

COURT OF APPEALS
DIVISION II

00 MAY 11 AM 11:28

STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 38018-8-II

STATE OF WASHINGTON,

Respondent.

vs.

BARRY DRAGGOO

Appellant.

STATE'S RESPONSE BRIEF

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
Law and Justice Center
345 W. Main St. 2nd Floor, MS: PROO1
Chehalis, WA 98532
360-740-1240

By:

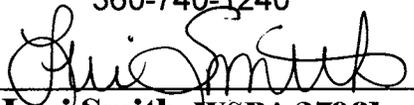

Lori Smith, WSBA 27961

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION WHEN IT DENIED DRAGGOO’S MOTION
FOR A MISTRIAL DUE TO ALLEGED WITNESS
MISCONDUCT.....1**

**B. THE JURY INSTRUCTIONS ADEQUATELY
INFORMED THE JURY THAT IT HAD TO BE UNANIMOUS
AS TO THE AGGRAVATING SENTENCING
FACTORS.....8**

CONCLUSION.....1

TABLE OF AUTHORITIES

Cases

<u>Heartsill v. State</u> , 341 P.2d 625 (Okl. Cr. App. 1959)	2
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	2, 3, 5
<u>State v. Cardenas</u> , 129 Wn.2d 1, 914 P.2d 57 (1996)	9
<u>State v. Condon</u> , 72 Wn.App. 638, 865 P.2d 521 (1993)	3
<u>State v. Davis</u> , 141 Wn.2d 798, 10 P.3d 977 (2000)	8
<u>State v. Harstad</u> , 17 Wn. App. 631, 564 P.2d 824 (1977) <i>review denied</i> , 89 Wn.2d 1013 (1978).....	2
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989)	3
<u>State v. Johnson</u> , 124 Wn.2d 57, 873 P.2d 514 (1994).....	3
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	1
<u>State v. Miles</u> , 73 Wn.2d 67, 436 P.2d 198 (1968)	2
<u>State v. Murawski</u> , 139 Wn.App. 587, 161 P.3d 1048 (2007)	8
<u>State v. Post</u> , 59 Wn.App. 389, 797 P.2d 1160 (1990), <i>aff'd</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992).....	2
<u>State v. Price</u> , 126 Wn.App. 617 109 P.3d 27 (2005).....	8
<u>State v. Rodriguez</u> , 146 Wn.2d 260, 45 P.3d 541 (2002)	1
<u>State v. Taylor</u> , 60 Wn.2d 32, 371 P.2d 617 (1962)	2
<u>Storey v. Storey</u> , 21 Wn.App. 370, 585 P.2d 183 (1978).....	2

Statutes

RCW 9.94A.537	9
---------------------	---

FEDERAL CASES

<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	8
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).....	8

STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DRAGGOO'S MOTION FOR A MISTRIAL DUE TO ALLEGED WITNESS MISCONDUCT.

A reviewing court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). Trial courts are required "to grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Additionally, the reviewing court will overturn a denial of a mistrial only when there is a substantial likelihood that the error prompting the motion for a mistrial affected the jury's verdict. Rodriguez, 146 Wn.2d at 270. Draggoo must therefore show a substantial likelihood that State's witness Kristi Draggoo's alleged misconduct affected the jury's verdict.

In general, witness misconduct involves a witness providing intentionally inadmissible and unsolicited testimony or engaging in

extraordinary conduct likely to prejudice the jury. State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997)(trial spectator made a gesture mimicking a gun in the presence of jury); State v. Taylor, 60 Wn.2d 32, 371 P.2d 617 (1962)(police witness intentionally injected prejudicial information at trial for a second time); State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968)(officer testified that defendant was coming to duplicate a robbery he had committed); Storey v. Storey, 21 Wn.App. 370, 585 P.2d 183 (1978)(witness intentionally injected impermissible testimony to influence the jury), *review denied*, 91 Wn.2d 1017 (1979); State v. Harstad, 17 Wn. App. 631, 564 P.2d 824 (1977) *review denied*, 89 Wn.2d 1013 (1978)(witness cried and embraced one of the defendants); Heartsill v. State, 341 P.2d 625 (Okl. Cr. App. 1959)(defendant's wife became upset and made derogatory comments about her husband in the presence of jury).

However, such "irregularities" in trial proceedings is grounds for reversal only when the conduct is so prejudicial that it deprives the defendant of a fair trial. See State v. Post, 59 Wn.App. 389, 395, 797 P.2d 1160 (1990), *aff'd*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992); State v. Harstad, 17 Wn.App.at 638 (without prejudice occurring, witness misconduct does not require a

mistrial). In determining whether such irregularity deprived a defendant of a fair trial, the reviewing court should analyze the following factors: (1) the seriousness of the irregularity, (2) whether the statement or behavior in question was cumulative of other evidence properly admitted, and (3) whether the trial court properly instructed the jury to disregard it. State v. Condon, 72 Wn.App. 638, 647, 865 P.2d 521 (1993); State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997), citing State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) .

The irregularities complained of in this case were not so serious as to warrant a mistrial. The defendant claims that witness Kristi Draggoo committed misconduct and “communicated her opinion of guilt to the jury” when she testified that (1) the Defendant was “the sperm donor on” her last two children, (2) when she testified that when she questioned her daughters about abuse, “neither one of them knew about the other,” and (3) when from the witness stand she turned towards the Defendant and silently “mouthed” the word “asshole.” But categorizing this conduct as “communicating her opinion of guilt to the jury” is a stretch. First of all, there was no objection to the “sperm donor” remark. RP 216.

Secondly, none of these “irregularities” seem very serious to the State. For example, the State does not know how calling the Defendant the “sperm donor” of her two children showed that Kristi Draggoo was communicating her opinion of the Defendant’s guilt to the jury. Indeed, given how often people hear or read about “sperm donors” these days--in the context of reproductive technology--it just does not seem likely that the jury would have been “shocked” by the use of the term or that the jury would give the words such a negative connotation as urged by the Defendant. And surely the jury would not have taken such a leap to think that the Defendant being referred to as a “sperm donor” meant that he was guilty of the charged crimes.

The next “irregularity” or misconduct claimed by the Defendant in regards to Kristi Draggoo’s testimony is that she violated the court’s pretrial order that she could not talk about incidences of abuse against any other child when she said, “I asked them both together. And come to find out, neither one of them knew about each other. . .” RP 223. But unlike cases where a witnesses pointedly interjected evidence of prior convictions, as in some of the cases referenced above, Kristi Draggoo’s comment in this regard was ambiguous at best. The entire exchange went like this:

Q. After you asked him to leave, did you approach your daughters again?

A. Yeah, I did.

Q. And tell me how that went.

A. Actually, I asked them both together. And come to find out, neither one of them knew about the other. . .

RP 223. Defense counsel immediately objected and requested a mistrial and a hearing was conducted outside the presence of the jury. RP 223, 224. The Defendant claims that this exchange made it “crystal clear to the jury that the defendant had also molested his other daughter and that his other daughter had revealed this at the same time D.E. revealed this fact. The State thinks the Defendant is making too much of this—and so did the trial court. The trial court correctly denied the motion for a mistrial, noting, “[t]hat statement is fairly innocuous. It can be interpreted a lot of different ways. I can give a limiting instruction or I can ignore it, and I’ll give you that option, Mr. Blair. But I’m not going to grant a mistrial on this.” RP 226. Thus, the trial court properly addressed the “seriousness of the irregularity” and also stated that it would give a limiting instruction if defense counsel so desired. Id., See, State v. Bourgeois, supra. Defense counsel decided not to do so.

Lastly, we have the conduct by Kristi Draggoo in which she “mouthed” profanity in the direction of the defendant. While the

court reporter noticed this, there is no evidence that the jury saw this conduct. See RP 217, where the court reporter noted parenthetically of Kristi Draggoo that the “witness turns head toward the Defendant and inaudibly mouthed a comment.” Again, this was done silently, and there is no evidence that the jury saw the witness exhibit this conduct. Indeed, this incident brings to mind the previously-cited Heartsill case, in which the defendant’s wife became upset and made some derogatory comments about the defendant in the presence of the jury. In finding that the defendant there had not shown that he was prejudiced by the behavior, the Heartsill Court observed,

[i]t was in no way proven that the juror heard what was purportedly said, but was presented on the basis of sheer speculation. Unless we go into the thin air of metaphysics for inspiration, and indulge in rank speculation, we cannot find that the jury heard the remarks, much less was influenced by them. The burden of proof is on the defendant to show that the jurors heard the remarks and were influenced by them to the defendant’s prejudice. The defendants have not met the burden in this regard. . .

Id. at 636. The same is true here. Draggoo has not shown that the jury actually saw his wife “mouth” a curse word towards him. And if the jury did not see Kristi’s conduct, then it follows that it could not have been affected by it. Even the Defendant’s counsel at trial apparently did not notice Kristi Draggoo mouthing a curse

word at the time it happened. Defense counsel said, “[i]was my understanding initially that she had said that to my client on her way out. That’s not correct. She actually said it to him on the stand with the jury present.” RP 228. So, Kristi’s silent act was not noticeable enough for defense counsel to have seen it when it actually occurred.

Nonetheless, Defense counsel moved for a mistrial due to Kristi Draggoo’s alleged misconduct. The trial court denied the motion, noting, “[i]t’s my understanding that, in reviewing what happened, that she [Kristi] mouthed the word, hadn’t said it out loud. I didn’t see it. . . . [T]he court reporter did see it. I don’t know if anybody else saw it.” RP 228, 229. Thus, while Ms. Draggoo’s behavior was crude and disrespectful to the Court, it is doubtful that the jury noticed that Ms. Draggoo silently called the Defendant a nasty name. In this way the conduct could not have affected the jury’s verdict. Accordingly, the Defendant has not shown that he was prejudiced by this irregularity. The trial court’s denial of the mistrial should be upheld.

B. THE JURY INSTRUCTIONS ADEQUATELY INFORMED THE JURY THAT IT HAD TO BE UNANIMOUS AS TO THE AGGRAVATING SENTENCING FACTORS.

Draggoo claims that the jury instructions pertaining to the aggravating sentencing factors were improper because, according to Draggoo, there was no “unanimity” instruction as to the aggravating factors. The State disagrees.

Draggoo did not object to the jury instructions. However, an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal. State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). The standard of review is *de novo* for alleged errors of law in a trial court’s instructions to the jury. State v. Price, 126 Wn.App. 617, 646, 109 P.3d 27 (2005).

For the purposes of Sixth Amendment analysis, following Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), an aggravating factor does not constitute a separate crime but, rather, constitutes an element of an “enhanced” sentence for the underlying offense. See State v. Murawski, 139 Wn.App. 587, 595, 161 P.3d 1048 (2007). Thus, just as the jury must be instructed to unanimously find that the elements of the

crime charged were proved beyond a reasonable doubt, so must the jury be instructed to unanimously find that the aggravating factor was proved beyond a reasonable doubt. Blakely, 542 U.S. at 301. Additionally, RCW 9.94A.537 provides, in pertinent part, “[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” Furthermore, a reviewing court will affirm the sentence if it finds any exceptional factor valid. See State v. Cardenas, 129 Wn.2d 1, 12, 914 P.2d 57 (1996).

In the present case the State alleged three aggravating factors: (1) the Defendant committed multiple instances of abuse over a prolonged period of time and (2) the Defendant abused his position of trust to facilitate the crime (3) the offense involved a family or household relationship. See Appendix B,C, & D. In addition to the three special verdict forms containing a question for each aggravator, the jury was given the following unanimity instruction as to the aggravators:

You will also be given special verdict forms for the crimes of Child molestation in the First Degree as charged in counts I to VII. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of any count of Child Molestation in the First

Degree, you will then use the special verdict form with the corresponding letter and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no.” If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 85(emphasis added); See also Appendix A. The jury also answered a special interrogatory for each of the three aggravator in the form of a special verdict form —writing in “yes” for each one. See Appendix B,C & D. Specifically, these special interrogatories on each special verdict form posed the following questions to the jury:

- Form A [Appendix B]: Was the offense of Child Molestation in the First Degree as charged in Count I part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time? ANSWER: yes.
- Form A1 [Appendix C]: Did the offense of Child Molestation in the First Degree as charged in County I involve a family or household relationship and was the offense part of an ongoing pattern of sexual abuse of the victim manifested by multiple incidents over a prolonged period of time? ANSWER: yes.
- Form A2[Appendix D]: Did the defendant, Barry Royce Draggoo, use his position of trust or confidence to facilitate the commission of the crime of Child Molestation in the First Degree as charged in Count I? ANSWER: yes.

Thus, as seen by reading these instructions and the three answered special verdict forms (Appendix A, B, C & D), it is clear that the jury was instructed that it had to be unanimous when answering the three special verdict forms--one for each aggravator. Accordingly, the unanimity requirement was fulfilled. Additionally, the trial court noted that it would have imposed the same sentence had just one of the aggravators been found by the jury. 7/9/08 RP 15(the trial court stating “[m]y finding is that any one of these three would justify and support the sentence that I’m imposing today”).

Draggoo further argues that the jury needed to be unanimous on the aggravating factors as to the “times and places” where the defendant acted from a position of trust, and that the jury was not unanimous on the other aggravators because “they might well have disagreed on which acts were proven and disagreed on what period of time they occurred.” Draggoo Brief at 28. But Draggoo does not cite any cases that stand for the propositions he advances regarding unanimity of aggravating factors such as those found here.

Furthermore, Draggoo’s argument as to the abuse of trust aggravator seems nonsensical to the State--what difference would it have made whether Draggoo abused his position of trust while his

wife was at work or when the victim was below school age?

Draggoo Brief 29. The fact of the matter is that Draggoo abused his position of trust every time he sexually abused his stepdaughter in this case—regardless of precise times or places. But the important thing to focus on here is that the jury was told it had to be unanimous when it answered the questions on each special verdict form. Appendix A-D. And, there was a separate special verdict form setting out the question to be answered for each of the three aggravators—all were answered “yes” by the jury. See Appendix B,C,D.

Moreover, the trial court noted the following when it imposed the exceptional sentence in this case:

The fact that there was only a finding of guilty on one does not preclude a finding of this—of these aggravating circumstances. That could be found, even if there is only one case charged. I am satisfied and the jury was satisfied that there was evidence to prove the ongoing pattern of abuse over a prolonged period of time and that is the basis. Also, they found that the defendant used his position of trust or confidence to facilitate the commission of the crime. As a parent, that is the —as Mr. Hayes stated, the ultimate abuse of trust. My finding is that any one of these three would justify and support the sentence that I’m imposing today.

* * *

I do take into account and am considering the fact that there was a conviction of one count and that the jury did not convict him on the others. That is part of

my consideration in imposing the sentence that I'm imposing here today.

07/09/08 RP 14,15,16 (emphasis added). The point is that the trial court made it clear that it would have imposed the same exceptional sentence even if only one aggravating factor had been found by the jury.

Accordingly, this Court should find that the instructions as to unanimity on the aggravating factors were adequate, and should affirm Draggoo's conviction in all respects. On other other hand, should this Court find that the unanimity instruction pertaining to the "abuse over a prolonged period of time" was defective, this Court should nonetheless affirm the exceptional sentence because the trial court made it clear it would impose the same sentence even if the jury had found just one of the aggravators.

CONCLUSION

The trial court did not abuse its discretion when it denied Draggoo's motion for a mistrial. The complained-of remark by witness Kristi Draggoo was minor and vague and surely could not be construed by the jury as an "opinion as to guilt" as claimed by the Defendant. Nor is it likely that the jury saw Kristi Draggoo turn in the direction of the Defendant and silently "mouth" a derogatory

term at him. Because it is highly unlikely that any of this conduct affected the jury's verdict, none of this conduct warranted a mistrial, and this Court should so find.

Draggoo's claim that there was no unanimity instruction given to the jury as to the three sentencing aggravators is also misplaced. In fact, a unanimity instruction as to the aggravators was provided to the jury, along with three special verdict forms setting out the required interrogatory for each aggravator. Each interrogatory was answered "yes" by the jury. Accordingly, this Court should find that the jury instructions and verdict forms as to the aggravating sentencing factors were all adequate. Furthermore, this Court should consider the trial court's finding that it would have imposed the same exceptional sentence even if just one of the aggravators had been found by the jury.

Based upon the foregoing facts and argument, this Court should affirm the convictions and sentence in all respects.

RESPECTFULLY submitted this 8th day of May, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By: 
LORI ELLEN SMITH, WSBA 27961
Deputy Prosecuting Attorney

No. 21

You will also be given special verdict forms for the crimes of Child Molestation in the First Degree as charged in count I to VII. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of any count of Child Molestation in the First Degree, you will then use the special verdict form with the corresponding letter and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS COUNTY

Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAY 15 2008

STATE OF WASHINGTON, Plaintiff,

No. 07-1-00498-4

By Kathy A. Brack, Clerk

vs.

SPECIAL VERDICT FORM A

Deputy

BARRY ROYCE DRAGGOO, Defendant.

We, the jury, answer the question submitted by the court as follows:

QUESTION: Was the offense of Child Molestation in the First Degree as charged in Count I part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time?

ANSWER: yes [Write "yes" or "no"]

DATED this 15 day of May, 2008.

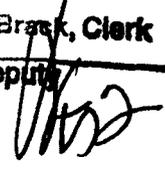
Don J. Spiller
PRESIDING JUROR

Received & Filed
LEWIS COUNTY, WASH
Superior Court

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS COUNTY

MAY 15 2008

STATE OF WASHINGTON, Plaintiff,)
)
 vs.)
)
 BARRY ROYCE DRAGGOO, Defendant.)

No. 07-1-00498-4 By Kathy A. Brack, Clerk
Dep. 
SPECIAL VERDICT FORM A1

We, the jury, answer the question submitted by the court as follows:

QUESTION: Did the offense of Child Molestation in the First Degree as charged in Count I involve a family or household relationship and was the offense part of an ongoing pattern of sexual abuse of the victim manifested by multiple incidents over a prolonged period of time?

ANSWER: yes [Write "yes" or "no"]

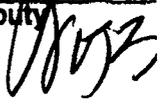
DATED this 15 day of May, 2008.


PRESIDING JUROR

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS COUNTY

MAY 15 2008

STATE OF WASHINGTON, Plaintiff,)
)
 vs.)
)
 BARRY ROYCE DRAGGOO, Defendant.)

No. 07-1-00498-4 By Kathy A. Brack Clerk
Deputy 

SPECIAL VERDICT FORM A2

We, the jury, answer the question submitted by the court as follows:

QUESTION: Did the defendant, Barry Royce Draggoo, use his position of trust or confidence to facilitate the commission of the crime of Child Molestation in the First Degree as charged in Count 1?

ANSWER: yes [Write "yes" or "no"]

DATED this 15 day of May, 2008.


PRESIDING JUROR

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
 vs.)
)
 BARRY DRAGGOO)
 Appellant.)
 _____)

NO. 38018-8-II

DECLARATION OF MAILING

BY _____
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
MAY 11 2009
CLERK OF COURT

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: on 5/8/09 I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

John A. Hays
1402 Broadway
Suite 103
Longview, WA 98632

Dated this 8th day of May, 2009, at Chehalis, Washington.

Lori Smith
Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent