact between father and sons would harm the sons.

Barring father-son contact does not directly relate to the father's crimes in this case. RCW 9.94A.120(20). Absent an ‘affirmative showing’ that the desired contact poses a danger to the sons, the trial court lacked authority to impose such a condition. *Letourneau*, 100 Wn. App at 442. For this reason, the court should reverse this condition and remand for re-sentencing without this condition.

3. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THREE OF THE FOUR CHARGES OF RAPE IN THE FIRST DEGREE.

The standard of review for challenges to the sufficiency of the evidence to support a criminal conviction is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205 (2006); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254 (1980).

The elements of Rape in the first degree are as follows:

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44.073. Sexual intercourse requires penetration or oral/genital contact. *State v. Jones*, 71 Wash.App. 798, 825 863 P.2d 85

(1993).

The first four counts require proof that certain types of sexual conduct occurred when the complainant was a particular age. The only testimony presented contained the delayed reporting of the complainant that Mr. Corbett put something in her mouth that she could not identify but felt like skin. On one of the incidents, the complainant opened her eyes and testified that she saw Mr. Corbett's penis. The reporting of the allegations is not consistent from the complainant nor from any of the others who listened to the complainant's recitation of what she believed occurred.

Mr. Corbett recognizes that the victim need not "pinpoint the exact dates of the oft-repeated incidents of sexual contact, however, the evidence must be sufficient to support each count. *State v. Ferguson*, 100 Wash.2d 131, 149-50, 667 P.2d 68 (1983).

In *State v. Alexander*, 64 Wn. App. 147, 149-50, 822 P.2d 1250 (1992), the complaint against Alexander was based on specific allegations of sexual misconduct. The complainant denied the misconduct during trial, but told a counselor and her mother that it had occurred. *Id.* The Court reversed the convictions for rape in the first degree where "the inconsistencies in M's testimony regarding when the abuse occurred, and whether the bathtub or

baby oil incidents occurred at all, were extreme. We cannot conclude that a rational jury would have returned the same verdict” .... we hold that, .... the evidence presented to this jury was too confused to allow it to find Alexander guilty on either count beyond a reasonable doubt.” *Alexander*, 64 Wn. App. at 158.

In Mr. Corbett’s case, as in *Alexander*, the evidence was confused and inconsistent. The complainant could only identify that Mr. Corbett put his penis in her mouth on one occasion. During the other alleged incidents, the complainant knew that candy was in her mouth and that something else that felt like skin, but she could not identify the object. RP 405, 463, 469, 472, 472. On one occasion, the complainant saw Mr. Corbett’s penis and believed that it felt the same as the object inserted into her mouth for 2-3 seconds during the other incidents. RP 402, 436, 472. The object that felt like skin never moved. RP 462. The complainant stated that the game only included frosting and hard candy but never whipped cream, chocolate or cotton candy as part of the “game”. RP 400, 402, 472-73. The complainant also insisted that she never told her mother or Christina that Mr. Corbett used anything but frosting or hard candy. RP 473.

Christina, the complainant’s best friend testified that the complainant

told her that Mr. Corbett put chocolate and whipped cream on his penis and put it in her mouth. RP 503, 505. According to Christina, the complainant told her these incidents occurred in a locked garage. RP 506. The complainant testified that these incidents occurred in the bathroom on the main floor. The nurse practitioner testified that the complainant told her the incidents occurred in her bedroom. RP 578-79. Ms. O'Herin, the complainant's mother was aware of the karate game and the candy game and had observed it being played without concern; the children seemed to like the game. RP 334-336.

The complainant testified that Mr. Corbett never threatened her or her family or told her to keep the game a secret. RP 473-74. According to Christina's father, the complainant told him that Mr. Corbett said he would hurt her and her family if she disclosed the incidents. RP 540. Cornelia Thomas, the child forensic interviewer stated that the complainant never told her that Mr. Corbett had told her to keep the incidents secret and had never said that she was afraid of Mr. Corbett. RP 677.

These many inconsistencies like those in *Alexander* created such doubt that it is not possible to determine that a rational jury would have a verdict of guilty on either count beyond a reasonable doubt. *Alexander*, 64 Wn. App. at 158. For this reason, Mr. Corbett asks this Court to reverse and remand his

four convictions.

4. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED PREJUDICIAL MISCONDUCT BY IMPLYING THAT SHE AND NOT THE JURY WAS CAPABLE OF EVALUATING THE MERITS OF THE CASE.

Mr. Corbett was denied a fair trial when the prosecutor in closing argument told the jury that there are hundreds of police reports about all sorts of sexual assaults that the jury does not know about. RP 889. The purpose of the prosecutor's statements was to tell the jury that the allegations were true and that the state and not the jury was competent to make that determination. The jury was informed that they would not be able to sleep at night if they did not decide that the state's charges were true. RP 889-83.

In Mr. Corbett's case, the defense objected to the offending argument about the hundreds of police reports, but did not object to the argument that the jurors would not be able to sleep at night. The statement regarding not being able to sleep at night was however so flagrant and ill-intentioned that under *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), aff'd, 119 Wn.2d 711 (1992), it may be raised on appeal. RP 890.

The prosecutor's arguments were misconduct. "Defense counsel tells

you that, you know, this is a really strange set of facts. Well, no offense, but you guys haven't read hundreds of police reports about sexual assaults that happen. . . ." "Objection" . . ." You don't know what happens in these types of cases. "RP 889.

Prosecutorial misconduct requires a new trial only if the misconduct was prejudicial. *State v. Stith*, 71 Wn.App. 14, 19, 856 P.2d 415 (1993). Although appeals to the prejudice or passion of the jury and references to matters outside the evidence are improper, *Belgarde*, 110 Wn.2d at 507, the defendant bears the burden of proving misconduct and that there is a substantial likelihood that the misconduct affected the verdict. See, e.g., *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986). "If misconduct is not objected to or a curative instruction is not requested, then reversal is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction." *Stith*, 71 Wn.App. at 20. Superior Court Criminal Rule, CrR 7.6(a), specifically authorizes courts to grant a new trial if it appears that a substantial right of the defendant was materially affected by prosecutorial misconduct. See, e.g., *State v. Perez*, 77 Wn.App. 372, 375, 891 P.2d 42, review denied, 127 Wn.2d 1014 (1995).

The record demonstrates prejudice. The prosecutor's argument that she and not the jury knew about sex abuse cases had the effect of telling the jury that they were not capable of evaluating the evidence but must listen to her to determine the correctness of the charges and evidence. This was prejudicial misconduct.

The prosecutor by arguing that there were so many sex abuse cases that they could not possibly understand, implicitly “sent a message” to the jury to resolve the case on larger grounds other than the facts of the case and the applicable law. *State v. Bautista-Caldera*, 56 Wn. App., 186, 195, 783 P.2d 116, review denied, 114 Wn.2d 1011 (1990).

The prosecuting attorney occupies a position of important trust *State v. Susan*, 152 Wn.2d 365, 380, 278 P. 149 (1929). Thus under the shroud of officialdom, it is improper for a prosecuting attorney to apply the “weight and influence of the personal character of counsel for the state” in order to “[call] upon the jury to support his judgment.” *Id.* A fair trial requires that the prosecuting attorney refrain from using the prestige of his or her office against the accused or from making any expression of personal belief in the defendant's guilt or innocence. *State v. Case*, 49 Wn. 2d 66, 71, 298 P.2d 500 (1956).

In *Case*, the prosecutor in summation made the following argument that was completely extraneous to the evidence presented at trial. He then delivered the following dissertation on sex deviation, which has no support in the record and is entirely extraneous:

‘Is it uncommon for a person charged with a sex crime to be a pillar of society? You can't characterize or pigeonhole this sort of crime in any segment of society. You can have the top man, the top man of the nation even. It hasn't happened, I am sure, but it could be. We have had men in the State Department that have been accused of things of that nature. In my own experience it has occurred in the Seattle School District, principals of schools have been accused, charged and convicted of sex deviations. It knows no difference. It is like a disease. It is like polio, it hits all over, it doesn't pay any attention to who the person is, whether you had measles as a child, whether you had rickets or something. It is something in the brain and mind and goes all over the area.’ Defense counsel interposed:

Id.

The Court in *Case*, reversed the charges finding that the misconduct was prejudicial. The Court characterized the misconduct by quoting the dissent in *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497, 498, 46 L.R.A. 641 (1899).” In discussing the evidence he is \* \* \* given the widest latitude, within the four corners of the evidence, by way of comment, denunciation or appeal, but he has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.”. *Case*, 298 Wn. 2d at 503-504

In Mr. Corbett's case, the prosecutor committed the same type of misconduct in *Case* by exhorting the jury to rely on her superior understanding of the masses of sexual abuse cases to find Mr. Corbett guilty as charged by the all-knowing office of the prosecutor.

In *Bautista-Caldera*, the prosecutor urged the jury to send a message to victims of child abuse: "should for some reason you not be satisfied that he penetrated her, although I think that is clear from her testimony and from the definition that you're given, certainly do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and enforce the law on their behalf". Also in *State v. Powell*, 62 Wn.App. 914, 918, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992), the prosecutor argued that an acquittal would send a message that children who report sexual abuse are not going to be listened to.

In Mr. Corbett's case as in these cases, the argument was prejudicial and this Court should remand for a new trial on this basis.

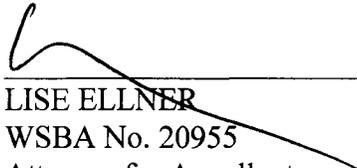
#### D. CONCLUSION

Mr. Corbett respectfully requests this Court reverse his convictions for rape in the first degree and dismiss with prejudice. In the alternative if the

Court does not accept due process arguments, Mr. Corbett requests this Court reverse three of his four convictions for double jeopardy violations and remand for recalculation of his offender score and re-sentencing without the condition of no contact with his sons. .

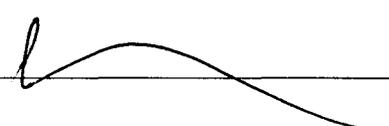
DATED this 19 th day of October 2009.

Respectfully submitted,

  
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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Edwin David Corbett DOC# 327972 Washington Corrections Center P. O. Box 900 Shelton, WA 98584 Or c/o Lena Corbett-Shaffette 13707 8<sup>th</sup> Ave. East Tacoma, WA 98445 a true copy of the document to which this certificate is affixed, on October 19, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

  
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