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Court of Appeals
Division II
State of Washington
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NO. 53194-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIE GARZA,

Appellant.

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

The Honorable Kitty-Ann van Doorninck, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The trial court erred in giving the “non-corroboration” instruction, over defense objection, where the instruction is an unconstitutional comment on the evidence.

Issue Pertaining to Supplemental Assignment of Error

Must Willie Garza’s convictions be reversed, where the trial court commented on the evidence, contrary to article 4, section 16 of the Washington Constitution, by instructing the jury that, in order for the jury to convict Garza of child molestation, “it shall not be necessary that the testimony of the alleged victim be corroborated?”

B. SUPPLEMENTAL ARGUMENT

The non-corroboration instruction given at Garza’s trial constitutes an unconstitutional comment on the evidence, necessitating reversal of Garza’s convictions.

The prosecution proposed a “non-corroboration” instruction. RP 438-39. Defense counsel objected to the instruction, stating “a lot of concerns with it.” RP 440. Defense counsel argued the instruction overemphasized I.R.’s testimony and constituted an impermissible comment on the evidence, as well as I.R.’s credibility. RP 440-42, 519-20. The trial court gave the instruction over defense objection, which read as follows: “In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the

testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.” CP 106 (Instruction No. 4); RP 442.

Article 4, section 16 of the Washington Constitution specifies, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision prohibits judges from making any statement that amounts to a “comment on the evidence.” State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Further, it prohibits a judge from giving instructions that single out specific parts of the prosecution’s case or emphasize particular evidence. State v. Lewis, 6 Wn. App. 38, 41-42, 492 P.2d 1062 (1972). The provision also prohibits judicial officers from conveying their personal attitudes towards the merits of the case or instructing a jury that matters of fact have been established as a matter of law. State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

The Washington Supreme Court addressed the non-corroboration instruction in State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949). Clayton was charged with “an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years.” Id. at 572. At trial, the jury was given the following instruction:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted

upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Id. Clayton argued on appeal that the instruction was an impermissible comment on the evidence. Id. at 572-73. The court gave a cursory examination of the instruction, agreed with Clayton's concession that it was a correct recitation of the law, and upheld the instruction. Id.

The Washington Supreme Court has not addressed the instruction again since Clayton in 1949. Notably, however, the Washington Pattern Criminal Jury Instructions (WPIC) do not include a corroboration instruction. State v. Zimmerman, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), review granted, cause remanded, 157 Wn.2d 1012 (2006). The Washington Supreme Court Committee on Jury Instructions has explicitly recommended against such instruction, finding corroboration to really be a matter of sufficiency of the evidence, "best left to the argument of counsel." Id. (quoting 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 45.02 cmt. (4th ed. 2016)).

The court of appeals had likewise expressed serious concern about the constitutionality of an instruction telling jurors the testimony of one witness is "enough" to convict. In Zimmerman, for instance, this Court

noted it shared the WPIC Committee’s misgivings about the instruction, but felt “bound by Clayton to hold that the giving of such an instruction is not reversible error.” 130 Wn. App. at 182-83. Similarly, in Division One, Judge Becker concurred in a separate opinion to express her concern in State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015). She declared, “If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction.” Id.

Garza recognizes, at present, this issue is controlled by Clayton and Zimmerman. However, the Washington Supreme Court recently continued this issue to its March 5, 2020 en banc conference in State v. Svaleson, No. 48855-8-II, 2018 WL 2437289 (May 30, 2018) (supreme court cause no. 96034-8). Garza therefore raises the issue in the event the Washington Supreme Court grants review in Svaleson, and to preserve his own ability to petition for review on the issue.

When a judge comments on the evidence in a jury instruction, prejudice is presumed. Jackman, 156 Wn.2d at 743. The prosecution bears the burden of showing no prejudice. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). The prosecution cannot do so here.

I.R.’s testimony was the only evidence supporting the prosecution’s case. No other physical evidence or eyewitnesses

corroborated her allegations. I.R. also made an unfounded accusation of physical abuse against her parents at the same time she accused Garza of sexual abuse. RP 303-04, 417, 457-59.

The jury clearly had doubts about I.R.'s accusations, being unable to reach a verdict on count 1 (the "Gig Harbor" incident where I.R. claimed Garza touched her vagina, with significant discrepancies in her various accounts of the incident). CP 131; RP 270-72, 307-09, 579-80. There is also insufficient evidence that Garza had sexual contact with I.R. on count 3 (the "upstairs apartment" incident, where I.R. testified only that Garza put his hands "underneath [her] shirt"), or that he did so for purposes of sexual gratification. RP 281; Br. of Appellant, 6-10.

Under the circumstances, it cannot be said instructing the jury that I.R.'s testimony needed no corroboration was harmless beyond a reasonable doubt. CP 106. Should the instruction be invalidated, Garza's convictions must be reversed.

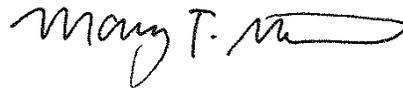
C. CONCLUSION

In addition to the bases for reversal articulated in the opening brief, Garza asks this Court to reverse his convictions, where the given non-corroboration instruction constituted an unconstitutional comment on the evidence.

DATED this 11th day of February, 2020.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Mary T. Swift", written over a horizontal line.

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