IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAYMOND HERNANDEZ, JR., Appellant.	No. 39148-1-II UNPUBLISHED OPINION

Penoyar, C.J. — Raymond Hernandez appeals four of his five first degree child molestation convictions. He argues that the jury instructions violated his right to be free from double jeopardy. We agree and vacate four of his convictions.

FACTS

I. Background

In late 2003, the Housley family moved in next door to Hernandez and his family. The families became friends; Hernandez and Shandra Housley walked together in the mornings and the Housley children frequently visited Hernandez's house. The Housleys' daughter, GH, began spending more time at Hernandez's house than the Housleys' other children. On September 20, 2006, GH told her mother that Hernandez had molested her. The Housleys contacted the police, and the State subsequently charged Hernandez with committing five counts of first degree child molestation between November 1, 2003 and September 20, 2006.

II. Jury Instructions

After a four day trial, the trial court gave the jury separate "to convict" instructions for each of the five counts. Aside from the count number, these five instructions were identical. The relevant portion of these "to convict" instructions stated:

> To convict the defendant of the crime of Child Molestation in the First Degree as charged in Count [ ], each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about and between November 1, 2003 and September 20, 2006, the defendant had sexual contact with [GH]

Clerk's Papers (CP) at 71-75; Instr. 8-12.

The trial court further instructed the jury: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP at 67; Instr. 4.

Finally, the trial court gave the jury the following unanimity instruction:

> The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

CP at 68; Instr. 5. The jury convicted Hernandez on all five counts.

ANALYSIS

I. Jury Instructions and Double Jeopardy

Hernandez argues that the jury instructions violated his right to be free from double jeopardy because they exposed him to multiple punishments for the same offense.[1] He asks that four of his five convictions be vacated. We agree that the jury instructions subjected Hernandez to double jeopardy.

A. Jury Instructions

We review jury instructions de novo in the context of the instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting *State v. Watkins*, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)).

The United States and Washington Constitutions protect a defendant from multiple convictions for the same crime. U.S. Const. amend. V; Wash. Const. art. I, § 9. In cases where multiple counts of sexual abuse are alleged to have occurred within the same charging period, the trial court must instruct the jury to find separate and distinct acts for each count when the counts are identically charged. *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996).

Hernandez argues that his case is similar to *Borsheim*. Borsheim was convicted of four identical counts of first degree child rape, each of which the State alleged occurred during a specified period. *Borsheim*, 140 Wn. App. at 362-63. The trial court gave only a single "to

[1] Hernandez raises the double jeopardy issue for the first time on appeal. We consider it because it is an issue of constitutional magnitude. *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

convict" instruction encompassing all four counts rather than setting the counts out in separate instructions.[2] *Borsheim*, 140 Wn. App. at 368. Division One held that the "to convict" instruction did not inform the jury that it was required to find "separate and distinct" acts for each count. *Borsheim*, 140 Wn. App. at 367. While the unanimity instruction[3] adequately conveyed to jurors the need for unanimity regarding the act that formed the basis for any given count, it did not convey the need to base each charged count on a "separate and distinct" underlying event. *Borsheim*, 140 Wn. App. at 367. Additionally, the "separate crime"[4] instruction failed to inform the jury that it must find "separate and distinct" acts for each count. *Borsheim*, 140 Wn. App. at 367. Finally, the court noted that the defect in these instructions was compounded by the fact that

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[2] The *Borsheim* trial court instructed the jury, in part, as follows:

> To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in counts 1, 2, 3, and 4, each of the following elements of the crime must be proved beyond a reasonable doubt as to each count:
>
> (1) That during a period of time intervening between February 1, 2001, and September 5, 2003, the defendant had sexual intercourse with [B.G.].

140 Wn. App. at 364 (emphasis omitted).

[3] The *Borsheim* trial court gave the jury the following unanimity instruction:

> There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

140 Wn. App. at 364 (emphasis omitted).

[4] The *Borsheim* trial court instructed the jury: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." 140 Wn. App. at 364 (emphasis omitted).

the same "to convict" instruction encompassed all four identical counts. *Borsheim*, 140 Wn. App. at 368. Therefore, the court held that the jury instructions violated Borsheim's right to be free from double jeopardy because they did not make manifestly apparent to the jury that each of the four counts had to be based on a different underlying act. *Borsheim*, 140 Wn. App. at 370.

By contrast, in *State v. Ellis*, we held that the jury instructions for two identical counts alleged to have occurred within the same time period were adequate to avoid double jeopardy violations. 71 Wn. App. 400, 406-07, 859 P.2d 632 (1993). The State charged Ellis with two counts of first degree molestation and two counts of first degree child rape. *Ellis*, 71 Wn. App. at 401. The trial court gave different "to convict" instructions for each of the four counts. *Ellis*, 71 Wn. App. at 401-02. The "to convict" instructions for each of the child rape charges—counts III and IV—included different time periods during which each of the alleged rapes occurred. *Ellis*, 71 Wn. App. at 402. The "to convict" instructions for each of the child molestation charges—counts I and II—were identical to each other except that the count II instruction stated that count II had to have occurred "on a day other than [c]ount I." *Ellis*, 71 Wn. App. at 402.

The *Ellis* trial court also gave two other instructions that helped clarify that each count required proof of different acts. First, the trial court instructed that a separate crime was charged in each count.[5] *Ellis*, 71 Wn. App. at 406. Second, the trial court gave a unanimity instruction that required the jury to unanimously agree that at least one particular act had been proved "for

[5] The *Ellis* trial court instructed the jury that: "A separate crime is charged in each count. You must decide each count separately as if it were a separate trial. Your verdict on one count should not control your verdict on any other count." 71 Wn. App. at 402.

each count."[6] *Ellis*, 71 Wn. App. at 406-07. Thus, the *Ellis* court concluded that the jury instructions were adequate to avoid a double jeopardy violation. *Ellis*, 71 Wn. App. at 406-07.

The instructions in this case are nearly identical to those in *Borsheim*. In both cases, the "to convict" instructions included multiple counts alleged to have occurred within the same time period, but did not inform the jury that it had to find a "separate and distinct" act for each count. By contrast, the "to convict" instructions in *Ellis* specifically informed the jury that count II had to have occurred "on a day other than [c]ount I," and the different time periods in counts III and IV made it clear that the jury had to find separate acts underlying those counts. 71 Wn. App. at 402, 406-07.

The State argues that the *Borsheim* "to convict" instruction is distinguishable because the *Borsheim* trial court gave one instruction encompassing all four counts while the trial court in this case gave separate instructions for each count. However, the *Borsheim* court stated that the "to convict" instruction was inadequate because it failed to inform the jury that a "separate and distinct" act was needed for each count. *Borsheim*, 140 Wn. App. at 367, 370. The fact that a single instruction encompassed all four counts only "compounded" this error. *Borsheim*, 140 Wn. App. at 368. Our conclusion is consistent with the court's holding in *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008), where separate "to convict" instructions were given for each

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[6] The *Ellis* trial court gave the following unanimity instruction:

> Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.]. Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

71 Wn. App. at 402.

count but the instructions were still found inadequate to protect against double jeopardy violations. Thus, although the trial court here gave separate "to convict" instructions for each count, the instructions were inadequate because they did not inform the jury that it had to find a "separate and distinct" act for each count.

We next observe that the unanimity instruction in this case, which was similar to the unanimity instruction in *Borsheim*, did not convey to the jury that it had to find a "separate and distinct" act for each count. The *Ellis* unanimity instruction, by contrast, informed the jury that it had to unanimously agree that at least one particular act had been proved for each count. *See Ellis*, 71 Wn. App. at 406-07.

Arguably, the "on any count" language from the unanimity instruction in this case was similar to the "for each count" language in the *Ellis* unanimity instruction. However, an average juror could have interpreted "[t]o convict the defendant on any count . . . one particular act . . . must be proved beyond a reasonable doubt," to mean that proof of one act beyond a reasonable doubt allowed the jury to convict Hernandez on multiple counts of child molestation without finding that a "separate and distinct" act supported each count. CP at 68. By contrast, the *Ellis* court's unanimity instruction, which states "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count," makes it at least somewhat more clear to the average juror that a separate act must be proved for each count.[7] *Ellis*, 71 Wn. App. at 402.

[7] Even the *Ellis* court, however, stated that this unanimity instruction was adequate but "marginal" because it unnecessarily mixed two different ideas—unanimity and the need for proof of "separate and distinct" acts. 71 Wn. App. at 407.

The *Berg* court came to a similar conclusion with regard to the inadequacy of the unanimity instruction employed in this case. 147 Wn. App at 936. In *Berg*, the trial court used the "on any count" language in the unanimity instruction, but it did not require that the jury base each charged count on a "separate and distinct" underlying event and it failed to distinguish between the counts in the "to convict" instructions. 147 Wn. App. at 935-36. The court held that the "on any count" language in the unanimity instruction did not alone adequately protect against double jeopardy. *Berg*, 147 Wn. App at 936.

Finally, the *Borsheim* court noted that a "separate crime" instruction identical to the one given in this case did not inform the jury that it must find "separate and distinct" acts for each count.[8] 140 Wn. App. at 367. The "separate crime" instruction cannot save the jury instructions as a whole when they otherwise fail to convey the necessity of finding a "separate and distinct" act for each count.

In sum, the trial court's jury instructions violated Hernandez's right to be free from double jeopardy. They failed to make manifestly apparent to the jury that each of the five counts had to be based on a different underlying act.[9]

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[8] A similar "separate crime" instruction was also given in *Ellis*, but there we did not hold that the instructions were adequate based on the "separate crime" instruction alone. *See Ellis*, 71 Wn. App. at 402, 406-07.

[9] In *State v. Carter*, 156 Wn. App. 561, 234 P.3d 275 (2010), we held that jury instructions that were nearly identical to the trial court's instructions here violated the defendant's right to be free from double jeopardy. In that case, the State charged Carter with four counts of rape of a child, each of which allegedly occurred within the same time period. *Carter*, 156 Wn. App. at 564. The jury instructions in *Carter* included four separate but identical "to convict" instructions, a unanimity instruction containing the "on any count" language, and a "separate crime" instruction identical to the one considered in this case. 156 Wn. App. at 564-65.

B. Clarification in the Prosecutor's Closing Argument

The State argues that we should consider the prosecutor's closing arguments together with the instructions to determine whether the trial court violated Hernandez's right to be free from double jeopardy. The State contends that our Supreme Court considered the prosecutor's closing argument when it determined the adequacy of jury instructions in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), a case that did not involve double jeopardy claims. While the court did consider the prosecutor's closing argument in *Hoffman*, it also determined that the instructions themselves were adequate and the closing argument was merely consistent with the instructions. 116 Wn.2d at 106. That is not the case here because the instructions were not adequate and clarification in the prosecutor's closing argument could not save them. *See State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (stating that the jury must base its verdict on the evidence and the instructions, not on the prosecutor's closing argument). In fact, the jury was specifically instructed not to base its findings on the lawyers' arguments: "[T]he lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP at 63; Instr. 1. The prosecutor's closing argument did not cure the defective instructions.

C. Harmless Error

The State attempts to persuade us that overwhelming evidence of "separate and distinct" acts should either "mitigate" the double jeopardy violation or render the error harmless. Respondent's Br. at 10. We disagree. The State cites no authority to support its contention that double jeopardy violations are subject to harmless error analysis. Moreover, as the *Berg* court

observed, harmless error analysis cannot be applied to errors in jury instructions that result in double jeopardy violations. 147 Wn. App. at 937. The proper remedy for double jeopardy violations is to vacate the additional convictions. *Berg*, 147 Wn. App. at 937.

We remand with instructions to vacate four of the five convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Worswick, J.

Sweeney, J.