

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

IN RE DETENTION OF MYOUNG PARK,  
  
STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
MYOUNG PARK,  
  
Appellant.

2009 APR 22 PM 4: 11

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

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

The Honorable Bryan E. Chushcoff, Judge

09 APR 24 AM 11: 20  
STATE OF WASHINGTON  
BY *[Signature]*

FILED  
COURT OF APPEALS  
DIVISION II

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT ERRED IN PROHIBITING THE JURY FROM CONSIDERING RELEVANT EVIDENCE ON THE ISSUE OF WHETHER PARK WAS LIKELY TO COMMIT FUTURE ACTS OF PREDATORY SEXUAL VIOLENCE.

The State claims the outdated WPIC instruction given to the jury was "legally sufficient" because it followed the wording of RCW 71.09.060(1). Brief of Respondent (BOR) at 1, 3-6. An instruction that follows the words of a statute is improper when the statutory language is misleading or not reasonably clear. Borromeo v. Shea, 138 Wn. App. 290, 294, 156 P.3d 946 (2007). Park's argument is precisely that the statutory language used in Instruction 6 is misleading and unclear. It is undisputed that the jury was entitled to consider all evidence relevant to the issue of risk of reoffense, not just the evidence specified in RCW 71.09.060(1).

The words of the statute are misleading or at best ambiguous when converted into a jury instruction limiting the type of evidence the jury may consider in deciding the issue of risk of reoffense. WPIC 365.14 was changed due to the committee's realization that the statutory language, when reproduced verbatim as a jury instruction without qualifying language, could be interpreted by the jury in a manner that misstates the law. Comment to WPIC 365.14.

Even if Instruction 6 did not plainly prohibit the jury from considering other relevant evidence on risk of reoffense, it could be interpreted as doing so and is thus fatally flawed. Jury instructions "must more than adequately convey the law. They must make the relevant legal standards manifestly apparent to the average juror." State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008) (quoting State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007)). Instruction 6 fails this standard. Instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). It may be possible to interpret Instruction 6 in a manner consistent with the law, but that is not good enough.

Cases involving defective self-defense instructions that limit the ability of the jury to consider all relevant facts in deciding a specific issue are the most closely analogous to Park's case. In LeFaber, the Supreme Court reversed conviction based on a single WPIC instruction that could be interpreted as a misstatement of the law and thus failed to make the law of self-defense manifestly clear to the jury. Id. at 898, 902. The instruction could be erroneously interpreted as requiring a finding of actual imminent harm to conclude the defendant's actions were reasonable. Id. at 899-901. The instruction could also be correctly interpreted as

allowing the jury to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant. Id. The instruction thus permitted two reasonable interpretations, one an accurate statement of the law and one erroneous. Id. at 900. Ambiguity in the grammatical structure was fatal to the outcome. Id. 902-03. Although a juror could read the instruction "to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading." Id.; see also State v. Wanrow, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977) (reversal required where instruction setting forth the law of self-defense erroneously directed jury to consider only those acts and circumstances occurring "at or immediately before the killing"; correct instruction needed to tell the jury it could consider all facts and circumstances known to defendant); State v. Allery, 101 Wn.2d 591, 593, 594-95, 682 P.2d 312 (1984) (reversal required where jury instruction adequately conveyed reasonableness standard for self-defense but omitted a direction to consider all surrounding circumstances, thereby failing to make that standard manifestly clear).

The State attempts to distinguish LeFaber and Wanrow on the ground that the instructions in those cases did not accurately state the law.

BOR at 6. The State provides no reasoned analysis of why Park's case is different.

Like the defendants in LeFaber and Wanrow, Park was deprived of his right to have the jury consider all the facts relevant to a central issue in the case in reaching its verdict. But the instruction here is even more misleading than those in LeFaber and Wanrow. Those instructions misled the jury by implication. They did not affirmatively tell the jury it could only consider certain evidence in determining an issue. The omission of clarifying language in those instructions allowed for a legally improper interpretation.

In contrast, the instruction in Park's case affirmatively told the jury what evidence it could consider to the wrongful exclusion of other evidence. Use of the word "only" in Instruction 6 resulted in an affirmative misstatement of the law. Although a juror could read Instruction 6 "to arrive at the proper law, the offending sentence lacks any grammatical signal compelling that interpretation over the alternative, conflicting, and erroneous reading." LeFaber, 128 Wn.2d at 902-03. On the contrary, the grammatical signal in Instruction 6 compels the erroneous interpretation. Given that jurors are presumed to follow the court's instructions absent evidence to the contrary, it follows the jury in

Park's case applied an incorrect law to the facts. State v. Montgomery, 163 Wn.2d 577, 596, 183 P.3d 267 (2008).

The State also claims the instructions as a whole clearly state the law because generalized instructions elsewhere refer to consideration of all the evidence. BOR at 6-8. But when faced with a specific command to limit the type of evidence to be considered on a particular issue and generalized instructions to consider all the evidence in reaching a verdict, a jury is likely to treat the specific command on a specific issue as trumping the generalized instructions to consider all the evidence in reaching a verdict. The two propositions are not even mutually exclusive. A jury could consider all the evidence in relation to other issues, but still follow Instruction 6's directive to only consider certain evidence in relation to the issue of whether Park was likely to reoffend.

The State also asserts the instruction was proper because it allowed defense counsel to argue his theory of the case. BOR at 1, 3, 8-12. But "[a] legally erroneous instruction cannot be saved by the test for sufficiency." LeFaber, 128 Wn.2d at 903. The test of whether an instruction allows a party to argue its theory of the case is an additional safeguard to be applied only where the instruction itself is an accurate statement of the law. Wanrow, 88 Wn.2d at 237.

Furthermore, jurors were instructed to disregard arguments and statements of counsel that were not supported by the law as explained by the trial court. CP 16 (Instruction 1). Defense counsel's ability to refer in closing argument to evidence barred from consideration by Instruction 6 did nothing to rehabilitate the misstatement of the law contained in that instruction.

Reversal is required because the instruction violated Park's right to present a complete defense and forced the jury to base its verdict on speculation rather than proof beyond a reasonable doubt. An erroneous jury instruction is presumed to be prejudicial and is grounds for reversal unless it can be shown that the error was harmless. Ezell v. Hutson, 105 Wn. App. 485, 492, 20 P.3d 975 (2001). For the reasons set forth in the opening brief, the error cannot be considered harmless and the State fails to overcome the presumption of prejudice.

B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the verdict.

DATED this 21<sup>st</sup> day of April, 2009.

Respectfully Submitted,

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STATE OF WASHINGTON/DSHS )  
Respondent, )  
v. ) COA NO. 37617-2-II  
MYOUNG PARK, )  
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 22<sup>ND</sup> DAY OF APRIL, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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COURT OF APPEALS  
DIVISION II  
09 APR 24 AM 11:20  
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BY Patrick Mayovsky  
REPLY

**SIGNED** IN SEATTLE WASHINGTON, 22<sup>ND</sup> DAY OF APRIL, 2009.

x Patrick Mayovsky