

NO. 39147-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDWIN DAVID CORBETT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 07-1-05938-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant invited error where he proposed or approved the instructions given by the court?
2. Whether the instructions, read as a whole, were sufficient to assure that the jury would find a separate act as basis for each count?
3. Whether the trial court abused its discretion where, as a condition of sentence, it prohibited the defendant from contact with minors?
4. Whether sufficient evidence was presented for the jury to find the defendant guilty of four counts of rape of a child in the first degree?
5. Whether the prosecuting attorney committed misconduct in her rebuttal closing?

B. STATEMENT OF THE CASE.

1. Procedure

On November 26, 2007, the Pierce County Prosecuting Attorney charged Edwin Corbett, hereinafter referred to as the defendant, with four counts of rape of a child in the first degree. CP 112-113. The charges alleged that the acts occurred between April 1 and September 5, 2005. *Id.*

On January 29, 2009, as the case was approaching trial, the State filed an Amended Information, with the same charges, but changing the time period to January 1- August 31, 2005. CP. 16-19.

On February 3, 2009, the trial began before the Honorable Vicki Hogan. RP. At the end of the trial, the jury found the defendant guilty of all four counts of rape of a child in the first degree. CP 49-52. On April 17, 2009, the court sentenced the defendant to 318 months to life in prison. CP 97. The court also ordered crime-related prohibitions. CP 99, 114-116. On the same date, the defendant filed his timely notice of appeal. CP 85.

2. Facts

In March, 2005, Kyla O.¹ married the defendant. RP 264. Kyla had 2 children from a previous marriage, her daughter J.O. and her son D.O.. RP 264. In 2005, both children were under the age of ten. *Id.* The four of them lived in a home in Tacoma, Washington. RP 270. The defendant watched the children while Kyla worked. RP 274

While watching the children, the defendant played a game with them involving candy. RP 281, 395. The defendant would have the children close their eyes and open their mouths. RP 395. He would then

¹ In the interest of protecting the victim's privacy, she and her family members will be referred to by their initials.

place a piece of candy in their mouths and then remove it. *Id.* He would put a second piece in and ask the children if they could tell if there was any difference. *Id.*

The defendant sometimes played the “candy game” with J.O., the victim, in the bathroom. RP 397. The defendant had her sit on the toilet and close her eyes. He then put candy in her mouth. *Id.* Nothing untoward happened the first time this occurred. RP 399.

The second time happened shortly after her April birthday in 2005. RP 461. The defendant again had the victim sit on the toilet with her eyes closed. He put candy in her mouth and removed it. RP 400. The defendant then put something with skin in her mouth. *Id.* The victim closed her mouth as much as possible, but could not close it all the way. RP 401. The skin object was in her mouth for 3-5 seconds. RP 402.

Less than a week later, the defendant repeated this. RP 407-408, 463. Again during the “candy game”, the defendant put a soft skin object into the victim’s mouth. RP 408. The skin object felt and tasted the same as on the previous occasion. RP 409. A few days later, the defendant repeated the “candy game” with the soft skin object. RP 411. During all of these “games”, the victim did not open her eyes to see what the soft skin object was. *Id.* She did not want to find out what it was. *Id.*

The defendant also played a different “game” with the victim. The defendant, a military veteran, claimed to know karate. RP 413. Ostensibly to teach the victim concentrate as in karate, he would have her sit with her

eyes closed. He then had her open her mouth. He inserted his finger into her mouth. RP 413. After withdrawing his finger, he inserted the soft skin object into her mouth. *Id.*

The second time the defendant played the “karate game” with the victim, she was listening to music on headphones. RP 415. The defendant again put a soft skin object in her mouth. *Id.*

During the third “karate game” incident, the defendant blindfolded the victim. RP 433. The defendant put cotton balls over her eyes and secured them with tape. *Id.* This time the victim opened her eyes and looked through a gap in the blindfold by her nose. *Id.*, 469-470. She saw that the defendant’s penis was in her mouth. *Id.*, 471. His penis felt the same as the soft skin object the defendant had inserted in her mouth in the “candy game” and “karate game”. RP 436.

J.O. disclosed the sexual abuse to her mother after her mother left the defendant and they moved out. RP 307. The victim was living with her father at that time. *Id.* However, J.O. insisted that her mother not tell the victim’s father. RP 314.

The sexual abuse came to light when the victim was returning from a fishing excursion with a friend and their fathers. RP 531, 600. The girls were riding home with the friend’s father, Chad Farmer. *Id.* Farmer heard the girls whispering. RP 532. Farmer heard his daughter tell the victim to tell Farmer. *Id.* The victim disclosed the sexual abuse to Farmer. RP 534.

Mr. Farmer told the victim's father, Jason O.. RP 536, 600. Jason contacted Kyla O. RP 602. Kyla called the police. RP 308.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE MULTIPLE COUNTS.

To return a guilty verdict, the jury must unanimously agree that the defendant committed the charged crime. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Where a defendant is charged with multiple counts of the same crime, the State must designate the acts upon which it relies to prove its case. *Id.* at 570. Alternatively, the court may instruct the jury to agree unanimously as to which acts support a specific count. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). The same act cannot be the basis for conviction of more than one count. *State v. Borshiem*, 140 Wn. App. 357, 165 P.3d 417 (2007). *State v. Ellis*, 71 Wn. App. 400, 859 P.2d 632 (1993), succinctly described the difference between the unanimity and the double jeopardy issues in jury instructions:

The one asserting that all jurors must agree on the same act underlying any given count has to do with jury unanimity and the right to jury trial. The one asserting that the jury could not use the same act as a factual basis for more than one count has to do with the right against double jeopardy; at least in the context here, to use one act as the basis for two counts is to convict twice for the same crime.

Id., at 404.

Jury instructions should be read as a whole in the context of the other instructions given. *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997).

In the present case, the court instructed the jury:

In alleging that the defendant committed rape of a Child in the First degree, the State relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant on any count, you must unanimously agree that this specific act was proved.

Instruction 6. CP 35. The court also 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.

Instruction 5. CP 34. The court gave four “to convict” instructions, one for each count. CP 39-42. Read as a whole, these instruct the jury that, not only that they must be unanimous, but that they must find different acts for different counts.

Instructions using the “separate and distinct” language in *Borsheim*, 140 Wn. App. at 367, or adding “on a day other than” language as in *Ellis*, 71 Wn. App. at 402 would be clearer. However, the combined instructions in the present case are sufficient for an ordinary juror to understand that each count required proof of a different act.

In addition to the instructions, both counsel told the jury to find separate acts for separate counts. In closing argument, the deputy prosecutor referred to Instruction 6 and told the jury that she was relying on specific incidents as the basis for each count. RP 846. This was to differentiate them from each other. Soon after that, she again told the jury that they had to agree on acts and counts individually. RP 847. Defense counsel also referred the jury to Instruction 6. He argued that there was insufficient evidence to find the defendant guilty of counts I-III, referring to the different acts described by the victim. RP 885.

It is significant that the instruction used in *Borsheim*, at 364, and *State v. Berg*, 147 Wn. App. 923, 934-935, 198 P.3d 529 (2009), was WPIC 4.25, the so-called *Petrich* instruction. It does not contain the “single act constituting each count” language that was used in the present case. *Borsheim* and *Berg* found the *Petrich* unanimity language alone was not enough to protect the defendant against double jeopardy. *Borsheim*, at 367; *Berg*, at 935.

Here, the court properly instructed the jury so as to insure that separate acts were the basis for separate counts. The arguments of counsel further emphasized that the jury was required to find separate acts for separate counts. There was no error.

2. IF THE INSTRUCTIONS ARE ERRONEOUS, IT WAS INVITED ERROR AS THEY WERE PROPOSED OR APPROVED BY THE DEFENDANT.

“[A] party may not request an instruction and later complain on appeal that the requested instruction was given.” *Seattle v. Patu*, 147 Wn. 2d 717, 721, 58 P.3d 273 (2002), quoting *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)(additional internal citations omitted). Even where the challenge to a jury instruction raises a constitutional issue, the courts will not consider it if the defendant himself proposed the instruction. *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 143 (2005).

In the present case, the defendant proposed instructions 5 and 6, citing WPIC 3.01 and 4.26, respectively. CP 22, 24. The court gave his requested instructions. CP 34, 35. In addition, during the jury instruction conference, defense counsel stated that he had reviewed the State’s proposed instructions and had no objections to them. RP 828. He later took no exception nor had objection to the final version of the court’s instructions. RP 838. The defendant cannot now complain that giving instructions that he proposed was error, or that the instructions were inadequate.

3. THE SENTENCE CONDITION OF NO CONTACT WITH JUVENILES WAS WITHIN THE COURT'S DISCRETION.

An appellate court reviews sentencing conditions, including crime-related prohibitions for abuse of discretion. *State v. Riley*, 121 Wn. 2d 22, 37, 846 P.2d 1365 (1993). No causal link need be established between the crime and the prohibition, so long as the condition relates to the circumstances of the crime. *State v. Warren* 134 Wn. App. 44, 70, 138 P.3d 1081 (2006).

Sentencing courts can restrict even the fundamental right to parent by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children. *State v. Berg*, 147 Wn. App. 923, 942, 198 P.3d 529 (2008). The decision in *Berg* is similar to the facts here. A jury convicted Berg of third degree child rape and two counts of third degree child molestation after he sexually molested a 14-year-old girl (A.A.) who lived with him. Berg parented A.A. but she was not his biological child. *Id.* at 927-31. Berg challenged the reasonableness of a no-contact order covering all minor females, including his two-year-old biological daughter (A.B.). *Id.*, at 941. The Court upheld the no-contact order as a reasonable crime-related prohibition. *Id.*, at 942.

In the present case, the defendant sexually abused his step-daughter. He was in a parenting position and was also the care-giver while the victim's mother was at work. The court had the discretion to decide that violation of this type of relationship between the defendant and the victim was grounds to prohibit contact with all children.

State v. Letourneau, 100 Wn. App. 424, 997 P.2d 436 (2000) is distinguishable. She did not have sex with a family member or with a child living in her home. Letourneau had been in a sexual deviancy treatment program. At sentencing, there was an extensive psychosexual evaluation that failed to conclude that she was a pedophile or a danger to her own children. *Id.*, at 440. Absent such a report, the sentencing court is free to impose conditions it feels necessary to protect all children, including the defendant's.

4. SUFFICIENT EVIDENCE WAS INTRODUCED AT TRIAL FOR THE JURY TO FIND THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*,

111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The elements of rape of a child in the first degree are: the defendant had sexual intercourse with the victim; the victim was less than 12 years old and not married to the defendant; the defendant was more than 24 months older than the victim; and the acts occurred in Washington. RCW 9A.44.073.

In the present case, as at trial, the defendant does not contest the age, marriage or location elements. At trial, he denied that the acts ever occurred. On appeal he challenges the sufficiency of the evidence that three of the four acts occurred. Appellant’s Brief at 21 -24.

The victim testified that the defendant put an object that felt like skin into her mouth. RP 400-410. She could not close her mouth around it completely. *Id.* She testified that 2-3 days later, he again put an object that

felt like skin into her mouth. RP 407-408. It felt the same as the object he inserted before. RP 408. She knew it was not a finger because it had no fingernail. RP 409. The defendant placed it in her mouth 2-3 times on that occasion, alternating his penis with candy. RP 409.

The victim testified that the defendant did this “candy game” a third time. The third time happened in the bathroom again. Again, the defendant alternated inserting candy and the “soft thing” into the victim’s mouth at least twice. RP 411. The victim testified that she believed it was his penis. *Id.* The “soft thing” felt the same as on the other two times the defendant put it in her mouth. RP 412.

The “karate game” incidents happened in a bedroom. RP 435. The victim testified that in the first incident, the defendant began by inserting his finger with frosting in her mouth. RP 413. The victim testified that the defendant then inserted the “soft thing” in her mouth. RP 413-415. It was the same “soft thing” that he had inserted in her mouth during the “candy game”. RP 415.

The victim testified that during a second incident of the “karate game”, she was listening to music through headphones. RP 415. She testified that, again, the defendant inserted the same “soft thing” into her mouth. RP 415.

The victim testified that during the third incident of the “karate game”, the defendant blindfolded her. RP 433. This time she looked and saw that the “soft thing” was the defendant’s “private”. RP 436. The

victim described the defendant's penis and drew a picture of it for the jury. RP 434. She testified what she saw and described as the defendant's "private" or penis felt the same as what she had previously referred to as the "soft thing". RP 435, 436.

The defendant's challenge to the sufficiency of the evidence must admit the truth of this testimony and all the inferences from it. Although Appellant's Brief argues the victim's credibility, that is not an issue that is revisited on appeal. This Court must accept her testimony as credible.

When the victim peered beneath the blindfold and confirmed her suspicions that the "soft thing" was the defendant's penis, it was circumstantial evidence supporting the finding that the defendant had inserted his penis in her mouth in all the other incidents of the "candy game" and the "karate game". There was sufficient evidence for the jury to find all the elements of each count of rape of a child in the first degree beyond a reasonable doubt and to find the defendant guilty of all four counts.

5. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT IN REBUTTAL CLOSING
ARGUMENT.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432

(2003)). A defendant can establish prejudice only if there is a substantial likelihood that the misconduct affected the jury's verdict. *Carver*, at 306.

A prosecutor's comments during closing argument is reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.* In evaluating whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel's argument. Therefore, defense counsel's conduct, as well as the prosecutor's response, is relevant. *State v. Ramirez*, 49 Wn. App. 332, 337, 742 P.2d 726 (1987).

Even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not “go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them.” *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005).

In defense counsel’s closing argument in the present case, he questioned the victim’s credibility in part by the very nature of the victim’s account. He argued that the use of cotton balls and masking tape for a blindfold was strange. RP 873. He said that “This is an unusual way for this type of offense to be committed.” RP 873. The prosecutor objected to that remark. *Id.* The court overruled the objection. *Id.* The defense counsel went on to argue that the manner in which the crime was committed was “bizarre”. RP 874.

In rebuttal, the prosecutor responded that this was not an unusual crime. RP 889. Her argument was supported by evidence given in the trial. Michelle Breland, the nurse practitioner, testified that she had examined thousands of children regarding physical and sexual abuse. RP 558. Cornelia Thomas, the forensic interviewer, testified that she had interviewed over a thousand children regarding physical and sexual abuse. RP 638. Detective Wade testified that of the “several hundred” sex cases she had investigated, over half had child victims. RP 700.

After defense counsel objected, the prosecutor further alluded to evidence the jury had heard in this case. She reminded them that delayed disclosure was common. (*See*, testimony of Ms. Breland, RP 558; Ms. Thomas, RP 645; and Det. Wade RP 700.) She argued that it was not uncommon for a child witness to give different facts in the course of the investigation. (Testimony of Ms. Breland, RP 558; Ms. Thomas, RP 645, 646.)

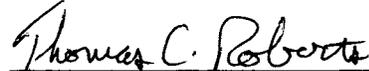
It is not improper for counsel to argue inferences and conclusions from testimony and evidence given in a trial. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *See, State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). When the prosecutor’s remarks are viewed in the context of the arguments of both parties, and the evidence, the prosecutor’s argument was not improper, nor misconduct. Her argument did not deprive the defendant of a fair trial.

D. CONCLUSION.

The defendant received a fair trial where the State presented more than enough evidence to convict him of all four counts of rape of a child. For the reasons argued above, the State respectfully requests that the Court affirm his convictions.

DATED: January 26, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-29-10 
Date Signature