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Court Rules

CrR 3.53

CrR 3.63

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information , [CP 200], sets for the charging period as “between the 1st day of February, 2007 and the 15th day of March, 2007” yet the to-convict Instruction, Instruction No. 26 [CP 90], sets forth the charging period as “on or about the period between the 15th day of December, 2006, and the 15th day of March, 2007.”
2. The trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information, [CP 200], alleges the crime as that of attempt by charging “did do on act which was a substantial step towards the commission of that crime; contrary to RCW 9A.28.020....” yet the to-convict Instruction, Instruction No. 26 [CP 90], sets forth the elements for the complete crime not that of attempt.
3. The trial court erred in failing to instruct the jury that it had to find “a separate and distinct act” for Counts III, IV, and V in violation of double jeopardy principle where the jury was given identical to-convict instructions for these counts.
4. The trial court erred in failing to instruct the jury that it had to find “a separate and distinct act” for Counts VI and VIII in violation of double jeopardy principle where the jury was given identical to-convict instructions for these counts.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information , [CP 200], sets for the charging period as “between the 1st day of February, 2007 and the 15th day of March, 2007” yet the to-convict Instruction, Instruction No. 26 [CP 90], sets forth the charging period as “on or about the period between the 15th day of December, 2006, and the 15th day of March, 2007?” [Assignment of Error No. 1].

2. Whether the trial court erred in allowing Wallmuller to be convicted of sexual exploitation of a minor (Count XII) where the information, [CP 200], alleges the crime as that of attempt by charging “did do on act which was a substantial step towards the commission of that crime; contrary to RCW 9A.28.020....” yet the to-convict Instruction, Instruction No. 26 [CP 90], sets forth the elements for the complete crime not that of attempt? [Assignment of Errors No. 2].
3. Whether the trial court erred in failing to instruct the jury that it had to find a “separate and distinct act” for rape of a child in the first degree in Counts III, IV, and V and for sexual exploitation of a minor in Counts VI and VIII? [Assignment of Errors Nos. 3 and 4].

C. STATEMENT OF THE CASE¹

1. Procedure

Frank A. Wallmuller (Wallmuller) was charged by first amended information filed in Mason County Superior Court with five counts of rape of a child in the first degree against TKO (Counts I-V), three counts of sexual exploitation of a minor against TKO (Counts VI-VIII), one count of unlawful imprisonment against CLJ (Count IX), one count of attempted sexual exploitation of a minor against CLJ (Count X), one count of child molestation in the third degree against CLJ (count XI), one count of sexual exploitation of a minor against SS (Count XII), and one count of

¹ This court should note that the instant case involves sexual offenses committed against juveniles. As such, throughout this brief, the juveniles will be referred to by their initials.

attempted rape of a child in the second degree against SS (Count XIII). [CP 194-201].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Wallmuller represented himself during much of the pretrial proceedings, but eventually was represented by counsel at trial.² [RP 89-634]. The trial court heard a motion to sever counts, which the court denied; and heard a motion pursuant to RCW 10.58.090 arguing for the admission of Wallmuller's prior convictions from Kitsap County on similar charges and an uncharged incident involving CLJ, the alleged victim in Counts XI-XI, which the court granted. [RP 691-732].

Wallmuller was tried by a jury, the Honorable Amber L. Finlay presiding. Wallmuller stipulated to having been previously convicted of possessing depictions of minors engaged in sexually explicit conduct. [CP 100; RP 1304]. After the State rested, [RP 1304], Wallmuller moved to dismiss Counts X and XI involving CLJ for insufficient evidence, the State agreed, and the court dismissed the two counts. [RP 1381-1382]. Wallmuller objected to the court's failure to give a unanimity/Petrich

² This court should note that counsel appointed as standby counsel while Wallmuller represented himself pro se and ultimately counsel at trial originally was not originally appointed out of an abundance of caution given that counsel had represented the mother of a potential witness in an unrelated non-criminal matter. [RP 18-22, 129, 133-135, 139-144]. Similarly, counsel noted that he had represented a newly identified State witness in an unrelated matter and did not perceive a conflict with the trial court specifically so finding. [RP 675-677].

instruction on Counts VI-VIII (sexual exploitation of a minor against TKO). [RP 1530]. The jury found Wallmuller guilty of rape of a child in the first degree against TKO (Count I), guilty of rape of a child in the first degree against TKO (Count II), guilty of rape of a child in the first degree against TKO (Count III), guilty of rape of a child in the first degree against TKO (Count IV), guilty of rape of a child in the first degree against TKO (Count V), guilty of sexual exploitation of a minor against TKO (Count VI), guilty of sexual exploitation of a minor against TKO (Count VII), guilty of sexual exploitation of a minor against TKO (Count VIII), not guilty of unlawful imprisonment against CLJ (Count IX), guilty of sexual exploitation of a minor against SS (Count XII), and not guilty of rape of a child in the second degree against SS (Count XIII). [CP 47, 48, 49, 50, 51, 52, 53, 54, 55, 56; RP 1616-1618].

The court sentenced Wallmuller to standard range sentences of 318-months to life on Counts I-V (rape of a child in the first degree), and to standard range sentences of 120-months on Counts VI-VIII and XII (sexual exploitation of a minor) based on an offender score of thirty-one. [CP 8-24, 25-27, 28-32, 33-46; RP 1651-1656].

A timely notice of appeal was filed on December 29, 2009. [CP 7]. This appeal follows.

2. Facts³

In January of 2008, Bremerton Police Officers during an investigation served a search warrant on a travel trailer belonging to Wallmuller. [RP 775-779, 781-782, 790-791]. Discovered during the search were two phones belonging to Wallmuller that contained sexually explicit images of young girls as well as photographs depicting similar content. [RP 791-795, 807-812, 923-925, 965-968, 972-973]. Exhibit No. 34 contained Video No. 3 time stamped December 29, 2006 at 10:51 PM depicting a pre-pubescent female in Wallmuller's trailer lifting her sweater and showing her breasts, Video No. 8 time stamped June 18, 2006 at 4:42 PM depicting a young girl performing oral sex, Video No. 9 time stamped June 16, 2006 at 5:03 PM depicting a young girl performing oral sex, and Video No. 10 depicting a young girl bending over exposing her privates were all images taken from the cell phone taken during the search of Wallmuller's travel trailer (admitted as Exhibit No. 37). [RP 981, 1000, 1003-1009, 1165-1166]

Two of the girls were identified (TKO and SS) and interviewed. [RP 785, 798-799, 926-927, 1033]. Both girls indicated that any acts committed against them by Wallmuller had occurred in Mason County.

³ The statement of facts set forth herein is limited to the facts related to the crimes for which Wallmuller was convicted.

[RP 785]. The case was referred to the Mason County Sheriff's Office for further investigation. [RP 785-786].

TKO, d.o.b. 1-27-95, testified that in 2006 Wallmuller lived with her family in their Grapeview home. [RP 1029-1030]. TKO testified that while Wallmuller was living with her family in Grapeview he took her to Shelton clothes shopping one day. [RP 1034]. Wallmuller drove around Shelton stopping the car by Southside School on Arcadia and zip tied TKO's hands then asked TKO to touch his penis with her mouth, which she did. [RP 1038-1039]. TKO noticed during this time that Wallmuller was "fidgeting" with his cell phone. [RP 1040]. Wallmuller then pulled her skort and underpants, and put his finger in her vagina. [RP 1035-1036]. Wallmuller untied TKO's hands, gave her some toilet paper because she was bleeding, and told her that if she told anyone that he would hurt her or her family. [RP 1037]. Wallmuller then drove behind the Shelton Athletic Center, parked the car, and told TKO to perform oral sex on him, which she did. [RP 1042].

TKO also testified about an incident that occurred after their trip to Shelton where Wallmuller took her into her dad's bedroom at home, hit her, and made her "suck his penis," which she did because she "didn't want to get hit again." [RP 1043]. TKO recalled that Wallmuller was taking videos with his cell phone. [RP 1043]. TKO testified that another

time Wallmuller made her bend over and spread her butt cheeks and took a picture with his cell phone. [RP 1044]. She also took pictures of her vagina at Wallmuller's request. [RP 1044-1045]. TKO identified herself in three of the videos comprising Exhibit No. 34. [RP 1055-1058]. TKO did not know when two of the images were taken but testified that the third was taken the year her father went to prison (2006). [RP 1055-1058]. TKO is not married to Wallmuller. [RP 1032].

Taylor, TKO's sister, testified that in 2006 her family lived in Grapeview and that Wallmuller lived there with her family for a time. [RP 878-880]. Tyrra, another sister of TKO, also testified that in 2006 (the year her father went to prison) her family lived in Grapeview and that Wallmuller lived there with her family for a time. [RP 889-893].

SS, d.o.b. 2-15-92, testified that she knew Wallmuller through TKO, Taylor, and Tyrra when she lived near them. [RP 1083-1085]. SS testified that she would go places with Wallmuller and that he had bought her alcohol and cigarettes. [RP 1087]. SS testified that she ran away from home some time before Christmas and she called Wallmuller who took her to his trailer parked up by Belfair State Park and that he took a picture of her with her shirt up with his cell phone. [RP 1089-1097, 1115-1116, 1119].

Jacob Fadder testified that he was being held in jail while Wallmuller was awaiting trial in the instant case and that Wallmuller admitted to him that he stuck his finger in TKO's vagina, that he had pictures of her including one where she was bending over showing her privates, and that he had pictures of her sucking his penis. [RP 1191-1192]. Wesley Duncan testified that he was being held in jail while Wallmuller was awaiting trial in the instant case and that Wallmuller admitted that TKO performed oral sex on him but that she had initiated it and that it had happened a couple of times. [RP 1263-1267].

Wallmuller testified in his own defense. [RP 1389-1513].

Wallmuller admitted that TKO performed oral sex on him, but explained that he had awoken one night while he was staying at the Grapeview home to find TKO performing the act—he did not request oral sex. [RP 1402, 1405-1409, 1443-1444]. Wallmuller also admitted to taking pictures of TKO performing oral sex on him but she asked him to do so saying if he didn't she would tell. [RP 1405-1409]. Wallmuller denied taking TKO to Shelton, zip tying her, digitally penetrating her, and denied forcing her to perform oral sex on him either at Southside School or at the Shelton Athletic Center. [RP 1396, 1398, 1445-1446]. Wallmuller denied taking the picture of TKO bent over showing her privates. [RP 1405]. Wallmuller also denied taking the picture of SS's breasts. [RP 1404].

D. ARGUMENT

- (1) WALLMULLER MAY NOT BE CONVICTED OF SEXUAL EXPLOITATION OF A MINOR (COUNT XII) WHERE THE INFORMATION CHARGES AN ATTEMPT AND THE TO-CONVICT INSTRUCTION, INSTRUCTION NO. 26, ASKS THE JURY TO CONVICT OF THE COMPLETED CRIME AND WHERE THE INFORMATION ALLEGES A DIFFERENT CHARGING PERIOD FROM THE TO-CONVICT INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees, “In all criminal prosecutions, the accused shall enjoy the right ...to be informed of the nature and cause of the accusation....” Article 1, section 22 (amend. 10) of the Washington State Constitution provides, “In criminal prosecutions the accused shall have the right to...demand the nature and cause of the accusation against him, to have a copy thereof....” Under these constitutional provisions, it is well settled law that a person cannot constitutionally be convicted of a crime with which he was not charged. State v. Garcia, 65 Wn. App. 681, 686 n.3, 829 P.2d 241 (1992); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979); State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986).

Failure to object to the jury instruction that does not comport with the charge set forth in the information does not preclude review. The federal and State constitutions require that a defendant only be tried and

convicted of the charge found in the indictment or information. State v. Frazier, 76 Wn.2d 373, 376, 456 P.2d 352 (1969). Claims involving manifest constitutional error may be raised for the first time on appeal. State v. Garcia, 65 Wn. App. 681, 686 n.3, 829 P.2d 241 (1992).

Here, the information charged Wallmuller with sexual exploitation of a minor in Count XII as follows:

COUNT XII

In the County of Mason, State of Washington, on or about the period between the 1st day of February, 2007, and the 15th day of March, 2007, the above-named Defendant, FRANK A. WALLMULLER, did commit SEXUAL EXPLOITATION OF A MINOR, a Class C Felony, in that said defendant did compel, aid, invite, employ, authorize, or cause a person under 18 years of age, to-wit: S.S. who was born on 02-15-1992, to engage in sexually explicit conduct, knowing that such conduct would be photographed or part of a live performance, did do an act which was a substantial step towards the commission of that crime; contrary to RCW 9A.28.020 and 9.68A.040 and against the peace and dignity of the State of Washington.

[Emphasis added]. [CP 200].

Contrary to the information, the to-convict instruction for Count XII, Instruction No. 26, informs the jury to find beyond a reasonable doubt the essential elements of charge as follows:

To convict the defendant of the crime of sexual exploitation of a minor as charged in Count 12, each of the following three elements must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 15th day of December, 2006, and the 15th day of March, 2007, the

defendant aided, invited, employed, authorized, or caused a minor, [SS], to engage in sexually explicit conduct;

- (2) That the defendant knew the conduct would be photographed or would be part of a live performance; and
- (3) That any of these acts occurred in the State of Washington.

[Emphasis added]. [CP 90].

The jury convicted Wallmuller in Count XII of sexual exploitation of a minor where he was not properly charged with this offense. First, the information charges that the crime was committed between February 1, 2007, to March 15, 2007, while the to-convict instruction allowed the jury to find guilt based on a substantially greater and uncharged time period of December 15, 2006, to March 15, 2007. This is particularly troubling as the evidence in support of this charge, a photo of SS showing her breasts, was date time stamped December 29, 2006 at 10:51 PM and SS, herself testified that the photo was taken some time around Christmas in 2006. Moreover, the information seems to charge an attempted sexual exploitation of minor given the “substantial step” language and reference to RCW 9A.28.020 while the to-convict instruction contains only the elements for the completed crime.

Given these differences between the information and to-convict instruction, Wallmuller was convicted of the completed crime of sexual exploitation of a minor when he was not constitutionally charged with the

completed crime nor was he charged during the time period for which he was convicted. This court should reverse and dismiss Wallmuller's conviction in Count XII.

- (2) IT WAS CONSTITUTIONAL ERROR FOR THE COURT TO FAIL TO INSTRUCT THE JURY THAT IT HAD TO FIND A "SEPARATE AND DISTINCT ACT" FOR RAPE OF A CHILD IN THE FIRST DEGREE IN COUNTS III, IV, V AND FOR SEXUAL EXPLOITATION OF A MINOR IN COUNTS VI AND VIII.

The double jeopardy clauses of the United States and Washington Constitutions protect a defendant from multiple convictions for the same crime. State v. Carter, __ Wn. App. __, __ P.3d __, 2010 WL 2590553 (Div. II June 29, 2010), *citing* State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

Recently in Carter, this court held that it was a violation of double jeopardy principles where a defendant is charged with multiple counts of the same offense during the same charging period and the court fails to give an instruction adequately informing the jury that it had to find a "separate and distinct act" for each count even where the court gave a unanimity instruction and instructed the jury that a separate crime was charged in each count. This court held that this issue can be raised for the first time on appeal even where the defendant did not propose a correct instruction, or raise the issue below (object). State v. Carter, __ Wn. App.

__, __ P.3d __, 2010 WL 2590553 (Div. II June 29, 2010), *citing* State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990).

In so holding, this court considered three cases: State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008); State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993) and State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996). Like Carter in Berg, the court gave nearly identical to-convict instructions, a unanimity instruction, and the separate charge in each count instruction and like this court in Carter the court in Berg found a double jeopardy violation because no instruction on “separate and distinct act” was given. In Ellis, unlike Carter, the to-convict instructions made it clear to the jury that it must find that the conduct for one count of molestation occurred “on a day other than” that of the second count and the rape charges gave different dates. In Hayes, while Division I acknowledged that double jeopardy principles are not violated when the information, instructions, testimony, and arguments clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense, this court recognized that the to-convict instructions informed that jury that in order to convict the jury must find on “an occasion separate and distinct from that charged in [the remaining counts].” The instant case does not have the saving phrases in its to-convict instructions like Ellis and Hayes and is more like Carter or Berg.

Here, like Carter and Berg, the court instructed the jury in the to-convict instructions for Counts III, IV, and V, Instructions Nos. 13, 14, 15, with the identical language as follows:

To convict the defendant of the crime of rape of a child in the first degree as charged in the Count [3, 4, 5], each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 1st day of January, 2006, and the 31st day of December, 2006, the defendant had sexual intercourse with [TKO];
- (2) That [TKO] was less than twelve years old at the time of the sexual intercourse and not married to the defendant;
- (3) That [TKO] was at least twenty-four months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

[CP 76, 77, 78].

Similarly, the court instructed the jury in the to-convict instructions for Counts VI and VIII,⁴ Instructions Nos. 21 and 23, with the identical language as follows:

To convict the defendant of the crime of sexual exploitation of a minor as charged in Count [6, 8], each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 16th day of June, 2006, the defendant compelled, aided, invited, employed, authorized, or caused a minor, [TKO], to engage in sexually explicit conduct;

⁴ This court should note that Count VII is not subject to this argument as it contains a specific and distinct date.

- (2) That the defendant knew the conduct would be photographed or would be part of a live performance; and
- (3) That any of these acts occurred in the State of Washington.

[CP 84, 86].

Like Carter and Berg, the court, here, did give a separate crime is charged in each count instruction, Instruction No. 5 [CP 68]; did give a unanimity instruction, Instruction No. 10 [CP 73], but did not give a unanimity instruction despite the fact that Wallmuller's attorney requested such an instruction for Counts VI-VIII, [RP 1530]; and like Carter and Berg, the court, here, did not give a "separate and distinct act" instruction. Since this court in Carter has held under almost identical circumstances to reverse and dismiss all but one conviction of the same crime in order to comport with double jeopardy principles, this court should reverse and dismiss all but one conviction for Counts III, IV, and V; and reverse and dismiss either Count VI or Count VIII.

E. CONCLUSION

Based on the above, Wallmuller respectfully requests this court to reverse and dismiss his convictions.

DATED this 6th day of August 2010

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 6th day of August 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 6th day of August 2010.

Patricia A. Pethick
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