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Court of Appeals
Division III
State of Washington

NO. 33252-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN MILLER,

Appellant.

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

The Honorable Vic L. VanderSchoor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE CORRECTLY CONCEDES THE JURY INSTRUCTIONS INADEQUATELY PROTECTED MILLER FROM DOUBLE JEOPARDY BUT IS INCORRECT THAT ELECTION OF A SPECIFIC ACT IN CLOSING ARGUMENT CURED THE ERROR.

In his opening brief, Miller established his conviction for child molestation violated double jeopardy because the jury was not instructed it needed to find separate and distinct acts of child rape and child molestation. Br. of Appellant, 14-23. The State correctly concedes “the instruction should have been given.” Br. of Resp’t, 7. This Court should accept the State’s concession for the reasons set forth in the opening brief.

However, the State goes on to argue the double jeopardy error was cured because “the State made a clear election to the jury regarding the Child Molestation charge.” Br. of Resp’t, 10. Specifically, the prosecutor said in closing: “And the child molestation is for the sexual contact, and the State’s alleging this is during when he would touch her breasts in the vehicle.” 5RP 248. In so arguing, the State confuses jury unanimity and double jeopardy, and ignores clear Washington law that election of a specific act is insufficient to prevent a double jeopardy violation.

In Washington, an accused person has the constitutional right to a unanimous jury verdict. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 409,

756 P.2d 105 (1988). This right guarantees the individual may be convicted only when a unanimous jury concludes the charged criminal act has been committed. State v. Borsheim, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). This means the jury “must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct.” Id. (emphasis in original). Thus, in cases like Miller’s where several acts could form the basis of one charged count, the State must elect the act on which it relies or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt—a Petrich instruction. Kitchen, 110 Wn.2d at 411.

The right to be free from double jeopardy, on the other hand, “is the constitutional guarantee protecting a defendant against multiple punishments for the same offense.” Borsheim, 140 Wn. App. at 366. Where jury instructions allow the jury to base multiple convictions on a single underlying event, the accused is exposed to multiple punishments for a single offense. Id. This implicates the right to be free from double jeopardy rather than the right to a unanimous jury verdict. Id.

The Washington Supreme Court has held that a prosecutor’s election of a specific act in closing, without more, does not cure a double jeopardy violation. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008). The State does address Kier, presumably because it cannot. See

In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”).

In Kier, the State argued Kier’s second degree assault and first degree robbery convictions did not merge because they were committed against two different victims—Hudson and Ellison. Id. at 808. Noting the case before it was “somewhat analogous to a multiple acts case,” the supreme court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. Because the evidence and instructions allowed the jury to consider a single person as the victim of both the robbery and assault, the verdict was ambiguous. Id. at 814. The rule of lenity therefore required the assault conviction to merge into the robbery conviction. Id.

The State asserted in Kier that the possibility the jury could have considered Ellison to be the victim of the robbery “was eliminated because the prosecutor made a ‘clear election’ of which act supported each charge, as is allowed in a multiple acts case.” Id. at 813. Specifically, in closing, the prosecutor identified Hudson as the victim of the robbery and Ellison as the victim of the assault. Id.

But the Kier court refused to consider the State’s closing argument in isolation. Id. The evidence suggested both men were victims of the robbery. Id. The jury instructions did not specify Hudson alone was to be

considered the robbery victim. Id. Further, “[w]hile the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel.” Id. The Kier court therefore concluded the evidence and instructions allowed the jury to consider either man to be a victim of the robbery and assault, “notwithstanding the State’s closing argument.” Id. at 814.

Kier controls. This Court cannot consider the prosecutor’s election of a specific act of child molestation “in isolation.” Id. at 813. Rather, this Court must look to the presentation of evidence and the jury instructions. The jury heard several allegations of sexual intercourse, as defined by RCW 9A.44.010(1), including penile and digital penetration of the vagina, as well as oral-genital contact. Several of the instances of sexual intercourse also included touching S.L.’s breasts, which the State alleged corresponded to the child molestation charge. But nowhere was this distinction made in the presentation of evidence. The State recites the multiple incidents alleged at trial in a bulleted list. Br. of Resp’t, 8-9. But the State fails to explain how these incidents were actually delineated between sexual intercourse and sexual contact for the jury.

Furthermore, like in Kier, the jury instructions did not specify that touching S.L.'s breasts, and no other acts, were to be considered for the child molestation charge. Also like Kier, Miller's jury was instructed:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence of the law in my instructions.

CP 16. Because it is presumed that jurors follow the trial court's instructions, this Court must presume the jury disregarded the State's election. Kier, 164 Wn.2d at 813; State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

The prosecutor's election of a specific act of child molestation, alone, does not prevent the double jeopardy error. The possibility remains that Miller's jury relied on the same act—the oral-genital contact—to convict for both rape and molestation. This violates Miller's right to be free from double jeopardy and requires dismissal of the child molestation conviction. Borsheim, 140 Wn. App. at 371.

2. THE STATE MISREADS OR MISCONSTRUES THE RECORD IN ARGUING THE PROSECUTOR DID NOT ELICIT TESTIMONY FROM MILLER'S WIFE ABOUT THEIR EXTRAMARITAL AFFAIR.

In his opening brief, Miller argued the trial court improperly admitted prejudicial ER 404(b) evidence that Miller had an extramarital affair with his now-wife, Sherri. Br. of Appellant, 24-28; see also Br. of Appellant, 28-29 (arguing in the alternative that the prosecutor committed misconduct by cross-examining Sherri about the affair). In response, the State claims "Ms. Miller clearly testified that the defendant was separating from his then wife during the start of their relationship. Nowhere in the record does she state they were having an affair. It is well-known that divorces take time, especially those involving children." Br. of Resp't, 11.

Miller encourages this Court to read the relevant portion of the transcript: 4RP 282-84. It is plain the prosecutor cross-examined Sherri about her extramarital affair with Miller, even if the word "affair" was not explicitly used. In response to the prosecutor's questions, Sherri explained she and Miller got together eight years prior to 2015, when he was separating from his previous wife. 4RP 282-83. However, Sherri explained she and Miller had a child together in 2001 and another child in 2003, well before Miller's divorce. 4RP 282-83. The obvious implication was that Sherri and Miller were involved in an extramarital affair a decade

before the charged incidents—blatant propensity evidence. The prosecutor even commanded Sherri, “And you can look at me,” further suggesting Sherri’s discomfort answering questions about this irrelevant, salacious topic. 4RP 284.

The State has either misread or misconstrued the record. Its argument should therefore be rejected.

3. THE TRIAL COURT DEMONSTRATED OBVIOUS BIAS AGAINST THE DEFENSE BY REPEATEDLY INTERRUPTING DEFENSE COUNSEL WITHOUT ANY OBJECTION FROM THE STATE.

In response to Miller’s appearance of fairness argument, the State focuses exclusively on the nine instances where the trial court added reasons for sustaining objections or commented on the evidence. Br. of Resp’t, 12-14. The State ignores the *fourteen* other instances where the trial court, sua sponte, interrupted defense counsel and made objections on the prosecutor’s behalf. Br. of Appellant, 32-33. The State merely asserts “[j]udicial rulings alone almost never constitute a valid showing of bias.” Br. of Resp’t, 12 (citing In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004)). In Davis, the trial court consistently ruled in the State’s favor on evidentiary issues. 152 Wn.2d at 692. This alone did not demonstrate the court’s bias against the defense. Id. at 692-93.

Unlike Davis, however, the trial court in Miller's case did not merely make rulings in the State's favor. Rather, the court interjected and made objections for the State, without any actual objection from the State. In doing so, the court essentially assumed the role of the prosecutor. This is not the trial court's job, and Washington courts have recognized such action by the court can result in "great prejudice" to the defense. Egede-Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 142, 606 P.2d 1214 (1980); accord State v. Ra, 144 Wn. App. 688, 705, 175 P.3d 609 (2008).

The trial court made no similar interruptions of the prosecutor. Reversal is necessary in a case like this where the trial court "reveal[s] such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

4. WPIC 4.01 RESTS ON AN OUTDATED VIEW OF REASONABLE DOUBT THAT EQUATED A DOUBT FOR WHICH A REASON EXISTS WITH A DOUBT FOR WHICH A REASON CAN BE GIVEN.

In State v. Kalebaugh, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is "a doubt for which a reason can be given" was erroneous because "the law does not require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). That conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing the instruction “a reasonable doubt is such a doubt as the jury are able to give a reason for”).

Forty years ago, the court of appeals considered the argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instructions). Thompson brushed aside this argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Id. at 5.

That cursory statement is untenable. WPIC 4.01 directs jurors to assign a reason for their doubt and no further context erases the taint of this articulation requirement. The Thompson court did not explain what “context” saved the language from constitutional infirmity. Its suggestion that the language “merely points out that [jurors’] doubts must be based on reason” fails to account for the obvious difference in meaning between a doubt based on “reason” and a doubt based on “a reason.”

The Thompson, 13 Wn. App. at 5, court began its discussion by recognizing the “instruction has its detractors,” but noted it was “constrained to uphold it” based on State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). But Tanzymore simply stated the instruction “has been accepted as a correct statement of the law for so many years” that argument to the contrary was without merit. 54 Wn.2d at 291. Nabors cites Tanzymore as its support. 8 Wn. App. at 202. Neither case specifically addressed the doubt “for which a reason exists” language.

The Thompson, 13 Wn. App. at 5, court further observed, “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Harras found no error in the language, “It should be a doubt for which a good reason exists.” 25 Wash. at 421. The Harras, 25 Wash. at 421, court

simply maintained the “great weight of authority” supported it, citing the note to Burt v. State (Miss.) 48 Am. St. Rep. 574 (s. c. 16 South. 342). However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.¹

So Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason be given for the doubt. Thompson then upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that a doubt for which a reason exists means a doubt for which a reason can be given. The Kalebaugh court held, however, that it was manifest constitutional error to instruct the jury that reasonable doubt is “a doubt for which a reason can be given.” 183 Wn.2d at 585.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), further illuminates this dilemma. At issue was the instruction: “The expression ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. In holding there was nothing wrong with the challenged language, Harsted cited a number of out-of-state cases upholding

¹ For the Court’s convenience, the relevant portion of the note cited by Harras (48 Am. St. Rep. at 574-75) is attached as an appendix to this brief.

instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. As stated in one of these decisions, “[a] doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” Butler v. State, 102 Wis. 364, 78 N.W. 590, 591-92 (1899). Harsted noted some courts disapproved of the same language, but was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

Here we confront the genesis of the problem. Over 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard reasonable doubt instruction: a doubt for which a reason exists means a doubt for which a reason can be given. This demolishes the argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. The supreme court found no such distinction in Harsted and Harras.

The mischief has continued unabated ever since. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Washington courts now condemn any suggestion that jurors must give a reason for why there is reasonable doubt. Old decisions like Harras and Harsted cannot be reconciled with Emery and Kalebaugh. The law

has evolved. What seemed acceptable 100 years ago is now forbidden. But WPIC 4.01 has not evolved. It is stuck in the misbegotten past.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for doubt. This distorts the reasonable doubt standard to the accused's detriment.

The State asserts Miller "cannot show manifest error justifying review under RAP 2.5(a)(3) of the unpreserved objection to WPIC 4.01 beyond a reasonable doubt." Br. of Resp't, 15. However, as established in Miller's opening brief, failure to properly instruct the jury on reasonable doubt is structural error. Br. of Appellant, 41. Structural error "is a special category of constitutional error that 'affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" State v. Wise, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Structural error is presumed prejudicial and is "not subject to harmless analysis." Id. at 14. The State's clam of waiver under RAP 2.5(a)(3) therefore fails.

5. MILLER WAS PREJUDICED BY THE JUROR'S ALTERNATE REASONABLE DOUBT DEFINITION BECAUSE IT DIFFERED SIGNIFICANTLY FROM THE STANDARD, APPROVED INSTRUCTION.

In response to Miller's argument that egregious juror misconduct necessitated a new trial, the State asserts the trial court properly denied the mistrial and new trial motions because the jury "indicated they would only follow the court's instructions and the court was satisfied." Br. of Resp't, 16. In so arguing, the State conducts an incorrect prejudice inquiry. The focus is not on whether jurors nodded that they could still be fair, but the language of the alternate definition and how it differed from the standard reasonable doubt instruction. This is clear from several Washington as well as out-of-state cases. Compare Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 138, 750 P.2d 1257, 756 P.2d 142 (1988) (affirming mistrial where alternate definition of "negligence" could "well have confused or misled the jury"), and State v. Aguilar, 224 Ariz. 299, 230 P.3d 358, 365 (2010) (reversing where alternate definitions of "premeditation" and "first degree murder" were significantly different than the jury instructions), with State v. Tinius, 527 N.W.2d 414, 417 (Iowa 1994) (finding harmless error where alternate definition of "reasonable" did not conflict with the instructions and was consistent with the common meaning of the word). As discussed in the opening brief, the juror's alternate definition of

reasonable doubt differed significantly from the jury instructions and the proper legal definition. Br. of Appellant, 46-48.

Such an objective inquiry is necessary because the actual effect of the misconduct inheres in the verdict. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). This Court should reject the State's implicit invitation to consider the actual effect of the misconduct, and instead apply the five-factor test from Mayhue v. St. Francis Hospital of Wichita, Inc., 969 F.2d 919, 924 (10th Cir. 1992).

In United States v. Lawson, the Fourth Circuit found two Mayhue factors weighed in the defendant's favor, while the other three presented close questions or weighed slightly in the defendant's favor. 677 F.3d 629, 651 (4th Cir. 2012). Miller's case is even more egregious, where four factors weigh in Miller's favor, some of them heavily, and only one is a close question. Br. of Appellant, 45-51. Under such circumstances, the Lawson court held:

In short, there are many uncertainties here, and, under [Remmer v. United States, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954)], "it is the prosecution" that "bears the risk of uncertainty." United States v. Vasquez-Ruiz, 502 F.3d 700, 705 (7th Cir. 2007). Therefore, because the government has a "heavy obligation" to rebut the presumption of prejudice by showing that "there is no reasonable possibility that the verdict was affected by the" external influence, [United States v. Cheek, 94 F.3d 136, 142, (4th Cir. 1996)], the government's showing in this case, as a matter of law, does not satisfy that obligation.

677 F.3d at 651. Thus, when the balance of the Mayhue factors weighs in the defendant's favor, as here, the State has failed to rebut the presumption of prejudice. Id. This Court should accordingly reverse and remand for a new trial.

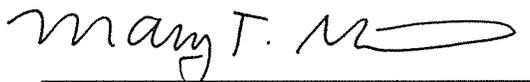
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss the child molestation conviction and remand for a new trial before a different judge on the remaining count.

DATED this 19th day of August, 2016.

Respectfully submitted,

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Appendix

convict, that the defendant, and no other person, committed the offense: *People v. Kerrick*, 52 Cal. 446. It is, therefore, error to instruct the jury, in effect, that they may find the defendant guilty, although they may not be "entirely satisfied" that he, and no other person, committed the alleged offense: *People v. Kerrick*, 52 Cal. 446; *People v. Carrillo*, 70 Cal. 643.

CIRCUMSTANTIAL EVIDENCE.—In a case where the evidence as to the defendant's guilt is purely circumstantial, the evidence must lead to the conclusion so clearly and strongly as to exclude every reasonable hypothesis consistent with innocence. In a case of that kind an instruction in these words is erroneous: "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It is not enough that the evidence necessarily leads the mind to a conclusion, for it must be such as to exclude a reasonable doubt. Men may feel that a conclusion is necessarily required, and yet not feel assured, beyond a reasonable doubt, that it is a correct conclusion: *Rhodes v. State*, 128 Ind. 189; 25 Am. St. Rep. 429. A charge that circumstantial evidence must produce "in" effect "a" reasonable and moral certainty of defendant's guilt is probably as clear, practical, and satisfactory to the ordinary juror as if the court had charged that such evidence must produce "the" effect "of" a reasonable and moral certainty. At any rate, such a charge is not error: *Loggins v. State*, 32 Tex. Cr. Rep. 364. In *State v. Shaeffer*, 89 Mo. 271, 282, the jury were directed as follows: "In applying the rule as to reasonable doubt you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty." This instruction was held to be erroneous, as it expresses the rule applicable in a civil case, and not in a criminal one. By such explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case, with respect to the preponderance of evidence. The following is a full, clear, explicit, and accurate instruction in a capital case turning on circumstantial evidence: "In order to warrant you in convicting the defendant in this case, the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt, for, before you can infer his guilt from circumstantial evidence, the existence of circumstances tending to show his guilt must be incompatible and inconsistent with any other reasonable hypothesis than that of his guilt": *Lancaster v. State*, 91 Tenn. 267, 255.

REASON FOR DOUBT.—To define a reasonable doubt as one that "the jury are able to give a reason for," or to tell them that it is a doubt for which a good reason, arising from the evidence, or want of evidence, can be given, is a definition which many courts have approved: *Fann v. State*, 83 Ga. 44; *Hodge v. State*, 97 Ala. 37; 38 Am. St. Rep. 145; *United States v. Cassidy*, 67 Fed. Rep. 698; *State v. Jefferson*, 43 La. Ann. 995; *People v. Stubenroll*, 62 Mich. 329, 332; *Welsh v. State*, 96 Ala. 93; *United States v. Butler*, 1 Hughes, 457; *United States v. Jones*, 31 Fed. Rep. 718; *People v. Guidici*, 100

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State V. Stephen Miller

No. 33252-7-III

Certificate of Service

On August 19, 2016, I e-served the reply brief directed to:

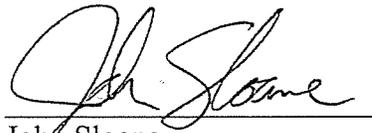
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PO Box 2049
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Re: Stephen Miller

Cause No. 33252-7-III, in the Court of Appeals, Division III, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

08-19-2016

Date

Done in Seattle, Washington