

NO. 65098-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CALVIN ARTIE EAGLE

Appellant.

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was deprived of his right to a public trial.
2. Appellant received ineffective assistance of counsel.
3. Appellant was deprived of his right to a unanimous jury verdict.

Issues Pertaining to Assignments of Error

1. The trial court and parties had an off-the-record jury instructions conference in chambers. The trial court did not conduct a Bone-Club inquiry.¹ Did the trial court deprive the appellant of his right to a public trial as provided for in the United States and Washington constitutions?

2. Did appellant receive ineffective assistance of counsel where defense counsel – in the state’s prosecution against appellant for rape of a child allegedly committed against his stepdaughter and her cousin – failed to object to evidence appellant made sexual overtures, or bestowed an inordinate amount of affection toward, two other young girls?

3. Where the state charged appellant with one count of first degree rape of a child and one count of second degree rape of a child, allegedly committed against his stepdaughter, but the state

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

offered evidence of multiple instances upon which the jury could have relied for each count and failed to make an election in closing argument, and where the court failed to instruct jurors they must be unanimous as to which act formed the basis for each charge, was appellant deprived of his right to a unanimous verdict for each charge?

B. STATEMENT OF THE CASE

1. Allegations

Appellant Calvin Artie Eagle is appealing from his convictions for one count of first degree rape of a child, allegedly committed against Shilair, the daughter of his former fiancée, and one count of second degree rape of a child, also allegedly committed against Shilair. Supp. CP __ (sub. no. 70, Second Amended Information, 12/1/09); CP 33-34 (verdict); CP 16-28 (Judgment and Sentence); CP 2-15 (Notice of Appeal); RP 241 (engagement). Eagle was also convicted of an additional count of second degree rape of a child, allegedly committed against Shilair's cousin, Brianne. Supp. CP __ (sub. 70); CP 33-34 (verdict).

Eagle testified in his own defense and denied abusing either girl. RP 708, 725-726, 753-54, 781. He presented evidence Shilair resented him as a father-figure and concocted the abuse allegation

to get even with him, and also because she did not want the family to relocate to Colorado, as Eagle and Shilair's mother, Sheila Rowe, were reportedly planning. RP 656, 789, 791, 803, 809, 820-21, 913-15918-919. The defense theorized Brianne corroborated Shilair's abuse allegation because she and Shilair were best friends, and Brianne likewise did not want Shilair to move. RP 968, 995. Both sides agreed the case hinged on the girls' credibility. See e.g. RP 1011 ("Do you believe the defendant, or do you believe the girls"), 1020 ("this is a case about credibility").

The defense offered reasons to doubt the girls' credibility and their allegations. See e.g. RP 78, 632-634 (although Shilair alleged Eagle ejaculated on her bed, his DNA was not found on her comforter); RP 118 (Shilair denied any abuse when confronted by her mother); RP 288-290, 680, 769-780 (impeachment of Brianne's testimony that Eagle allowed the girls to sit on his lap and drive his car); RP 891-894, 896 (despite state witnesses' testimony Eagle was overly affectionate with the girls, Eagle's co-worker saw nothing inappropriate in the ten times he visited the home).

Ultimately, the jury sided with the state and convicted Eagle of the offenses. CP 33-34.

Significantly, however, with regard to Shilair, the state presented evidence of at least three acts that could have formed the basis for the first degree charge and at least four acts that could have formed the basis for the second degree charge. RP 53-56, 65-67, 89, 99, 101, 109, 111-12, 114, 122-123, 169, 182-83, 203.² The state made no election as to which act it relied on for each count. See e.g. RP 954-956 (referring to numerous different allegations). And the court failed to instruct the jury it must be unanimous as to the basis for each count. CP 35-50 (court's instructions); RP 947-48 (discussion of instructions). Because the unanimity issue concerns only the counts involving Shilair, this section will focus on the facts offered in support of those charges.³

Shilair was born on October 14, 1994. RP 44. At the time of trial, December 2009, she was 16 years old and in the tenth grade. RP 44, 154. The state alleged the first degree charge occurred between October 14, 2003 (Shilair's 10th birthday) and October 13, 2005 (the day before her 12th). Supp. CP __ (sub. 70, Second Amended Information, 12/1/09). The state alleged the second

² Each act will be set forth clearly in the argument section.

³ The state conceded in closing argument it presented evidence of only one instance to support a conviction for second degree rape of Brianne. RP 957.

degree charge occurred between October 14th, 2005 (Shilair's 12th birthday) and June 14, 2008 (8 months beyond Shilair's 14th).⁴ Id.

Rowe and Eagle moved from Colorado to Washington in the summer of 2003, when Shilair was 9 years old. RP 47-48, 53, 225, 519-20, 692. They lived with Rowe's parents in Bellingham for Shilair's fourth grade year, 2003-2004. RP 47-48, 53, 149, 519. In Spring 2004, Eagle moved into a one-bedroom house in Blaine, after a fight with Rowe. RP 53, 526-27. Eagle and Rowe reconciled, however, and continued seeing each other throughout the summer of 2004, although they still lived apart. RP 54-55, 536.

Shilair testified that before her fifth grade year (when she was 10), she once spent the night by herself with Eagle at his house in Blaine. RP 53-56, 169. According to Shilair, Eagle insisted she slept in his bed and wanted to cuddle. RP 56. When asked on direct whether Eagle touched her that night, Shilair answered, "not that I can recall." RP 56. However, when asked on cross-examination when was the first time Eagle digitally penetrated her vagina, Shilair answered it was "the first house in Blaine," the summer before her fifth grade year. RP 182-83 (emphasis added). Significantly, Shilair and the rest of the family

⁴ This was the date the alleged abuse was disclosed, the facts of which are not

stayed with Eagle at his house in Blaine for about a month that summer before her fifth grade year, before they all moved into the "house on C Street in Blaine."⁵ RP 57, 60, 538.

The family continued to reside at that house on C Street until February 2009, when they moved back to Bellingham. RP 516, 539. Accordingly, Shilair testified the first penetration occurred at Eagle's house in Blaine the summer before her fifth grade year.

Shilair described additional digital penetrations once the family moved to the C Street house. During Shilair's fifth grade year, when she was between the ages of 10 and 11, Eagle reportedly engaged in digital penetration on numerous occasions in her bedroom. RP 65-67, 183. She said it happened too many times for her to remember the details. RP 67.

She alleged similar abuse occurred in sixth grade, when she would have been either 11 or 12 years old. RP 99, 101, 203. Shilair also claimed that while she was in sixth grade, Eagle bought her a pair of shoes after she performed oral sex on him. RP 123.

Shilair testified she thought she received bunk beds for her birthday in seventh grade, which would have been her 13th. RP 88-

relevant to the issue raised.

⁵ Rowe thought it was for just two weeks in July. RP 538.

89. She alleged that digital penetration occurred before and after her bunk bed birthday. RP 89.

Shilair claimed Eagle tried to engage in vaginal-penile penetration when she was in seventh grade. She alleged it happened on her mother's "limo night," when Rowe went out with her girlfriends. RP 109. According to Shilair, she fell asleep watching a movie downstairs, but awoke to find Eagle on top of her and her pants pulled down. According to Shilair, Eagle tried to put his penis in her vagina. RP 111-12. Shilair ran upstairs to her room. RP 113-14. Reportedly, Eagle eventually followed, climbed up on the top bunk with her and engaged in digital penetration. RP 114. According to Shilair, Eagle left when Shilair yelled at him to get out of her room. RP 115.

Shilair's final accusation was that while she was in the seventh or eighth grade (between ages 12 and 14), Eagle performed oral sex on her a few times a week. RP 122-23.

2. Allegations of Inappropriate Behavior Towards Others

On direct examination of Shilair, the prosecutor asked whether Eagle commented on her body, particularly her breasts. RP 107. When Shilair indicated he did not, the prosecutor asked

whether Eagle commented on other people's breasts, and the following exchange took place:

A He talked about one other girl's breasts with me. He compared them.

Q Tell us about that.

A Like my friend Cassie would be always over and he said Cassie has the boobs and you have the bubble butt.

Q Did he say these things to Cassie directly about these things?

A He told her she had big boobs for her age and stuff like that.

RP 107. The prosecutor further elicited that Eagle would tickle and wrestle Cassie and allow her to come over, even when Shilair was grounded. RP 108. Defense counsel did not object.

Shilair's brother confirmed Shilair's testimony about Cassie.

On direct, the prosecutor asked how Eagle behaved around some of Shilair's friends:

Q Did you ever see anything inappropriate between Mr. Eagle and any of those miscellaneous friends that came over:

A Um, he slapped Cassie on the bottom and chased her around the house.

Q Did you see anybody else?

A Her friend Amber.

RP 462.

Shilair's other brother confirmed Cassie was allowed to come over even if Shilair was grounded, and that he observed Eagle tickling and wrestling Cassie. RP 482-83. On this note, the prosecutor ended his direct examination. RP 483.

In addition to Shilair's friends, Shilair's cousin, Brooke (Brianne's younger sister), was also a subject for the prosecution. On direct of Shilair, the prosecutor asked whether there ever came a time when Eagle began paying attention to Brooke, and this exchange took place:

Q What happened?

A He was in my bedroom with Brooke and Brianne and he's usually touching her hair telling her how pretty she's getting and her hair is nice and long and everything. He was just paying a lot of attention to her and stuff.

Q What did you think about that? Did that have any impact on you?

A I freaked out a little bit.

Q What do you mean?

A I was scared that he was going to go to her next and I wanted to stop it.

RP 144. With the exception of two additional questions, the prosecutor ended on this note. RP 144.

The prosecutor also questioned Shilair's grandmother about Eagle's attention to Brooke:

Q Did you ever see the defendant pay any attention to Brooke?

A Yes. I did see him paying attention to Brooke and in fact that was at that birthday party where the pajamas were given to Brianne.

Q What kind of things did you see?

A He was talking about how she was growing up to be so pretty. What a pretty girl she was turning into. A birthday party you said for Brianne.

A Right.

Q What age was she turning, do you remember?

A I do. Brianne was turning eleven. So Brooke would have been nine.

RP 232. As was becoming characteristic, the prosecutor ended his examination on this note. RP 232.

3. Jury Instructions Discussion In Chambers

Before closing argument, the parties went on record regarding an in-chambers discussion regarding jury instructions:

THE COURT: I have given the parties a copy of the court's proposed instructions. I will start with

the State; do you have any objections or requested additional instructions?

MR. RICHEY [prosecutor]: Your Honor, I've not had an opportunity to review the instructions but based on your comments that you made in chambers I'm going to ask that we just give the WPICs. I know you have talked about giving some instructions that were not WPICs; I'm asking that the court give the WPICs.

THE COURT: That's referring to the court's proposed instructions with regard to circumstantial evidence and expert witnesses. Okay, your objections and exceptions are noted.

Mr. Lustick [defense counsel], does the defense have any objections or requested additional instructions?

MR. LUSTICK: Your Honor, we had noticed in the latest version of the WPICs that's published on the state bar home page and Westlaw home page that there's certain instructions that's proposed as to the jury, a certain way they might conduct themselves in the jury room. That was a WPIC and that was proposed by the Supreme Court's committee on pattern jury instructions. I know it's a new one, I don't know if it's ever been read in this court, but we thought it had merit. We felt it would give the jury some guideline and streamline things and actually move things along faster. So we had requested that instruction.

RP 947-48.

The court explained it declined to give the instruction, because it did not want to instruct juries on how to conduct their

deliberations. RP 949. There was no discussion on the record regarding the need for a unanimity instruction. RP 947-49.

C. ARGUMENT

1. THE TRIAL COURT DENIED EAGLE HIS RIGHT TO A PUBLIC TRIAL BY HAVING THE JURY INSTRUCTIONS CONFERENCE WITH COUNSEL IN CHAMBERS.

The trial court held an off-the-record conference in chambers to decide how the jury would be instructed. RP 948. The public had no opportunity to view the process for selecting those instructions. This violated the constitutional provisions mandating open trials.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide the accused with the right to a public trial. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, ___, ___ L. Ed. 2d. ___ (2010); State v. Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The purposes behind the constitutional public trial guarantee are to ensure a fair trial, foster public understanding and trust in the process, and give judges the check of public scrutiny. State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007). Public trials embody a “view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citations omitted). The public trial right extends beyond the taking of witness testimony at trial. Presley, 130 S. Ct. at 724 (Sixth Amendment right to public trial applies to voir dire); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (qualified First Amendment right to open access to preliminary hearings); In re Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004) (voir dire); Bone-Club, 128 Wn.2d at 257 (suppression hearing); Ishikawa, 97 Wn.2d at 36 (motion to dismiss).

The purposes behind the open trial provisions are just as applicable to factual hearings as to purely legal ones. There is thus no reason why those provisions should not apply to instructions conferences.

Whether a trial court procedure violates the right to a public trial is a question of law courts review de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right is considered to be of such constitutional magnitude that it may be raised for the first time on appeal. Strode, 167 Wn.2d at 229. The Washington Supreme Court has set forth the specific factors a trial court must consider on the record before ordering a courtroom closure, unless the defendant affirmatively agrees to and benefits from the closure.⁶ State v. Momah, 167 Wn.2d 140, 151, 217 P.3d 321 (2009); Bone-Club, 128 Wn.2d at 258-59.

⁶ Those factors are:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

The circumstances in this case constitute a closure. Instructive is State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008). The Court held that questioning four prospective jurors in the jury room was a “closure” that mandated Bone-Club analysis even though the trial court did not explicitly announce it was closing the proceedings. Erickson, 146 Wn. App. at 211. Observing that “[m]ost courts have jury rooms and chambers adjacent to, but separate from, the courtroom[,]” the court found that “it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord.” Erickson, 146 Wn. App. at 209-10. The Court also held that “[b]ecause the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, . . . it acts as a closure for purposes of Bone-Club.” Id. at 209. See also State v. Heath, 150 Wn. App. 121, 128, 206 P.3d 712 (2009) (trial court’s sua sponte decision to hear pretrial motions and to examine one prospective juror in chambers was closure calling for Bone-Club analysis); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) (conducting part of voir dire in chambers without Bone-Club analysis violated right to public trial); but see State v. Wise, 148 Wn. App. 425, 436, 200 P.3d 266

(2009) (questioning 10 jurors individually in chambers was at most "temporary and partial, below the 'temporary, full closure' threshold of Bone-Club."), petition for review granted, No. 82802-4 (7/9/2010).

In Eagle's case, the trial court's decision not to discuss jury instruction in open court had more than a trivial effect on the proceedings, particularly since a unanimity instruction was needed but not given. And as a general rule, jury instructions – even when wrong – that are not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). "Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel." State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007). At the risk of stating the obvious, "words that a judge says, particularly to a jury, are very important." U.S. v. Wisecarver, 598 F.3d 982, 989 (8th Cir. 2010). See U.S. v. Medina-Martinez, 396 F.3d 1, 8 (1st Cir. 2005) ("Although our review is for plain error, we are cognizant of the fundamental importance of adequate jury instructions."), cert. denied, 544 U.S. 1007 (2005).

In any event, our Supreme Court has never found a public trial right violation to be trivial. Strode, 167 Wn.2d at 230. The trial

court improperly closed an important part of the trial by conducting the instructions conference in chambers without first applying the Bone-Club factors.

The trial court's error was structural under the Sixth Amendment. See Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (violation of right to public trial is structural) (citing Waller v. Georgia, 467 U.S. at 49 n.9); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006); State v. Paumier, 155 Wn. App. 673, 685, 230 P.3d 212 (2010) (remedy for closing part of jury selection is reversal of conviction under Presley and Sixth Amendment).

The choice of remedy under article I, section 22 is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

Rather, the remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. The Court asserted that in those cases, "we have held that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51.

Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed because of unjustified closure.

In Easterling, the Court did not first consider whether reversal and remand were appropriate where the trial court

improperly closed a hearing on a co-defendant's motion to sever his case from the defendant's. Instead, the remedy was automatic:

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. See Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

State v. Easterling, 157 Wn.2d 167, 181, 127 P.2d 825 (2006).

The Brightman court held similarly, finding the structural error remedy of a new trial necessarily followed where the trial court failed to apply the Bone-Club factors before closing voir to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors.

Orange, 152 Wn.2d at 808-09. The Court did not hesitate in finding the remedy for the improper closure was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that "[p]rejudice is presumed where a violation of the public trial right occurs." 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court did consider – and reject – the Waller remedy where the trial court closed a portion of a pretrial suppression hearing. Bone-Club, 128 Wn.2d at 261-62. The Court rejected the state's request. It found persuasive the defendant's argument the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review of the cases shows reversal and remand for a new trial – contrary to the suggestion in Momah -- is the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

Eagle's case, like every other closure case except Momah, has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure, argue for its expansion, or forgo the opportunity to object. Unlike Momah's counsel, Eagle's attorney did not "make a deliberate choice to pursue" an in-

chambers conference. Momah, 167 Wn. 2d at 155. The judge sought no input from counsel and did not close the proceedings to protect Eagle's constitutional right to a fair trial. Counsel presumably participated in the instructions conference, since he proposed instructions the trial judge did not use. CP 55-57 (defense instructions not used); CP 35-50 (court's instructions); RP 948 (defense counsel exception). But the private instructions conference did not "benefit" Eagle any more than an open one would have. For all the reasons the Momah Court found against a reversal of the convictions, this Court should find for such a result. The error here was structural, and a new trial on all charges is required.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO PREJUDICIAL PROPENSITY EVIDENCE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Defense counsel permitted the prosecutor to elicit damaging propensity evidence Eagle acted inappropriately toward other young girls. As a result of defense counsel's failure to object, the prosecutor elicited evidence Eagle talked to Shilair's friend Cassie about her "big boobs" (RP 107), and that he "slapped Cassie on the bottom and chased her around the house." RP 462. As a result of

defense counsel's failure to object, the prosecutor also elicited evidence suggesting Eagle was grooming Brianne's younger sister, Brooke (RP 144, 232), that "he was going to go to her next," and Shilair "wanted to stop it." RP 144.

Counsel's failure to object to this testimony constituted deficient performance. It was not part of a legitimate strategy, as the evidence painted Eagle as a creepy child molester with no self-control, as opposed to someone who was wrongfully accused by a step-daughter who resented him as a father figure. Because the testimony unfairly bolstered the state's case, counsel's failure was prejudicial. This Court should reverse Eagle's convictions.

Failing to object to inadmissible evidence generally waives a challenge on appeal. State v. Roberts, 73 Wn. App. 141, 146, 867 P.2d 697, review denied, 124 Wn.2d 1022, 881 P.2d 255 (1994). Because an ineffective assistance claim raises an issue of constitutional magnitude, however, Eagle may raise this issue for the first time on appeal. State v. Gerdts, 136 Wn. App. 720, 726, 150 P.3d 627 (2007).

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's

conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Eagle meets both requirements here.

An ineffective assistance of counsel claim is reviewed de novo. State v. Thach, 126 Wn. App. 297, 319, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). Deficient performance may be shown where counsel fails to object to inadmissible prejudicial evidence. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failing to object to evidence of prior convictions); State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257, 1261 (2007) (trial counsel ineffective for failing to object to inadmissible hearsay testimony), affd., 165 Wn. 2d 474, 198 P.3d 1029 (2009), cert. denied, 129 S. Ct. 2873 (2009); State v. Dawkins, 71 Wn. App. 902, 907-10, 863 P.2d 124 (1993) (failing to object to evidence of uncharged crimes).

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show

(1) an absence of legitimate tactical reasons for failing to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Under ER 404(b):

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

Case law also recognizes a “lustful disposition” exception to ER 404(b). Our Supreme Court “has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female.” State v. Ray, 116 Wn.2d 531, 547 806 P.2d 1220 (1991); see also State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); State v. Ferguson, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). The key inquiry is whether the evidence demonstrates sexual desire for the *particular victim*. Ferguson, 100 Wn.2d 133-34.

Whether Eagle made sexual overtures toward Cassie or paid inappropriate attention toward Brooke, such behavior did not demonstrate sexual desire for either Shilair or Brianne. The only relevance of Eagle's behavior toward Cassie and Brooke was to show his propensity for behaving inappropriately toward young girls. In other words, its only relevance was to show action in conformity therewith and was clearly prohibited under ER 404(b). Accordingly, a timely objection by defense counsel would have been sustained.

Counsel's failure to object was not part of a reasonable strategy. As counsel both agreed in closing argument, the case boiled down to credibility, whether the jury believed Eagle or Shilair and Brianne. Significantly, Eagle denied abusing either girl and presented a plausible motive for both to lie: to keep Shilair in Washington. Eagle testified he and Rowe were planning to move back to Colorado. RP 788-89. Eagle's mother Judy testified that while Eagle was visiting in Colorado just before Shilair's allegations arose, she spoke to Rowe on the phone. RP 912, 914. Rowe reportedly said she was excited about moving back and looking for work on the internet. RP 915. Rowe acknowledged she looked online for work in Colorado. RP 934. Evidence that Eagle

reportedly behaved inappropriately toward Cassie and Brooke, however, made Shilair and Brianne's accusations appear more credible. Under these circumstances, failing to object was not a reasonable strategic decision.

Finally, counsel's deficient performance was prejudicial. An evidentiary error is prejudicial if it is reasonably probable that the error materially affected the jury's verdict. State v. Viney, 52 Wn. App. 507, 511, 761 P.2d 75 (1988). Because of its bolstering effect, it is reasonably probable the propensity evidence materially affected the outcome of Eagle's trial. State v. McSorley, 128 Wn. App. 598, 609-10, 116 P.3d 431 (2005) (counsel's failure to object to detective's hearsay statement related to disputed point constituted ineffective assistance because it allowed prosecutor to pit accused's credibility against detective's at trial where credibility was crucial).

This Court should conclude counsel deprived Eagle of his constitutional right to effective representation by failing to object to inadmissible propensity testimony. Reversal is the proper remedy.

3. EAGLE WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT.

A criminal defendant has the right to a unanimous jury verdict. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). When the prosecution presents evidence of multiple acts of like misconduct, any one of which could form the basis of a count charged, either the State must elect which of such acts the State is relying on for a conviction or the court must instruct the jury to agree on a specific criminal act. Coleman, 159 Wn.2d at 511. These precautions assure that the unanimous verdict is based on the same act proved beyond a reasonable doubt. Coleman, 159 Wn.2d at 511-12.

A recent decision by Division Two is directly on point. State v. York, 152 Wn. App. 92, 216 P.3d 436 (2009). Richard York was convicted of four counts of second degree child rape. The first three counts were based on three specific instances described by the complainant, S.B. S.B. also testified the sex occurred on many other occasions, but she could not remember specific dates or instances other than those already identified. Rather, she testified she spent the night at Cindy York's house "like, every Friday night"

and that York would have sex with her “[m]ost of the time.” York, 152 Wn. App. at 93-94.

In closing argument, the prosecutor supported count four by stating that:

[S.B.] talked about a pattern ... she said it happened a lot.... It's not anything you can hang a number on. And she said it happened all the time or some of the time or none of the time. RP at 430.

York, 152 Wn. App. at 94.

The Court of Appeals reversed York's conviction for that count, reasoning:

Here, the evidence supporting count four was S.B.'s testimony that she spent the night at Cindy's house once a week for about a year and that York had sex with her on most of those occasions. This evidence presented the jury with multiple acts of like misconduct, any one of which could form the basis of count four. See Coleman, 159 Wash.2d at 511, 150 P.3d 1126. Because the State did not specify an act for count four, the trial court should have given a unanimity instruction to ensure that the jurors agreed that a specific act, out of the multiple acts S.B. described, supported the count four conviction beyond a reasonable doubt.

York, 152 Wn. App. at 95.

The same is true here. Regarding the first degree rape charge, the state presented evidence of at least three acts that could have formed the basis for the charge. Shilair testified that in

the summer before her fifth grade year, when she was ten, she once spent the night alone with Eagle at his Blaine house. RP 53-56, 169. Shilair and Rowe both testified the family stayed with Eagle for a period of time that summer before moving into the house on "C Street." RP 57, 60, 538. Shilair testified the first digital penetration occurred at that first house in Blaine before her fifth grade year. RP 182-83. However, Shilair also testified that during her fifth grade year, digital penetrations occurred in her bedroom at the house on C Street. RP 65-67, 183. Shilair claimed that digital penetrations continued in sixth grade, which would include a period of time when she was 11. RP 99, 101, 203. Finally, Shilair claimed that when she was in sixth grade, which again, would include a period of time when she was 11, Eagle bought her a pair of Phat Farm shoes after she performed oral sex on him. RP 123. Accordingly, the jury had several acts to choose from to convict on this charge.

The same is true of the second degree charge. Shilair alleged there continued to be digital penetration after her seventh grade birthday, when she turned 13 and received the bunk beds. RP 88-89. She testified that on "limo night," when she was in the seventh grade, Eagle attempted vaginal/penile sex. RP 109, 111-

112. Importantly, the jury was instructed that any penetration, however slight, constituted intercourse. CP 42. Shilair testified “he was just trying to force it in and I told him it hurt[.]” RP 112. A reasonable juror could have concluded the “attempt” counted as intercourse. Shilair also testified that after she went up to her room that same night, Eagle climbed up on her bunk bed and engaged in digital penetration. RP 114. Finally, Shilair testified that while she was in the eighth grade, which would include a period of time when she was 13, Eagle performed oral sex on her several times a week. RP 122-23. Accordingly, there were several acts the jury could have relied on to convict on this charge as well.

In closing argument, the prosecutor did not specify which of the acts the jury should rely on for either charge. RP 950-969, 1018-1038. Instead, he discussed the allegations very generally. RP 954-955 (describing various acts and arguing it “happened frequently” to Shilair), 956 (“repeated abuse”). Nor did the court instruct the jury it must be unanimous as to which of the acts Eagle committed. CP 35-50. The court’s failure to so instruct the jury violated Eagle’s right to a unanimous jury verdict. This Court should reverse both of the convictions involving Shilair.

D. CONCLUSION

This Court should reverse each of Eagle's convictions because he was deprived of his right to a public trial and to effective assistance of counsel. Alternatively, this Court should reverse the convictions pertaining to Shilair because Eagle was deprived of his right to unanimous jury verdicts.

Dated this 27th day of August, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Lind". The signature is written in black ink and is positioned above a horizontal line.

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Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65098-0-1
)	
CALVIN EAGLE,)	
)	
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 27TH DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **DESIGNATION OF CLERK'S PAPERS - SUPPLEMENTAL** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIC RICHEY
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
SUITE 201
BELLINGHAM, WA 98225

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF AUGUST, 2010.

x 