

NO. 42120-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

CATREENA R. MENDENHALL,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The trial court erred in conducting discussions about the jury instructions outside of Ms. Mendenhall's presence.

2. In light of this error, the trial court erred in entering a judgment against Ms. Mendenhall.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant is entitled to be present at each critical stage of the trial proceedings. A critical stage is when the defendant's presence relates to the opportunity to defend against the charges. The trial court excluded Ms. Mendenhall from jury instruction discussions even though the discussion gave Ms. Mendenhall the opportunity to defend her case. Did the trial the trial court err in excluding Ms. Mendenhall from this critical stage of the proceedings?

C. STATEMENT OF THE CASE

1. Procedural Facts.

A jury found Catreena Mendenhall guilty of one count of second degree child molestation and acquitted her of three other charges: second degree rape of a child, third degree rape of a child, and third degree child

molestation. CP 27, 28, 29, 30; RP (Report of Proceeding) at II-A, II-B, III-A, III-B, and IV. C.D.C. was the named victim in each count. CP 1-2.¹ The court sentenced Ms. Mendenhall to 15 months in prison followed by 36 months of community custody. CP 35, 36. Ms. Mendenhall makes a timely appeal. CP 51.

2. Trial Testimony.

Catreena Mendenhall has known C.D.C. all of her life. RP III-B at 451. Their families were longtime friends. RP III-A at 271. In the fall of 2008, C.D.C. moved to Washougal. RP III-A at 271. Ms. Mendenhall lived in Beaverton. Oregon RP III-A at 303. A visit between the families brought Ms. Mendenhall and C.D.C. together. RP III-A at 272. Before that, they had not seen each other in some time. RP III-A at 271. They found they shared a common interest in Anime. RP III-A at 273. They quickly became close friends. RP III-A at 272-74; RP III-B at 452. Ms. Mendenhall's birthday is September 13, 1989. RP III-B at 451. C.D.C.'s birthday is January 30, 1995. RP III-A at 269.

Ms. Mendenhall often spent her weekends at C.D.C.'s Washougal home. RP III-A at 274. When C.D.C. had friends over for the night, they

¹ The State amended the information late in the trial. RP III-B at 361. Ms. Mendenhall did not object to the amendment. *Id.* at 361-62. The text of the amendment is clear from the record. The amendment expands the dates. *Id.* However, the amended information, to date, has not been made part of the superior court file.

slept together in CDC's twin bed. RP III-A at 275, 308. This also held true when C.D.C. and Ms. Mendenhall slept together. RP III-A at 275.

In March 2010 while at school, C.D.C. told her friend Marlia that she and Ms. Mendenhall had a sexual relationship. RP III-A at 283. Ms. Mendenhall then told the school counselor about the relationship. RP III-A at 284. The school counselor called the police. The Washougal police investigated the allegations. RP III-A at 242-51; RP III-B at 396-402.

At trial, C.D.C. described only one event with specificity. She testified that the first time Ms Mendenhall spent the night, she pushed C.D.C. against the wall and kissed her. RP III-A at 275. After the initial encounter, commonly on the weekends when Ms. Mendenhall stayed over, the two consensually kissed and touched each other's intimate parts to include placing their fingers in each other's vaginas. RP III-A at 276-80, 340. Per C.D.C., the physical aspect of their relationship ended in July 2009. RP III-A at 321. Ms. Mendenhall was seeing a boyfriend. RP III-A at 317-21. Ms. Mendenhall talked about the boyfriend all the time and that made C.D.C. jealous so C.D.C. told Ms. Mendenhall that she no longer wanted to be friends. RP III-A at 317-22.

During her trial testimony, Ms. Mendenhall acknowledged a close friendship with C.D.C. but denied any sort of physical relationship with her. RP III-B at 452-53. Ms. Mendenhall acknowledged telling the police

that she'd kissed C.D.C. but said she only did so because the police were badgering her. RP III-B at 460.

D. ARGUMENT

BY FAILING TO INCLUDE MS. MENDENHALL IN JURY INSTRUCTION DISCUSSIONS, THE TRIAL COURT VIOLATED MS. MENDENHALL'S CONSTITUTIONAL RIGHT TO BE PRESENT AT EVERY CRITICAL STAGE OF HER TRIAL.

During her criminal trial, Catreena Mendenhall was entitled to be at all discussions about jury instructions. Because the trial court failed to observe that right, Ms. Mendenhall is entitled to reversal of her conviction and a new trial.

A person charged with a crime in Washington has both a state and federal due process right to be present at all critical stages of a trial. Under Washington Constitution Article 1 § 22, a defendant in a criminal case has a fundamental right to “appear and defend in person.” Although federally the right to be present is rooted to a large extent in the confrontation clause of the Sixth Amendment to the United States Constitution, the United States Supreme Court has recognized that this right is also “protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.” *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Whether a defendant's constitutional right

to be present has been violated is a question of law, subject to de novo review. *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009).

These constitutional guarantees are embodied in the rule that a defendant has the right to be present at every critical stage of a criminal proceeding. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). In *State v. Chappel*, the Washington Supreme Court stated the rule as follows:

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with “the right to appear and defend in person.” Wash. Const. Art. I, § 22. Additionally, Washington's criminal rules state that “[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown.” CrR 3.4(a).

State v. Chapple, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001).

At a minimum, “critical stages” in a criminal trial include any hearing at which “evidence is being presented or whenever the defendant’s presence has a relation, reasonably substantial, to the opportunity to defend against the charge.” *State v. Bremer*, 98 Wn. App. 832, 991 P.2d 118 (2000).

Washington’s case law recognizes two fact patterns under which a defendant can be deemed to have waived her right to be present at a critical stage of the proceeding: (1) when the defendant voluntarily absents

herself from the proceedings; and (2) when the defendant acts in a contemptuous and disruptive manner. See *State v. Garza*, 150 Wn.2d 360, 77 P.3d 347 (2003) (trial continues in defendant's absence when he does not appear on second day), and *State v. DeWeese*, 117 Wn.2d 369, 816 P.2d 1 (1991) (pro se defendant made disruptive outbursts during trial). However, under the first exception, the trial court cannot simply presume a waiver from mere absence, and under the second exception, the trial court must use the least restrictive alternative available and allow a defendant to return to the courtroom if she promises to behave. *Garza, supra*; *DeWeese, supra*. The hallmark of both these exceptions to the defendant's right to be present at any critical stage of the proceedings is that the defendant always has the power to return to the proceedings.

Normally, conferences about the admissibility of jury instructions are not deemed a "critical stage" in the proceedings that require the defendant's presence because they only involve the resolution of legal issues. Such discussions may at times occur off the record and in chambers outside the defendant's presence. For example, in *State v. Bremer, supra*, a defendant convicted of attempted residential burglary appealed, arguing that the court's decision to hold a discussion about jury instructions in chambers outside his presence denied him the right to be present in all critical stages of the proceedings. However, noting that the

discussion in chambers dealt solely with the legal issues surrounding the use of certain jury instructions, the court found no constitutional violation:

The crux of a defendant's constitutional right to be present at all critical stages of the proceedings is the right to be present when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.

Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in *Lord*², Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

Bremer, 98 Wn.App. at 834-835 (internal citations omitted).

The facts of *Bremer* stand in contract to the facts in Ms. Mendenhall's case. In Ms. Mendenhall's case, at the conclusion of the evidence, the court told the attorneys to come to the jury room to discuss the jury instructions. RP III-B at 472. The court excused the jury for the day. *Id.* Ms. Mendenhall was out of custody and available to attend the

² *In re Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994)

conference. RP IV at 541. There was nothing preventing the court from holding the discussion in open court with Ms. Mendenhall present and able to consult with her attorney. Although Ms. Mendenhall did not object to this procedure, the court did not advise her that she could attend. RP III-B at 472-73.

The next day, the court went back on the record to talk about the jury instruction discussion held the previous afternoon. The court noted that at the State's request, it was adding State's proposed instruction 20:

You may have heard evidence relating to one witness's opinion on the credibility of another witness. You are not to consider one witness's opinion of another witness's credibility. You are the sole judges of the credibility of the witnesses.

CP 25; RP IV at 476-85.

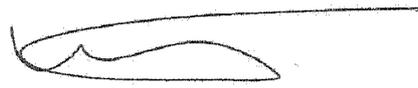
Instruction 20 was discussed and approved by the court the previous afternoon when Ms. Mendenhall was not present. RP IV at 476. Instruction 20 is not a WPIC instruction. It emphasized testimony that Ms. Mendenhall herself may have questioned and objected to had she been a party to the jury instruction discussion. The instruction refers to testimony by Washougal Detective Thad Eakins who called Ms. Mendenhall a liar during his testimony. RP III-B at 427. In defending her case, Ms. Mendenhall likely would not want Detective Eakins' opinion of her emphasized in a jury instruction. This is particularly true as another

instruction, Instruction 1, told that jury that they were the “sole judges of the credibility of each witness.” CP 5. As such, the previous afternoon’s jury instruction discussion went well beyond a simple discussion about the law. Since the discussion included a discussion about the evidence, it constituted a “critical stage” in the proceeding. The exclusion of Ms. Mendenhall from that portion of the trial denied her the state and federal constitutional right to be present. As a result, this court should reverse Ms. Mendenhall’s conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated herein, Ms. Mendenhall’s second degree child molestation conviction must be reversed and her case remanded for further proceedings.

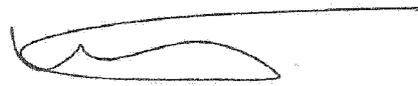
Respectfully submitted this 24th day of October 2011.



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CERTIFICATE OF SERVICE

I certify under the penalty of perjury for the State of Washington that on October 24, 2011, in Longview, Washington, I did the following with this document: (1) efiled it with Anne Mowry Cruser, Clark County Prosecutor's Office at prosecutor@clark.wa.gov; and (2) the Court of Appeals, Division II. I also (3) mailed it to Catreena R. Mendenhall/DOC#348175, Mission Creek Corrections Center for Women, 3420 NE Sand Hill Rd., Belfair, WA 98528.



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COWLITZ COUNTY ASSIGNED COUNSEL

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