

NO. 38264-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

GERMAINE D. CARTER,

Appellant.

COURT OF APPEALS
DIVISION II
09 APR 21 PM 10:56
STATE OF WASHINGTON
BY *Ker*
DEPUTY

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

1/17/2014 11:07

TABLE OF CONTENTS

TABLE OF CONTENTS	I
TABLE OF AUTHORITIES	II
A. ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
B. STATEMENT OF THE CASE	2
A. CHILD HEARSAY HEARING	3
B. TRIAL TESTIMONY	6
C. CLOSING ARGUMENTS	10
C. ARGUMENT	14
1. THE COURT’S INSTRUCTIONS DID NOT ADEQUATELY INFORM THE JURY IT HAD TO FIND A SEPARATE AND DISTINCT ACT FOR EACH OF THE IDENTICALLY CHARGED COUNTS, AND THE RESULTING CONVICTIONS VIOLATE DOUBLE JEOPARDY.....	14
2. IMPROPER ADMISSION OF UNRELIABLE CHILD HEARSAY DENIED CARTER A FAIR TRIAL	22
3. THE PROSECUTOR’S UNSUBSTANTIATED REMARK DURING REBUTTAL ARGUMENT IMPLYING THAT CARTER WAS A MURDERER REQUIRES REVERSAL.....	26
D. CONCLUSION	32

TABLE OF AUTHORITIES

Washington Cases

<u>City of Kennewick v. Day</u> , 142 Wn.2d 1, 11 P.3d 304 (2000).....	24
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	21
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988)	27
<u>State v. Berg</u> , 147 Wn. App. 923, 198 P.3d 529 (2008)..	14, 16, 17, 18, 19, 20, 21
<u>State v. Borsheim</u> , 140 Wn. App. 357, 165 P.3d 417 (2007) .	14, 16, 17, 21
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	31
<u>State v. Clausing</u> , 147 Wn.2d. 620, 56 P.3d 550 (2002).....	21
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	31
<u>State v. Ellis</u> , 71 Wn. App. 400, 859 P.2d 632 (1993).....	15, 18, 19, 20
<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788, <u>review denied</u> , 130 Wn.2d 1013 (1996).....	14, 21
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>review denied</u> , 124 Wn.2d 1018 (1994).....	28
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	28
<u>State v. Neidigh</u> , 78 Wn. App. 71, 895 P.2d 423 (1995)	31
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991)	28
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	27, 30, 31
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984)	5, 22
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993)	28, 29, 32
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	26
<u>State v. Woods</u> , 154 Wn.2d 613, 114 P.3d 1174 (2005).....	22, 23

State v. Young, 62 Wn. App. 895, 802 P.2d 829 (1991)..... 25

Federal Cases

Berger v. United States, 295 U.S. 78, 79 L. Ed. 2d 1314, 55 S. Ct. 629
(1934)..... 27

Reed v. General Motors Corp., 773 F.2d 660 (5th Cir. 1985). 32

Statutes

RCW 9A.44.073..... 3

RCW 9A.44.120..... 22

Rules

RAP 2.5(a) 15

Constitutional Provisions

Const. art. I, § 22 (amend. 10) 27

U.S. Const. Amend VI..... 27

U.S. Const. amend. V..... 14

Wash. Const. art. I, § 9..... 14

A. ASSIGNMENTS OF ERROR

1. The court's instructions failed to inform the jury that each conviction had to be based on a separate and distinct act, violating appellant's right to be free from double jeopardy.

2. Improper admission of unreliable child hearsay denied appellant a fair trial.

3. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with four counts of rape of a child in the first degree occurring within the same charging period. The court's instructions did not make it manifestly apparent to the jury that each conviction must be based on a separate and distinct act, however. Where the court's instructions exposed appellant to multiple punishments for the same offense in violation of constitutional double jeopardy protections, must three of his convictions be vacated?

2. The trial court erroneously admitted testimony about the complaining witness's out of court allegations, despite concerns that the circumstances did not indicate the statements were reliable, based on its conclusion that the child witness who heard the allegations was testifying truthfully. Where this erroneous admission of unreliable child hearsay

likely affected the jury's verdict, must appellant's convictions be reversed?

3. During rebuttal, the prosecutor responded to the defense argument that the child's claim that she yelled during the abuse was not credible by telling the jury that appellant would have killed the child if she had yelled. Where there was no evidence to support this accusation aimed at the heart of the defense, does the prosecutor's personal assurance of appellant's guilt require reversal?

B. STATEMENT OF THE CASE

A.C. is a troubled child who has had a very difficult life. 3RP¹ 304; 5RP 399, 401. Her mother was a drug addict who was unable to care for her, and A.C. was moved around to live with various family members. 3RP 277. In 2003, when she was six years old, A.C. was placed with her father, Germaine Carter. 3RP 279. Carter had worked to obtain custody, and CPS placed A.C. and her brother with him when he established a stable home. 3RP 301. A.C. lived with Carter until September 2004. 3RP 281.

Almost three years later, Carter was charged with four counts of first degree rape of a child based on recently-made allegations by AC. CP

¹ The Verbatim Report of Proceedings is contained in nine volumes, designated herein as follows: 1RP—5/6/08; 2RP—5/13/08; 3RP—5/14/08; 4RP—5/15/08 (a.m.); 5RP—5/15/08 (p.m.); 6RP—5/19/08; 7RP—5/20/08; 8RP—5/22/08; 9RP—9/5/08.

1-2; RCW 9A.44.073. The case proceeded to jury trial in Pierce County Superior Court before the Honorable Thomas J. Felnagle. The parties agreed AC was competent to testify, and the State called her as a witness at trial to repeat her allegations to the jury. 1RP 4; 2RP 157. Nonetheless, the State also sought to present statements she had made to a friend prior to her 10th birthday concerning the alleged sexual contact. CP 11-19.

a. Child Hearsay Hearing

At the hearing, 12-year-old A.S. testified that A.C. is one of her best friends, and they have known each other about three years. 1RP 54. When A.C. was nine years old, she was spending the night with A.S. A.S. noticed that A.C. seemed sad, so she asked her what was wrong. A.C. would not tell her, so A.S. started guessing about what could be making A.C. sad. 1RP 57. A.S. asked if A.C. was mad at her, or if something had happened at home. 1RP 57. A.C. responded that it was something about her dad, that he kind of did something to her. A.C. would not say what he had done, so A.S. kept guessing what it could be, eventually asking A.C. if he had raped her. A.C. said no. 1RP 58.

A.C. did not explain anything, so A.S. kept guessing. Eventually A.C. said, "He stuck something in me." 1RP 58. A.S. then asked if it was his private or his finger. 1RP 58. A.C. did not say where he stuck it, so A.S. kept guessing, suggesting "her mouth, her butt, her other part." 1RP

58. A.C. finally indicated he stuck his “weiner” in “her butt.” 1RP 58-59. A.C. did not say how many times this happened, and she did not tell A.S. anything her dad had said about it. 1RP 59. She did tell A.S. not to tell anyone, however, saying her family already knew. 1RP 55, 61.

A.S. then testified that some months later, after A.C. turned 10, the girls were in the car with A.C.’s grandmother, Jo Aerni, when A.C. mentioned that she loves her dad. A.S. asked why she would love him after what he did to her. 1RP 61. When Aerni heard A.S.’s question, she asked what he had done. A.C. refused to answer, so A.S. repeated A.C.’s earlier allegations to Aerni. 1RP 61.

A.C. also testified at the hearing. She said she had talked to her best friend A.S. about what her dad had done, and that her grandmother later became aware of it when she was in the car with the girls. 1RP 71-72. Aerni confirmed that in May 2007, she heard a conversation between the girls in which A.S. asked A.C. how she could miss her dad. Aerni asked what they were talking about, but A.C. would not tell her anything. She asked A.S. to do it, so A.S. said, “He put his weiner in her butt hole.” 1RP 82. Aerni also testified that she has talked to A.C. about truth and lies, and she seems to understand the difference. 1RP 84.

The defense argued that A.C.’s out of court statements did not meet the requirements for admissibility under the child hearsay statute.

First, the conversation with the grandmother did not qualify because A.C. did not make any statements, and she was over the statutory age requirement at the time in any event. 1RP 89. Counsel argued that the conversation with A.S. was not sufficiently reliable, because A.C. did not spontaneously make any disclosures but only agreed to A.S.'s suggestions. 1RP 89-90.

The court noted that this case was a little unusual in that it needed to determine not only whether the declarant, A.C., was reliable, but also whether A.S. was reliable. 1RP 92. Applying the *Ryan*² factors, the court found nothing suggesting either girl had a motive to lie. 1RP 92. It found A.C. to be of normal, trustworthy character. 1RP 93.

Next, the court found that no one else heard A.C.'s disclosures to A.S., and A.C. did not make any disclosures to Aerni, but A.C. was present when A.S. repeated the allegations to Aerni, and she did not disagree with them. 1RP 93-64. Thus, although there were not multiple disclosures to multiple people, the court found that the circumstances of A.C.'s statements suggested their reliability. 1RP 94.

As to whether the statements were spontaneous, the court noted that A.C.'s demeanor suggested something was wrong. A.S. pushed the point, played "20 questions" with her, and eventually A.C. agreed to what

² *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

A.S. said. 1RP 95. The court found that A.C.'s naiveté suggested she was unlikely to make up the allegations, but it also gave A.S. the chance to substitute her version of events for A.C.'s statements. 1RP 95.

The court found that the timing and relationship factor strongly weighed in favor of reliability, noting that a sleep over with a best friend is the classic time for a disclosure. 1RP 95. It noted that A.C.'s recollection was not perfect, but it did not seem faulty, and it found no reason to believe A.C. misrepresented Carter's involvement. 1RP 96.

The court believed it was possible A.S. was putting words in A.C.'s mouth. Noting that A.S. was a very strong witness, however, and appeared to be speaking without deception, the court found no reason to believe A.S. was making up the allegations. 1RP 96. The court concluded that overall the circumstances strongly suggested the reliability of both girls, and it ruled A.C.'s statements to A.S. admissible. 1RP 97.

b. Trial Testimony

A.S.'s trial testimony was similar to her testimony at the child hearsay hearing. She explained that she had tried to figure out why A.C. was sad by asking her questions, guessing that A.C.'s father had abused her, and explaining what rape was. 2RP 144-45. A.C. was not very forthcoming during their conversation, and A.S. had to ask a lot of questions. 2RP 151. After about 15 to 20 minutes, A.C. said she thought

her dad had raped her, but she asked A.S. not to tell anyone, because her family already knew. 2RP 146-48.

A.C. testified that about four years earlier, she and her older brother lived with Carter in a big blue house in Tacoma. 2RP 163. When they first moved in, Calina and her two children also lived there. 2RP 163, 169. Later, Melanie and her children moved in. When Melanie was living there, her daughter Alyssa shared a room with A.C. 2RP 165; 6RP 432.

According to A.C., when she was living with her father, there were times when he would come in her room while she was doing homework or sleeping. 2RP 179-80. He would ask her to lie on the floor and pull down her pants. He put his hands on her bottom and started doing stuff, although she did not know what. 2RP 182. He used some lotion and moved back and forth while she was on her knees with her bottom in the air, and part of his body touched her bottom. 2RP 183-85. This happened most nights, and she thinks something went inside her bottom each time. 2RP 186, 190.

A.C. remembered one time when Calina came to the door to tell her father he had a phone call. 2RP 189. Her father put his foot on the door to keep it from opening, and then he got up and told her to go to bed. 2RP 189, 210.

Although A.C. testified that this sometimes happened when Melanie was in the house with her kids, she said that Melanie's daughter Alyssa was never in the room when her dad came in. 2RP 211. She also said that her brother was sleeping in the next room when it happened, but he never heard anything, even though she was yelling. 2RP 211.

There was testimony at trial that A.C. had developed a serious infection from flea bites while she was living with Carter. 3RP 282. A.C.'s aunt took her to the hospital, because she had a rash which hurt when she walked, with some areas open and weeping. 3RP 302; 4RP 380. She was prescribed some cream and some antibiotics. 5RP 404. The infection worsened, and her aunt took her back to the hospital two weeks later. 5RP 407. At that point A.C. had open sores, mostly on her legs, with some lesions on her buttocks and abdomen. 4RP 378; Exhibit 5. A.C. was diagnosed with impetigo and given a stronger antibiotic and more cream. 5RP 408.

Carter had explained when he was questioned by the police that he had had to treat infections on A.C.'s backside when she lived with him. 4RP 342. A.C.'s aunt testified that A.C. did not like the treatment because it stung. 5RP 413, 418.

A.C. did not remember much about her infection or treatment. A.C. remembered only that she had gotten two kittens when she was living

with Carter, and they had trouble with fleas. 2RP 171. She had flea bites all over her, which itched at first and then hurt. 2RP 171-72. A.C. thought she went to the hospital, but she did not know if she was given medicine. 2RP 173. She thought she put cream on the bites to stop the itching, but it did not help much. 2RP 173. She did not remember who put the cream on her. 2RP 174.

A.C. had other memory lapses as well. 2RP 212. For instance, A.C. testified that she started living with Carter when she was in second grade, and she thought she lived with him for two to three years. 2RP 198. She was in fifth grade at the time of trial, however, and she had been living with her grandmother for almost four years. 2RP 198-99.

A.C. also said she did not remember a time when she was crying in class and she told her teacher that her grandmother had been shot to death. 2RP 204-05. Aerni testified, however, that A.C. had had a meltdown at school and tried to run away. She was crying inconsolably, and when her teacher asked what was wrong, she said her grandmother had been shot, which was clearly not true. 3RP 284-85, 305-06.

In September 2004, A.C. was removed from Carter's home. She lived with her aunt for a few months and then was placed with her grandmother. 3RP 283. A.C. was living with Aerni when she became friends with A.S. 3RP 286. After Aerni heard the allegations of abuse

from A.S., she called the police, and a detective made arrangements for a forensic interview and a medical exam. 3RP 292, 294-95.

Although she appeared nervous and uncomfortable during the interview, A.C. repeated the allegation that her father had raped her. 3RP 253, 267; Exhibit 3. A.C. made no disclosures of abuse during the physical exam. 4RP 367-68. She had an extreme reaction when placed in the prone knee-to-chest position during the exam, but there were no physical findings to corroborate the allegations of sexual abuse. 4RP 370-71.

c. Closing Arguments

The prosecutor argued that all the elements of first degree rape of a child listed in the to-convict instructions had been established by the evidence. 7RP 501-07. He then pointed out that all the to-convict instructions contained the same language. 7RP 509. Although the prosecutor told the jury it had to agree to a separate incident for each count, he could only identify one specific incident, the time when Calina came to the door, from the evidence. 7RP 509. He focused the rest of his argument on issues of credibility, arguing that A.C. and A.S. were credible witnesses. 7RP 510-516.

Defense counsel argued that A.C. was remembering the pain associated with treatment of her infection, which she either mistakenly

reported as rape due to A.S.'s suggestive questions, or deliberately misrepresented as a way to get attention. 7RP 531-33. Counsel reminded the jury of the previous incident when A.C. had lied about her grandmother being shot and her attempt to keep the story of abuse from going further by telling A.S. not to talk about it because her family already knew. 7RP 531, 533. Counsel pointed out several inconsistencies between A.C.'s various statements which called her testimony into question. 7RP 537-52. He argued that A.C.'s discomfort during the forensic interview and on the witness stand, as well as her inability to provide significant details, suggested that there was no truth to her allegations. 7RP 530, 537-42.

Counsel drew the jury's attention to the fact that A.C. had said during a defense interview that she was usually yelling during the abuse, but no one heard her. When asked about that statement on cross examination at trial, she denied that she was yelling, but then agreed she had said that in the interview. Then she changed her testimony and said she was yelling. 2RP 211; 7RP 547. Counsel argued that this vacillation, as well as the improbability that no one heard her yelling in the middle of the night, cast serious doubts on A.C.'s credibility. 7RP 547.

In rebuttal, the prosecutor argued,

The defense makes a big deal about screaming, about how [A.C.'s] screams would have been heard by other people in the house. Well, here's one thing we do know: [A.C.] said that it was hurting, and at one point, she said that she didn't say that she was screaming. I'm sure she wanted to scream, and she may have thought that she was making more noise than she was, and she might have screamed at one point. What do you think the defendant did if she would make any noise? You know how concerned he was about anybody finding out about this. Do you think that he would have stood for that, and as he's anally raping her, if she lets out noise, do you think she would still be breathing? She was scared.

7RP 571. Defense counsel immediately objected to the improper argument, and the court sustained the objection. 7RP 571. The prosecutor then continued, "She said it was painful. And as you might imagine, she was making as much noise as her dad would allow her to make, and if she made it one decibel higher than that, she would have felt the consequences." 7RP 571.

The jury returned guilty verdicts on all four counts, and Carter moved for a new trial based on prosecutorial misconduct. CP 76-79, 80-83. Defense counsel argued that even if the prosecutor's remark was inadvertent, it was so prejudicial as to require a new trial. The prosecutor impeached the testimony of his own witness by implying that Carter would have killed his daughter rather than letting her make any noise. 9RP 4. There was no evidence to support this comment, which was tantamount to raising an uncharged crime. Moreover, the remark was so

inflammatory that it could not have been cured by an instruction from the court. 9RP 8.

The prosecutor responded that he did not intend for his argument to come out like it did. He only wanted to make the point that Carter was in control of the situation, and A.C. made as much noise as he allowed her to make. 9RP 6.

The court agreed that the prosecutor's impermissible argument constituted misconduct. 9RP 8. It stated, however, that there was no reason to disbelieve the prosecutor's claim that he did not intend to suggest Carter was a killer. 9RP 9. The court believed, from listening to the argument at the time, that this impermissible remark was not highlighted for the jury, as there was no dramatic pause where the prosecutor suggested Carter was a murderer. 9RP 9. Although the jury could have reasonably concluded that the prosecutor was suggesting Carter would have killed his daughter, the court found the remarks were not particularly inflammatory in the way they were made. 9RP 9.

The court stated that since child rape is a serious violation to begin with, it did not think the jury would be horrified by the prosecutor's argument. 9RP 10. Moreover, since the court had sustained the defense objection, and the jury was instructed that arguments of counsel are not evidence, the court found there was not a substantial likelihood the

prosecutor's misconduct affected the verdict. 9RP 10. It denied the motion for a new trial. 9RP 10.

The court imposed a sentence of 318 months to life, the high end of the standard range calculated with all four convictions. CP 100, 103. Carter filed this timely appeal. CP 93.

C. ARGUMENT

1. THE COURT'S INSTRUCTIONS DID NOT ADEQUATELY INFORM THE JURY IT HAD TO FIND A SEPARATE AND DISTINCT ACT FOR EACH OF THE IDENTICALLY CHARGED COUNTS, AND THE RESULTING CONVICTIONS VIOLATE DOUBLE JEOPARDY.

The constitutional right to be free from double jeopardy protects a defendant against multiple punishments for the same offense. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008); U.S. Const. amend. V; Wash. Const. art. I, § 9. To ensure that double jeopardy is not violated when a defendant faces multiple identically-charged counts, the court's instructions must make it manifestly apparent to the jury that each conviction must be based on a separate and distinct act. Berg, 147 Wn. App. at 931-32; State v. Borsheim, 140 Wn. App. 357, 368, 165 P.3d 417 (2007); State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996). The court's instructions in this case

failed to ensure that Carter was not punished multiple times for the same offense, in violation of his double jeopardy protections.

As an initial matter, while Carter did not object to the instructions below, he can challenge the instructions on appeal because his claim raises an issue of constitutional magnitude. See RAP 2.5(a); State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (similar double jeopardy claim was constitutional in magnitude and therefore reviewable despite defendant's failure to object to instructions at trial).

The court below instructed the jury as follows:

To convict the defendant of the crime of rape of a child in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period between the 10th day of December, 2003, and the 10th day of December, 2004, the defendant had sexual intercourse with A.C.;

(2) That A.C. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than A.C.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 68 (Instruction 11). The to-convict instructions for Counts II, III, and IV were identical to this instruction, except for the designation of the Count number. CP 69-71 (Instructions 12, 13, 14).

The court also instructed the jury regarding the unanimity requirement:

There are allegations that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

CP 72 (Instruction 15).

In addition, the court instructed the jury that “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.”

CP 64 (Instruction 7).

Identical³ instructions were held insufficient to protect against double jeopardy in State v. Berg. As the Court of Appeals explained in that case, jury instructions ““must more than adequately convey the law. They must make the relevant legal standards manifestly apparent to the average juror.”” Berg, 147 Wn. App. at 931 (quoting Borsheim, 140 Wn. App. at 366). Unless it is manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense, the defendant’s right to be free from double jeopardy may be violated. Berg, 147 Wn. App. at 931. Thus, “where multiple counts of sexual abuse are

³ The only difference was the crime charged: child molestation in Berg; rape of a child here.

alleged to have occurred within the same charging period, an instruction that the jury must find ‘separate and distinct’ acts for convictions on each count [is] required.” Berg, 147 Wn. App. at 931-32 (citing Borsheim, 140 Wn. App. at 368).

The Berg Court held that nothing in trial court’s instructions required the jury to base each conviction on a separate and distinct underlying event. Berg, 147 Wn. App. at 935. It compared the case to two previous cases.

First, in Borsheim, the defendant was charged with four counts of first degree rape of a child, and the court gave a single to-convict instruction listing each count. Borsheim, 140 Wn. App. at 364-65. Although the instruction set out the elements the State was required to prove as to each count, it did not inform the jury that it must find a separate and distinct act for each count. Borsheim, 140 Wn. App. at 367. Moreover, the court’s instructions on unanimity and that a separate crime was charged in each count did not cure the defect. The instructions as a whole failed to inform the jury that each crime required proof of a different act, and vacation of three of the four convictions was required. Borsheim, 140 Wn. App. at 370-71.

Although the trial court in Berg had given separate to-convict instructions, the Court of Appeals held that the reasoning and rule applied

in Borsheim required reversal in that case as well. Because the trial court did not give a “separate and distinct” instruction and did not otherwise require the jury to base each conviction on a separate and distinct act, the defendant was potentially exposed to multiple punishments for a single act. The court remanded for vacation of one of the two convictions. Berg, 147 Wn. App. at 935.

Next, the Berg Court discussed State v. Ellis. In that case, the defendant was charged with two counts of first degree child molestation and two counts of first degree rape of a child. Ellis, 71 Wn. App. at 401. The trial court gave four separate to-convict instructions. The instructions for counts I and II, the two counts of child molestation, listed the same elements and charging period, but the instruction for count II also informed the jury that that crime had to have been committed “on a day other than Count I”. Ellis, 71 Wn. App. at 402. The instructions for the rape charges listed separate dates during which the crimes were committed. Ellis, 71 Wn. App. at 402. The court also instructed the jury that a separate crime was charged in each count and gave the following unanimity instruction:

Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.].

Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

Ellis, 71 Wn. App. at 402.

The defendant was convicted on all four counts, and he argued on appeal that the instructions failed to inform the jury that it had to rely on a separate and distinct act for each conviction. Ellis, 71 Wn. App. at 403. The Court of Appeals disagreed, finding the instructions marginally adequate. Ellis, 71 Wn. App. at 406-07. The court believed that the ordinary jury would understand that when two similar crimes are charged, each count requires proof of a different act. The court also noted, however, that the jury was affirmatively instructed that it had to agree that at least one particular act was proved for each count. Ellis, 71 Wn. App. at 406-07.

The Berg court distinguished Ellis, noting that the to-convict instructions in Ellis contained language distinguishing the counts. Thus, taken together with the unanimity instruction which informed the jury, "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count," the instructions as a whole conveyed to the jury the requirement that each conviction be based on a separate and distinct act. Berg, 147 Wn. App. at 936. The to-convict instructions in Berg, unlike those in Ellis, did not distinguish between the

counts. Thus, the “for any count” language in the unanimity instruction did not alone adequately protect against double jeopardy. Berg, 147 Wn. App. at 936.

The reasoning applied in Berg applies equally in this case. Although the trial court gave four separate to-convict instructions, these instructions did not distinguish between the counts in any way. CP 68-71. The same time period was described in each instruction, and unlike in Ellis, the instructions did not inform the jury that each conviction had to be based on a crime committed on an occasion separate from the other counts. See Ellis, 71 Wn. App. at 402. While the unanimity instruction informed the jury that “[t]o convict the defendant on any count..., one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt”⁴, this instruction alone did not adequately protect Carter against double jeopardy. See Berg, 147 Wn. App. at 936.

In Berg, the State argued that there was no double jeopardy violation because the State presented evidence of separate acts for each conviction and the prosecutor argued in closing that the jury had to agree that two particular acts occurred. Berg, 147 Wn. App. at 935. The Court of Appeals rejected this argument, pointing out that the double jeopardy violation resulted from inadequate instructions, not failure in the State’s

⁴ CP 72.

proof or argument. Berg, 147 Wn. App. at 935. As in Berg, the State's evidence and argument in this case did not cure the double jeopardy violation caused by the court's deficient instructions. Although the prosecutor told the jury it had to agree to a separate incident for each count, he could only identify one specific incident from the evidence. 7RP 509. In any event, it has long been recognized by Washington courts that "[t]he jury should not have to obtain its instruction on the law from arguments of counsel.' Rather, it is the judge's 'province alone to instruct the jury on relevant legal standards.'" Berg, 147 Wn. App. at 935-36 (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995), and State v. Clausing, 147 Wn.2d. 620, 628, 56 P.3d 550 (2002)).

Because the offenses in this case were identically charged, the court was required to affirmatively instruct the jury "that they are to find 'separate and distinct acts' for each count." See Hayes, 81 Wn. App. at 431. Without this instruction, Carter was potentially exposed to multiple punishments for a single act in violation of double jeopardy protections, and three of his convictions must be vacated. See Berg, 147 Wn. App. at 935; Borsheim, 140 Wn. App. at 370-71.

whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. Ryan, 103 Wn.2d at 175-76. Although not every factor need be established, this test must be substantially satisfied for the child's hearsay statements to be admissible. Woods, 154 Wn.2d at 623-24.

In this case, A.S. testified at the child hearsay hearing that A.C. seemed sad when she was spending the night at A.S.'s house. Because A.C. would not say what was bothering her, A.S. kept "guessing" what it might be, suggesting possibilities until eventually A.C. agreed that she thought her dad had raped her. 1RP 57-59. In analyzing the reliability of A.C.'s statements, the court noted that no one else heard the statements, and there was no evidence of multiple disclosures to multiple people. 1RP 93-94. The court could not say the statements were spontaneous, because A.C. was merely agreeing with what A.S. said. 1RP 94. Moreover, the court noted that while A.C.'s naiveté suggested it was unlikely she was making the accusations up, it also left her susceptible to suggestion, and the court found it was possible A.S. was putting words in A.C.'s mouth. 1RP 95-96.

Although the court recognized there were concerns with the reliability of A.C.'s statements, it justified admission of those statements on the basis that A.S. was a strong witness who did not appear to be lying to the court. 1RP 96-97. The court stated that it had never seen a witness A.S.'s age who was as strong a witness as she was. The court continued,

She appeared to be speaking without deception, very straightforward, articulate, bright. There wasn't anything at all under the totality of the circumstances that suggested she was making it up. And the way she said it just had a logical flow to it, such that it seemed to describe how you would expect a reticent nine-year-old who is – has undergone something like this to react in relation to someone who's a friend trying to get her to disclose.

1RP 96.

It was error for the court to find that A.S.'s credibility as a witness outweighed the unreliability of A.C.'s statements. In ruling on the admissibility of child hearsay statements, the court must determine whether the time, content, and circumstances *of the statements* provide sufficient indicia of reliability. RCW 9.44.120. Instead, the court below focused on whether the witness to the statements accurately reported them. The court's decision was based on a misapplication of law and constitutes an abuse of discretion. See City of Kennewick v. Day, 142 Wn.2d 1, 15, 11 P.3d 304 (2000) (misapplication of law is abuse of discretion).

The issue for the court was not whether A.S. testified truthfully to what A.C. said. That credibility determination was for the jury to make if

A.S.'s testimony about the statements was properly admitted. The question the court had to resolve was whether the circumstances demonstrated that A.C.'s statements were reliable. The fact that A.S. was a good witness who did not appear to be deceiving the court was irrelevant to that question.

As the court recognized, several factors called the reliability of A.C.'s statements into question, most notably, the extremely suggestive nature of the interrogation which led to the disclosures. Unlike a professional interviewer who is trained to ask open ended questions, A.S. continued to suggest answers to her questions until she got A.C. to agree to one of her suggestions. A.C. did not supply any details spontaneously but instead played along with her friend's game of 20 questions. See e.g. State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991) (child's statements are not spontaneous if the product of leading or suggestive questions). The fact that A.S. was acting out of concern for her friend does not render A.C.'s statements reliable. Regardless of her intent, as the court found, there was a very real likelihood A.S. was putting words into A.C.'s mouth. Under these circumstances, the court erred in admitting A.C.'s statements to A.S.

The erroneous admission of hearsay requires reversal if, within reasonable probabilities, the outcome of the trial would have been

different if the error had not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The court's error in this case was not harmless. As the court below noted, A.S. was a very strong witness. She clearly and articulately described A.C.'s allegations, and she told the jury she was there to support her friend. 2RP 144-48, 150. A.C., on the other hand, was not such a strong witness. She had difficulty answering questions, remembering facts, speaking up, and making eye contact, and much of her testimony was impeached with prior inconsistent statements. 2RP 164, 170, 173, 176, 178-89, 198, 202, 205, 208-15; 6RP 468-76. Moreover, there was no physical evidence corroborating abuse, and evidence of A.C.'s skin infection and treatment provided an alternate explanation for the acts A.C. described. 4RP 371, 390. A.S.'s testimony likely carried great weight with the jury, as it did with the trial court, and it is reasonably probable the improper admission of her testimony tipped the scales as to the verdict. The court's error was not harmless, and Carter's convictions must be reversed.

3. THE PROSECUTOR'S UNSUBSTANTIATED REMARK DURING REBUTTAL ARGUMENT IMPLYING THAT CARTER WAS A MURDERER REQUIRES REVERSAL.

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interests of justice. "It is as much his duty to refrain

from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). A prosecutor who acts as a heated partisan, seeking victory at all costs, violates the duty entrusted to him by the people of the state whom he is supposed to represent. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

Prosecutorial misconduct may deprive the defendant of the right to a fair and impartial trial guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22 (amend. 10). Reed, 102 Wn.2d at 145. A defendant is deprived of a fair trial when there is a substantial likelihood that the prosecutor’s misconduct affected the verdict. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (citing Reed, 102 Wn.2d at 147-48).

The prosecutor committed misconduct in this case when, during rebuttal argument, he told the jury Carter would have murdered his daughter if she had attempted to scream. There was nothing in the record to support this accusation. 9RP 8. While a prosecutor has latitude to express reasonable inferences from the evidence, “a prosecutor may not make statements that are unsupported by the record and prejudice the defendant.” State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993)

(citing State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991)), review denied, 124 Wn.2d 1018 (1994). It is improper for the state, which bears the burden of proof, to argue facts that are not in evidence. Belgarde, 110 Wn.2d at 506-510.

While the trial court acknowledged that the prosecutor's argument was impermissible, it concluded that it was not substantially likely the improper argument influenced the jury. 9RP 8, 10. A trial court's ruling on prosecutorial misconduct is given deference on appeal. State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). But when the appellant establishes that the prosecutor's conduct was both improper and prejudicial, reversal is required. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993).

In Stith, the defendant was charged with delivery of cocaine. Although no evidence was admitted at trial regarding the defendant's prior drug convictions, the prosecutor argued in closing that "[h]e was just -- he was out. He was out of jail for a week and he basically was just resuming his criminal ways. He was just coming back and he was dealing again." Stith, 71 Wn. App. at 16. Defense counsel objected, and the court instructed the jury to disregard any inference about being out on the street and dealing again. Stith, 71 Wn. App. at 16.

Stith was convicted, but the Court of Appeals reversed. The court held the prosecutor's comment was improper because it provided information which had not been entered in evidence, and it expressed the prosecutor's opinion that the defendant was selling drugs and was guilty again as he had been in the past. Stith, 71 Wn. App. at 22. Moreover, even the trial court's strongly worded instruction did not cure the prejudice caused by this flagrantly improper argument. Because the comments clearly reflected the prosecutor's personal assurance of the defendant's guilt, they struck at the very heart of the defendant's right to a fair trial before an impartial jury. "Once made, such remarks cannot be cured." Stith, 71 Wn. App. at 23.

As in Stith, the prosecutor's flagrant misconduct in this case requires reversal. The prosecutor's suggestion that Carter would have killed his daughter if she had yelled not only implied Carter had violent tendencies, information which had been specifically excluded from evidence⁵, but also amounted to a personal assurance by the prosecutor that Carter was guilty. The comment prejudiced Carter's right to a fair trial before an impartial jury. See Stith, 71 Wn. App. at 23.

At the hearing on Carter's motion for a new trial, the court concluded that the improper remark was not prejudicial because there was

⁵ 3RP 308-15.

nothing about the way the remark was made that would draw any attention to it. 9RP 9. The court's memory of the argument is not supported by the record. The record shows that defense counsel immediately objected when the prosecutor argued that Carter would have killed his daughter. 7RP 571. The remark obviously drew attention, as it was presumably designed to do. Reed, 102 Wn.2d at 146 (rejecting argument that improper remarks, presumably made to influence the jury, were probably not listened to by jury).

The court below agreed that the jury could have reasonably understood that the prosecutor was telling them Carter was a killer. The court concluded, however, that given the context of the case, it was unlikely the jury was swayed by that argument. 9RP 9-10. Contrary to the trial court's conclusion, it is the context of the prosecutor's argument which makes it prejudicial.

The prosecutor was attacking the defense theory that A.C.'s accusations could not be believed because her statements were inconsistent and in some cases did not make sense. Specifically, A.C. had said these incidents occurred in the middle of the night, and she was usually yelling, although no one heard her. The prosecutor deflected attention from this improbable claim by the State's complaining witness by making unsubstantiated allegations against Carter. Basically, the

prosecutor told the jury it could ignore this chink in A.C.'s credibility based on the prosecutor's personal assurance that Carter would have killed his daughter if she had screamed. Such improper comments striking directly at the heart of the defense require reversal. See Reed, 102 Wn.2d at 146-47.

This hint that the prosecutor had some information about Carter, that the jury did not, likely carried great weight with the jury. See State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995) (hints of violence, crimes, or other inculcating information kept out of evidence are "out of bounds."). A prosecutor's expression of personal opinion about a defendant is subject to heightened scrutiny because the prosecutor "commands the respect of the people of the county, and usually exercises a great influence upon jurors." State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Professed prosecutorial opinions regarding guilt are especially prejudicial because a prosecutor's argument "carries an aura of special reliability and trustworthiness." State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

Finally, the court below noted that it sustained an objection to the improper argument, and the jury was instructed to disregard inadmissible evidence and that the attorneys' arguments were not evidence. 9RP 10. Even though the jury is presumed to follow the court's instructions,

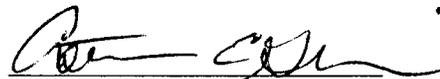
prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. Stith, 71 Wn. App. at 23. “The wisdom of experience is embodied in the aphorism that the scent of a skunk thrown into the jury box cannot be wiped out by a trial court’s admonition to ignore the smell.” Reed v. General Motors Corp., 773 F.2d 660, 664 (5th Cir. 1985). As in Stith, the prosecutor’s personal assurance of Carter’s guilt was flagrant misconduct resulting in prejudice that could not be cured by instruction. Carter’s convictions must be reversed and his case remanded for a new, fair trial.

D. CONCLUSION

The court’s instructions failed to protect Carter’s right to be free from double jeopardy, and three of his convictions must be vacated. In addition, improper admission of child hearsay and prosecutorial misconduct require reversal of the remaining conviction and remand for a new trial on a single count.

DATED this 20th day of April, 2009.

Respectfully submitted,



CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibits and Brief of Appellant in *State v. Germaine D. Carter*, Cause No. 38264-4-II, directed to:

Kathleen Proctor
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
Tacoma, WA 98402-2102

Germaine D. Carter, DOC# 776240
G B 23
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
April 20, 2009

09 APR 21 PM 12:56
STATE OF WASHINGTON
BY  DEPUTY
COURT REPORTERS
DIVISION II