

FILED
Court of Appeals
Division II
State of Washington
12/5/2017 2:43 PM

NO. 49466-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JABS,

Appellant.

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

The Honorable Kevin D. Hull, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. SEVERAL OF THE COURT'S FINDINGS UNDER STATE V. RYAN¹ ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In his opening appellate brief, appellant Stephen Jabs assigned error to the court's admission of unreliable hearsay under RCW 9A.44.120. Brief of Appellant (BOA) at 1. As set forth in the opening brief, the issue before the Court is: "Where the time, content and circumstances of C.G.'s, K.H.'s and K.K.'s out-of-court statements to the forensic child interviewer showed such statements to be unreliable, did the court err in admitting them?" BOA at 1. In the argument section, appellant discussed the specific Ryan factors that did not favor reliability. BOA at 54-61.

In State v. Ryan, the Supreme Court adopted a set of factors applicable to determining the reliability of hearsay statements, which are:

(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness [;]" ... [(6)] the statement contains no express assertion about past fact [;] [(7)] cross examination could not show the declarant's lack of knowledge [;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are

¹ State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Id. at 175-76 (quoting State v. Parris, 98 Wash.2d 140, 146, 654 P.2d 77 (1982); Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

(i) The Trial Court's Findings Are Not Verities on Appeal

As indicated in the opening appellate brief, the trial court found the Ryan factors favored admissibility, which appellant disputes. CP 300-302; BOA at 56-61.

In its response brief, the state claims that because appellant did not expressly assign error to the court's Ryan factor findings, the court's factual findings are verities on appeal. Brief of Respondent (BOR) at 14, 16. This is substantively incorrect.

With respect to C.G., appellant argued that her general character weighed against reliability (Ryan factor #2). BOA at 56. Appellant also argued the lack of spontaneity weighed against reliability (Ryan factor #4). BOA at 56. Also weighing against reliability was the timing of C.G.'s declaration and the relationship between C.G. and Sinclair (Ryan factor #5). BOA at 56-57. Finally, appellant argued the circumstances surrounding C.G.'s statements were such that there was plenty of reason to

suppose C.G. misrepresented the defendant's involvement (Ryan factor #9). BOA at 57.

Thus, with respect to C.G., appellant substantively challenged the court's factual findings regarding Ryan factors #2, #4, #5 and #9. In challenging the court's evaluation of these factors, appellant implicitly challenged the court's Findings of Fact (FOF) VII, IX, XI, XII, XVII and XVIII. CP 301-302.

While appellant did not explicitly assign error to the court's findings in its assignments of error, it is clear from the argument section that appellant challenges the court's findings set forth above. Therefore, appellant asks this Court to overlook the technical oversight and treat entry of the findings as challenged. See State v. Olson, 126 Wn.2d 315, 318-324, 893 P.2d 629 (1995) (failure to assign error in opening brief will be overlooked where issue addressed in brief and nature of argument clear); RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits).

This Court should also overlook the technical oversight in failing to expressly assign error to the court's findings with respect to K.H. In the argument section concerning K.H.'s statements to Sinclair, it is clear appellant challenged the court's findings regarding Ryan factors: #4 (spontaneity); #5 (the timing of the declaration and the relationship

between the declarant and the witness); and #9 (the circumstances are such that there is reason to suppose K.H. misrepresented the defendant's involvement). BOA at 58-59. Again, in doing so, appellant implicitly challenged the court's FOF VII, XI, XVII and XVIII. CP 300-302.

Finally, this Court should also overlook the technical oversight as it relates to K.K. In the argument section, it is clear appellant challenged the court's findings regarding Ryan factors: #2 (general character of the declarant); #4 (spontaneity); #5 (the timing of the declaration and the relationship between the declarant and the witness); and #9 (the circumstances are such that there is reason to suppose K.K. misrepresented the defendant's involvement). BOA at 60-61. In doing so, appellant implicitly challenged the court's FOF VII, IX, XI, XII, XVII, and XVIII. CP 300-302.

(ii) Appellant's Challenge to the Court's Determination of Reliability is Tied to the Court's Findings

The state claims "Jabs questions the trial court's conclusion by attempting to contradict the trial court's unchallenged findings." BOR at 22. For the reasons stated above, however, Jabs maintains he sufficiently challenged the court's findings bearing on reliability in his argument section pertaining to each of the declarants.

The state next claims, “Jabs never in fact ties these perceived contradictions to any of those unchallenged findings.” BOR at 22. This is incorrect.

With respect to C.G., Jabs argued: “C.G.’s general character weighs against reliability.” BOR at 56. Jabs explained this is so because C.G. was only four at the time of the interview and as a result, highly suggestible. Moreover, she did not answer Sinclair’s statements about the difference between a truth and a lie correctly. BOA at 56. This directly challenges the court’s: FOF VII (that “the time, content and circumstances of each of the proposed statements by each of the witnesses suggest reliability”); as well FOF IX (that “there was no evidence that any of the children had a general character for untruthfulness”).

With respect to C.G., Jabs also argued that, “the lack of spontaneity with regard to C.G.’s statements also weighs against reliability.” BOR at 56. Jabs explained this is so because it was not until after Sinclair asked C.G. a barrage of questions about what she told her mom and what happened in the hot tub that C.G. disclosed anything. Jabs argued that such repetitive questioning – near badgering – does not result in a spontaneous, reliable statement. BOR at 56. This directly challenges the court’s: FOF VII (time, content and circumstances); FOF XI and XII

(finding C.G.'s statements spontaneous); and FOF XVIII (finding no evidence of badgering).

Also with respect to C.G., Jabs argued the timing of the declaration and relationship between C.G. and Sinclair also weighs against reliability. BOA at 56. This is so because Sinclair explored no rival hypotheses, engaged in dogged persistence and interjected facts and emotion (worry) into the interview. BOR at 57. This directly challenged the court's: FOF VII (time, content and circumstances).

Based on Sinclair's questioning, Jabs argued it was not possible to tell whether C.G.'s allegations were the result of Sinclair's interview style or the truth. This directly challenges the court's: FOF XVII (no evidence the children misrepresented the defendant's involvement); and FOF XVIII (no suggestive questioning or badgering).

Thus, with respect to C.G., Jabs' challenge to the reliability of her statements is tied to the court's factual findings, a number of which Jabs disputes are supported by the record. That there was no corroboration of C.G.'s claims goes to the question of prejudice resulting from the admission of her unreliable statements – not to their admissibility. See BOR at 22. Jabs was explaining that due to the lack of corroboration, this was not a case with overwhelming evidence, such that the admission of

C.G.'s out-of-court statements would have no effect on the outcome of the trial.

With respect to K.H., Jabs argued "the primary factor weighing against the reliability of K.H.'s statements is the length of time that the interview lasted – an hour and forty minutes." BOA at 58. Jabs explained that as a result, K.H.'s statements were not at all spontaneous. BOA at 58. This directly challenges the court's: FOF VII (time, content and circumstances); and FOF XI and XII (finding that lack of spontaneity does not detract from reliability).

With respect to K.H., Jabs also argued the timing of her declaration and relationship between her and Sinclair also weighs against reliability because it was not until nearly the end of the interview – after Sinclair engaged in repeated questioning, dogged persistence, and suggested K.H. would have to come back unless she disclosed something – that K.H. actually disclosed anything. BOA at 58-59. This directly challenges the court's: FOF VII (time, content and circumstances); FOF XVII (no evidence the children misrepresented the defendant's involvement); and FOF XVIII (finding no suggestive questioning or badgering).

Thus, with respect to K.H., Jabs' challenge to the reliability of her statements is tied to the court's factual findings, a number of which Jabs

disputes are supported by the record. As with C.G., the state is incorrect that “Jabs argues against the trial court’s conclusion regarding the admissibility of K.H. statements by again asserting the primacy of credibility in this case.” BOR at 23. Again, however, in this context (BOA at 59), Jabs was explaining why the court’s wrongful admission of the evidence (K.H.’s statements) prejudiced him. It is the state that is mixing up apples and oranges. There are two questions here: (1) whether there was error; and (2) if so, was it prejudicial. To obtain reversal, Jabs must convince the Court of both.

With respect to K.K., Jabs argued the “primary factor weighing against the reliability of K.K.’s statements to Sinclair is the general character of K.K.” BOA at 60. Jabs explained this is so because K.K. admitted she lied and previously accused a close family member of sexual abuse in order to gain attention. BOA at 60. This directly challenges the court’s: FOF VII (time, content, circumstances) and FOF IX (no evidence children had general character for untruthfulness).

With respect to K.K., Jabs also argued K.K.’s statements were not spontaneous but in response to repeated questioning. BOA at 60. This directly challenges the court’s: FOF XI (finding that lack of spontaneity did not detract from reliability). In addition, Jabs’ argued the timing of the

declaration and relationship between K.K. and Sinclair likewise did not weigh in favor of reliability, as Sinclair engaged in repeated questioning and failed to explore rival hypothesis concerning James Hetrick, as well as any rival hypothesis for K.K.'s precocious sexual knowledge based on the pornography she admittedly watched with E.H. BOA at 60. This directly challenges the court's: FOF VII (time, content and circumstances); and FOF XVII (no evidence children misrepresented the defendant's involvement).

Thus, with respect to K.K., Jabs' challenge to the reliability of her statements is tied to the court's factual findings, a number of which Jabs disputes are supported by the record. Again, Jabs argues that because credibility was so crucial in this case, the erroneous admission of K.K.'s statements prejudiced him. Contrary to the state's understanding, Jabs is not suggesting that's why the statements should not have been admitted. See BOR at 23. Rather, he is suggesting that's why reversal is required. In other words, assuming this Court agrees the trial court erred in evaluating the Ryan factors, reversal is required because the wrongful admission of the statements unfairly bolstered the credibility of the complainants and the state's case.

2. BECAUSE THE JURY INSTRUCTIONS DID NOT REQUIRE THE JURY TO RELY ON “SEPARATE AND DISTINCT” CONDUCT FOR EACH OF THE MULTIPLE COUNTS CHARGED, THEY VIOLATED APPELLANT’S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

As argued in the opening appellate brief, the jury instructions did not insure that the jury relied on separate and distinct conduct for the multiple counts charged with respect to C.G. (two counts of rape), H.H. (two counts of molestation) and K.H., J.J. and K.K. (one count of rape and one count of molestation each). BOA at 61-69. As a result, the instructions violated appellant’s right to be free from double jeopardy. State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). In response, the state claims there was no error because “the jury was provided with a clear and un-confusing multiple acts instruction and because the prosecutor clearly and unambiguously advised the jury which act applied to which count.” BOR at 24. Contrary to the state’s claims, the jury instructions were far from clear and a prosecutor’s election, which is merely argument, cannot remedy a double jeopardy violation.

The state claims the jury instructions made it clear the state was not seeking multiple punishments for the same offense because: the jury was instructed that a not guilty plea “puts in issue every element of the crime charged,” and requires the state to prove “each element of the crime

beyond a reasonable doubt;" the jury was instructed it must decide each count separately; and because the jury was given a "comprehensive multiple acts instruction." BOR at 25.

However, the jury in every case is instructed that a not guilty plea "puts in issue every element of the crime charged" and requires the state to prove "each element of the crime charged." This is the standard reasonable doubt instruction. Moreover, in multiple counts cases, the jury typically is also instructed the jury must decide each count separately. Thus, if these standard instructions could cure a double jeopardy violation, the Borsheim court would have so found. Significantly, the jury in Borsheim was in fact instructed that the jury must decide each count separately. Yet, this did not affect the court's decision that a double jeopardy violation occurred. Borsheim, 140 Wn. App. at 364. The state's reliance on standard instructions is unpersuasive.

Thus, the real question is the adequacy of the multiple acts/multiple counts instruction. With respect to the C.G. charges (two counts of rape), the jury was instructed:

In alleging that the defendant committed rape of a child in the first degree as charged in counts I and II, the state relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant on any count, you must unanimously agree that this specific act was proved.

CP 256 (emphasis added).

Contrary to the state's claim, this instruction is far from clear. In the context of two charges, it talks about the state's reliance on a "single act." This lack of clarity easily could have been remedied had the state simply added language in the to convicts indicating the jury must find in count II, in an act separate and distinct from count I, that the defendant committed the elements of the crime. The state failed to do so.

With respect to the H.H., K.H. J.J. and K.K. charges, the jury was instructed:

The state alleged that the defendant committed acts of rape of a child in the first degree, and child molestation in the first degree, in counts III, IV, V, VI, VII, VIII, IX, and X on multiple occasions. To convict the defendant of rape of a child in the first degree or child molestation in the first degree, one particular act of rape of a child in the first degree or child molestation in the first degree must be proved beyond a reasonable doubt as to each respective count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree or child molestation in the first degree.

CP 256.

Contrary to the state's claim, this instruction is similarly unclear because it instructs the jury it can convict of either rape or molestation if it unanimously finds one particular act of rape or molestation is proved for each count. It doesn't say the convictions have to be based on separate and distinct conduct.

The state concedes it did not follow the recommendation in the WPIC to include "separate and distinct" language in the "to convict" when there is more than one count of the crime charged:

The comment does, however, advocate that if there is more than one count of the crime, "then the to-convict instructions need to clearly distinguish the acts that the jurors may consider for each count. Id. No authority is cited for this suggestion. In the present case, that was not done.

BOR at 26 (citing 11 Washington Practice, Washington Pattern Jury Instructions – Criminal, Comment to WPIC 4.25 (3rd Ed. 2008)).

Whether cited or not, the comment is supported and required by the Borsheim decision. See BOA at 63 (citing and discussing Borsheim, 140 Wn. App. at 367-68).

The state claims this case is distinguishable from Borsheim because the multiple acts/multiple counts instruction here required the jury

to find one act with respect to each count, whereas in Borsheim the instruction did not require an act be tied to a particular count. BOR at 27. This is a distinction without a difference. Whether the instructions here required the jury to find one act with respect to one count, there was nothing preventing the jury from finding the same act with respect to a different count because it was not instructed the underlying act must be different for each count. That is the exact problem the Borsheim court addressed. Borsheim, at 367-68.

This Court should reject the state's attempts to liken this case to State v. Carson, 184 Wn.2d 207, 357 P.3d 1064 (2015). First of all, there is not an "exact congruence between the number of incidents shown and the number of charges" here. See BOR at 27. This is particularly true with respect to the state's evidence concerning H.H. and K.K. See BOA at 50-53 (discussing trial testimony). Thus, Carson is inapposite. Moreover, Carson addressed an ineffective assistance of counsel claim, not double jeopardy. Thus, this Court should decline the state's invitation to graft onto this case the reasoning of the Court in a completely inapposite case addressing a completely different issue.

Conversely, the state's reliance on State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996), is perplexing. See BOR at 28. There the

court specifically endorsed that the jury must be informed in a multiple counts case that they are to find separate and distinct acts for each count when the counts are identically charged. This case supports Jabs' position.

Finally, the state claims any deficiency in the instructions was remedied by the prosecutor's election in closing. BOR at 27-30. However, the prosecutor's election does not remedy a double jeopardy violation. State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008); see BOA (discussing in more detail). The Supreme Court likewise intimated as much in State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). In Mutch, the court opined it will be a "rare circumstance" where jury instructions like those here – that do not make it manifestly apparent that each count must be based on a separate and distinct act – will not result in a double jeopardy violation. Mutch, 171 Wn.2d at 665. However, it was a "rare circumstance" in Mutch's case because the five charges lined up perfectly with five discrete acts described and the five to-convict instructions. Id. Those rare circumstances are not present here.

3. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO REQUEST A LACK-OF-VOLITION INSTRUCTION.

Lack of consciousness, i.e. being asleep, is an affirmative defense to child rape. State v. Deer, 175 Wn.2d 727, 287 P.3d 539 (2012). K.H.

was adamant in both her statement to Sinclair and in her testimony that Jabs was asleep during the couch incident. Accordingly, substantial evidence supported a lack-of-volition instruction and would have provided Jabs with an alternate defense to the alleged rapes of K.H. and J.J. and the alleged molestation of H.H. In his opening appellate brief, Jabs argued counsel's failure to request such an instruction constituted ineffective assistance of counsel. BOA at 70-75.

In response, the state does not argue that Jabs would not have been entitled to the instruction had defense counsel requested one. BOR at 33 ("Where a legally permissible alternative defense exists, these decisions will always be subject to question post hoc.") Rather, the state claims defense counsel's decision not to request the instruction was tactical because it would have been inconsistent with Jabs' defense that the couch incident did not happen. BOR at 30-31.

But the state acknowledges Jabs "[t]repidly acknowledge[ed] the possibility of an un-felt fellatio because he sleeps soundly[.]" BOR at 36. Moreover, the state also acknowledges Jabs told the interviewing detectives the couch incident possibly could have happened if he was "three sheets to the wind." BOR at 36 (citing 19RP 3396).

Legitimate trial tactics will not support a claim of ineffective assistance of counsel. State v. Kolesnik, 146 Wn. App. 790, 812, 192 P.3d 937 (2008). Legitimate is the key issue here. Considering that Jabs himself left open the possibility he was asleep during the couch incident, it was not reasonable trial strategy to leave that possibility hanging without providing the jurors with a mechanism to acquit Jabs of the three charges based on lack of volition. See e.g. State v. Smith, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009) (“all or nothing” approach not a legitimate trial tactic under circumstances of the case).

Considering K.H.’s testimony, it is likely the outcome of the trial with respect to the three charges relying on the couch incident would have been different. This Court should therefore reverse those convictions.

C. CONCLUSION

Because C.G.'s, K.H.'s and K.K.'s statements were unreliable and unfairly bolstered the state's case with respect to all charges, all of Jabs' convictions should be reversed. Alternatively, the convictions on the following counts violated double jeopardy and must be vacated: II, IV, VI, VIII and X. Because Jabs received ineffective assistance of counsel with respect to counts III, VI and VII, those counts must be reversed as well. As argued in the opening brief, Jabs maintains his right to a unanimous verdict with respect to the communicating count was violated and his conviction on that count therefore should be reversed. See BOA at 75-80. The state concedes the condition prohibiting access to social media should be stricken. BOR at 41-42.

Dated this 5th day of December, 2017.

Respectfully submitted,

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December 05, 2017 - 2:43 PM

Transmittal Information

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Superior Court Case Number: 14-1-01041-7

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