

NO. 37450-1-II
IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

CARL GREGORY WILLIAMS,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court committed reversible error in denying defendant's motion in limine to exclude evidence of uncharged alleged misconduct.

B. The trial court committed reversible error in instructing the jury as follows:

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

C. The defendant failed to receive effective assistance of counsel.

D. The trial court erred in failing to hold an evidentiary hearing exploring the extent of defense counsel's apparent conflict of interest and this case should be remanded for hearing on that issue.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court failed to make a pretrial finding by a preponderance that the uncharged misconduct occurred before denying defendant's motion in limine.

2. Whether the trial court failed to balance the prejudicial effect versus probative value of the uncharged misconduct evidence before denying defendant's motion in limine.

3. Whether the trial court error in failing to follow correct procedure in ruling on defendant's motion to exclude evidence of uncharged misconduct was harmless.

4. Whether the non-corroboration instruction given in this case unnecessarily and unfairly emphasized the testimony of the complainant constituting an improper comment on the evidence.

5. Whether the non-corroboration instruction given in this case operated to subvert the presumption of innocence and relieved the State of its burden of proof in derogation of defendant's due process right to a fair trial.

6. Whether the record establishes that defense counsel had a conflict of interest that adversely affected his performance.

7. Whether the trial court should have held an evidentiary hearing to explore the extent of the defense counsel's conflict of interest.

III. STATEMENT OF FACTS

A. Procedural History

Carl Gregory Williams was originally charged by information filed February 23, 2007 with one count of child molestation in the first degree, two counts of child molestation in the second degree, and three counts of child molestation in the third degree. CP 1. He was summons to court on

April 10, 2007. CP 5. Williams entered a not guilty plea and trial was scheduled for June 11, 2007. CP 9.

Charles H. Buckley, Jr. entered a Notice of Appearance to represent Williams. CP 7. On May 8, 2007 an omnibus hearing was held, and defense moved for a continuance of the trial date. Trial was rescheduled to July 30, 2007. RP 24. Defense then moved for another continuance on July 26, 2007, and trial was reset to October 8, 2007. CP 35, 36. One more continuance was subsequently granted resulting in a final trial date of November 19, 2007. CP 47. On each trial setting, the State filed witness lists naming the same four witnesses, including Mary Liddle, the complaining witness' mother. CP 26, 37.

An amended information was filed on May 8, 2007, which changed the incident dates on counts one through three, amended count one to child molestation in the second degree, added another charge of child molestation in the third degree, and added one count of delivering marijuana to a minor and one count of furnishing liquor to minors. CP 22.

On November 15, 2007, the trial court held a readiness hearing. RP 3. The State filed a second amended information changing the incident dates on counts one and two. CP 54. Williams maintained his not guilty

pleas. RP 4. The defense filed a motion in limine with briefing. CP 57-8. The State filed a response on the day of trial. CP 61, 62.

Trial convened on November 19, 2007 before the Honorable Robert L. Harris, with the court entertaining argument on motions in limine raised by the parties. RP 9-43. Defense counsel anticipated that the State would offer testimony concerning allegations of uncharged sexual misconduct allegedly committed by the defendant against the complainant at Long Beach in Pacific County, Washington, and in Portland, Oregon. The defense argued for exclusion on grounds that a lack of evidence existed to actually prove the uncharged misconduct occurred and because the prejudicial nature of the allegations outweighed any probative value. RP 30-33. Without taking testimony to determine whether the State could prove the uncharged misconduct, and without balancing prejudice versus probative value on the record, the court summarily concluded that evidence of lustful disposition directed toward the complaining witness is generally allowed and denied the defense motion. RP 33.

On the second day of trial, the court was informed that defense counsel had previously represented Mary Liddle in a juvenile matter. RP

268. The court obtained a waiver of attorney-client privilege from Mary Liddle. RP 268. No waiver of conflict was obtained from the defendant.

The defense excepted to jury instruction No. 7, which stated:

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated. CP 66.

Prior to submitting the case to the jury, the Court dismissed count eight, furnishing liquor to minors, because the statute of limitations had expired. RP 410. The jury returned guilty verdicts on the remaining seven counts.

Mr. Williams was sentenced to 100 months in custody on February 20, 2008. CP 84. Notice of Appeal was timely filed.

B. Substantive Facts

1. Time Frames

The State proceeded to trial on the second amended information alleging as follows:

Count 01 - Child Molestation in the Second Degree - - Between September 12, 2003 and September 11, 2005 while K.M.L. was at least twelve years old but less than fourteen years old.

Count 02 - Child Molestation in the Second Degree - - Between September 12, 2003 and September 11, 2005 while K.M.L. was at least twelve years old but less than fourteen years old.

Count 03 - Child Molestation in the Second Degree - - Between September 12, 2004 and September 11, 2005 while K.M.L. was at least twelve years old but less than fourteen years old.

Count 04 - Child Molestation in the Third Degree - - Between September 12, 2005 and December 16, 2006 while K.M.L. was at least twelve years old but less than sixteen years old.

Count 05 - Child Molestation in the Third Degree - - Between September 12, 2005 and December 16, 2006 while K.M.L. was at least twelve years old but less than sixteen years old.

Count 06 - Child Molestation in the Third Degree - - Between September 12, 2005 and December 16, 2006 while K.M.L. was at least twelve years old but less than sixteen years old.

Count 07 - Over 18 and Deliver a Narcotic from Schedule III-V, or a Non-Narcotic from Schedule I-V to Someone Under 18 and 3 Years Junior - - Between September 12, 2004 and December 16, 2006.

2. Mary Liddle

Kayla Liddle was born on September 12, 1991 to Mary and Richard Liddle. RP 57-58. Mary and Richard had a son together as well, Scott. In 1999, Mary and Richard divorced. RP 58-59.

Mary Liddle and Judy Williams are sisters. RP 59. Carl Gregory Williams married Judy, and they moved to Clark County around 2000 along with their son, Carl Junior. RP 61. Kayla and Carl Junior are about the same age. RP 61.

Mary Liddle testified she and her children had a very close relationship with the Williams family. RP 64. The Williams would take the Liddle kids on vacation, often to Long Beach where Mary and Judy's father had a cabin. RP 64. Judy and Greg assisted Mary by providing transportation for Kayla to and from sporting events, as well as school. RP 89-90. Greg Williams was like a surrogate father to Kayla because there were periods of her life when her dad was not involved. RP 65, 130-31. He would pick her up, take her shopping, and take her on vacation with them. RP 65. At the time he and Kayla became close, approximately 2003, Mary was having significant problems with Kayla and would ask him for help with her daughter. RP 65-66.

After the Williams family moved to Vancouver, they started having an annual barbecue in July. RP 70. Mary attended every year from 2003 to 2006. RP 70. She only recalls Kayla attending once or twice. RP 70-71.

Mary began to have disciplinary problems with Kayla in the eighth grade. She became completely defiant and didn't want to obey the rules. RP 72. She attended counseling for maybe nine months. RP 73. They had trouble communicating. RP 73. Kayla began inflicting superficial cuts on herself. RP 74-75. The escalating defiance and concerning behavior eventually caused Mary and her boyfriend Don Gilbert to go through Kayla's room in December of 2006. RP 73. They found a journal. RP 76. Kayla came home before it could be examined and hysterically attempted to get it back. RP 77. She did not want Mary to read it. RP 77.

Don took it outside and read it. RP 77.

On cross-examination Mary acknowledged that Kayla's behavioral problems occurred after December of 2005 for the most part. RP 103. Kayla had not actually visited with her father for probably about a year prior to the search of her room in December of 2006. RP 101.

Kayla made no complaint about the defendant before the journal was found. She didn't appear to be afraid of him. RP 86. He had never given Mary any reason to be concerned with his behavior. She saw no indication of a problem. RP 107. Despite the fact that Mary had made it clear to Kayla off and on over the years that she should report any improper touching, Kayla never made any complaint about the defendant, even when she was in counseling. RP 95, 106-07.

3. Kayla Liddle

Kayla testified she kept a journal. RP 215. The prosecutor asked her what she had written in the journal. RP 215. Defense counsel objected on grounds that the question called for self-serving hearsay.¹ RP 215. The trial court overruled the objection, and Kayla testified: "I had written in there that my Uncle Greg had molested me." RP 215.

1

Defense counsel had filed a motion in limine to exclude any reference to the content of the journal because Kayla had destroyed it after her accusations had been reported to the authorities, contending that the content of the journal is hearsay and, without any ability to see the context in which the claim that the defendant had molested her was made, the defense was effectively deprived of any meaningful ability to cross-examine. The court ruled the girl would be available for cross-examination and could confirm that she made the accusation in her journal as "hue and cry." RP 34-38.

Discovery of the journal caused Kayla to be reunited with her estranged father, as he became immediately involved in the family crisis. RP 217-18.

Kayla testified she had never reported the sexual misconduct because she was afraid of what would happen to her mother, Greg, Greg's wife, and everybody. RP 218-19.

As to the specifics of the alleged sexual misconduct, Kayla testified the first incident occurred during the summer barbecue at the Williams' house in July of 2003. RP 176. This occurred prior to September 12, 2003, the first date charged in the second amended information. CP 54. Kayla was able to sneak some alcohol, a mixed drink, as there were a number of people at the party. RP 177. Greg helped her obtain the alcohol. RP 178. He gave her a few glasses. RP 179. That night while Kayla was downstairs in the basement, Greg motioned her to come to where he was. RP 179. As she walked down the hallway, Greg kept putting his feet under hers, tripping her. RP 179. He did that about three or four times and every time she tripped, he would grab her breasts like he was helping her up. RP 179-80. She didn't know if it was intentional the first trip, but after multiple times she thought it was intentional that he was touching her breasts. RP 180. Greg said:

“Wow, you must be pretty drunk.” RP 181. Two women walked around the corner while this was happening, and Greg held her up by the sides of he arms and said: “This is my niece.” RP 181.

The second incident occurred in 2004. Greg and Kayla were driving somewhere in Clark County when they started having a conversation about remaining a virgin until she was sixteen. RP 183-84. Kayla made a statement that she was not exactly a virgin. RP 183. Greg responded since she had already done stuff she shouldn’t wait and just do everything with anybody. RP 183. At some point Greg reached over and put his hand between her legs over her pants on the inside of her thigh close to her crotch. RP 184. She did not push his hand away or say anything. RP 184. His hand did not remain there very long. RP 184.

Kayla testified she did not have a clear recollection of the next incident. RP 186. She did remember countless times Greg had rubbed over her pants in her crotch area in the hallway at his house when she was thirteen years old, in 2004. RP 186-88. For example, she recalls an incident where she was following her cousin down the upstairs hall . RP 186.

On another occasion she was staying overnight at his house and she was playing on his laptop on the couch and he was watching TV. He

rubbed her crotch between her legs. RP 189. She was thirteen years old.
RP 189.

She began to cut herself on her legs, arms, and stomach. RP 190.
Superficial cuts. No need for medical attention.

She testified Greg fondled her at her house as well. RP 192.
Again, bypassing her in the hall he'd stop her and rub her crotch or
breasts. RP 192-93.

Kayla testified she never reported the activity because she thought
maybe she was over-exaggerating, thought maybe it happened to
everybody, and didn't know what would happen, although her mother had
stressed to her that she should report anything like that if it ever happened
to her. RP 194. She didn't want the family disrupted, so she didn't report.
RP 195.

Another incident occurred during her eighth grade year in school
where he fondled her crotch and asked to see her breasts on her mother's
bed at her house. She replied, "Maybe later." RP 198-99.

The last incident was about two weeks before the journal was
discovered. That was sometime in December of 2006. RP 196. Greg
touched her over her clothes on her breasts and crotch at her house right
outside of her kitchen. RP 196-98.

She smoked pot. RP 200. That started when she was thirteen with friends. RP 200. She got pot from Greg. RP 201. Almost every time she saw him. RP 203. They smoked it at his house, for example, on April 20, 2005. RP 205-206. After smoking the pot in Greg's bedroom on his bed, he put his hand between her legs against her crotch. RP 206-07.

On one occasion Kayla went to Portland with Greg to buy a ticket for a concert. She was in the eighth grade, sometime in 2005 to 2006. RP 208. He parked and asked to see her boobs. RP 209. Then he groped her breasts. RP 209.

On another occasion in Long Beach at her grandpa's cabin, Greg made out with her behind the pole barn and guided her hand down his pants to his member. RP 211. She disengaged. They heard a cousin running around outside and walked away. RP 212. She didn't tell anybody because she knew it would wreck the family and didn't think it was that big of a deal. RP 212.

Kayla was in counseling during her eighth grade year in school but did not disclose any of the alleged fondling or drug use with Mr. Williams to the counselor. RP 214-15.

On cross-examination, defense counsel confronted Kayla with defense exhibit 5. RP 240. It is a handwritten statement provided to her

victim advocate. RP 240. The document was admitted without objection.

RP 241. It represents critical evidence to the defense because it states in pertinent part:

May 27-29-06 (Memorial Day weekend) my mother, brother, aunt, cousin were inside the cabin in Cesial [sic] County. My uncle and I were outside on the side of the garadge [sic] where we stacked wood. Carl kept on cornering me and kissing my lips, cheek, neck, when he kissed me, he used his tongue. I would push him away and say, "No Greg" He'd say "okay" and just do it again. Then at night brought me to the back corner of the pole barn, outside it. he got close to me and started kissing me again. But this time he grabbed my hand and plast [sic]it around his penis. Every chance I get I went to pull my hand out of his pants and say "no" But he just did it several times more. Other than those two all else that happened was Carl acting overly friendly. Slapping my butt, and pintching [sic] the back of my upper arm or leg.

Upon re-direct examination Kayla acknowledged that exhibit 5 does not contain a complete list of everything she testified to on direct examination. RP 285.

After Kayla's testimony concluded, the State rested. RP 303.

After opening, the defense called Jason Englan as its first witness.

4. Jason England

Jason England grew up with Greg's wife Judy. He's known Mr. Williams over fifteen years. He also knows Mary and Kayla Liddle. RP 306. He had occasion to observe Kayla and Mr. Williams together on several occasions over the years and described their interaction as a normal relationship an uncle would have with his niece. RP 307. He never saw any inappropriate physical contact or Mr. Williams provide any marijuana to Kayla. RP 308.

5. Nicolas Wideman

Wideman testified he had been friends with Mr. Williams about fifteen or sixteen years. RP 310. He also had a romantic relationship with Mary Liddle at the end of 2005 through 2006. RP 310. He had occasion to observe Mr. Williams and Kayla together and saw it as a very proper uncle-niece relationship. He thought Greg was kind of like a father to Kayla. RP 311. He went to meetings, picked her up from school, took her to football games because she was on the football team, etc. RP 311. He never saw Mr. Williams provide marijuana to Kayla. He denied ever having any discussion with Mr. Williams about supplying marijuana to

Kayla. He never saw Kayla stoned at Mr. Williams' house although he was over there a lot for barbecues and get-togethers. RP 311-12.

He never observed Carl driving Kayla around alone in the car. She usually rode with her mom or traveled with Greg, his wife and son. RP 312.

On cross-examination, Nicolas explained that his last name legally is Wideman. His parents registered him as Nicolas Fletcher from the fourth grade on but never legally changed his last name. RP 313.

6. Curtis Williams

Curtis Williams testified he is Carl Gregory Williams' brother. RP 317. They have a close relationship and so he is familiar with Mary and Kayla Liddle, having had many occasions over the years to observe his brother and Kayla interact at Mr. Williams' residence. RP 317-18. He described Mr. Williams as like a surrogate father to Kayla and her brother Scott. RP 318. He never observed his brother act inappropriately toward Kayla or provide her marijuana. RP 318.

7. Judy Williams

Judy Williams is married to Carl Gregory Williams. RP 321. Mary Liddle is her sister, and Kayla is her niece. RP 322.

After Mary moved her family up from Oregon in January of 2000, Judy began to pick Kayla and her brother Scott up after school and take them to her house until Mary got off work. RP 323-24. Mr. Williams picked the kids up from school only occasionally and when he did that would have included their son Carl Jr. RP 327.

Greg was a father figure to both Scott and Kayla. Greg took Scott and their son Carl Jr. on trips for scouts. Greg attended their Tuesday night scout meetings. RP 331-32.

Greg was never alone with Kayla except when called upon by Mary to mediate disciplinary problems she was having with her daughter. RP 332-33.

Judy described Kayla as happy-go-lucky around Greg. She never appeared wary of him. RP 333. Nor did she ever see Greg behave inappropriately with Kayla. RP 334.

On cross-examination she acknowledged Greg had gone with Kayla to Portland to purchase the concert ticket together. RP 339. Greg

smoked marijuana, which he kept in their bedroom, but stopped using pot over a year before the trial. RP 341.

On re-direct examination Mrs. Williams testified she never saw her husband supplying marijuana to Kayla and never noticed that he was high from smoking pot after he returned from counseling Kayla at Mary's request. RP 344.

8. Carl Gregory Williams

Greg testified he worked at Curt Warner Chevrolet and then Westin Pontiac from early 2003. Westin Pontiac is located in Gresham, Oregon. He worked there until October of 2005. RP 349-50.

He transported Scott to Boy Scouts. He attended Kayla's football games with his wife Judy, Mary, his son Carl. RP 350. He spent time alone with Kayla when asked by her mother Mary to counsel her when they were having conflict. RP 351.

Although he used to smoke marijuana, he never did with Kayla. RP 352. Never provided her marijuana. RP 352. He has seen her smoke it with other people. RP 353. He never had a conversation with Nick Wideman (Fletcher) about providing marijuana to Kayla. RP 380.

Other than meeting with Kayla alone to mediate at Mary's request, he was only alone with Kayla a time or two. On one occasion he and Kayla went to Portland to obtain concert tickets. RP 356. He did not ask Kayla to expose her breasts. RP 357.

Greg denied ever touching Kayla inappropriately on her breasts; putting his arm around her and touching her breasts; putting his hand between her legs; touching her crotch; or cornering her in the hallway and groping her. RP 358. He also denied ever putting his hand between her legs while she was on the computer in the bedroom at her house. RP 358.

When Kayla came over to Greg's house she would often give him a big hug. She hugged him every time they parted company. He used to pinch her on the arm to tease her. RP 359. He recalls smacking her on the butt, not in a sexual way. RP 360. He's done that to his son as well. RP 361. He never molested her. RP 378.

IV. ARGUMENT AND AUTHORITIES

A. The trial court committed reversible error in denying defendant's motion in limine to exclude evidence of uncharged misconduct by (1) failing to make a factual determination by a preponderance that the uncharged misconduct actually occurred, and (2) by failing to balance the prejudicial effect of the evidence versus its probative value.

Evidence of uncharged misconduct is generally inadmissible under ER 404(b). That statute provides:

(b) **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The party offering evidence of prior misconduct has the burden of proving by a preponderance of the evidence that the misconduct actually occurred. In the absence of the necessary foundation showing, the evidence is inadmissible. *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993). The court may proceed by evidentiary hearing, or by a narrative offer of proof, but a factual determination is required. *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Assuming that the uncharged misconduct actually occurred (and is relevant for some purpose other than

that prohibited by ER 404(b)), the court is also required to make a determination on the record whether probative value is outweighed by the danger of unfair prejudice. If so, the evidence should be excluded under ER 403. *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984).

The record in the case at bench establishes that defense counsel filed a motion in limine requesting exclusion of uncharged (because extra-jurisdictional) sexual misconduct alleged by the complainant to have occurred in Long Beach, Washington, May 27-29, 2006 and in September or early October of 2005 in Portland, Oregon. CP 61. Prior to jury selection on the morning of the first day of trial, counsel argued for exclusion on grounds that a lack of evidence existed to actually prove the uncharged misconduct occurred *and* that the prejudicial nature of the allegations outweighed any probative value. RP 30-33. More specifically, counsel argued a lack of any evidence to support the naked allegation of the complaining witness that the uncharged misconduct ever happened, RP 30, 32, *and* reminded the court that in the absence of a factual determination and balance analysis the evidence should be excluded. RP 32. Nevertheless, the prosecutor argued, and the trial court apparently agreed, that evidence of alleged uncharged sexual misconduct by the defendant directed towards the complainant has been admitted over

404(b) objection as tending to show lustful disposition pursuant to *State v. Guzman*, 119 Wn.App. 176, 79 P.3d 990 (2003), and *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991), and the factual determination and balancing required by law was completely ignored. RP 30-33.

While it is true that evidence of lustful disposition toward the complainant is generally admissible as an exception to ER 404(b), our jurisprudence at least requires an offer of proof by the prosecutor before a factual determination based on the preponderance standard can be made. *State v. Kilgore*, supra at 295. Especially where counsel reminds the court that a factual determination is necessary, and points out that the alleged uncharged misconduct is based solely upon the unsupported testimony of the complainant, the failure of the trial court to follow the correct procedure is clearly error. *State v. Binh Thach*, 126 Wn.App. 297, 311, 106 P.3d 782 (2005).

As a direct result of the trial court's failure to take evidence or at least an offer of proof to make a factual foundation as to whether or not the alleged acts of prior misconduct ever actually occurred, no factual basis existed upon which the trial court could balance probative value versus prejudice. Again, the trial court's failure to do so is clearly error. *Id.* at 311.

In *State v. Guzman*, 119 Wn.App. at 184, for example, admission of evidence to show defendant's prior sexual misconduct toward the complainant was upheld on appeal, but there the trial court "carefully weighed the probative value of the evidence against the risk of prejudice."

Reviewing the trial record, there is no evidence corroborating Kayla Liddle's testimony claiming that sexual contact with the defendant occurred either at Long Beach, Washington or in Portland, Oregon. While the State's case based upon the say-so of the complainant may go to the jury without corroboration, a finding of preponderance is required before prior uncharged misconduct may be admitted for any purpose. *State v. Benn*, supra.

Moreover, the uncharged misconduct testimony, particularly that describing the sexual contact at Long Beach, was highly inflammatory. The charged misconduct involved nothing more than sexual contact over the clothing, while the Long Beach incident involved the defendant allegedly placing the complainant's hand on his penis repeatedly - - the only skin-to-skin sexual contact alleged to have occurred in the entire case. Consequently, exclusion of this testimony could easily have resulted in a different outcome at trial, and may not be fairly characterized as harmless error.

B. The non-corroboration instruction given in this case unnecessarily and unfairly emphasized the testimony of the complainant constituting an improper comment on the evidence, was misleading and confusing in the absence of further explanatory instruction defining the technical term “corroborated”, and operated to subvert the presumption of innocence and relieve the state of its burden of proof, all in derogation of defendant’s due process right to a fair trial.

1. The non-corroboration instruction given in this case unnecessarily and unfairly emphasized and highlighted the testimony of the complaining witness constituting an improper comment on the evidence.

Article IV, § 16 of the Washington State Constitution prohibits the court from commenting on the evidence: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement by a court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the credibility of the testimony of any given witness may be inferrable or otherwise communicated to the jury. *State v. Trickle*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977). The concern is that the constitution mandates that juries are supposed to determine the credibility of witnesses and the value of evidence, not the court. *State v. Davis*, 20 Wn.2d 443, 147 P.2d 940 (1944). Because of the deference juries accord the experience and wisdom of the court, comment by the

court must be scrupulously avoided to ensure a fair trial, *State v. Crotts*, 22 Wash. 245, 250-51, 60 P. 403 (1900), and constitutionally prohibited judicial comments on the evidence are presumed to be prejudicial. *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006).

In the case at bench the trial court instructed the jury as follows: “In order to convict the defendant of a sexual offense against a child, it shall not be necessary that testimony of the alleged victim be corroborated.” CP 66.

The language of the instruction closely approximates RCW 9A.44.020(1). As such, it is a correct statement of the law, but nevertheless should never be given in any criminal case for a variety of reasons. First, as explained by the Washington Supreme Court Committee on Jury Instructions in 11 WPIC § 45.02, cmt. at 561 (2nd ed. 1994):

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

Second, the instruction is *unnecessary* because the credibility, testimony-as-evidence, and reasonable doubt instructions given in any

criminal case provide sufficient guidance to enable the jury to evaluate the credibility of witnesses and weigh the evidence on the reasonable doubt standard. As a result, no need to emphasize the testimony of one witness or one side or the other exists from an instructional standpoint.

Third, the instruction *unfairly* emphasizes the testimony of the complaining witness. As may be seen by the instruction in this case, no corresponding mention of the defendant's testimony or evidence is made. The obvious unfairness of this is driven home by the care taken by the Washington Supreme Court Committee on Jury Instructions to point out in its comment: "Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness *or the uncorroborated testimony of the defendant* is best left to argument of counsel." You simply cannot selectively mention one side or the other in an adversarial trial without running the risk of unfairness, especially where the instruction tells the jury no additional evidence is necessary beyond the testimony of the complainant. The danger is that the jury may decide what that means is if she said it happened no other evidence is needed, and render its verdict accordingly.

The Washington Supreme Court first addressed whether a non-corroboration instruction unconstitutionally commented on the evidence in

State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949). In *Clayton*, the defendant was charged with attempting to carnally know a female child under the age of 18. The court instructed the jury, at 923:

You are instructed that it is the law in this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Counsel for Clayton argued the foregoing instruction constituted an improper comment on the evidence as it singled out the prosecutor's witness and informed the jury that a conviction can be based solely on the alleged victim's testimony. The court agreed that the instruction singled out the state's witness, but concluded that it correctly stated the law by explaining that a defendant may be convicted upon such testimony *provided* the jury should believe from the evidence, *and* was satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged, and affirmed. *Id.* at 924.

Two non-corroboration instruction cases have been decided in the Court of Appeals since *Clayton*. *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005), *review granted*, 157 Wn.2d 1012, 138 P.3d 113 (2006); *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978), *review denied*, 91 Wn.2d 1018 (1979). Although both cases affirmed a non-corroboration instruction similar to that given by the court in the case at bench, in each case, the non-corroboration instruction omitted language that was essential to the court's ruling in *Clayton*, as in the case at bench.

In *Zimmerman*, the defendant was convicted of first degree child molestation. The court's instruction provided: "In order to convict a person of any crime defined (Chapter 9A.44 RCW, sex offenses) it shall not be necessary that the testimony of the alleged victim be corroborated." The *Zimmerman* instruction did not remind the jury to assess the credibility of the complainant or refer the jury back to the reasonable doubt standard as the *Clayton* instruction had done, and yet the *Zimmerman* ultimately held "we are bound by *Clayton* to hold that the giving of such an instruction is not reversible error", without any analysis or discussion of the importance of the additional language contained in the *Clayton* instruction. *Zimmerman*, 130 Wn. App. at 182.

Likewise, in *Malone*, the defendant complained of an instruction that provided: "In order to convict the defendant of the crime of rape in any degree, it shall not be necessary that the testimony of the alleged victim be corroborated." 20 Wn. App. at 714. The Court of Appeals held the instruction was a correct statement of the law pertinent to the issues presented, did not convey an opinion on the alleged victim's credibility, and did not constitute a comment on the evidence. Other than dismissing Malone's argument that the instruction was "negative" and therefore improper, the opinion is otherwise devoid of analysis. Most significantly, the Supreme Court's decision in *Clayton* is never mentioned, and the critical differences in the language of the non-corroboration instruction approved by the State Supreme Court and the language of the instruction in *Malone* never contrasted or compared.

While it is true that the non-corroboration instruction in this case is a correct statement of the law in-so-far as it goes, it is not the same instruction approved by the Washington Supreme Court in *Clayton*. Noticeably missing from the language in the instruction in this case, as well as the instructions in *Zimmerman* and *Malone*, is the language contained in the second sentence of the instruction given in *Clayton* which emphasizes the fact that it is still for the jury to decide whether

corroboration is necessary to convict, and after considering all the evidence the jury must still be satisfied beyond a reasonable doubt, with or without corroboration of the alleged victim's testimony. *Clayton*, supra, at 923.

The differences between the *Clayton* instruction and those submitted to the jury in *Zimmerman*, *Malone*, and the case at bench, roughly approximates the difference between handing twelve children a loaded firearm or giving twelve children an unloaded firearm with ammunition and instructions on how to operate it safely. The former carries with it an unacceptable risk of unnecessary injury, while the latter at least includes the kinds of precautions normally taken when introducing a firearm to novices.

The fact that the instruction approved by the Supreme Court in *Clayton* specifically referred the jury back to the reasonable doubt standard can not be overemphasized. The concept of the burden is all-important because by definition it not only includes *evidence* but also *lack of evidence*. 11 WPIC § 4.01. The relevant language provides: "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." 11 WPIC § 4.01. Thus, the language in the *Clayton* instruction saves it from condemnation as a comment on the

evidence because the jury is explicitly and immediately reminded to weigh all the testimony and consider all the evidence and lack of evidence along with the testimony of the complainant. This prevents the testimony of the complainant from being assigned undue emphasis by the jury, and most importantly, reminds the jury that the issue in any criminal case is not “who do you believe?”, but whether or not there is reasonable doubt. While the instructions in *Zimmerman*, *Malone*, and that given by the trial court in the case at bench each contained a correct statement of the law, none of them included the saving language deemed critical by the Supreme Court in *Clayton*. As stated by the court at 923-24:

It is true, in the instruction of which complaint is here made, the trial court in a sense singled out the testimony of the prosecutrix. However, what the court thereby told the jury was not that the uncorroborated testimony of the prosecutrix in the instant case was sufficient to convict the appellant of the crime with which he was charged, but, rather, that in cases of this particular character, a defendant *may be* convicted upon such testimony alone, provided the jury should believe from the evidence, and should be satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged. That was a correct statement of the law.

Thus, the court in *Clayton* explicitly condoned the non-corroboration instruction precisely because it contained safeguarding language that the instruction given by the trial court in the case at bench

did not. Those safeguards represent the difference between a fair summary of the law and an impermissible comment on the evidence.

2. The non-corroboration instruction operated to subvert the presumption of innocence and relieved the state of its burden of proof in derogation of defendant's right to a fair trial.

In a criminal prosecution, due process requires that the State prove beyond a reasonable doubt all elements constituting the crime charged. *Carella v. California*, 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989); *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Jury instructions relieving the State of its burden violate a defendant's due process rights. *Carella*, at 265. Such instructions subvert the presumption of innocence and invade the truth-finding task assigned solely to juries in criminal cases. *Id.*

Sexual assault cases are commonly decided by juries based upon the uncorroborated testimony of complainant and defendant, as in the case at bench. Because this is true, there is no more justification for submitting a jury instruction that emphasizes to the jury that it may convict based upon the uncorroborated testimony of the complainant, as there is for submitting a jury instruction emphasizing that the jury may acquit based

upon the uncorroborated testimony of the defendant. For this reason, again, the Washington Supreme Court Committee on Jury Instructions stressed: “Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to the argument of counsel.” 11 WPIC § 45.02, cmt. at 561 (2nd ed. 1994).

Ultimately, the question for the jury in any sexual assault case is whether there is reasonable doubt about complainant’s accusation, and any non-corroboration instruction that fails to remind the jury that a reasonable doubt may be based upon the lack of evidence alone is subversive to the presumption of innocence and impermissibly dilutes the prosecutor’s burden of proof. As a result, no non-corroboration instruction may fairly be regarded as constitutionally sufficient unless the jury is specifically reminded that they are not bound by the complainant’s testimony and may not convict unless satisfied beyond a reasonable doubt as required by law.

An example of a constitutionally sufficient non-corroboration instruction, therefore, would have to include the following, or similar, language:

In order to convict the defendant of the crime, it shall not be necessary that the testimony of the alleged victim be corroborated. You are not, however, bound by such testimony and may not convict unless you are satisfied that the defendant is in fact guilty beyond a reasonable doubt as defined elsewhere in these instructions.

Although the language of the instruction approved by our state supreme court in *Clayton* was far from perfect, it did two things that the instruction in the case at bench did not: (a) explained that the jury does not have to accept the testimony of the complainant without reservation, and (b) reminded the jury that the ultimate issue is whether or not there is a reasonable doubt as to the guilt of the defendant. Those two safeguards were not included in the instruction submitted to the jury in the case at bench. As a result, jurors may have interpreted the non-corroboration instruction in this case to mean that the testimony of the complainant should be given credit regardless of its merit and accepted without question despite inconsistencies, contradiction by circumstances, or otherwise. *Ludy v. State*, 784 NE 2d 459 (2003). Taken together, these deficiencies effectively operated to divest the defendant of the presumption of innocence, relieved the state of its burden of proof, and denied defendant his due process right to a fair trial in this case.

C. The defendant did not receive effective assistance of counsel.

“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” Amendment VI, U.S.C.A. Const. The Sixth Amendment right guarantees the accused not only the assistance of counsel, but effective assistance of counsel.

The right to effective assistance of counsel is fundamental to the defendant receiving a fair trial. “We cannot over-emphasize the primary importance of the right to counsel: ‘[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.’” *State v. McDonald*, 96 Wn.App. 311, 316, 979 P.2d 857 (1999).

In order to demonstrate *ineffective* assistance of counsel, a defendant must show: (1) defense counsel’s representation was deficient, and (2) defense counsel’s deficient representation prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Representation is deficient if it fell below an objective standard of reasonableness based on consideration of all the

circumstances. *State v. Rodriguez*, 121 Wn.App. 180, 184, 87 P.3d 1201 (2004).

Courts engage in a strong presumption counsel's representation was effective, but the presumption can be overcome by showing deficient representation. *Id.* at 336. The defendant can prove deficiency by showing an absence of legitimate strategic or tactical reasons supporting the challenged conduct. *Id.*

The Sixth Amendment right to counsel includes the right to assistance of counsel free from conflicts of interest. *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000). Effective assistance of counsel includes the duty of loyalty and a duty to avoid conflicts of interest. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999). During trial, the court was informed that defense counsel previously represented the State's witness Mary Liddle.

An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. *McDonald*, 96 Wn.App. at 317. Trial courts may allow an attorney to continue representation despite a conflict of interest if the defendant makes a voluntary, knowing, and intelligent waiver. *State v. Regan*, 143 Wn.App. 419, 427, 177 P.3d 783 (2008) (quoting *Garcia v. Bunnell*, 33

F.3d 1193, 1195 (9th Cir. 1994)). For a conflict waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice. *Id.* (quoting *Evans v. Raines*, 705 F.2d 1479, 1480 (9th Cir. 1983)). The court must indulge every reasonable presumption against the waiver of fundamental right. *Id.* (citing *E.S. v. Allen*, 831 F.2d 1487, 1498 (9th Cir. 1987)). In the case at bench, the defendant was never informed of the consequences and clearly never waived the conflict.

Previously, the law required automatic reversal where the trial court knew of a conflict of interest but failed to inquire fully. *In re Richardson*, 100 Wn.2d 669, 675, 675 P.2d 209 (1983), *abrogation recognized by State v. Dahliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003). Now, however, the defendant must show that a conflict adversely affected the attorney's performance. *Dahliwal*, 150 Wn.2d at 571. The defendant need not demonstrate the outcome of the trial would have been different, but rather that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests. *Regan*, 143 Wn.App. at 428. The conflict must either (1) cause some lapse in representation contrary to the

defendant's interests, or (2) have likely affected particular aspects of counsel's advocacy on behalf of the defendant. *Id.*

In the case at bench, there was absolutely no discussion with the defendant as to his attorney's conflict of interest. Since there was no waiver of the conflict of interest, and no objection was made by the defendant at the time, the defendant must demonstrate an actual conflict of interest adversely affected his lawyer's performance.

In this case the defense attorney previously represented Mary Liddle, the mother of the complaining witness. The State called Mary Liddle as a primary witness in its case-in-chief. It is evident from the record that the defense counsel did not aggressively or effectively cross-examine his former client. RP 88-110. And, as the Supreme Court of Washington recognized in *Richardson*:

In a case of joint representation of conflicting interests the evil - - it bears repeating - - is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with the record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interest on the attorney's options,

tactics, and decisions and plea negotiations would be virtually impossible. 100 Wn.2d at 676.

D. The trial court erred in failing to hold an evidentiary hearing to explore defense counsel's conflict of interest and this case should be remanded for an evidentiary hearing on that issue.

Where the trial court fails to inquire about a potential conflict of interest, automatic reversal in Washington is not required. *Dahliwal*, 150 Wn.2d at 570. However, where the trial court becomes aware of a conflict of interest, it should be required to hold a hearing to determine the extent of the conflict and whether it could materially affect counsel's performance and/or the outcome of the trial. *State v. Mims*, 180 N.C. App. 403, 410, 637 S.E.2d 244 (2006).

In *Mims*, the North Carolina Court of Appeals held where the trial court becomes aware of even the "mere possibility" of a conflict of interest prior to the conclusion of a trial, the trial court must conduct a hearing to determine whether the conflict will deprive a defendant of his Sixth Amendment right to counsel, determining that remand for an evidentiary hearing was the appropriate remedy. *Id.*

Given the apparent conflict of interest discovered by the trial court in the case at bench, and the utter failure to make any record developing

the issue, this case should be remanded to the trial court for an evidentiary hearing to determine whether the conflict may have impacted the defendant's Sixth Amendment right to counsel. *Id.*

V. CONCLUSION

Based upon the foregoing argument and authorities, this case should be reversed and remanded for new trial based upon the argument and authorities supporting assignments of error A, B, and C.

This case should be remanded for an evidentiary hearing to address the issues of fact surrounding defense counsel's conflict of interest pursuant to assignment of error D.

Respectfully submitted this 11th day of October, 2008.



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NO. 37450-1-II
IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,)
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 Respondent,)
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v.)
)
CARL G. WILLIAMS,)
)
 Appellant.)

DECLARATION OF
SERVICE

I declare that on October 11, 2008, a true copy of Brief of Appellant was sent to the following persons via first-class mail, postage prepaid, in an envelope addressed as follows:

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

Signed at Vancouver, Washington this 11th day of October, 2008.

A handwritten signature in cursive script that reads "Betty Olesen". The signature is written in black ink and is positioned above a horizontal line.

Betty Olesen, Legal Assistant
Steven W. Thayer, P.S.