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Court of Appeals
Division III
State of Washington

NO. 31252-6

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In re the Detention of James McMahan:

STATE OF WASHINGTON,

Respondent,

v.

JAMES MCMAHAN,

Appellant.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

MALCOLM ROSS
Senior Counsel
WSBA #22883
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98108
(206) 464-6430

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I. ISSUE PRESENTED

Whether the trial court properly instructed the jury that the crime of rape of a child in the first degree constitutes a crime of sexual violence as a matter of law, where that crime is identified as such by the statute, the court's instruction did not relieve the State of proving that McMahan was convicted of that crime and the instruction was consistent with the Washington Pattern Instructions.

II. STATEMENT OF THE CASE

The State adopts McMahan's Statement of the Case in his Brief of Appellant at 1-3, supplemented by a few additional facts presented in the argument below.

III. ARGUMENT

McMahan argues that the trial court violated article 4, § 16 of the Washington Constitution by instructing the jury that rape of a child in the first degree is a crime of sexual violence. The instruction, however, accurately stated the law, was consistent with the pattern jury instructions and did not relieve the State of the burden of proving that McMahan had been convicted of that offense. Furthermore, in closing argument McMahan's counsel conceded McMahan had been convicted of that crime. There was no error and the order civilly committing McMahan as a sexually violent predator should be affirmed.

A. Standard of Review

McMahan did not object below to the jury instruction at issue. Nevertheless, because he claims there was a manifest error affecting a constitutional right, his claim can be considered for the first time on appeal. RAP 2.5(a); *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). This Court reviews alleged errors of law in jury instructions de novo. *State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

B. The Trial Court's Instruction Properly Advised the Jury of the Applicable Law and Did Not Comment on the Evidence

In order to establish that a person is a sexually violent predator, the State must prove beyond a reasonable doubt that the person:

- Has been convicted of or charged with a crime of sexual violence;
- suffers from a mental abnormality or personality disorder; and
- because of the mental abnormality or personality disorder, is likely to engage in predatory acts of sexual violence if he is not confined in a secure facility.

RCW 71.09.020(18); RCW 71.09.060(1).

The offenses that will satisfy the first element are statutorily identified in the definition of "sexually violent offense." RCW 71.09.020(17). They include "rape of a child in the first or second

degree." *Id.* The State alleged that McMahan's 1999 conviction for rape of child in the first degree satisfied the first element. CP at 1.

McMahan argues that the trial court's instruction relieved the State of its burden to prove that McMahan had been convicted of a crime of sexual violence. Brief of Appellant at 5. He asserts that, by specifying the crime McMahan was alleged to have committed, the court commented on the evidence and "told jurors that McMahan's first degree child rape conviction satisfied the first listed element."[1] Brief of Appellant at 7.

Jury instructions pass muster if they allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of

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[1] The court instructed the jury that:

> 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.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that James McMahan is a sexually violent predator.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that James McMahan is not a sexually violent predator.

CP at 565 (instruction No. 5) (emphasis added).

the applicable law. *Barnes,* 153 Wn.2d at 382. Here, the trial court did not inform the jury McMahan had been convicted of a crime and did not comment on the evidence. Instead, it properly informed them of the State's allegation and instructed them that, in order to find McMahan was a sexually violent predator, they had to find beyond a reasonable doubt he had been convicted of rape of a child first degree. CP at 565. This allowed McMahan – had he been so inclined – to argue he had never been convicted of child rape, and it was unquestionably a correct statement of the law. RCW 71.09.020(17), (18). It was not misleading. An instruction is reviewed within the context of all other jury instructions. *Levy,* 156 Wn.2d at 721. Instruction No. 5 twice instructed that jury that they had to find each element proved beyond a reasonable doubt, and concluded by instructing them that their reasonable doubt as to any element required them to find for Mr. McMahan. CP at 565. The admission of a certified copy of McMahan's 1999 conviction for rape of a child in the first degree proved the element beyond a reasonable doubt. Exhibit 19.

The Washington Pattern Instructions are persuasive authority on jury instructions. *State v. Mills,* 116 Wn. App. 106, 116 n.24, 64 P.3d 1253 (2003), *rev'd on other grounds by* 154 Wn.2d 1, 109 P.3d 415 (2005). Here, the trial court's instruction was consistent with the

corresponding Washington Pattern Instruction. The pattern instruction provides, in pertinent part:

> To establish that (respondent's name) is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:
>
> (1) That (respondent's name) has been convicted of a crime of sexual violence, namely (identify crime of sexual violence)[.]

6A Washington Practice: Washington Pattern Jury Instructions: Civil 365.10 at 568 (6th ed. 2012) (WPI). The "Note on Use" that accompanies the pattern instruction advises readers to "[f]ill in the name of the particular crime of sexual violence where indicated." WPI 365.10 at 569.

McMahan argues that this case is like *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997). In *Becker,* a special verdict form required the jury to determine whether the defendants were within 1,000 feet of school grounds when they committed a crime and included the language: "to-wit: Youth Employment Education Program [YEP] School[.]" 132 Wn.2d at 64. It was an issue at trial, however, whether or not YEP was in fact a school. *Id.* At 65. The instruction, therefore, relieved the State of proving an element that supported an enhanced sentence. *Id.*

Becker is distinguishable because, here, there was no question that rape of child first degree is a crime of sexual violence. RCW 71.09.020(17). Indeed, the trial court properly informed the jury of that

legal fact in its instruction No. 10. CP at 570. At trial, rape of a child first degree was the only crime the State alleged as the predicate offense. It was therefore proper for the trial court to inform the jury of that allegation and to charge them with determining whether the State had proved McMahan had a conviction for that crime.

Levy is distinguishable for the same reasons. 156 Wn.2d 709. In *Levy* the trial court, as in *Becker*, adopted "to-wit" instructions implying conclusions about contested issues: an apartment was a "building" and a crowbar was a "deadly weapon." *Id.* at 720-22. Here, the jury was not required to determine whether rape of a child first degree is, in fact, a sexually violent offense. It is as a matter of law. RCW 71.09.020(17).

Another case relied on by McMahan is *State v. Hagler*, 150 Wn. App. 196, 208 P.3d 32 (2009). In *Hagler*, the trial court's instructions identified the charges as crimes of domestic violence. 150 Wn. App at 198. That constituted harmless error because a domestic violence designation is neither an element nor evidence pertinent to any element. *Id.* at 202. *Hagler* does not support McMahan's argument.

Where a trial court impermissibly comments on the evidence, the burden is on the State to show that there was no prejudice. *Levy*, 156 Wn.2d at 725. Assuming for the sake of argument that the trial court

erred, there was no prejudice. McMahan's counsel conceded the point in closing argument:

> The first element is whether or not Mr. McMahan had been convicted of a crime of sexual violence and I know Mr. Ross went through that with you, and he has. He was convicted. Not just convicted, he pled guilty to the rape of his daughter. So he has been convicted of a crime of sexual violence.

RP at 516. Thus, even assuming error, there was no prejudice.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm McMahan's commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 20TH day of June, 2013.

ROBERT W. FERGUSON
Attorney General

MALCOLM ROSS, WSBA #22883
Senior Counsel
Attorneys for Respondent

NO. 31252-6-III

WASHINGTON STATE COURT OF APPEALS, DIVISION III

In re the Detention of: JAMES MCMAHAN, Appellant.	DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On June 21, 2013, I deposited in the United States mail true and correct copies of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Eric Nielsen
Nielsen, Broman & Koch
1908 East Madison Street
Seattle, WA 98122-2842

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of June, 2013, at Seattle, Washington.

ELIZABETH JACKSON