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NO. 35578-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

TROY STEENHARD AKA BLOOR,

Appellant.

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

The Honorable James M. Triplet, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. STEENHARD'S CONVICTION MUST BE REVERSED
BECAUSE HE DID NOT COMMIT RAPE OF A CHILD
AS DEFINED BY THE JURY INSTRUCTIONS.

The jury instructions in this case included a very limited definition of what constitutes sexual intercourse. CP 19. The witness' descriptions of Steenhard's conduct do not meet this definition. It is well established that a jury instruction that has not been objected to at trial is the law of the case. State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)).

“[T]he law of the case doctrine applies to all unchallenged instructions, not just the to-convict instruction.” State v. Johnson, 188 Wn.2d 742 n. 5, 765, 399 P.3d 507 (2017) (quoting State v. France, 180 Wn.2d 809, 816, 329 P.3d 864 (2014)). Every fact necessary to make a person's conduct criminal must be proved, regardless of whether the fact is described as an element or a definition. State v. Crowder, 196 Wn. App. 861, 869, 385 P.3d 275 (2016) (citing State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006); State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016); State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011)). Under the law of the case doctrine, for purposes of this case, sexual intercourse means only what the jury instruction says it does. Under the law provided to these

jurors, the State was required to prove oral or anal contact to support a conviction. CP 19. It did not do so, and the conviction must be reversed.

The State argues the common understanding and statutory and definition of sexual intercourse are both broader than the jury instruction. Brief of Respondent at 11-12. This argument fails because the jury was not instructed to apply their common understanding or the statutory definition. CP 19. By urging this Court to apply a different definition on appeal than the one contained in the jury instructions given at trial, the State ignores the law of the case doctrine as applied in Hickman, 135 Wn.2d 97, and recently reaffirmed in Johnson, 188 Wn.2d at 74, and State v. Tyler, ___ Wn.2d ___, 422 P.3d 436, 437 (2018).

The State charged Hickman with committing insurance fraud “in Snohomish County, Washington” and agreed to jury instructions requiring proof of the Snohomish County venue as an element of the crime. Hickman, 135 Wn.2d at 99, 105. By acquiescing to jury instructions that included venue as an element, the State assumed the burden of proving venue under the “law of the case” doctrine. Id. This was so even though venue was not an element of insurance fraud. Id. at 99.

Notably, the court did not view the issue as instructional error, although the instruction listing venue as an element of the offense was incorrect. Instead, the Supreme Court found the evidence insufficient to

prove the crime occurred in Snohomish County, reversed the conviction, and dismissed with prejudice. Id. at 99, 105-06. Hickman controls the outcome in this case.

Hickman illustrates that the jury was not free to substitute its common understanding or the statutory definition for the one contained in the jury instruction, as the State suggests. Brief of Respondent at 12-13. If that were true, the jury in Hickman would have been permitted to rely on its common understanding of insurance fraud or the law that venue in a specific county is not an element of a criminal offense.

Nor can this Court rely on the common understanding or the statutory definition on appeal. The purpose of the law of the case doctrine is to ensure that the same law is applied on appeal as at trial. State v. Calvin, 176 Wn. App. 1, 316 P.3d 496 (2013), review granted in part, cause remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015); see also Johnson, 188 Wn.2d at 515. Here, the law given to the jury was a very limited definition of sexual intercourse. Nothing in the jury instruction indicates that anything other than oral or anal to genital contact could constitute sexual intercourse. CP 19.

The State also argues that sexual intercourse is not a technical term that required a jury instruction to define it. Brief of Respondent at 14. But that argument is also immaterial. This is not a case in which the term

remained undefined in the jury instructions. Instead, the jury instructions gave a carefully limited definition. Commonly used words often have more precise or even entirely different definitions in the legal realm. When that is the case, juries are required to apply the legal definition. It does not matter that the instruction defining sexual intercourse was unnecessary. In Hickman, listing the county as an element to be proved at trial was also unnecessary. The lesson of Hickman is that even unnecessary elements must be proved when included in the jury instructions without objection.

Hickman also makes clear that the State is incorrect when it urges this Court to view this as mere instructional error. Hickman did not turn on the propriety of the instruction listing the county as an element. Instead, the court followed the law of the case doctrine and reversed for insufficiency of the evidence. Hickman, 135 Wn.2d at 99, 105-06. The same result is mandated here.

The State also wrongly faults defense counsel for not objecting to the instruction at trial. Brief of Respondent at 14. The State proposed this instruction. CP 162.¹ If the State wanted a more expansive definition of sexual intercourse, it should have proposed one. Defense counsel is not required to object to an instruction that that works to the benefit of her client.

¹ A supplemental designation of clerk's papers has been filed for the Plaintiff's proposed jury instructions, file June 26, 2017 as sub number 41 in the superior court file. Counsel has anticipated the clerk's papers citation assuming continued sequential pagination.

“Defense counsel is an advocate for her client, not a ‘law clerk’ for the prosecutor.” State v. Hobbs, 71 Wn. App. 419, 424, 859 P.2d 73 (1993).

Because the State proposed the instruction, it cannot complain about it now: “[A] party cannot . . . disavow jury instructions on appeal that were acquiesced to below. That basic function serves to avoid prejudice to the parties and ensure that the appellate courts review a case under the same law considered by the jury.” Calvin, 176 Wn. App. at 22. The State cannot now disavow the instructions it proposed or ask this Court to consider a sufficiency challenge under any other law than that considered by the jury. Id.

Moreover, insufficiency of the evidence is not waived and can be raised for the first time on appeal. State v. Sweany, is directly on point: “The State’s argument overlooks the longstanding maxim that a criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal.” State v. Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) aff’d, 174 Wn.2d 909 (2012) (discussing Hickman). Because this is a sufficiency challenge, which may be raised for the first time on appeal, the standards of RAP 2.5 regarding manifest constitutional error do not apply.

The evidence was insufficient to meet the definition of sexual intercourse contained in the jury instructions. Under the law of the case

doctrine, Steenhard's conviction for rape of a child must be reversed. Hickman, 135 Wn.2d at 105-06.

2. MANIFEST CONSTITUTIONAL ERROR OCCURRED WHEN TWO WITNESSES DIRECTLY OPINED THAT THE COMPLAINING WITNESSES WERE HONEST.

Personal opinions as to the veracity of witnesses are "clearly inappropriate" under the constitutional principles protecting the defendant's right to have the jury as the sole arbiter of witness credibility. State v. Quaaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014). In Steenhard's trial, witnesses twice invaded the province of the jury in this way when the complaining witnesses' mother and her friend were both permitted to testify that the girls are honest. RP 467, 538-39.

The prosecutor's question to the girls' mother specifically references the possibility that her daughters would falsely accuse Steenhard. RP 467. She answered, "They're going to tell the truth. They're not going to lie." RP 467. The State claims this comment avoids the prohibition on witness opinions on credibility because it referred to what the girls might say in their forensic interview, not the trial. Brief of Respondent at 23. This argument amounts to mere semantics. The mother's testimony was a direct comment on the girls' credibility, specifically as it pertained to their accusations against Steenhard. It is an explicit opinion on the credibility of another witness, an implicit opinion on guilt, both of which violate the constitutional

right to a jury trial. State v. Montgomery, 163 Wn.2d 577, 590-91, 594, 183 P.3d 267 (2008); State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

The comments from the mother's friend are no better. Again, the prosecutor specifically asked about their honesty. RP 538-39. "Is she an honest girl" is a direct question asking for an opinion on the credibility of another witness.

Contrary to the State's argument, this testimony is utterly unlike the testimony in Kirkman, 159 Wn.2d at 929-30, and State v. Warren, 134 Wn. App. 44, 52, 138 P.3d 1081 (2006). Brief of Respondent at 20-22. The mother and her friend in this case did not testify that the girls knew the difference between the truth and a lie, which is a question of competency to testify. They did not testify the girls had promised to tell the truth, which the jury knows every witness does as he or she is sworn in. They testified these girls were honest people. RP 467, 538-39. That is a direct comment on their credibility.

State v. Madison, 53 Wn. App. 754, 760-63, 770 P.2d 662 (1989), also does not help the State's argument. In that case, the defense argued it was improper opinion to describe the child's masturbation behavior as "typical of a sex abuse victim." This is analogous to the comments in Kirkman about whether the child's statements were consistent with each

other or with the lack of physical findings. Kirkman, 159 Wn.2d at 929, 932, and the permissible expert testimony expressly approved of in Montgomery, 163 Wn.2d at 592-93 (expressing approval of expert opinion phrased in terms of whether a given history is consistent with clinical findings). The witness in Madison did not directly state that the child was honest. 53 Wn. App. at 760.

The opinion testimony in this case was manifest constitutional error. The girls' testimony and statements were the only evidence against Steenhard. The truth or falsity of their accusations was the only issue the jury had to decide. But the jury's deliberations on that issue were unfairly influenced by the girls' own mother and her friend offering improper opinions on their credibility. The improper opinion testimony requires reversal of Steenhard's convictions.

3. THE INSTRUCTION REGARDING CORROBORATION OF THE ALLEGED VICTIMS' TESTIMONY IS DISFAVORED, AMOUNTS TO A COMMENT ON THE EVIDENCE, AND SHIFTS THE BURDEN OF PROOF.

Over defense objection, the jury was instructed, "it shall not be necessary that the testimony of the alleged victims be corroborated." CP 25. This instruction is disfavored by recent Washington law, amounts to an unconstitutional judicial comment on the evidence, and subtly shifts the

burden of proof by suggesting testimony of other witnesses not subject to this instruction may require corroboration.

The State relies on State v. Galbreath, 69 Wn.2d 664, 419 P.2d 800 (1966). Brief of Respondent at 35-37. But Galbreath does not justify giving the disfavored instruction in this case. First, in Galbreath, the instruction was superfluous and could not really have made a difference because the child's testimony was, in fact, corroborated. 69 Wn.2d at 670. Second, even in that case, the court acknowledged that without express reference to the burden of proof, "we cannot, therefore, commend it as a model instruction." Id. Finally, in the more than five decades since Galbreath, our courts have expressed further disapproval of instructions such as the one given here. State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015); State v. Johnson, 152 Wn. App. 924, 936-37, 219 P.3d 958 (2009); State v. Zimmerman, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005), rev. granted, cause remanded on other grounds, 157 Wn.2d 1012, 138 P.3d 113 (2006).

The State is simply incorrect in claiming that it is "only the WPIC Committee" that has reservations about this instruction. See Brief of Respondent at 37 n. 16. In Zimmerman, Division Two of this Court declared, "[W]e share the Committee's misgivings." Zimmerman, 130 Wn. App. at 182-83. In Division One, Judge Becker expressed her concern in State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015), declaring

in her concurrence, “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. A different panel² of Division Two in Johnson also shared the concern for this instruction, stating, “Without this specific inclusion, the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim’s credibility.” Johnson, 152 Wn. App. at 936-37.

The plain language of the instruction also shifts the burden of proof by singling out the complaining witness’ testimony for special consideration. CP 25. Although there were many other witnesses at trial, including Steenhard and his friends and family, the jury was not told whether any of their testimony required corroboration or not. The “non-corroboration” instruction was not included in the general instructions regarding assessing witness credibility, but was instead included in a separate instruction pertaining only to the “alleged victims.” CP 11, 25. From this format, a reasonable juror could conclude that corroboration was implicitly required for other witnesses, and that only the alleged victims were exempt. This is not, as the State argues, “personal preference,” (Brief of Respondent at 40), but a reasonable interpretation of the plain language of the jury instructions.

² The opinion in Zimmerman was authored by Judge Quinn-Brintnall, joined by Judges Morgan and Bridgewater. The Johnson opinion was authored by Judge Penoyar, joined by Judges VanDeren and Bridgewater.

This instruction suggested that the jury's assessment of the complaining witness' credibility was to be gauged by a different standard than that of other witnesses. CP 11, 25. This was an improper judicial comment on the evidence that subtly shifted the burden of proof. Whether viewed alone or taken in combination with the improper opinion testimony discussed above, the no-corroboration instruction also requires reversal of Steenhard's convictions.

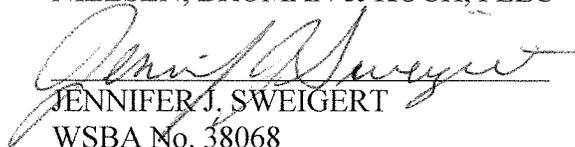
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Steenhard asks this Court to reverse his convictions and instruct the trial court to dismiss the rape of a child charge with prejudice.

DATED this 14th day of September, 2018.

Respectfully submitted,

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