

NO. 67868-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARCEL SAMPSON,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. **The erroneous admission of uncharged allegations denied Sampson a fair trial on all charges for which he was convicted.**

The prosecution agrees, as it must, that the court's admission of uncharged allegations of sexual misconduct under RCW 10.58.090 was error, but complains it is unclear whether Sampson believes this improperly admitted evidence tainted all convictions, or only some convictions. As a matter of clarification – multiple incidents of uncharged crimes involving sexual misconduct were admitted into evidence or argued to the jury.

In particular, admitted solely under RCW 10.58.090 and a central focus of the trial was Sampson's prior convictions involving sexual abuse of Briann Porter – she was second witness called to testify, the first witness was her aunt who testified in detail about the same incident, her mother also testified about the offense, the judgment and sentence showing the convictions were presented in court, Sampson's admissions relating to the incident with Porter were the tools by which the police detective pressed Sampson for statements that were used against him at trial, and the prosecution emphasized in his opening and closing arguments that Sampson's acts against Porter showed his sexual

“appetite” and willingness to take advantage of children.¹ This highly prejudicial and improperly admitted evidence tainted the jury’s ability to fairly deliberate on all charges.

Second, the prosecution insists that by telling the jury in Instruction 7 that the evidence of “the defendant’s commission of previous sex offenses” cannot “on its own” be “sufficient to prove the defendant guilty of the crimes charged,” the jury would not have used the other bad acts as the sole evidence to convict Sampson. CP 156; Response Brief at 19. This argument rests faulty premise.

Telling the jury that uncharged and otherwise inadmissible allegations cannot be the “sole” or “only” evidence to convict Sampson is not the equivalent of telling the jury it may not use those allegations to characterize Sampson as a bad person or the kind of person likely to commit sex offenses against children. Instruction 7 did not preclude the jury from using the evidence that Sampson had committed “previous sex offenses” for an improper purpose, it only told them there must be some other kernel of evidentiary support for the convictions. Indeed, the prosecution insisted that RCW 10.58.090 entitled the jury to

¹ See Appellant’s Opening Brief, at 11, 15-17 for detailed citations to the record.

consider the evidence uncharged sexual misconduct for any purposes as “it sees fit.” 7/28/11RP 13. The intended and lasting persuasive force of Porter’s allegations against Sampson is plain from the State’s use of her claims as the very first evidence the jury heard, before anyone else testified, and emphasizing her testimony in closing argument.

The error is not eradicated, or even helped by the State’s request that this Court to affirm on that ground that Porter’s testimony would have been admitted as a common scheme or plan. The State makes this argument without acknowledging that the trial court rejected this theory of admissibility. Response Brief at 20 n.3. Unlike the cases cited by the prosecution which allow the Court to affirm on other grounds “supported by the record,” the trial judge’s decision on the admissibility of evidence may not be revisited by the appellate court when the court already ruled on that claim, denied it, and the State is not claiming the court was manifestly untenable.

More critically, the court instructed the jury to consider the information for improper purposes, unconstrained by the limitations of ER 404(b). 7/7/11RP 19-20, 8/1/11RP 47, 50, 52, 55, 99. By instructing the jury that all evidence not listed under Instruction 8 to be used for any purpose whatsoever, the reviewing court must presume the

jury followed that instruction, just as the prosecution argued to the jury that it could.

Furthermore, Porter's allegations were not the only uncharged allegations used to condemn Sampson. Taking aside the four evidentiary items admitted under ER 404(b) and addressed in Instruction 8, the State's closing argument focused on Sampson's purported "appetite" and "pattern" of offending. 8/1/11RP 44, 45, 50-52. The prosecution's closing argument claimed Sampson had sex with Porter's cousin Ivy, and Christina Rock's younger sister – but these allegations were not admitted into evidence during trial. 7/25/11RP 36; 8/1/11RP 56, 99. The prosecution also insisted another child, P.R. was "yet another victim of the defendant," although Sampson was not prosecuted for such crimes. 8/1/11RP 101. The State's reliance on such uncharged allegations demonstrates the undeniable prejudicial effect that taints each charged crime because of the negative light in which it paints Sampson. He did not receive a fair trial on any of the charges due to the improperly admitted allegations.

2. The concededly inadmissible child hearsay testimony and vouching contributed to the harmful effect of inadmissible evidence used to secure convictions against Sampson.

Just as the State conceded the allegations about uncharged sexual misconduct admitted for purposes other than ER 404(b) should never have been presented to the jury, the prosecution also agrees “it is true” that several witnesses improperly repeated hearsay claims that children made against Sampson. Response Brief at 21. This evidence is not evaluated in a vacuum, but rather treated as part of the cumulative harmful effect of improperly admitted allegations against Sampson, including the improper admission and allegation of uncharged crimes against Sampson. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

Defense counsel objected to the State’s request to admit child hearsay, which included but was not limited to competency issues. Supp. CP __, sub. no 178A (Defendant’s Pretrial Brief at 54); 7/7/11RP 2-4, 30, 34; 7/12/11RP 93. The State’s motion requesting the admission of such evidence included the pertinent text of RCW 9A.44.120. Supp.

CP __, sub no. 188 (State's Trial Memorandum at 41).² The information before the court apprised it of the need to strictly adhere to the permissible basis for admitting child hearsay. The court ruled that the content of the statements was admissible under the child hearsay rules, over Sampson's objection. 7/12/11RP 93-95. The children's difficulty in articulating an offense while testifying in court demonstrates the prejudicial bolstering effect of having other people repeat out-of-court allegations about things that happened to other children. See, e.g., 7/20/11RP 118, 137, 151-53 (L.H. and L.R.'s ambiguous testimony of the purported incidents).

Likewise, the prosecution improperly elicited testimony about the children's truthfulness to prove they were not lying in or out of court when they accused Sampson of sexual misconduct. "[I]t is improper for any witness to express a personal opinion on the defendant's guilt" or on an "ultimate issue of fact" such as when the complainant is telling the truth. State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

² A supplemental designation for the State's Trial Memorandum, dated June 27, 2011, has been filed.

The State cites one case that predates Kirkman to contend the error in Sampson's case does not constitute a manifest constitutional error that may be raised on appeal. Response Brief at 24. Because Kirkman is the most recent statement from the Supreme Court on this issue, Sampson addresses that case in his reply even though it was not cited by the prosecution.

In Kirkman, professional witnesses (doctors and detectives) gave testimony that included: protocols used when interviewing children, whether child knew the difference between telling the truth and a lie, that injuries were not medically inconsistent with abuse, or that child described incident with appropriate affect and consistently. 159 Wn.2d at 923-24. The Supreme Court reiterated that, “[i]mpermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial” Id. at 927 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Because the witness testimony offered did not directly or indirectly comment on whether the defendant was guilty, the court found the opinion testimony was not manifest constitutional error. Id. at 931, 933.

However, the Court affirmed the notion that it is manifest constitutional error for a witness to give “an explicit or almost explicit” statement “on an ultimate issue of fact.” *Id.* at 936. At Sampson’s trial, the two mothers of the child complainants repeatedly reinforced the credibility of the children and their truthfulness. Janine Thornton said her children have been taught to and will “always tell the truth”; this comment is an explicit vouching that the children would tell the truth about Sampson in court, to the police, and to the child interview specialist. 7/20/11RP 11, 38. Fuhyda Rogers similarly apprised the jury her children know the importance of telling the truth and it was unacceptable to them to doing anything other than be truthful at all times. 7/20/11RP 173. These explicit and almost explicit, repeated statements that the children were telling the truth constitutes a manifest constitutional error that invades the province of the jury.

These numerous errors must be viewed cumulatively because viewed together, they denied Sampson his constitutional right to a fair trial by jury.

3. The plain evidence of an unauthorized 13th juror who deliberated in the case undermines the verdict.

The prosecution does not dispute that a 13th person was present during deliberations, was polled, and offered a verdict. The transcript unambiguously reflects this unusual occurrence. Counsel will provide the court with the audio recording of the jury delivering its verdict to confirm that the audio recording reflects the same information as indicated in the transcript, if the Court seeks additional confirmation. See RAP 9.11.

The prosecution reaches for a heightened legal standard in evaluating this error but its legal argument is undermined by the very cases it cites. Response Brief at 26. In State v. Cuzick, 85 Wn.2d 146, 149, 530 P.2d 288 (1975), the Supreme Court held that the mere presence of an unauthorized person in the jury room, even someone who did not participate in the deliberations at all, “violates the cardinal requirement that juries must deliberate in private.” It summarized its holding as follows:

We granted the State's petition for review to determine whether allowing an alternative juror into the jury room constitutes reversible error absent proof of prejudice to the defendant stemming therefrom. We hold that it does and affirm the Court of Appeals.

Id. at 147 (emphasis added). The Cuzick Court rejected the State's insistence that there should be an evidentiary hearing, because jury deliberations cannot be reliably recreated and the verdict should have been obtained through strict adherence to the secrecy required. Id. at 149-50. The only "substantial intrusion" discussed in Cuzick, which the State now uses as setting a legal standard, was offered in reference to the notion that the unauthorized person's presence was more than fleeting in that case; the Court explicitly refused to demand any showing of actual prejudice or substantive weighing as the State seeks. Id. at 150. The prosecution misreads Cuzick.

The prosecution cited as "see also" State v. Elmore, 139 Wn.2d 250, 298-99, 985 P.2d 289 (1999), but Elmore distinguished Cuzick on the ground that "the record indicates the alternate jurors were not in the jury room during deliberations." There was no question that "[t]he alternates were not present during deliberations and upon their arrival [in court] were not informed of the jury's verdict prior to its announcement in open court." Id. at 299. Consequently, "[a]s no unauthorized person was present in the jury room during deliberations, the error we discerned in Cuzick is not present here." Id. at 300.

Jurors' verdict may not be impeached by after-the-fact explanations of their deliberative process. Gardner v. Malone, 60 Wn.2d 836, 840, 376 P.2d 651 (1962). Their deliberations cannot be redone and they cannot justify their verdict at this late stage. See, e.g., State v. Wise, _ Wn.2d _, 288 P.3d 1113, 1121 (2012) (“we cannot know what the jurors might have said differently if questioned in the courtroom” where the public could have been present). The unexplained delivery of a verdict by 13 individuals shows that an unauthorized person was present and deliberated in the case. No further inquiry is necessary and no showing of actual prejudice is required.

4. Sampson's sentence violates due process, equal protection, and the right to trial by jury

Several recent cases further support the illegalities that undermine Sampson's sentence of life without the possibility of parole based on prior convictions.

The Supreme Court has emphasized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. Southern

Union Co. v. United States, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012). Southern Union underscores the jury’s role in determining all facts essential to punishment. The Court has rejected the notion that arbitrary labeling of facts as “sentencing factors” or “elements” was meaningful. “Merely using the label ‘sentence enhancement’ to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). A judge may not impose punishment based on additional findings. Blakely v. Washington, 542 U.S. 296, 304-05, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Furthermore, while the state Supreme Court felt it must “follow” Almendarez-Torres in State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), the “following” of this case has been sharply criticized. State v. Witherspoon, 171 Wn.App. 271, 286 P.3d 996, 1016 (2012) (Quinn-Brintnall, J, dissenting in part). Indeed, this holding of Smith is undermined by the contrary holding of State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony). Where

prior convictions increase the maximum sentence available are termed “elements” of a crime, they must be proved to a jury beyond a reasonable doubt. Id.; see State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). The State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn.App. 456, 475, 237 P.3d 352 (2010). The courts have simply treated these factors as elements, and the same requirement should be applied in the case at bar. Sampson should receive the due process and jury trial rights to which he is entitled at a new sentencing hearing.

B. CONCLUSION.

For the forgoing reasons as well as those explained in Mr. Sampson's opening brief, he should receive a new trial and sentencing proceeding.

DATED this 22nd day of February 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written over a horizontal line.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2013, CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2013.

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