

NO. 31252-6-III

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

In re Detention of James McMahan,

STATE OF WASHINGTON,

Respondent,

v.

JAMES MCMAHAN,

Appellant.

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

The Honorable Jerome J. Leveque, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's rights under article 4, § 16 of the Washington Constitution.¹

2. The trial court erred in giving Instruction 5, the 'to-commit' instruction in a civil commitment trial under Chapter 71.09 RCW, because it included an improper judicial comment on the evidence that relieved the State of its burden to prove beyond a reasonable doubt all elements necessary for commitment. CP 565.

Issue Pertaining to Assignments of Error

Did the trial court violate appellant's right under article 4, § 16 by instructing the jury that one of the three elements that had to be proved beyond a reasonable doubt was satisfied by the evidence that appellant had "been convicted or a crime of sexual violence, namely: Rape of a Child in the First Degree"?

B. STATEMENT OF THE CASE

The State sought to have appellant James McMahan committed under Chapter 71.09 RCW. The State's commitment petition alleges McMahan had previous convictions for "Rape of a Child in the First Degree" (one count in Washington, 1999), and "Forcible Rape" (three

¹ Wash. Const. Article 4, § 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

counts in California, 1986). CP 1. The petition also alleges McMahan has several mental abnormalities, including "Sexual Sadism" and "Pedophilia", and that he also has an "Antisocial Personality Disorder." CP 2. Finally, the petition alleges McMahan's mental abnormalities and personality disorder "cause him to have serious difficulty in controlling his dangerous behavior and make him likely to engage in predatory acts of sexual violence unless confined to a secure facility." CP 2.

A jury trial was held October 29, 2012 through November 7, 2012. RP.² The State presented evidence that in 1999 McMahan pleaded guilty in Washington to one count of first degree child rape and was sentenced for that offense. CP 507; Exs 18 & 19 (McMahan's guilty plea statement & associated judgment and sentence, respectively); RP 155-56. The State also presented evidence that in 1986 McMahan pleaded guilty in California to three counts of forcible rape. CP 497-504; Exs. 8 & 9 (felony minutes of plea & abstract of associated judgment and sentence); RP 167-68.

The jury also heard testimony from two expert witnesses; Dr. Dale Arnold for the State, and Dr. Luis Rosell for McMahan. RP 171-357 (Arnold); RP 358-416 (Rosell). According to Dr. Arnold, McMahan

² There are five consecutively paginated volumes of verbatim report of proceedings collectively referenced as "RP".

suffers from pedophilia, sexual sadism, amphetamine dependence, alcohol abuse, anti-social personality disorder and also adjustment disorder with depressed and anxious features chronic. RP 189. Dr. Arnold also opined that if released into the community McMahan is "more likely than not to commit a sexually violent act in a predatory way". RP 277.

Dr. Rosell disagreed with Dr. Arnold, both as to his diagnosis of pedophilia and sexual sadism, and as to whether McMahan meets the criteria for commitment under Chapter 71.09 RCW. RP 365-68, 371. In Dr. Rosell's opinion, there was an insufficient basis to conclude McMahan was more likely than not to commit predatory acts of sexual violence if released into the community. Dr. Rosell noted that McMahan's age, health problems and progress in sex offender treatment all contribute to a reduced likelihood that McMahan would offend in the future. RP 365-66, 377-79.

The jury spent part of two days deliberating before entering a verdict finding McMahan met the criteria for indefinite commitment under Chapter 71.09 RCW. CP 586; RP 538-44. A commitment order was entered. CP 587. McMahan appeals. CP 588-90.

C. ARGUMENT

THE TRIAL COURT VIOLATED McMAHAN'S RIGHTS UNDER ARTICLE 4, § 16.

The purpose of article 4, § 16 “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Unfortunately, the trial court's written instructions to the jury conveyed that in the court's opinion McMahan's first degree child rape conviction satisfied the first element of the 'to-commit' instruction, which provides:

To establish that James McMahan is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

(1) That James McMahan has been convicted of a crime of sexual violence, namely: Rape of a Child in the First Degree;

(2) That James McMahan suffers from a mental abnormality or personality disorder which causes serious difficulty in controlling his sexually violent behavior; and

(3) That this mental abnormality makes James McMahan likely to engage in predatory acts of sexual violence if not confined to a secure facility.

...

CP 565 (Instruction 5, emphasis added). Because the State cannot show the improper comment was harmless beyond a reasonable doubt, reversal and remand for a new commitment trial is required.

The prohibition under article 4, § 16 is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." Id.

This constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial does not prohibit appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

Unfortunately, the trial court relieved the State of its burden to prove McMahan had been previously convicted of a qualifying predicate offense for commitment, i.e., "a crime of sexual violence". By designating McMahan's 1999 first degree child rape conviction in Instruction 5 as "a crime of sexual violence, the trial court relieved the State of its burden to prove this element.

In State v. Hagler, 150 Wn. App. 196, 198, 208 P.3d 32 (2009), this Court warned against informing jurors that a particular crime meets the

requirements for a specific designation, in that case whether a crime constituted "domestic violence". In Hagler, where jurors were not asked to decide whether the offenses involved domestic violence, revealing this information was deemed harmless. But this Court noted that prejudice might result in other cases. Id. at 201-203.

This is such a case. In particular, the Supreme Court's opinions in Levy and Becker make it clear that the type of instruction given to McMahan's jury warrants reversal.

In Becker, a special verdict form asking whether defendants were within 1,000 feet of school grounds included the phrase "to-wit: Youth Employment Education Program [YEP] School." Becker, 132 Wn.2d at 64. The Supreme Court held that by describing the program as a "school," this comment impermissibly relieved the State of its burden to prove the program was, in fact, a school and reversed. Id. at 64-65.

Similarly, in Levy, a burglary instruction required jurors find the defendant had unlawfully entered "a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA." Levy, 156 Wn.2d at 716. Citing Becker, the Supreme Court found that "use of the word 'building' in the instruction improperly suggested to the jury that the apartment was a building as a matter of law." Levy, 156 Wn.2d at 721.

There is no practical distinction between the special verdict form in Becker, the burglary instruction in Levy, and the to-commit instruction used at McMahan commitment trial, which told jurors that McMahan's first degree child rape conviction satisfied the first listed element. This was an improper judicial comment under article 4, § 16.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). The State cannot meet its burden to prove the error was harmless. This Court should accordingly reverse McMahan's commitment and remand for a new trial.

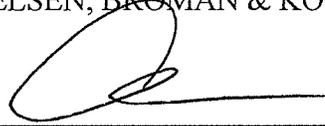
D. CONCLUSION

For the reasons stated, this Court should reverse and remand for a new commitment trial.

DATED this 29th day of May 2013.

Respectfully submitted,

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Respondent,)	
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vs.)	COA NO. 31252-6-III
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JAMES McMAHAN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF MAY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL PER AGREEMENT OF THE PARTIES PUSUANT TO GR30(b)(4) AND/OR BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY, 2013.

X *Patrick Mayovsky*