

COURT OF APPEALS
DIVISION II

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No. 40293-9-II

STATE OF WASHINGTON

BY  DEPUTY
THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GEORGE WOODARD,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE STATE MISUNDERSTANDS THE DOUBLE JEOPARDY TEST AND ITS APPLICATION UNDER THESE FACTS

The same evidence test determines whether punishment for two offenses violates double jeopardy. Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). This test rests on whether the offenses are the same in law and the same in fact. Id.

The legal test does not require that the two offenses are actually identically defined. Brown v. Ohio, 432 U.S. 161, 164, 100 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Orange, 152 Wn.2d at 816. The test is whether each offense requires separate and distinct elements, and it rests on the case as prosecuted, not the generic offense definition.

The cases the prosecution cites are inapposite, because they addressed a different prong of the kidnapping statute. In Vladovic,¹ Fletcher,² Louis,³ the courts compared kidnapping and

¹ State v. Vladovic, 99 Wn.2d 413, 423-24, 662 P.2d 856 (1983).

robbery as charged, and concluded that the kidnapping offenses at issue required “deadly force,” while robbery required only the threat of non-deadly force, thus demonstrating the difference between the elements of the offenses.

Here, the existence of the element of deadly versus non-deadly force is not an issue because there was no evidence that Woodard committed kidnapping based on the threatened use of deadly force. See 2BRP 20-29, 41. The complainant did not claim Woodard threatened or used deadly force, and accordingly, deadly force was not a required element that distinguishes kidnapping from another offense. Id.; CP 36-37. The kidnapping could be only predicated upon “secretion,” i.e., committing the crime in a non-public setting. CP 37.

In Fletcher, the defendant pled guilty and then tried to challenge his convictions in a personal restraint petition, so the facts of the incident were only minimally addressed or presented. 113 Wn.2d at 45. After relying upon the deadly versus non-deadly

² In re Personal Restraint of Fletcher, 113 Wn.2d 42, 50, 776 P.2d 114 (1989) (“As was the case in Vladovic, the kidnapping charge required proof of use or threatened use of deadly force, which is not an element of robbery, while the robbery charge required proof of taking of personal property, which is not an element of kidnapping.”).

³ State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005).

force element to distinguish robbery and kidnapping, Fletcher also examined the possibility of merger. Merger analysis governs a double jeopardy issue only where the same criminal conduct test fails, and two offenses are separately criminalized, but one offense raises the degree of a second offense. State v. Leming, 133 Wn.App. 875, 882, 138 P.2d 1095 (2006).

In Fletcher, the court concluded that the intent to facilitate a robbery, as required for kidnapping in that case, is different from the completed robbery that must occur to be convicted of robbery. But Fletcher rests on a generic and abstract assessment of the facts, which this Court rejects. Leming, 133 Wn.App. at 889 (citing Freeman, 153 Wn.2d at 177). Under the specific circumstances of the offenses as charged in Woodard's case, the State had to prove the same facts to prove the kidnapping and the sexual assaults, and there is no evidence required to commit kidnapping that was not also required to commit the underlying offenses of rape or molestation. The complainant was only detained for a short period of time, one or two minutes away from home, and only for as long as it took to facilitate the commission of the predicate offenses. 2BRP 20; 3RP 103.

Accordingly, a comparison to Johnson is most apt. As in Johnson, the offenses occurred during a single incident, where the defendant secreted his victim in order to effectuate the sexual assault. State v. Johnson, 92 Wn.2d 671, 681, 600 P.2d 1249 (1979); see also State v. Freeman, 153 Wn.2d 765, 778-79, 108 P.3d 753 (2005); State v. Williams, 156 Wn.App. 482, 495, 234 P.3d 1134 (2010) (finding assault merged with rape where the “assault was used to effectuate the rape. The assault had no purpose or effect independent of the rape.”). The offenses were contemporaneous and “the sole purpose” was to commit the sexual offenses, which by their nature would not occur in public. Id. Under the particular facts as charged, the conviction for the lesser offense or offenses must be stricken and vacated, while the offense that embraces the underlying offenses and has the greater seriousness level, first degree kidnapping with sexual motivation, may remain.

2. THE FAILURE TO INSURE SEPARATE
CONVICTIONS RESTED ON DISTINCT ACTS
VIOLATES DOUBLE JEOPARDY.

The prosecution explains the nuances of “unanimity” case law but ignores the double jeopardy violation that is at the heart of the legal issue and thus its analysis the misses the mark. Moreover, the failure to give a unanimity instruction when presenting the jury with multiple acts that could constitute child molestation denied Woodard is right to a unanimous jury verdict.

In order to insulate multiple convictions based on a single incident from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged count in a criminal case. State v. Noltie, 116 Wn.2d 831, 842-43, 809 P.2d 1990 (1991); State v. Borsheim, 140 Wn.App. 357, 365, 165 P.3d 417 (2007). This principle, rooted in protection against double jeopardy, has been broadly enforced.⁴

⁴ See e.g., State v. Carter, 156 Wn.App. 561, 568, 234 P.3d 275 (2010) (reversing three counts of rape in same charging period due to lack of clear “separate and distinct” jury finding); State v. Berg, 147 Wn.App. 923, 935, 198 P.3d 529 (2008) (same holding for two counts of rape); Hayes, 81 Wn.2d at 431 (affirming where court instructed jury that each conviction must rest on “an occasion separate and distinct from” remaining counts); State v. Holland, 77 Wn.App. 420, 425, 891 P.2d 49, rev. denied, 127 Wn.2d 1008 (1995) (reversing two counts of child molestation where, “It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions on each count.”).

The prosecution accused Woodard of one count of rape of a child in the second degree and one count of child molestation in the second degree, occurring at the same time and place and involving the same complaining witness. CP 13-14; CP 39; CP 42. Child molestation is defined as “sexual contact,” and while it is a broader definition than the “sexual intercourse” required for rape, the same acts could meet the same definition of either offense. RCW 9A.44.010(2). “Intercourse” includes penetration by an object that is not limited to a lay person’s notion of “sex.” CP 10. Here, the State alleged Woodard engaged in various acts, including penile penetration, and vaginal penetration with a tongue, as well as other sexual touching.

The jury instructions for child molestation spoke generally of sexual contact but did not explain to the jury that it could not use an act of sexual contact that it relied on for the rape charge to convict him of child molestation. The failure to require that the jury’s verdict for two offenses rests on separate acts violates double jeopardy. See e.g., Carter, 156 Wn.App. at 568.

The prosecution ignores the double jeopardy violation and does not address the pertinent case law cited in the Opening Brief.

Presumably, this gap in argument arises from the settled nature of the law and the plain double jeopardy violation that occurred.

The prosecution defends the lack of a unanimity instruction by quoting selectively from its closing argument. But the prosecution did not unambiguously elect the touching of the complainant's breast as the factual predicate for this charge and mentioned various alleged acts in its closing argument. 5RP 91-93, 118. Even if the prosecutor had made an argument focusing narrowly on specific intended basis of each count, "[a] jury should not have to obtain its instruction on the law from the arguments of counsel." In re Detention of Pouncey, 168 Wn.2d 382, 392, 229 P.3d 768 (2010) (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)). Double jeopardy violations are manifest constitutional errors which should be corrected on review. Berg, 147 Wn.App. at 931; RAP 2.3(a). The charging documents, instructions, and verdict forms did not require a distinction between the acts alleged and consequently, the verdict does not represent unanimous findings of separate and distinct acts. This double jeopardy violation requires striking the lesser offense. Borsheim, 140 Wn.App. 371.

3. THE COURT'S FAILURE TO EXPLAIN THE UNANIMITY REQUIRED FOR A SPECIAL VERDICT ENHANCEMENT DENIED WOODARD HIS RIGHT TO A FAIR TRIAL BY JURY

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury does not have to be unanimous to find that the State had not proven the special finding beyond a reasonable doubt. State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003).

The prosecution claims that Woodard cannot raise the plain error in his jury instructions defining the unanimity required for the special verdict because he did not object to the instruction proposed by the prosecution, which required the jurors to answer unanimously, regardless of whether the answer was yes or no. The State argues that the issue is not "manifest constitutional

error,” because, even though the error is obvious, i.e., manifest, the resulting prejudice is not clear. Response Brief, at 9-10.

But in Bashaw, “[t]here was no objection to the instruction” regarding the unanimity required for the special verdict form sentencing enhancement. 144 Wn.App. 196, 199, 182 P.3d 451 (2009), reversed on review, 169 Wn.2d at 146.⁵ In Bashaw, the trial court polled the jury and the jury said its verdict was unanimous, but the Supreme Court found the fundamental, structural nature of the incorrect explanation about the deliberative process denied Bashaw a fair trial. Id. The prosecution does not explain why this Court should not follow the reasoning and holding of the Supreme Court when addressing the same issue.

In Bashaw, the Court ruled such an error can essentially never be harmless even where the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

. . .

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot

⁵ The Court of Appeals decision in Bashaw provides further details regarding the instructional issue and nature of objections lodged,

say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

169 Wn.2d at 147-48 (emphasis added).

The prosecution's gratuitous citations to a dissenting opinion in In re Personal Restraint of Crace, 157 Wn.App. 81, 117-18, 276 P.3d 914 (2010) (Quinn-Brintnall, J., dissenting), is likewise beside the point.⁶ Response Brief, at 13-14. CrR 6.15(a) explains the process by which instructions should be presented to the court but does not mandate that all parties must present full copies of every instruction that the court should give. The right to a fair trial by jury is strenuously protected in Washington and it should be accorded to Woodard as well.

In addition, as in Bashaw, the error was not harmless since it is impossible to determine what would have occurred had the jury been properly instructed. In State v. Williams-Walker, 167 Wn.2d 889, 899, 225 P.3d 913 (2010), the Court held that guilty verdicts cannot authorize sentence enhancements.

⁶ The issue that prompted the dissent in Crace was whether the trial attorney was ineffective for failing to request a lesser included offense instruction, and whether the petitioner had satisfied the heightened standard of prejudice necessary for relief in a personal restraint petition, which are not issues in the case at bar.

We decline to hold that guilty verdicts alone are sufficient to authorize sentence enhancements. If we adopted this logic, a sentencing court could disregard altogether the statutory requirement that the jury find the defendant's use of a deadly weapon or firearm by special verdict. Such a result violates both the statutory requirements and the defendant's constitutional right to a jury trial.

Id.

This error also cannot be excused by relying on the verdicts for other charges. Rape of a child is a strict liability crime, and does not require the intent to be sexually gratified. State v. Chhom, 128 Wn.2d 739, 743, 911 P.2d1014 (1996). The sexual contact necessary for child molestation includes serving the desires of any party, and does not require gratifying the desires of the charged defendant, as the sexual motivation finding requires. CP 43, 52. The jury's verdict does not reflect the statutory requirements of the sexual motivation special verdict as well as the constitutional right to a jury trial. Williams-Walker, 167 Wn.2d at 899. This Court should vacate the special verdict finding. Bashaw, 169 Wn.2d at 148.

4. THE PROSECUTION MUST BEAR RESPONSIBILITY FOR ITS WITNESSES'S REFUSAL TO ABIDE BY COURT RULINGS AND THEIR INJECTION HIGHLY PREJUDICIAL ALLEGATIONS INTO THE CASE.

Before trial, based on Woodard's fear of the State's "jailhouse snitch" witnesses tainting the jury with improper accusations about Woodard, the court expressly directed the prosecution to tell its witnesses not to interject irrelevant and highly prejudicial accusations about the commission of multiple uncharged sexual offenses or drug use during the incident. 1RP 120, 131-37. The prosecution agreed but distanced itself from responsibility for its witnesses. 1RP 133. Just as Woodard feared, these witnesses snickered at trial while telling the jury that Woodard had engaged in additional, uncharged sexual acts with the complaining witness and was using crack cocaine on the day of the incident. 4RP 68, 72. Woodard objected but the error could not be cured. 4RP 68-75; Opening Brief, at 26-27, 30-32..

The prosecution claims Woodard opened the door to this testimony, but this contention distorts the record. Response Brief, at 34. Woodard anticipated this problem and tried to short circuit it by obtaining a clear, pretrial ruling directing the prosecution to properly instruct its witnesses on the strictures of admissible

evidence. 1RP 131-37. His question to the witness Barnes presupposed he would follow the court's rulings. He did not fish for the precluded information in his questions, which the witness unnecessarily inserted as part of an apparent effort to disregard the court's limitations. 4RP 68. It was the prosecution who elicited the "smoking crack," comment, not Woodard's attorney. 4RP 78. The snickering by the witnesses showed their deliberate interest in tainting the trial. 4RP 72, 85.

"An evidentiary error is not harmless if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." In re Detention of Post, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 4244821 at 6 (October 28, 2010). Here, the error in the admission of the serious allegations of sexual offenses against a young girl and drug evidence was prejudicial. It is precisely the type of evidence that is both inflammatory and likely to strike a chord with the jury, making it hard to remain unbiased and fair toward Woodard. See Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). While the allegations against Woodard were serious, the child complainant's testimony was not without suspicion or dubiousness. Hearing that Woodard was using crack cocaine before the incident, and that he

had done the same thing made times before, surely affected the jury, made Woodard's conduct seem not only egregious but so dangerous that convictions were required for public safety. The State's failure to keep its witnesses from violating the motions in limine could not but have influenced the jury's verdicts.

5. THE JURY INQUIRY AND LACK OF WRITTEN FINDINGS FURTHER DENY WOODARD A FAIR TRIAL AND MEANINGFUL APPEAL

For the reasons set forth in Woodard's Opening Brief, the court improperly conferred with and communicated with the deliberating jury, and further denied Woodard's his right to a meaningful appeal by neglecting to formally explain its ruling by entering mandatory written findings of fact and conclusions of law.

B. CONCLUSION.

For the foregoing reasons as well as those discussed in Appellant's Opening Brief, Mr. Woodard respectfully requests this Court reverse the convictions due double jeopardy violations, reverse the special verdict finding due to the lack of a fair trial by jury, and find the prejudice attendant to the injection of inadmissible allegations of uncharged acts in addition to the court's improper communication with the deliberating jury and lack of written findings of fact requires reversal.

DATED this 13th day of December 2010.

Respectfully submitted,



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Respondent,)	
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v.)	
)	
GEORGE WOODARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF DECEMBER, 2010.

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