

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 80523-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
NATHAN MARTIN KING,	)	
	)	
Respondent.	)	
	)	

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HAZELRIGG, J. — Following a jury trial on three counts of child molestation in the second degree as to three separate named victims, Nathan M. King was acquitted on one count and convicted on two. Prior to trial, King moved unsuccessfully to sever each count. The “to convict” instructions that were provided to the jury at the close of trial included the birth dates of each named victim. King argues the trial court erred in denying his motion to sever, that the inclusion of the birthdates in the jury instructions was an improper comment on the evidence by the court, and that a number of the community custody conditions imposed at sentencing are vague and ambiguous such that modifications are necessary. We find that the inclusion of the complaining witnesses’ birthdates in the jury instructions is an error of a constitutional magnitude requiring reversal. Because our holding on that issue is dispositive, we do not reach King’s other assignments of error.

## FACTS

Nathan King was charged with three counts of child molestation in the second degree. The first count was based on alleged sexual contact with King's step-sister, A.H. The second and third counts related to alleged sexual contact with two of A.H.'s friends, H.B. and K.S. King brought a pretrial motion to sever each count, which was denied. The case proceeded to a jury trial on all three counts and each of the youths individually testified as to their birthdate. King's defense was primarily denial and he argued that the girls were not credible due to inconsistencies in their accounts and the lack of physical evidence.

At the close of argument, the judge instructed the jury on the applicable law. Each of the three "to convict" instructions included the birthdate of the named victim for the corresponding count. The jury acquitted King as to count one and found him guilty as to counts two and three. The court imposed a standard range sentence of 33 months on each count, to be served concurrently. The court also imposed community custody for a term of 36 months and included conditions requiring him to "[pay] . . . the costs of crime-related and medical treatment required by" the named victims in counts two and three, "[s]tay out of areas where children's activities regularly occur" which specifically included "church services [and] restaurants," disclose his sex offender status prior to any sexual contact, and which prohibited sexual contact in a relationship "until the treatment provider/Community Corrections Officer approves of such." King now appeals.

## ANALYSIS

King first argues that the trial judge improperly commented on the evidence and violated article IV, section 16 of the Washington State Constitution when he instructed the jury regarding the victims' birthdates. We agree.

We review challenges to jury instructions de novo. State v. Jackman, 156 Wn.2d 736, 742, 132 P.3d 136 (2006). Jury instructions are proper when the instructions allow the parties to argue their theories of the case, do not mislead the jury, and accurately convey the law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH CONST. art. IV, §16. "Through this provision, 'the framers of the constitution could not have more explicitly stated their determination to prevent the judge from influencing the judgment of the jury on what the testimony proved or failed to prove.'" State v. Zimmerman, 130 Wn. App. 170, 174, 121 P.3d 1216 (2005) (quoting Bardwell v. Ziegler, 3 Wn. 34, 42, 28 P. 360 (1891)). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

A judicial comment in a jury instruction is an error of constitutional magnitude and may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719–20, 132 P.3d 1076 (2006). If a judicial comment on the evidence is

determined to have occurred, we presume prejudice and the burden is then on the State to rebut that presumption, unless the record shows that no prejudice could have occurred. Jackman, 156 Wn.2d at 743

Our analysis in this case is guided by Jackman wherein our supreme court declared inclusion of the victims' birthdates in the "to convict" instructions, where the victim's age is an essential element of the charged crime, is a violation of article IV, section 16 of the Washington State Constitution. Id. at 744. In Jackman, the defendant was charged with "three counts of sexual exploitation of a minor, three counts of communication with a minor for immoral purposes, four counts of furnishing liquor to a minor, one count of patronizing a juvenile prostitute, and one count of intercepting, recording, or divulging private communication." Id. at 740. The four victims in the case testified as to their birthdates and the State presented corroborating evidence as to their respective ages. Id. In the "to convict" instruction, each victim was identified by their initials and birthdate. Id. at 740–41. Jackman did not object to the instruction and was convicted as charged. Id. On direct appeal, our court reversed and remanded on all but one count. Id. at 741. The State then petitioned for review to the Supreme Court as to the issue of the jury instructions. Id. at 742. The Supreme Court reinforced that including the victim's birthdates amounted to judicial comment on the evidence and held that such comment allowed the jury to "infer the victim's birth dates had been proved by the State." Id. at 744. Despite the boys' testimony, the corroborating evidence of their age, and the fact that Jackman had not challenged the fact of their minority, the Jackman court went on to conclude that the inclusion of the birthdates was

prejudicial. Id. at 744–45. The determination of prejudice was based on the circumstance that the jury is tasked with determining the facts of a case and the victims’ ages were essential elements of the charged crimes; it was improper to remove facts that went to a critical element from the jury’s consideration. Id. at 745.

As to the two counts for which King was found guilty, the “to convict” instructions, in relevant part, read as follows:

To convict the defendant of the crime of Child Molestation in the Second Degree as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on a specific date between on or about the 1st day of June, 2013, through on or about the 8th day of August, 2014, the defendant had sexual contact with H.B. (DOB: 3/17/2001);
- 2) That H.B. was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- 3) That H.B. was at least thirty-six months younger than the defendant; and
- 4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

...

To convict the defendant of the crime of Child Molestation in the Second Degree as charged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on a specific date between on or about the 23rd day of September, 2013, through on or about the 8th day of August, 2014, the defendant had sexual contact with K.S. (DOB: 9/22/2001);
- 2) That K.S. was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- 3) That K.S. was at least thirty-six months younger than the defendant; and
- 4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.<sup>1</sup>

This case is analogous to Jackman and we see no reason to depart from the Supreme Court's analysis. As in Jackman, the "to convict" instructions included the victim's birthdates. The charges for which King was tried required the jury to find facts relating to the ages of the complaining witnesses in order to determine whether the State had satisfied its burden of proof as to an essential element of each charge. Further, as in Jackman, it cannot be said that this error was not prejudicial. The inclusion of the birthdates in the "to convict" instructions presents information about those critical facts as though they have been resolved as a matter of law. The State has not provided any compelling authority to rebut the presumption of prejudice. As in Jackman, "[w]e conclude that because the jury instructions state the victims' birth dates and removed those facts from the jury's consideration, the record does not affirmatively show that no prejudice could have resulted." Id. As such, we follow the binding precedent set out by our supreme court and reverse.

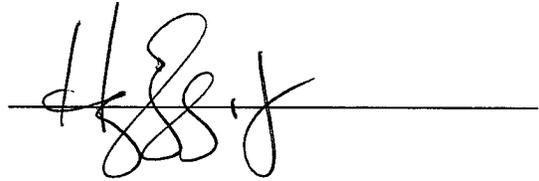
Because our holding as to instructional error is dispositive, we need not reach King's challenge to the constitutionality of his community custody conditions or his assignment error on the trial court's denial of his motion to sever. King is free to move to sever the remaining two counts on retrial. Because he was

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<sup>1</sup> The "to convict" instruction for count one mirrored the language in these two instructions and provided A.H.'s birth date. As King was acquitted on count one, we need not review it here.

acquitted of one of the counts at issue in his original several motions and jeopardy has attached, the trial court will necessarily engage in the severance test based on a different record than that which is presented to us on appeal.

Reversed and remanded.



WE CONCUR:

