

NO. 40495-8-II
COURT OF APPEALS, DIVISION II

FILED
APPELLANT'S BRIEF
APR 25 2011
BY

STATE OF WASHINGTON,
Respondent

vs.

RENE D. MANUEL,
Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Amber L. Finlay, Judge
Cause No. 08-1-00563-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in permitting Manuel to be represented by counsel who provided ineffective assistance by failing to properly present evidence that the alleged victim had threatened her mother that if she were forced to return to Washington from Massachusetts to attend junior high school she would claim that Manuel had raped her.
02. The trial court erred in giving Court's Instruction 7 that commented on the evidence and constituted a directed verdict.
03. The trial court erred in permitting Manuel to be represented by counsel who provided ineffective assistance by failing to properly object to Court's Instruction 7, the court's purported limiting instruction.
04. The trial court erred in failing to dismiss Manuel's convictions where the combination of trial errors denied him a fair trial.
05. The trial court erred in imposing a community custody condition prohibiting Manuel from purchasing, possessing or viewing any pornographic materials.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether reversal is required where Manuel was prejudiced as a result of his counsel's ineffective assistance in failing to properly present evidence that H.M.C. had threatened her mother that if she were forced to return to Washington from Massachusetts to attend junior high school she would claim that Manuel had raped her? [Assignment of Error No. 1].

02. Whether the court's purported limiting instruction, Court's Instruction 7, impermissibly commented on the evidence and constituted a directed verdict by assuming as an undisputed fact that Manuel had engaged in sexual intercourse and/or had sexual contact with H.M.C. in the State of Oregon? [Assignment of Error No. 2].
03. Whether Manuel was prejudiced as a result of his counsel's failure to properly object to Court's Instruction 7, the court's purported limiting instruction? [Assignment of Error No. 3].
04. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Manuel's convictions? [Assignment of Error No. 4].
05. Whether the community custody provision prohibiting Manuel from purchasing, possessing or viewing any pornographic materials is unconstitutionally vague? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Rene D. Manuel (Manuel) was charged by first amended information filed in Mason County Superior Court on January 26, 2010, with rape of a child in the second degree, count I, child molestation in the second degree, count II, sexual exploitation of a minor, count III, and possession of depictions of minors engaged in sexually

explicit conduct, count IV, contrary to RCWs 9A.44.076, 9A.44.086, 9.68A.040, 9.68A.070 and 10.99.020. [CP 44-46].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 49]. Trial to a jury commenced on January 26, the Honorable Amber L. Finlay presiding. The jury returned verdicts of guilty as charged, Manuel was sentenced within his standard range and timely notice of this appeal followed. [CP 5-22, 36-40].

02. Substantive Facts

H.M.C. (dob 10/07/94) moved with her mother and stepfather, Manuel (dob 11/19/63), to Mason County, Washington, in June 2008. [RP 257, 277, 366, 388, 394]. According to H.M.C., with the exception of approximately one month she was out of state from June 24 to July 22 [RP 402], from the time she moved to Mason County until she moved to Massachusetts to live with her aunt at the end of September [RP 233], she engaged in sexual intercourse with Manuel anywhere from one to three times a week, in addition to having him rub her vagina on one occasion in the family hot tub. [RP 273, 277-78, 280-81].

After H.M.C. moved to Massachusetts, she complied with Manuel's requests to send him naked pictures of herself. [RP 282, 302-05].

I felt like if he had gotten what he wanted then he'd just leave me alone. And that it would be over, like he would stop talking to me. And I didn't want him to get angry at me. And I didn't want him to take it out on my mom. Just - - so this whole thing was going through my mind at the time.

[RP 283].

The pictures sent by H.M.C. were later recovered from a computer seized from Manuel's residence. [RP 335-340, 349-353, 363].

Ann Parsons Marchant, who is employed by the State of Massachusetts as a pediatric sexual assault nurse examiner, conducted a physical examination of H.M.C. on November 10 and could not determine if she had actually engaged in sexual intercourse. [RP 194, 196, 219]. Marchant employed circular reasoning—supporting a premise with the premise—to address the “indeterminate changes” she had observed in H.M.C.'s genital area:

Indeterminate changes are well known in child sexual abuse circles as those that when combined with a clear disclosure of abuse, support a

disclosure of abuse.

[RP 211].

She further noted that indeterminate findings, standing alone, i.e., without an accompanying clear disclosure of sexual abuse, are not diagnostic of trauma or sexual abuse. [RP 216, 219].

Manuel denied the allegations, as he had during his initial interview with the police. [RP 428, 434-35].

D. ARGUMENT

01. REVERSAL IS REQUIRED WHERE MANUEL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S INEFFECTIVE ASSISTANCE IN FAILING TO PROPERLY PRESENT EVIDENCE THAT H.M.C. HAD THREATENED HER MOTHER THAT IF SHE WERE FORCED TO RETURN TO WASHINGTON FROM MASSACHUSETTS TO ATTEND JUNIOR HIGH SCHOOL SHE WOULD CLAIM THAT MANUEL HAD RAPED HER.

01.1 Proffered Testimony and Ruling

Manuel moved to admit testimony at trial that while H.M.C. was in Massachusetts for approximately a month during June and July 2008 [RP 396, 402], she called her mother, Mary Jane Manuel, and threatened her she would claim that Manuel had raped her if she were forced to return to Washington to attend junior high school because she wanted to stay with her friends and go to school in Massachusetts. [RP 397]. Manuel argued that this testimony was not hearsay and was admissible to show Mary Jane Manuel's state of mind. [RP 398-400]. The court sustained the State's objection, finding that the

testimony was hearsay and not admissible as a state of mind exception:
“(T)he witness’s (Mary Jane Manuel’s) state-of-mind is not relevant as to
whether or not this act occurred or didn’t occur.” [RP 400].

01.2 Ineffective Assistance Standard

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant,

State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

01.3 The Proffered Testimony Was Admissible Under ER 803(a)(3)

ER 803(a)(3) creates an exception to the hearsay rule for statements that describe the declarant's then-existing state of mind to show intent, motive, but not including a statement of memory to prove the fact remembered.¹ It was under this exception that the proffered testimony should have been offered as to H.M.C.'s state of mind, not Mary Jane Manuel's.

H.M.C.'s threatening statement to her mother was indicative of her then-existing state of mind vis-à-vis her intent and motive as to what she would do if forced to return to Washington. She couldn't have been more clear. Statements of a declarant's then-existing state of mind are

¹ ER 803(a)(3) creates a hearsay exception for then existing mental, emotional, or physical condition:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

admissible in// evidence if they are relevant to a material issue in the case. State v. Terrovona, 105 Wn.2d 632, 637, 716 P.2d 295 (1986); State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). ER 803(a)(3) has also been held to authorize the admission of evidence of a party's intentions as evidence that he or she acted in accordance with those intentions. State v. Terrovona, 105 Wn. App. at 638. This extension of the state of mind exception allows statements to be admitted to show that the declarant acted in conformity with those statements where the conduct of the declarant is at issue at trial. Id. at 642.

As mentioned, H.M.C.'s statement to her mother is relevant² to explain her intent and motive in accusing Manuel of rape. It demonstrates that H.M.C. may have had motives and biases for making her allegations that did not involve conveying the truth. There was an obvious need for this statement in Manuel's defense, especially where the State argued in closing that H.M.C.'s allegations were credible because she had "no dog in the fight, ladies and gentlemen. She just wanted it to end." [RP 497].

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² Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevancy is a low bar. "Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

01.4 Counsel's Ineffective Assistance Requires Reversal

The record does not reveal, nor could it, any tactical or strategic reason why trial counsel failed to properly argue for the admission of H.M.C.'s threat to her mother under ER 803(a)(3).

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident. This case was hardly clear-cut, and H.M.C.'s testimony was crucial to the State's case, for the combined testimony of the other witnesses at trial would not be sufficient to convict Manuel. It is impossible, then, to conclude that a reasonable jury would have reached the same result had the proffered testimony been given, with the result that this court should reverse and remand for a new trial.

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02. THE COURT'S PURPORTED LIMITING INSTRUCTION IMPERMISSIBLY COMMENTED ON THE EVIDENCE AND CONSTITUTED A DIRECTED VERDICT BY ASSUMING AS AN UNDISPUTED FACT THAT MANUEL HAD ENGAGED IN SEXUAL INTERCOURSE AND/OR HAD SEXUAL CONTACT WITH H.M.C. IN THE STATE OF OREGON.

02.1 Review: Trial Testimony

At trial, H.M.C. testified that while she was living in Oregon in 2007 and 2008, Manuel had initially entered her room in the middle of the night and touched her vagina under her clothes [RP 264] before their relationship escalated to where they were engaging in sexual intercourse “(e)very night.” [RP 267]. Manuel denied these accusations. [RP 428].

02.2 Instruction

The trial court gave the following purported limiting instruction:

Evidence has been introduced in this case that the defendant engaged in sexual intercourse and/or had sexual contact with (H.M.C.) in the State of Oregon. This evidence has been admitted for the limited purpose of presenting evidence relating to the defendant's lustful disposition or common scheme or plan. You must not consider this evidence for any other purpose.

[Court's Instruction 7; CP 75].

This instruction is based loosely on WPIC 5.30, which reads:

Evidence has been introduced in this case on the subject of _____ for the limited purpose of _____. You must not consider the evidence [for any other purpose] [for the purpose of _____].

11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.30, at 132 (1994) (WPIC).

02.3 Article IV, section 16 of the Washington Constitution Prohibits a Trial Court From Instructing the Jury That Matters of Fact Have Been Established As a Matter of Law

The Washington Constitution explicitly prohibits judicial comments on the evidence. Const. article IV, section 16.³ The Washington Supreme Court has interpreted this section as forbidding a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1231 (1997). A violation of this constitutional prohibition will arise not only where the judge’s opinion is expressly stated but also where it is merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

³ Article IV, section 16 reads “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

Because judicial comments on the evidence are expressly prohibited by the Washington Constitution, they constitute manifest constitutional error that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d at 719-20; RAP 2.5(a)(3).

Impermissible judicial comments on the evidence are presumed to be prejudicial, and reversal is required unless the State shows that the defendant was not prejudiced or the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. The fundamental question in deciding whether a judge has impermissibly commented on the evidence is whether the alleged comment or omission “conveys the idea that the fact has been accepted by the court as true.” Levy, 156 Wn.2d at 726.

02.4 Directed Verdict

The most important element of the right to a jury trial is the right to have the jury, not the judge, reach findings on guilt. Sullivan v. Louisiana, 508 U.S. 275, 277, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993). A judge may not direct a verdict of guilt in a criminal case no matter how overwhelming or conclusive the evidence is. Id.; United Brotherhood v. United States, 330 U.S. 395, 408, 91 L. Ed. 973, 67 S. Ct. 775 (1947).

02.5 Argument

Court’s Instruction 7 impermissibly commented on the evidence and amounted to a directed verdict. The

phrase that Manuel “engaged in sexual intercourse and/or sexual contact with (H.M.C.) in the State of Oregon(,)” removed this factual issue from the jury’s consideration, which was contested at trial: H.M.C. said it happened; Manuel denied it. In short, the court instructed the jury in a manner that established or at least implied that the contested facts had been established as a matter of law. See State v. Eaker, 113 Wn. App. 111, 53 P.3d 37 (2002), rev. denied, 149 Wn.2d 1003 (2003). In this regard, the instruction was tantamount to instructing the jury that it need not find whether the contested facts had even occurred, for they had been established as a matter of law, which was comparable to the situation in Becker, where our Supreme Court reversed the sentence enhancements, concluding that by identifying the Youth Employment Education Program as a school in the special verdict form, the trial court “literally instructed the jury that YEP was a school.” State v. Becker, 132 Wn.2d at 65. The essential question of whether Manuel had engaged in the alleged activity in Oregon, should have been left to the jury to decide as a factual matter.

Since Court’s Instruction 7 removed the material fact of whether Manuel had sexually assaulted H.M.C. in Oregon, it constituted an unconstitutional comment on the evidence by the trial judge. This court must presume that the comment was prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In such a case, “[t]he burden rests on the

State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment”. Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff’d in part, rev’d in part, 83 Wn.2d 485, 519 P.2d 249 (1974). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or “overwhelming,” a comment by the trial court, in violation of the constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

It cannot be credibly asserted that the court’s improper comment in its instruction 7 did not influence the jury. H.M.C.’s credibility was the essential issue in the case, even more so given that the State’s expert sexual assault examiner, following a physical examination of H.M.C., could not determine if she had actually engaged in sexual intercourse, even though H.M.C. had claimed that at one point she had sexual intercourse with Manuel every night in Oregon: “On the couch in the middle of the night. Sometimes I stayed home from school, and I’d be in their bed. And then in the shower.” [RP 267]. And all of this proceeded the one to three times a week alleged sexual encounters in Washington. [RP 273, 277-78, 280-81].

All over a period of nine months, as argued by the prosecutor in closing.
[RP 477].

Under the circumstances of this case, the State cannot sustain its burden of rebutting the presumption that the court's comment was prejudicial, with the result that this court should reverse and remand for a new trial.

03. MANUEL WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY OBJECT TO THE COURT'S PURPORTED LIMITING INSTRUCTION.⁴

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to properly object⁵ for the same reasons to the court's purported limiting instruction or by somehow inviting the error, then both elements of ineffective assistance of counsel have been established.⁶

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to properly object, and if counsel had

⁴ While it is submitted that this issue is properly raised for the first time on appeal this portion of the brief is presented only out of an abundance of caution should this court disagree.

⁵ Counsel did object to the form of the instruction because of the evidence, but not specifically to the giving of the instruction. [RP 466-67].

⁶ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

done so, the objection would have been sustained under the law set forth in the preceding section of this brief.

The prejudice here is self-evident: but for counsel's failure to properly object, the jury would not have been given Court's Instruction 7, which impermissibly commented on the evidence and constituted a directed verdict, as fully set forth in the preceding section of this brief.

Counsel's performance was deficient for the reasons argued herein, which was highly prejudicial to Manuel, with the result that he was deprived of his constitutional right to effective assistance of counsel and is entitled to reversal of his conviction.

04. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF MANUEL'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant

reversal of Manuel's convictions, the cumulative effect of these errors materially affected the outcome of his trial and his convictions should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). This is especially true given the effect of the jury's failure to be made aware of H.M.C.'s conditional threat to claim that Manuel had raped her, which was compounded by the court's purported limiting instruction, which impermissibly commented on the accusations concerning the alleged events in Oregon and constituted a directed verdict.

05. THE COMMUNITY CUSTODY PROVISION PROHIBITING THE PURCHASE, POSSESSION OR VIEWING OF PORNOGRAPHIC MATERIALS IS UNCONSTITUTIONALLY VAGUE.

At sentencing, as a condition of community custody, the court ordered that Manuel "shall not purchase, possess, or view pornographic materials." [CP 34].

A defendant may raise claims relating to unconstitutionally vague conditions of community custody for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204 n.9, 76 P.3d 258 (2003); State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The term “pornography” or “pornographic material” is unconstitutionally vague. State v. Bahl, 164 Wn.2d at 754-56. In State v. Sansone, 127 Wn. App. 630, 638-641, 111 P.3d 1251 (2005), Division I of this court held that such a condition⁷ violated due process because it was unconstitutionally vague.

Additionally, in Bahl, our Supreme Court held that pre-enforcement challenges to similar conditions were properly raised, even if it was left to a third party to determine what satisfied the condition. Bahl, 164 Wn.2d at 754-52, 758.

Here, because the condition does not define pornography and is thus unconstitutionally vague, it must be stricken. See State v. Sansone, 127 Wn. App. at 643.

E. CONCLUSION

Based on the above, Manuel respectfully requests this court to reverse his convictions and/or remand for resentencing consistent with the arguments presented herein.

DATED this 10th day of August 2010.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant, WSBA 10634

⁷ Sansone was “not (to) possess or peruse pornographic materials unless given prior approval by (his) sexual deviancy treatment specialist and/or (CCO). Pornographic materials are to be defined by the therapist and/or (CCO).” Sansone, 127 Wn. App. 642-43.

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Monty Cobb
Dep Pros Attorney
P.O. Box 639
Shelton, WA 98584

Rene Manuel #759310
W.C.C.
P.O. Box 900
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DATED this 13th day of July 2010.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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