IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 64103-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
BARRY MICHAEL CAUDLE,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 19, 2010
	)	
	)	

Cox, J. – Article IV, section 16 of the Washington State Constitution prohibits a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'"[1] Here, because the "to convict" instruction in the trial against Barry Caudle implied that certain disputed facts had been established, it was an improper judicial comment on the evidence. The State cannot prove the absence of prejudice to Caudle. We reverse and remand for a new trial.

The State charged Caudle with one count of rape of a child in the first degree. The information alleged that the crime occurred sometime between

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[1] State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)); see also Const. art. IV, § 16 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

June 1, 2000, and August 31, 2001, in King County.

K.G.'s mother married Caudle's father in 1999. In 2000, the two families moved in together at a home in Auburn. At the jury trial, 16-year-old K.G. testified as to two discrete incidents of alleged rape by Caudle. The first occurred one day when she was seven or eight years old, watching television in the family room with Caudle. The second occurred a couple of months later, while K.G. and Caudle were in a swimming pool in Ocean Shores, Washington. K.G. did not tell anyone about these incidents for several years.

The jury did not receive a unanimity instruction telling them that all 12 jurors must agree that the same underlying act of rape was proved beyond a reasonable doubt. Instead, the State elected the act it was relying upon—the incident in the family room. Before the end of the trial, both parties stipulated that if the alleged incident occurred, it occurred during the charging period. The trial court instructed the jury in the "to convict" instruction that it must find, "[t]hat during a period of time intervening between June 1, 2000 through August 31st, 2001, the defendant had sexual intercourse with K.A.G. (downstairs family-TV room incident)."

The jury found Caudle guilty as charged.

Caudle appeals.

COMMENT ON THE EVIDENCE

Caudle argues that the "to convict" instruction impermissibly commented on the evidence and prejudiced his trial. We agree.

Article IV, section 16 of the Washington State Constitution prohibits a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'"[2] Where the alleged judicial comment involves a jury instruction on an element of the offense, the judge's personal feelings need not be expressly conveyed to the jury, "it is sufficient if they are merely implied."[3] Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as a judicial comment.[4] Because judicial comments on the evidence are expressly prohibited by the constitution, they are manifest constitutional errors that may be challenged for the first time on appeal.[5]

A judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that a defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.[6]

We review jury instructions de novo, within the context of the jury instructions as a whole.[7] The determination of whether a comment on the evidence is improper depends on the facts and circumstances in each case.[8]

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[2] Levy, 156 Wn.2d at 721 (quoting Becker, 132 Wn.2d at 64); see also Const. art. IV, § 16.

[3] Levy, 156 Wn.2d at 721.

[4] Id.

[5] Id. at 719-20.

[6] Id. at 725.

Criminal defendants in Washington have a right to a unanimous jury verdict.[9] Where the State alleges multiple acts and any one of them could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime.[1] The constitutional requirement of unanimity is assured by either (1) requiring the prosecution to elect the act upon which it will rely for conviction, or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt.[11]

Where the State elects the act upon which it will rely, and refers to corroborating facts in order to identify the specific act, the court must avoid instructing the jury in a manner that implies those facts have been established as a matter of law.[12]

In State v. Eaker,[13] the defendant was charged with one count of first degree rape of a child based on allegations that he demanded oral sex from his

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[7] Id. at 721 (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

[8] State v. Eaker, 113 Wn. App. 111, 117-18, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003).

[9] State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing Const. art. I, § 21).

[1] State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

[11] Eaker, 113 Wn. App. at 115-16 (citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)).

[12] Id. at 117-19.

[13] 113 Wn. App. 111, 117-18, 53 P.3d 37 (2002), review denied, 149 Wn.2d 1003 (2003).

half-brother on several occasions between January 1, 1988, and December 31, 1991.[14] The jury did not receive a unanimity instruction. Instead, the State elected to rely on one alleged incident and referred to corroborating facts to identify the incident.[15] The "to convict" jury instruction stated that in order to convict Eaker, the jury had to find:

> That on or between the 1st day of January, 1990 and the 31st day of December, 1991, the defendant had sexual intercourse with [M.F.] while [M.F.'s] parents were on vacation on the day that Judy Russel [sic] was babysitting [M.F.] and took him to his house at 1325 Isaacs Street, Walla Walla.[16]

The court concluded that the instruction was an improper comment on the evidence because it resolved a disputed issue of fact that should have been left to the jury.[17] Specifically, the instruction improperly commented on the evidence because it

> assumes as an undisputed fact that on a day sometime between January 1, 1990 and December 31, 1991, Judy Russell served as a babysitter for M.F. and took him to his house on Isaacs. Even if we assume that Ms. Russell did babysit for M.F., and that she returned him to the house on Isaacs, this event may or may not have occurred between January 1, 1990 and December 31, 1991. The instruction is misleading in that it suggests that if a juror concludes that the specified act of abuse occurred on the day that Ms. Russell was baby-sitting for M.F., that juror need not also make a determination that the day Ms. Russell baby-sat fell sometime between January 1, 1990 and December 31, 1991.[18]

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[14] Id. at 112-13.

[15] Id. at 115, 116, 118.

[16] Id. at 118.

[17] Id.

The court rejected the State's arguments that the instruction was proper because it required the jury to determine whether any of the corroborating facts took place and that the corroborating facts served only to identify the specific act elected.[19] The court stated, "[E]ven if the incident occurred as described by these facts, the jury should have been instructed that they must also determine that the date identified by those facts occurred" during the charging period.[2] In other words, the instruction "does not make it clear that the jury must determine that the criminal act took place, that it took place on the day that Ms. Russell baby-sat for M.F., and that this day occurred between January 1, 1990 and December 31, 1991."[21]

The court concluded that the error was "clearly not harmless," as M.F.'s credibility was central to the State's case and M.F. had given conflicting evidence as to when the alleged act of abuse occurred.[22] Accordingly, the court reversed Eaker's conviction.[23] The supreme court denied review.[24]

Similar evidence and a similar "to convict" instruction are at issue here.

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[18] Id.

[19] Id.

[2] Id.

[21] Id.

[22] Id. at 120.

[23] Id. at 121.

[24] Eaker, 149 Wn.2d 1003 (2003).

The State charged Caudle with one count of rape of a child in the first degree. K.G. testified to three incidents relating to sexual abuse by Caudle. First, she described an incident in which she woke up during the night in her bedroom and found Caudle holding up the bottom half of her blanket and shining a flashlight on the lower half of her body. Second, a couple of weeks later, she was sitting on the couch watching TV and ended up sitting on Caudle's lap. Caudle put his hand inside K.G.'s pants and penetrated her vagina with his finger. Third, a few months after that, K.G. went swimming with Caudle and two of her brothers in an indoor pool in Ocean Shores. Caudle sat down next to K.G. on a step in the pool, K.G. ended up on his lap, and he put his finger in her vagina while the other boys were off playing at the other end of the pool. Caudle did not testify.

Given these multiple acts, the State elected the second of these three incidents as the one on which it was relying for the charge. It appears from the record that the State and Caudle agreed that the "to convict" instruction should state, in relevant part:

> To convict the defendant of the crime of rape of a child in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That during a period of time intervening between June 1, 2000 through August 31st, 2001, the defendant had sexual intercourse with K.A.G. (downstairs family-TV room incident).[25]

The court gave this proposed instruction.

As in Eaker, this instruction compounds in a single element factual

[25] Clerk's Papers at 32.

allegations in a manner that suggests that some of the allegations were, in fact, true. The instruction indicates the court's view that there was an incident in the downstairs family room. It also could be read to imply that such incident occurred during the charging period. The instruction does not make clear that the jury must determine beyond a reasonable doubt that the alleged rape took place, that it took place in the downstairs family-TV room, and that it took place during the charging period. Any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as a judicial comment.[26] The instruction here suggested that the jury need not consider one or more elements of the offense, and was therefore an improper comment on the evidence.

The State argues that the instruction was not improper because, unlike the instruction in Eaker, it "resolved no disputed issues." But this argument is incorrect and also merges the analysis of judicial comments with the question of prejudice.[27] Caudle asserted a general denial and never stipulated that there was an incident in the family-TV room. His stipulation was that if the alleged incident occurred, it occurred during the charging period.

"A judicial comment is presumed prejudicial and is only not prejudicial if

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[26] Levy, 156 Wn.2d at 721.

[27] See Levy, 156 Wn.2d at 723 ("the State has the burden of showing that the jury's decision was not influenced, *even when the evidence is undisputed or overwhelming*" (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974))).

the record affirmatively shows no prejudice could have resulted."[28] The burden is on the State to show that the defendant was not prejudiced.

The State first argues that any comment on the evidence regarding the time frame element of the offense is harmless here because the parties stipulated that if the alleged incident occurred, it occurred during the charging period. We agree. Caudle's stipulation to the time frame made that element in the "to convict" instruction undisputed.

The State next argues that any error here was not prejudicial because the instruction did not resolve conflicting testimony, as was present in Eaker. But Caudle presented a defense of general denial. Every element of the crime, except for the stipulated time frame, was in dispute. Given the evidence of multiple acts and the State's election to rely on the family room incident to support the charge, the State was required to prove that Caudle raped K.G. in that incident. Thus, the State cannot show that the trial court's instruction, which implied that an incident in fact occurred in the "downstairs family-TV room," did not prejudice Caudle.

Moreover, K.G.'s credibility was the central issue in the case. K.G. was the only person to testify about the circumstances of the sexual abuse that was alleged to have occurred in the family room. All of the other witnesses essentially testified as to the circumstances under which K.G. disclosed Caudle's sexual abuse to them. In closing argument, defense counsel argued

[28] Id. at 725.

that K.G.'s testimony was not credible and that there was "too much speculation" and "gray area" for the jury to find Caudle guilty. The "to convict" instruction, in implying that an "incident" actually occurred, bolstered K.G.'s credibility. This too shows prejudice to Caudle.

In sum, the "to convict" instruction included an improper comment on the evidence and that comment was not harmless.

Caudle also claims that the court failed to give a limiting instruction when it admitted certain evidence on the basis of ER 404(b). Because we reverse Caudle's conviction on the above grounds, we need not address this ER 404(b) issue raised in Caudle's supplemental assignment of error.

We reverse the judgment and sentence and remand for further proceedings.

Cox, J.

WE CONCUR:

Dwyer, C. J.

Becker, J.