

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.

09 SEP 18 PM 12:51  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

COURT OF APPEALS  
DIVISION II

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

The Honorable Thomas J. Felnagle, Judge

REPLY 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

10-11-11

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... I

**TABLE OF AUTHORITIES** ..... II

**A. ARGUMENT IN REPLY** ..... 1

    1. THE COURT’S INSTRUCTIONS FAILED TO ENSURE THAT CARTER WAS NOT PUNISHED MULTIPLE TIMES FOR THE SAME OFFENSE, IN VIOLATION OF HIS DOUBLE JEOPARDY PROTECTIONS. .... 1

    2. IMPROPER ADMISSION OF UNRELIABLE CHILD HEARSAY DENIED CARTER A FAIR TRIAL. .... 5

    3. THE PROSECUTOR’S UNSUBSTANTIATED REMARK DURING REBUTTAL ARGUMENT IMPLYING THAT CARTER WAS A MURDERER REQUIRES REVERSAL..... 7

**B. CONCLUSION** ..... 10

## TABLE OF AUTHORITIES

### Washington Cases

<u>City of Kennewick v. Day</u> , 142 Wn.2d 1, 11 P.3d 304 (2000).....	7
<u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995).....	4
<u>State v. Berg</u> , 147 Wn. App. 923, 198 P.3d 529 (2008) .....	1, 2, 3, 5
<u>State v. Borsheim</u> , 140 Wn. App. 357, 165 P.3d 417 (2007) .....	1
<u>State v. Clausing</u> , 147 Wn.2d. 620, 56 P.3d 550 (2002).....	4
<u>State v. Ellis</u> , 71 Wn. App. 400, 859 P.2d 632 (1993).....	1, 2, 3, 4
<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788, <u>review denied</u> , 130 Wn.2d 1013 (1996).....	4
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>review denied</u> , 124 Wn.2d 1018 (1994).....	8
<u>State v. Knight</u> , 162 Wn.2d 806, 810, 174 P.3d 1167 (2008).....	5
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991) .....	8
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993) .....	9
<u>State v. Woods</u> , 154 Wn.2d 613, 114 P.3d 1174 (2005).....	6
<u>State v. Young</u> , 62 Wn. App. 895, 802 P.2d 829 (1991).....	6

### Federal Cases

<u>Reed v. General Motors Corp.</u> , 773 F.2d 660 (5 <sup>th</sup> Cir. 1985).....	10
---	----

### Statutes

RCW 9A.44.120.....	5
--------------------	---

### Constitutional Provisions

U.S. Const. amend. V.....	1
---------------------------	---

Wash. Const. art. I, § 9..... 1

A. ARGUMENT IN REPLY

1. THE COURT'S INSTRUCTIONS FAILED TO ENSURE THAT CARTER WAS NOT PUNISHED MULTIPLE TIMES FOR THE SAME OFFENSE, IN VIOLATION OF HIS DOUBLE JEOPARDY PROTECTIONS.

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. Unless the court's instructions to the jury make it manifestly apparent 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; State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007).

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 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 State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993). Even with the unanimity<sup>1</sup> and "separate crime"<sup>2</sup> instructions

---

<sup>1</sup> Instruction 15 provides as follows:

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

given by the court, the instructions as a whole did not adequately protect Carter against double jeopardy. See Berg, 147 Wn. App. at 936.

The State suggests in its brief that this Court should reject Carter's double jeopardy argument because it relies on Berg, a Division One case, arguing that Berg contravenes this Court's holding in Ellis. Br. of Resp. at 24. The State misconstrues Berg. Berg did not announce a different legal standard than applied by this Court in Ellis. Rather, it distinguished Ellis on the facts of that case.

In Ellis, as in this case, the trial court gave four separate to-convict instructions. But in Ellis, unlike here, the instructions made it clear that the jury had to find a separate and distinct act for each count. While the instructions for counts I and II listed the same elements and charging period, 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 other counts listed separate dates during which the crimes were committed. Ellis, 71 Wn. App. at 402. The

---

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.

<sup>2</sup> "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)

court also instructed the jury that a separate crime was charged in each count gave a unanimity instruction. Ellis, 71 Wn. App. at 402.

This Court rejected Ellis's double jeopardy challenge, finding the instructions marginally adequate. Ellis, 71 Wn. App. at 406-07. Considering the separately worded to-convict instructions together with the unanimity instruction, the instructions as a whole adequately conveyed the need for the jury to base its decision on each count on a separate act. Ellis, 71 Wn. App. at 402-06. The court believed that the ordinary jury would understand that when two similar crimes are charged, each count requires proof of a different act. But it also noted 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, while the instructions in Berg did not. While the instructions in Ellis, taken as a whole, conveyed to the jury the requirement that each conviction be based on a separate and distinct act, the same could not be said for the instructions in Berg. Berg, 147 Wn. App. at 936.

As discussed in Appellant's Opening Brief, the facts of this case are comparable to those in Berg and distinguishable from Ellis. See Br. of App. at 16-21. Because the to-convict instructions did not distinguish

between the counts in any meaningful way, the unanimity instruction did not alone adequately protect Carter against double jeopardy. Berg, 147 Wn. App. at 936.

Despite the inadequate instructions, the State argues that there is no possibility Carter's double jeopardy rights were violated, noting that the prosecutor explained in closing argument that the jury must find a separate and distinct act for each count. Br. of Resp. at 27. The jury should not have to obtain its instruction on the law from the arguments of counsel, however. 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)). In any event, the prosecutor could only identify one specific incident from the evidence. 7RP 509. In Ellis, by contrast, the prosecutor identified a separate act for each of the four counts in closing argument. Ellis, 71 Wn. App. at 403.

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 State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996). 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.

Finally, without citation to any authority, the State argues that the proper remedy for violation of Carter's double jeopardy protections is to give the State the option of resentencing Carter on one count or retrying him on all four counts. Br. of Resp. at 27. This Court should reject the State's unsupported argument. It is well established that the appropriate remedy for double jeopardy violations is to dismiss with prejudice the convictions that violate double jeopardy. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008); Berg, 147 Wn. App. at 937; Borsheim, 140 Wn. App. at 371. Because the court failed to ensure that Carter was not punished multiple times for the same offense, three of his convictions must be vacated.

2. IMPROPER ADMISSION OF UNRELIABLE CHILD HEARSAY DENIED CARTER A FAIR TRIAL.

By statute, hearsay statements of a child under the age of ten concerning sexual contact are admissible if the trial court finds the time, content, and circumstances of the statements establish their reliability, and the child testifies at trial. RCW 9A.44.120. Reliability is analyzed

according to the nine factors<sup>3</sup> identified in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). Although not every factor need be established, this test must be substantially satisfied for the child's hearsay statements to be admissible. State v. Woods, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (2005).

The court below recognized that 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. 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). As the court found, there was a very real likelihood A.S. was putting words into A.C.'s mouth.

Nonetheless, the court justified admission of A.C.'s statements on the basis that A.S. was a strong witness who did not appear to be lying to

---

<sup>3</sup> (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) 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.

the court. 1RP 96-97. The court stated that it had never seen a witness of that age who was as strong a witness as A.S. 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.

The question the court before the court, however, was whether the circumstances demonstrated that A.C.'s statements were reliable. See RCW 9.44.120. The fact that A.S. was a good witness who did not appear to be deceiving the court was irrelevant to that question. The court's decision to admit the statements 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).

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

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).

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. 7RP 571.

In its brief, the State suggests that the prosecutor’s remark was not improper but just “inartfully worded.” Br. of Resp. at 32. This Court should reject this argument, as did the trial court. See 9RP 8. The State’s contention that the prosecutor’s remark was an appropriate response to defense counsel’s argument is outrageous.

In his closing argument, defense 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. During cross examination she denied that she was yelling, but she then 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. Rather than responding to defense counsel's argument, as the State claims, the prosecutor was deflecting attention from A.C.'s questionable credibility by making unsubstantiated allegations against Carter, assuring the jury Carter would have killed his daughter if she had screamed. The prosecutor's argument constitutes flagrant misconduct.

Next, the State argues that the fact that defense counsel did not ask for a curative instruction indicates that the defense did not perceive the comment as prejudicial. Br. of Resp. at 32. To the contrary, defense counsel immediately objected to the prosecutor's shocking comment. It is well recognized, however, that prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993). "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 (5<sup>th</sup> Cir. 1985). The prosecutor’s flagrant misconduct resulted in prejudice that could not be cured by instruction, and Carter’s convictions must be reversed.

B. CONCLUSION

For the reasons discussed above, this Court should grant the relief requested in Appellant’s Opening Brief.

DATED this 16<sup>th</sup> day of September, 2009.

Respectfully submitted,



CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

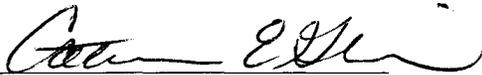
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,  
properly stamped and addressed envelopes containing copies of the Reply 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  
September 16, 2009

FILED  
COURT OF APPEALS  
DIVISION II  
09 SEP 18 PM 12:51  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY