

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 JAN 10 3:46

NO. 68675-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

EBRIMA SUSOHOR,

Appellant.

REC'D

JAN 10 2013

King County Prosecutor
Appellate Unit

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

The Honorable Andrea Darvas, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's jury instruction defining violation of a court order was an unconstitutional comment on the evidence because it indicated to the jury that there was a victim of a sexual assault. CP 92 (Instruction 17).

2. The trial court's jury instruction listing the elements of violation of a court order was an unconstitutional comment on the evidence because it indicated to the jury that there was a victim of a sexual assault. CP 93 (Instruction 18).

Issue Pertaining to Assignments of Error

Article IV, section 16 of Washington's constitution forbids judges from commenting on the evidence. The charges before the jury were two counts of rape of a child and one count of violation of a court order. In the instructions regarding violation of a court order, the court twice referred to the victim of a sexual assault. Were these instructions an unconstitutional comment on the evidence because the reference to the victim of a sexual assault necessarily assumed a rape occurred?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Ebrima Susohor with two counts of second-degree rape of a child and one count of misdemeanor violation of a sexual assault protection order. CP 9-10. The State also

alleged the aggravating factor that the child was particularly vulnerable. CP 9-10. The jury found Susohor guilty on all three counts and answered yes to the special verdict forms regarding the aggravating factor. CP 99-103. The court found imposed an indeterminate sentence with an exceptional minimum of 160 months and a maximum of life. CP 111.

2. Substantive Facts

Susohor is a native of Gambia. 2RP¹ 413-14. Although he understands English, it is not his native language and he speaks with a heavy accent. 2RP 421, 429, 453-55. In 2009, he was 21 years old and had been married for three years. 2RP 424; 10RP 767. During his time in the United States, Susohor worked as a caregiver for an in-home care agency and received training on caring for people with disabilities. 7RP 336-41. But by 2009, he had only a part time job and was collecting unemployment. 8RP 468.

He lived in Renton with his wife and her daughter A.R.C., then age 12 and diagnosed with autism. 2RP 425-26. A.R.C.'s mother testified she was usually a sweet and happy child, but she was frustrated and angry about being different. 10RP 752, 758. A.R.C.'s mother testified Susohor got

¹ There are 13 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 4-5, 2012; 2RP – Jan. 11, 2012; 3RP – Jan. 12, 2012; 4RP – Jan. 17, 2012; 5RP – Jan. 11, 24, 2012; 6RP – Jan. 25, 2012; 7RP – Jan. 25, 2012 (cont'd); 8RP – Jan. 31, 2012; 9RP – Feb. 1, 2012; 10RP – Feb. 2, 6, 2012; 11RP – Feb. 7, 2012; 12RP – Feb. 8, 2012; 13RP – Mar. 30, 2012.

along well with A.R.C., who called him “dad.” 10RP 767-79. During a brief marital separation in 2008, her mother testified, A.R.C. missed Susohor very much. 10RP 785-86.

On Valentine’s Day 2009, the Susohor learned his wife was pregnant with his first child. 10RP 781-82. A.R.C. reacted strongly. She told her mother she was angry about the pregnancy. 10RP 792-93. She hit Susohor. 10RP 792. She told her mother she did not want the baby to live. 10RP 795.

In July 2009, A.R.C.’s mother had to be checked into the hospital due to complications with the pregnancy. 10RP 801-02. Susohor stayed home to care for A.R.C. 10RP 803. Two days later, while he and A.R.C. were visiting her mother in the hospital, police arrested him and told him he was accused of raping A.R.C. 8RP 465.

Susohor adamantly denied any misconduct with A.R.C. 8RP 466, 468. He told police he could not understand why she would say something like that. 8RP 466. He said that the night his wife went into the hospital, A.R.C. slept in bed with him because she was scared. 8RP 466. He explained that it happened regularly, about every couple of weeks, that A.R.C. would be scared at night and climb into bed with Susohor and her mother. 8RP 466.

Susohor explained that, although he was not raised to do so, he made an effort to be physically affectionate with his step-daughter so he could be a

good father to her. 2RP 427; 8RP 467. He explained they routinely hugged, kissed, and cuddled, but he never did anything sexual or inappropriate. 2RP 427. He explained that A.R.C. slept in bed with him while her mother was in the hospital because she was feeling insecure. 2RP 427.

Police pressed Susohor for a reason why A.R.C. would accuse him. 8RP 468. He told the detective maybe A.R.C. was jealous or she and her mother were only pretending to like him to get child support. 8RP 468. He admitted he did not currently have a job, while his wife had worked full time throughout their relationship. 8RP 468. The detective told Susohor A.R.C. would be having a medical examination and asked him how he would explain it if his semen were found in her vagina. 8RP 468. He answered it would not surprise him because she may have had intercourse with him while he was asleep, or stimulated him manually, taken the semen and put it in her vagina. 8RP 468-69, 473-74. He told the detective he was a heavy sleeper, and his wife often had sex while the other was sleeping. 8RP 469, 474-75. His wife denied this in her testimony. 10RP 854-55.

Several witnesses testified A.R.C. suffered from developmental delays. Her Fifth grade special education teacher explained she was at least three years behind in math, and her reading comprehension was at a First or Second grade level. 2RP 371-72. She had been taught in school about good and bad touching, but A.R.C. had missed at least half of the instruction, and

the teacher did not know how much of it she understood. 2RP 383-84. The teacher testified Susohor sometimes picked A.R.C. up from school and knew she was in the special education program. 2RP 399.

Dr. Beverly Cartwright evaluated A.R.C. when she was 10 and diagnosed her with pervasive developmental disorder and mild mental retardation. 6RP 233, 246. She testified A.R.C. has significant deficits in her ability to communicate and pick up social cues. 6RP 233. She testified that in 2007 she met with all of A.R.C.'s caregivers, including Susohor, to discuss her issues and needs. 6RP 250.

Cartwright testified A.R.C.'s language use is bizarre; she often gives answers completely unrelated to the context of the question. 6PR 241. This tendency to answer a different question than the one asked was confirmed by A.R.C.'s special education teacher. 2RP 400. Cartwright also testified A.R.C. has a tendency to mimic and repeat both language and bodily movements of people around her. 6RP 297-98. Cartwright explained A.R.C. repeats in order to give the impression of understanding when in fact she does not. 6RP 299-301. She also testified A.R.C. sometimes gives farfetched answers when she does not understand a question. 6RP 306-07.

Dr. Carl Koschmann, who examined A.R.C. in the emergency room testified she told him "saliva came from penis yesterday morning it was long and stringy and inside me." 5RP 193. Koschmann testified A.R.C.

answered “yes” to his questions regarding whether there had been contact between Susohor’s penis and her vagina, his penis and her anus, his hand and her vagina, his hand and her anus, her hand and his penis, his mouth and her breast. 5RP 191. She told him she was not threatened with harm, but she was restrained and did not feel safe to sleep. 5RP 189-90. The nurse practitioner who conducted a follow up exam several days later testified A.R.C. said her stepfather touched her crotch area all over and she couldn’t get him out of her head. 9RP 704.

Megan Inslee from the Washington State Patrol Crime Lab testified that a pair of purple underwear tested positive for sperm and semen. 2RP 272-73. The panties, size extra large 14/16, were found on the family’s master bedroom floor. 2RP 287. The sperm portion of the DNA profile was from a single male source that matched Susohor. 2RP 277-278. She testified the chances of the source being an unrelated individual were one in 180 billion. 2RP 278. The non-sperm portion was predominantly from A.R.C., with a trace of an unknown third person. 2RP 278. The tag did not specify whether the underwear were adult or child size, but A.R.C.’s mother testified they were too small for her and belonged to A.R.C. 10RP 818-19.

A.R.C. testified Susohor was in jail because he touched her in the wrong way. 8RP 558-59. She testified the touching was both inside and outside her private part and her butt. 8RP 564-68. She testified his private

part went inside her more than one night. 8RP 572-73. She testified he told her to “suck it” but she did not know what he was talking about. 8RP 575. A.R.C. also testified that even before this happened, she did not like Susohor. 8RP 577. She described him as rude and mean. 8RP 577.

A.R.C.’s mother testified that the second time Susohor and A.R.C. came to visit her in the hospital, A.R.C.’s demeanor was different. 10RP 805. She was wearing clothes her mother thought she had put away because they were too small. 10RP 805. She seemed nervous and exhausted. 10RP 805. She wouldn’t make eye contact and refused to sit next to Susohor. 10RP 805. A.R.C.’s mother immediately pulled her into the bathroom for a private conversation, then sent Susohor home on a false errand, and called the police. 10RP 808-09. A.R.C.’s mother testified she has not seen Susohor since, and the couple are now divorced. 10RP 816.

A.R.C.’s paternal grandfather accompanied A.R.C. to the sexual assault examination, and brought her home with him afterwards because her mother was still in the hospital. 9RP 663-64, 667. When he got to the hospital, he observed A.R.C. was not herself; she did not smile or communicate as usual. 9RP 662, 664. That night, for the first time he could remember, she came into his bedroom in the middle of the night saying she was scared. 9RP 668. She could not go to sleep until he put her on an air mattress at the foot of his bed with the lights on. 9RP 668.

Two days later Susohor's baby son was born. 10RP 813. A.R.C.'s grandfather testified that after the baby was born, the whole family was very happy and A.R.C.'s glow came back. 9RP 669. A.R.C.'s mother testified that initially, A.R.C. said the baby looked like Susohor and did not want to hold him. 10RP 814. However, she eventually warmed up to the baby. 10RP 814.

The State also presented exhibit 39, a sexual assault protection order restricting Susohor from contacting A.R.C. either directly or indirectly or via third parties. 8RP 491-92. The order was issued August 3, 2009. 8RP 492. A.R.C.'s mother testified Susohor sent letters containing greetings for her, the new baby, and A.R.C. dated November of 2009. 8RP 499; 10RP 817. One letter stated, "Hi, [A.R.C.]. How are you doing? And your little brother? Happy Thanksgiving. Daddy!" 10RP 819.

Jury instruction 17 defined violation of a court order:

A person commits the crime of violation of a court order when he or she knows of the existence of an order issued for the protection of a sexual assault victim, and knowingly violates: restraint provisions of the order prohibiting contact with a protected party or a provision of the order excluding the person from a residence or school or a provision of the order prohibiting the person from knowingly coming within or remaining within a specified distance of a location.

CP 92 (emphasis added). Jury instruction 18 listed the elements of the offense that must be proved:

To convict the defendant of the crime of violation of a court order as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about a time intervening between December 2, 2009 and December 9, 2009, there existed an order for the protection of a victim of sexual assault applicable to the defendant;

CP 93.

C. ARGUMENT

THE JURY INSTRUCTIONS COMMENTED ON THE EVIDENCE BY ASSUMING THE EXISTENCE OF A SEXUAL ASSAULT VICTIM.

Article 4, section 16 of the Washington Constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This provision prohibits a judge from instructing the jury “that matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (citing, State v. Primrose, 32 Wn. App. 1, 3, 6, 645 P.2d 714 (1982)).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). “All remarks and observations as to the facts before the jury are positively prohibited.” State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478, 483 (2009) (quoting State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963)). But a comment on the evidence is especially problematic when it conveys an opinion regarding the truth or falsity of evidence produced at trial or relieves the prosecution of its burden

of proof. See Bogner, 62 Wn.2d at 250; Primrose, 32 Wn. App. at 2-4 (instruction that defendant had produced no evidence of lawful excuse for failure to appear was tantamount to directed verdict)).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Errors in jury instructions are reviewed de novo. Id. at 721. Here, reversal is required because the jury instruction assumed the existence of a sexual assault victim, thereby indicating to the jury that the trial judge believed A.R.C.'s testimony was true.

An instruction that assumes any material fact is true or untrue is an unconstitutional comment on the evidence. See, e.g., Levy, 156 Wn.2d at 721-22 (references to victim's address as a building and to crowbar as a deadly weapon improperly suggested these elements of burglary charge were met); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (instruction appeared to resolve material fact of victim's birth date); State v. McDonald, 70 Wn.2d 328, 330, 422 P.2d 838 (1967) (instruction that evidence was presented of escape assumed fact of escape as true and was prohibited comment on the evidence). Regardless of the judge's intention, any remark that has the potential effect of suggesting the jury need not consider an element of the offense is a prohibited comment. Levy, 156 Wn.2d at 721. The jury instructions in this case were forbidden comments

on the evidence because they assumed the facts of a sexual assault and a victim, thereby improperly conveying a belief that A.R.C. was telling the truth. CP 92-93.

An instruction describing a prior incident as a “rape” is an unconstitutional comment on the evidence because it conveys to the jury that the judge believes the complaining witness. State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998), abrogated on other grounds by State v. DeVincentis, 150 Wn. 2d 11, 74 P.3d 119 (2003). Dewey was charged with third degree rape against K.B. and contended the sexual intercourse was consensual. 93 Wn. App. at 52. The trial court granted the State’s motion to present evidence from an earlier rape case involving A.N.R. for the limited purposes of determining whether the incident with K.B. was consensual and whether it was part of a common scheme or plan. Id. at 53. Just before A.N.R. took the stand, the trial judge read a defense-proposed limiting instruction. Id. at 54. But at the conclusion of the evidence, the court used the State’s instruction, which referred to the prior incident as a “rape.” Id. at 54.

On appeal, the court agreed the concluding instruction was an unconstitutional comment indicating the judge believed A.N.R. was telling the truth. Id. at 58. The court explained, “[t]he ‘incident’ would only become a ‘rape’ if A.N.R.’s testimony were believed.” Id. at 59. Therefore,

the instruction permitted the jury to infer the trial court believed A.N.R.'s testimony was true. Id. The court reversed Dewey's conviction. Id.

Similarly, in this case, the issue before the jury was whether a rape occurred. The instructions referring to the victim of a sexual assault implied that the rape described by A.R.C. had occurred. CP 92-93. The instructions here commented on the evidence even more directly than in Dewey because the instructions here did not refer to a prior incident. The only sexual assault the instruction could possibly have referred to were the two counts of rape of a child at issue in the trial.

The drafters of the pattern jury instructions were evidently aware of the potential for unconstitutional comment on the evidence, because the comment to WPIC 36.51 recommends, "If there has not yet been a conviction, the word "victim" should be replaced with a more neutral term such as "complainant" or "protected party." 11 Washington Practice: Washington Pattern Jury Instructions – Criminal WPIC 36.51 (2008). The court should have used a more neutral term in this case, rather than giving an instruction that assumed the existence of a sexual assault victim.

Judicial comments on the evidence are presumed prejudicial. Levy, 156 Wn.2d at 725. This presumption exists because the very purpose of prohibiting judicial comments is to prevent the trial judge's opinion from influencing the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929

(1995). The Supreme Court has explained, “the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.” Id. (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Reversal is mandated unless the record affirmatively shows no prejudice could have resulted. Jackman, 156 Wn.2d at 745 (reversible error where court’s instructions referenced victims’ birth dates, an uncontested but critical element of the crime).

The evidence here was not so overwhelming that no prejudice could have resulted. There was no physical evidence of the offense; the only evidence was A.R.C.’s testimony and her statements to others. The defense cast doubt on her statements by pointing out her animosity towards Susohor, particularly as regards the new baby, as well as her tendency to mimic the language of others and respond with far-fetched stories when she did not understand something. 6RP 297-301, 306-07; 10RP 792-95. This was a credibility contest with significant potential that the jury was influenced by instructions assuming that a sexual assault occurred. Susohor’s convictions should be reversed.

D. CONCLUSION

Because jury instructions 17 and 18 violated article IV, section 16 of the Washington Constitution prohibiting judicial comments on the evidence, Susohor's conviction should be reversed.

DATED this 10th day of January, 2013.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 68675-5-I
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EBRIMA SUSOHOR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EBRIMA SUSOHOR
 DOC NO. 355752
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF JANUARY 2013.

X *Patrick Mayovsky*