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No. 70561-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TRENT Y.
(DOB 4/29/1997),

Appellant.

ON APPEAL FROM THE JUVNENILE COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

BRIEF OF APPELLANT

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process is violated if a juvenile adjudication is based upon testimony from an incompetent witness. A young child is a competent witness if she (1) understands the obligation to testify truthfully, (2) had the mental capacity at the time of the events to which

she will testify to receive an accurate impression of them, (3) has a sufficient memory to retain an independent recollection of the events, (4) is capable of expressing the memory in words, and (5) is capable of understanding simple questions about the events. D.B.'s understanding of the obligation to tell the truth was unclear, she had a faulty and inconsistent memory of recent events, and she had difficulty expressing what happened in words. Did the juvenile court abuse its discretion in finding D.B. was a competent witness?

2. A juvenile accused of violating the criminal law has a due process right to a fair trial, and a prosecutor's improper arguments may violate that right. The State had the burden of proving every element of the crime beyond a reasonable doubt, but the prosecutor's argument shifted that burden to Trent. Must Trent's juvenile adjudication be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not be cured by timely objections?

C. STATEMENT OF THE CASE

15-year-old Trent Y. lived with his mother, Chrissy Mannhalter, stepfather, and two younger siblings in Bothell in the summer of 2012.

CP 28; RP 136-37, 147-48.[1] Mrs. Mannhalter ran a licensed day-care on the main floor of the house. RP 31, 148. There were up to eight children in the day-care, including Trent's little sister. RP 151, 164. Mrs. Mannhalter employed her mother-in-law, her husband, and another woman to provide child care with her, and Trent sometimes helped. RP 138-39, 150-51. Mrs. Mannhalter was careful to adhere to licensing requirements that the children be in line-of-sight of an adult at all times. RP 74-75, 148-52, 165-66, 167-68, 177-78.

D.B. began attending Mrs. Mannhalter's day-care when she was 14 months old in 2009, and she stayed until the summer of 2012 when she was 4 years old. RP 14, 31, 152. D.B. was friends with Mrs. Mannhalter's daughter, who was the same age. RP 12, 63, 141. That summer D.B. was in the bathroom with her mother and said, "I hurt down there," indicating her private area. RP 36. Ms. B. got out lotion and noted that D.B. was red. Id. D.B. said that she was red because Trent kept touching her down there. Id. Ms. B. also remembered observing that Trent seemed to have an erection when D.B. was sitting on his lap a month or two earlier. RP 34.

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[1] The verbatim report of the proceedings of the fact-finding hearing on May 20, 2013, is referred to as RP. The other two volumes are referred to by date.

After talking to her parents, Ms. B. called Mrs. Mannhalter. RP 36-37, 156. Mrs. Mannhalter asked Trent if he had inappropriately touched D.B., and he said he had not. RP 157. Mrs. Mannhalter reported the incident to her licenser on the next business day. RP 53, 159, 169.

CPS licensing investigator Corrie Hayes investigated Mrs. Mannhalter's report. RP 52-53. Ms. Hayes met with D.B. at her home on July 24, 2012. RP 55-56. D.B. was talkative. RP 57. While they played with her stuffed animals, D.B. told Ms. Hayes that Trent was a big kid and her friend and she liked to play with him. RP 58. When asked what they played, D.B. pulled up her dress, patted the front of her underpants, and said "he touches me there." RP 58. She said Trent would tickle her, they would laugh and then sit on a couch in the playroom; afterwards Trent would give her hugs and a kiss on the cheek. RP 60-61. She said that Mrs. Mannhalter and her mother-in-law were present when this occurred. RP 76. Ms. Hayes later spoke to Trent, who denied the abuse. RP 67.

Ms. B. was hesitant to pursue charges or have her daughter further evaluated until CPS initiated an investigation into her fitness as a parent. RP 65-66, 71-72. Ms. B. therefore consented to have D.B.

examined by a forensic nurse practitioner, Paula Newman-Skomski, on December 5, 2012. RP 92, 97. Ms. Newman-Skomski found a cigarette burn on D.B.'s arm and questioned D.B. about safety rules. RP 98-99, 105. When asked about improper touching, D.B. told the nurse that Gunther touched Jayden's private area. When asked if anyone touched her, D.B. said no but then offered that Trent did at day-care. RP 100. In response to further questions, D.B. told the nurse that Trent was bigger than she, he touched her with his hand underneath her clothing, it did not hurt, and it occurred in the living room. RP 100-01. Ms. Newman-Skomski did not find any physical signs of abuse or trauma. RP 102.

A few days later D.B. was again interviewed, this time at Dawson's Place Child Advocacy Center. RP 80, 84. Before the Child Interview Specialist Gina Coslett could discuss the rules of the interview, D.B. announced, "Trent touched my pee pee down there and I can't go to Chrissy's anymore."[2] RP 85-86, 89; Ex. 2 at 14:26. When asked for details, D.B. said "I can't remember. Can you tell me?" Ex. 2 at 14:27. Eventually D.B. related that this happened one time in the day-care living room when others were present, including Mrs.

[2] Chrissy is Mrs. Mannhalter.

Mannhalt, and she was wearing her clothing. Ex. 2 at 14:27, 28, 30. D.B. demonstrated what happened by pulling up her dress and pointing to her stomach. Ex. 2 at 14:39.

Trent was charged in juvenile court with one count of child molestation in the first degree. CP 88. D.B. was the State's first witness at the fact-finding hearing before the Honorable Eric Lucas in May 2013. D.B. knew that she was 5 years old, but did not know her birthday. RP 12. She also remembered a birthday party and presents. RP 11-12. She said she played with friends at the party, but could only give the name of one friend. RP 12. She could not remember last Christmas and said she did not get any presents for Christmas. RP 14.

The prosecutor asked questions about the difference between the truth and a lie, eliciting comments that it was not true that the prosecutor was wearing a blue dress and "Keri" did not have green hair.[3] RP 15. In fact, the prosecutor was not wearing a dress but a pink shirt. Id. D.B. answered in the affirmative when asked "are you going to talk about only things that actually really are the truth and actually really happened." RP 15-16.[4]

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[3] Counsel does not know who "Keri" is.

[4] The record does not show if D.B. understood the term "actually."

D.B. did not know where she was attending day-care at the time of the fact-finding hearing. RP 16. She did remember attending day care at Mrs. Mannhalter's home in the past. RP 17. D.B. said the only thing she did at the day care was play with toys. RP 17. In response specific questions, however, D.B. remembered watching a Justin Bieber tape and eating food while at day-care. RP 17-18. D.B. was unable to name any of the toys she played with, relating only that there was a box full of toys. RP 17. D.B. knew the names of only two of the other children at the day care. RP 17.

When asked if it made her sad when she stopped attending Mrs. Mannhalter's day care, B.D. answered "no," but later gave conflicting testimony, stating that she liked day-care and missed Mrs. Mannhalter. RP 16-17, 20, 29.

After this discussion, D.B. asked the prosecutor if she could leave. RP 20. D.B. announced, "I brushed my teeth," but later admitted that she wanted to brush her teeth, perhaps as a reason to leave the courtroom, which she again asked to do. Id. Earlier D.B. made the comment, "Grandpa said I can talk," which was not in response to any question. RP 14. The court then found that D.B. was a

competent witness. RP 21; Findings of Fact 1-5; Conclusion of Law 2.[5]

D.B. then testified that Trent tickled her under her clothing and demonstrated where Trent touched her to the court. RP 23-26. The court admitted D.B.'s out-of-court statements under the child hearsay statute and also admitted her statements to the forensic nurse practitioner under the hearsay exception for statements made for purposes of treatment and medical diagnosis. Conclusions of Law 3-4.

Trent testified that he did not touch D.B.'s private area. RP 139-40. He explained that he did not usually spend time in the day-care portion of his home when the children were there, but did help his mother once in a while. RP 138-39. He played games with the children and tickled them, but only tickled D.B.'s stomach. RP 140, 142-43. Trent further explained he was never alone with the children; there was always an adult present. RP 139.

Mrs. Mannhalter also testified that Trent was not left alone with the children. RP 152. The day-care was on the main floor of her home, which contained a living room, dining room, and kitchen. RP 148-49.

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[5] The juvenile court's Findings of Fact and Conclusions of Law, found at CP 2-5, are attached as an appendix. Findings of Fact 1-5 address competency, Findings of Fact 6-13 address the admissibility of D.B.'s out-of-court statements, and Findings 14-20 address the court's guilty finding

The rooms were open, and there was no wall between the living room and the kitchen. RP 149-50, 177. Because Mrs. Mannhalter did not work alone, there was always an adult within sight of the children. RP 151-52.

Ms. B. day-care expenses were normally paid by the Department of Social and Health Services, but Mrs. Mannhalter was not paid in July 2010 even though she reported the problem to Ms. B. several times. RP 153, 154-55. Mrs. Mannhalter testified that D.B. did not appear to have any behavioral issues at that time. RP 154. D.B. had occasionally made things up and taken things home from the day-care. Id.

The juvenile court adjudicated Trent guilty of first degree child molestation. Conclusion of Law 6. The court committed Trent to the Division of Juvenile Rehabilitation for 15-36 weeks. CP 68-69, 77. Trent filed a Notice of Appeal, and the prosecutor filed a cross-appeal. CP 1, 6-24.

D. ARGUMENT

1. **The trial court abused its discretion in finding D.B was competent to testify.**

A young child is competent to testify only if she (1) understands the obligation to speak the truth, (2) had the mental capacity at the time of the occurrence to receive an accurate impression of it, (3) has sufficient memory to retain an independent recollection, (4) has the capacity to express the memory in words, and (5) the capacity to understand simple questions about the incident. D.B. did not show that she understood the importance of telling the truth on the witness stand, her memory of past events was spotty, and she was unable to consistently state what occurred. Because the juvenile court based its decision on untenable grounds, the court abused its discretion in determining that D.B. was a competent witness.[6] Trent's conviction must therefore be reversed.

a. Only competent witnesses may testify. Due process protects the accused against a conviction based upon incompetent evidence. State v. Brousseau, 172 Wn.2d 331, 336, 259 P.3d 209 (2011); U.S.

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[6] Appellate courts give great deference to a trial court's decision on witness competency and review it for a manifest abuse of discretion. In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998).

Const. amend. XIV; Const. art. I §§ 3, 22. Therefore only competent witnesses may testify in court. RCW 5.60.020. While witnesses are presumed to be competent, they may not testify if they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2); State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010). In criminal cases, court rules prohibit children under the age of 10 from testifying if they "do not have the capacity of receiving just impression of the facts about which they are examined or who do not have the capacity of relating them truly." CrR 6.15(c); JuCR 1.4(b).

b. The juvenile court's conclusion that D.B. was competent to testify was based upon untenable grounds and reasons. In determining if a child is competent to testify, the court considers the five Allen factors. S.J.W., 170 Wn.2d at 102. These are:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). On review, the appellate court may examine the entire record and not just the competency hearing. Brousseau, 172 Wn.2d at 340.

i. *The obligation to speak the truth on the witness stand.* First, the court concluded that D.B. "testified to the difference between the truth and a lie to the Court's satisfaction." RP 21; 5/29/13 RP 3; accord Finding of Fact 1. This is not the criteria. Instead, the court must determine if D.B. understood "the obligation to speak the truth on the witness stand." Allen, 70 Wn.2d at 692. D.B.'s testimony shows that she did not understand this obligation.

D.B. gave contradictory answers to questions when the prosecutor posed questions designed to demonstrate competency. For example, D.B. first said the only thing she did at the day care was play with toys, but she later agreed that she ate meals, watched a tape, and took naps while there. RP 17-19. She first asserted it did not make her sad to leave the day care and later said it did. RP 16-17, 20.

D.B.'s fact-finding testimony was no different. She said she could not remember who Trent was, said Trent was not at the day care when she was enrolled there, but later agreed he was at the day care when she was. RP 22-23. Trent was obviously in the courtroom, and

D.B. seemed to say he was either in the courtroom or at the daycare. RP 22-23. D.B. also testified that Trent touched her in the "bedroom part" of the house, although the day care children were not allowed in the bedroom area of the Mrs. Mannhalter's house. RP 27, 31, 137-38, 148-49. D.B. immediately changed her mind and agreed with the prosecutor that it happened on a couch in the living room. RP 27. She added that her friends were present. RP 27-28.

In addition D.B. made a number of spontaneous statements while on the witness stand that show she did not understand her obligation as a witness. RP 20 ("I brushed my teeth . . .. Now."); 25 ("Trick or treating is fun.") 26-27 ("Chrissy has lights up there."). She also asked several times if she could leave. RP 20, 25, 29.

D.B. thus did not show that she understood the requirement that she tell the truth in court, and the juvenile court abused its discretion in finding that she could distinguish between the truth and a lie.

ii. *Mental capacity at the time of the occurrence and memory at the time of testimony*. The next two criteria are that the child has the mental capacity at the time of the occurrence to receive an accurate impression of it and a memory sufficient to retain an independent recollection of the incident. Allen, 70 Wn.2d at 692. The

juvenile court found that D.B. could accurately perceive and remember events because she was able to testify about her birthday, Halloween, and her day care experience. RP 21; 5/29/13 RP 3-4; Findings of Fact 2-4. There is little evidence that what D.B. perceived and related about the past events, however, was accurate. While she said she had a birthday party and related what present she received, for example, no one provided any information about the accuracy of what D.B. related.

D.B.'s memory of past events was also limited. Although the fact-finding hearing occurred in May, she could not remember Christmas and said she did not get any presents. RP 14. While D.B. remembered her birthday, it was only two months earlier yet D.B. could only name one of the friends who attended the party. RP 12-13.

The fact-finding hearing concerned events occurring between March 20 and July 23, 2012, one year before D.B.'s appearance in juvenile court. CP 2, 88. D.B.'s ability to remember her day-care experience was limited even though she attended the day-care for three years. RP 31, 152. She could not remember any of the toys at the day care, and only remembered the names of two other children who attended. RP 17. D.B.'s limited ability to relate her recent birthday and to know that Halloween involved candy do not demonstrate that

she had the ability to accurately perceive and remember events occurring approximately a year earlier, and the juvenile court's conclusion to the contrary was untenable.

iii. *Capacity to express her memory of the incident in words and understand simple questions*. Concerning the fourth and fifth Allen factors, the court found that D.B. was able to respond to questions and express herself understandably. RP 4; 5/29/13 RP 4; Finding of Fact 5. D.B.'s response to questions, however, was often inconsistent. D.B. said the touching occurred in the "bedroom part" of the house and then said it occurred in the living room. RP 27. She first said she was not sad to leave Mrs. Mannhalter's day care, but later said she was sad because she liked it there. RP 16-17, 20, 29. She also made a number of statements while on the witness stand that were not logical responses to questions. RP 20 ("I brushed my teeth. . . . Now."); 25 ("Trick or treating is fun.") 26-27 ("Chrissy has lights up there."). While D.B. was able to respond to questions, her answers were not always consistent or logical. The juvenile court abused its discretion in finding D.B. had sufficient memory and verbal skills to testify.

c. The juvenile court abused its discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.3d 1362 (1997). A decision is based upon untenable grounds if the factual findings are not supported by the record, the decision is based upon an incorrect legal standard, or the facts do not meet the requirements of the correct legal standard. Id. at 47. For example, the trial court abused its discretion in finding a child witness competent in A.E.P. when the court did not know when the incidents were alleged to have occurred. In re Dependency of A.E.P., 135 Wn.2d 208, 223-25, 956 P.2d 297 (2008). Logically, the court could not find that the child had the mental capacity at the time of the alleged abuse to receive an accurate impression of it. Id. at 225. The facts did not support the requirements of the correct legal standard.

In another case, the child witness promised to tell the truth and not make up stories, but then testified in detail about events that were clearly not true, such as being born at the same time as his brother, who was five years younger. State v. Karpenski, 94 Wn. App. 80, 94-96, 971 P.2d 553 (1999), abrogated on other grounds, State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). The trial court acknowledged that the

child testified about an event he could not have experienced and confused dreams with reality, but nonetheless found him competent to testify. Id. at 106. The Court of Appeals concluded that the only reasonable view of the evidence supported the conclusion that the child was not competent. Id.

Here, the juvenile court found that D.B. "had the ability to distinguish between the truth and a lie," but not that she understood her obligation to tell the truth in court. Finding of Fact 1. The court thus utilized the wrong legal standard. Moreover, the evidence does not support a conclusion that D.G. understood the obligation to tell the truth in court. In addition, the record of D.B.'s testimony does not support the juvenile court's conclusions that D.B. had the mental capacity at the time of the incident to receive an accurate impression or sufficient memory to retain an independent memory of the occurrence. Similarly, her inability to answer simple questions about past activities show that she did not have the ability to answer questions and express in words what she experienced. The juvenile court thus abused its discretion in concluding D.B. was competent.

d. Trent's adjudication must be reversed. When a trial court abuses its discretion, the conviction must be reversed if, absent the

error, the outcome of the trial would be "materially affected." State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Trent's adjudication was based not only upon D.B.'s testimony, but also hearsay statements admitted pursuant to RCW 9A.44.120. Under that statute, the hearsay statements of a child under the age of 10 may be admitted as evidence if the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability" and (1) the child testifies, or (2) the child is unavailable and there is corroborative evidence of the act at issue. RCW 9A.44.120. The statements here were admitted because D.B. testified, but would not have been otherwise admissible because there was no corroborating evidence. See A.E.P., 135 Wn.2d at 227.

The determination of whether a child's hearsay statements are sufficiently corroborated to permit their introduction as evidence even when the child does not testify is decided on a case by case basis. State v Jones, 112 Wn.2d 488, 495, 772 P.2d 496 (1989). Here, there is no direct evidence, such as a witness or physical examination, to corroborate D.B.'s hearsay statements. Indirect evidence may be sufficient only if it supports a reasonable inference that the acts

described by the child did occur. A.E.P. 135 Wn.2d at 231-32; Jones, 112 Wn.2d at 495.

The Jones Court found that a child's hearsay statements concerning sexual abuse were corroborated by (1) evidence that the defendant enjoyed urolagnia and the child's precocious knowledge of this unusual sexual practice. Jones, 112 Wn.2d at 497-98. Other cases also show a degree of corroboration not found in Trent's case. C.J., 148 Wn.2d at 688 (pediatrician's testimony concerning trauma to child's penis sufficient corroboration to support admission of hearsay statements); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990) (child's hearsay statements corroborated by her friend's parallel disclosures, both girls' precocious sexual knowledge and other factors), cert. denied, 498 U.S. 1046 (1991); State v. Swanson, 62 Wn. App. 186, 813 P.2d 614 (yeast infection, extreme behavioral changes, fear of visiting defendant's house, licking mother and herself, and activities with therapist), rev. denied, 118 Wn.2d 1002 (1991); State v. Robinson, 44 Wn. App. 611, 621, 722 P.2d 1379 (semen stain on child's blanket), rev. denied, 107 Wn.2d 1009 (1986).

The juvenile court opined in its oral ruling that the testimony of Trent and his mother corroborated D.B.s' statements. 5/29/13 RP 15,

30-31. Their testimony, however, only established that Trent played games with the children, tickled the children, and they sat in his lap. RP 140, 142-43, 144. 171-72, 174-75. This does not corroborate D.B.'s statements that Trent touched her private area underneath her clothing.

Without D.B.'s testimony and her hearsay statements, there is no evidence to support the juvenile court's conclusion that Trent touched D.B.'s private area under her clothing. This Court cannot conclude that, had the error not occurred, the outcome of the fact-finding hearing would not have different. The juvenile court's error in determining D.B. was competent is thus not harmless, and Trent's conviction must be reversed. A.E.P., 135 Wn.2d at 234; Gresham, 173 Wn.2d at 433-34.

2. **The prosecutor's misconduct in closing argument shifted the burden of proof to Trent and violated his constitutional right to a fair fact-finding hearing.**

The prosecutor misstated the State's burden of proof beyond a reasonable doubt in closing argument by arguing that the court should convict Trent if it could not find a reason to disprove D.B.'s testimony. This misconduct was so flagrant and ill-intentioned that Trent's conviction must be reversed.

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial. Juveniles facing criminal charges have the due process right to a fair trial. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for propriety in closing argument. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-04, 715, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Glasmann, 175 Wn.2d at 703-04; Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must first decide if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice would not have been cured with a limiting instruction. Id. at 760-61.

b. It is misconduct for a prosecutor to misstate the burden of proof beyond a reasonable doubt or shift the burden to the respondent. "[The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364. The requirement of proof beyond a reasonable doubt has consistently played an instrumental role in protecting the integrity of the American criminal justice system. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); Winship, 397 U.S. at 361-63; State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d

188 (1977). This standard applies to children in juvenile court as well as adults. Winship, 397 U.S at 365.

It is therefore misconduct for the prosecutor to argue to the jury in a manner that reduces its high burden of proof of every element of the crime or shifts the burden to the defendant. Glasmann, 175 Wn.2d at 713 (misconduct for prosecutor to imply that jury could not acquit defendant unless it believed his testimony); State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008) (misconduct for prosecutor to argue that the presumption of innocence did not mean the jury had to give the defendant the benefit of the doubt), cert. denied, 556 U.S. 1192 (2009); accord Emery, 174 Wn.2d at 759-60 (misconduct for prosecutor to argue that the jury has to fill in the blank with a reason in order to find the defendant not guilty); State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (misconduct for prosecutor to argue that jury could only acquit if it believed the defendant); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (misconduct for prosecutor argue jury could only acquit if found complainant was lying), rev. denied, 131 Wn.2d 1018 (1997). "[I]t is an unassailable principle that the burden is on the State to prove every element and that

the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." Warren, 165 Wn.2d at 27.

c. The deputy prosecuting attorney committed misconduct by shifting the burden of proof in her closing argument. The deputy prosecuting attorney's closing argument placed the burden on the defense to prove that D.B. made up a story or that she was coached. 5/21/13 RP 2-11. The prosecutor began by stating that the only reasonable explanation for D.B.'s statements "is that what she said is what happened," adding, "What doesn't make sense is the implication that either she made it up or that somehow she was coached." Id. at 2. The prosecutor then related reasons why it was not logical that D.B. was coached or made up a story: D.B.'s youth and related inability to consistently tell an untrue story, D.B. liked the respondent and Mrs. Mannhalter's daycare, the daycare bill was paid, and the likelihood that D.B. was occasionally alone with Trent. Id. at 2-10.

The prosecutor's argument is like that found to be misconduct in Fleming, supra. In Fleming the prosecutor told the jury it could only acquit the defendants in a rape case if the jury found that the complainant was lying, confused or fantasizing. Fleming, 83 Wn. App.

at 213. This Court explained the argument was improper because it misstated the law, the burden of proof, and the jury's function.

> The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find D.S. was lying or mistaken, in order to acquit.

Id. (Emphasis in original). Here, the prosecutor argued that the court had to find Trent guilty unless he showed the D.B. was making up a story or was coached. Like the argument in Fleming, this argument was misconduct.

In a prosecution for sale of a small amount of cocaine to an undercover police officer, the prosecutor argued that the jury had to believe the defendant and disbelieve the police officers called by the State in order to find the defendant not guilty. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, rev. denied, 118 Wn.2d 1007 (1991). Looking at decisions from throughout the country, this Court concluded the argument was improper because it mischaracterized the evidence and the jury's role. The jurors did not need to "completely disbelieve"

the officers' testimony in order to acquit Barrow; all that the needed was to entertain a reasonable doubt that it was Barrow who made the sale to the undercover officer. Id. at 875-76.

The Emery Court's decision that a prosecutor's argument subverted the presumption of innocence is also instructive. Emery, 174 Wn.2d at 759-60. In that case the prosecutor used a "fill-in-the-blank" argument that told the jury it had to be able to write down a reasonable doubt in order to find the defendant not guilty:

> [I]n order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank.

Emery, 174 Wn.2d at 750-51. The argument was accompanied with an illustration on a PowerPoint slide. Id. at 751 n.7.

The Supreme Court noted several problems with this argument. First, the argument was improper "because a jury need do nothing to find a defendant not guilty." Emery, 174 Wn.2d at 759-60. Second, the argument improperly suggested that the jury was required to fill in the blank with the reason why it had a reasonable doubt when in fact the jury was required to determine if the State met its burden of proof beyond a reasonable doubt. Id. at 760 (citing State v. Camera, 113

Wn.2d 631, 638, 781 P.2d 483 (1989), in turn citing Winship, supra). "By suggesting otherwise, the State's fill-in-the-blank argument subtly shift the burden to the defense." Id. (citing State v. Gregory, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006)).

In Trent's case, the prosecutor subtly shifted the burden of proof to the defense by arguing that the court had to find Trent guilty unless it found that D.B. was mistaken or coached. This argument improperly shifted the burden of proof.

d. Trent's adjudication must be reversed. Trent's attorney did not object to the misconduct addressed above. This Court therefore reviews the misconduct in light of the entire record to determine if was so flagrant and ill-intentioned that no objection or instruction could cure the prejudice. Emery, 174 Wn.2d at 760-61.

The prosecutor's argument that the court should convict because it was not logical that D.B. made up the story or was coached shifted the burden of proof and was flagrant and ill-intentioned. The prosecutor was certainly well-aware of her long-established burden to prove the elements of the crime beyond a reasonable doubt. Moreover, several appellate courts issued prior to Trent's fact-finding hearing addressed prosecutorial misconduct in shifting the burden of proof. See

Glasmann, 157 Wn.2d at 713; Emery, 174 Wn.2d at 759-60; State v. Evans, 163 Wn. App. 635, 643-47, 260 P.3d 934 (2011); State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010).

The prosecutor's argument was thus flagrant and ill-intentioned. An objection would not have cure the prejudice engendered when the prosecutor's argument asked the court to decide the case based upon the complaining witness's credibility rather than proof of the elements of the crime. Trent's adjudication must be reversed and remanded for a new trial. Fleming, 83 Wn. App. at 216.

E. CONCLUSION

Trent's adjudication for first degree child molestation must be reversed and remanded for a new fact-finding hearing because (1) the juvenile court abused its discretion in permitting an incompetent witness to testify and (2) the prosecutor's misconduct in closing argument shifted the burden of proof to Trent in violation of his constitutional right to a fair fact-finding hearing.

DATED this 10th day of March 2014.

Respectfully submitted,

Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW

June 28, 2013

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON, Plaintiff, v. YOUNG, TRENT DOB: 04/29/1997 Respondent.	No. 13-8-00269-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on May 20, 2013 through May 21, 2013 for a bench trial. The Court considered the testimony of witnesses, the exhibits introduced into evidence, and the arguments of counsel. Being fully advised, the Court now makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. D.B. had the ability to distinguish between the truth and a lie.
2. D.B. could relate what she perceived and had a memory of the events, including specific detail of events.
3. D.B. had the ability to recall what she experienced without doubt or hesitation.
4. D.B. demonstrated an ability to verbalize what she had perceived and recalled with clarity.

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5. D.B. had the ability to respond to questions concerning all of the above and to express in words understandable to all for the record what she experienced.
6. D.B.'s statements to all concerned indicate that she liked the Respondent, considered him and his mother her friends, and had no ill will or motive to lie against them. In fact, she still demonstrates no animosity to either party. There is no apparent motive to lie.
7. Nothing about the circumstances or the statements themselves suggest any sort of bad character on the part of this child. Nothing about the circumstances or the statements themselves suggest that she has any sort of reputation for not telling the truth.
8. The statements at issue were spoken directly to D.B.'s mother, Cory Hayes, Gina Coslett, and the nurse practitioner, Paula Newman-Skomski. Each individual was told essentially the same information. D.B. repeated similar statements to different people on different occasions.
9. The statements made to all who heard them were made spontaneously. In fact, spontaneity was the identifying characteristic of the statements made. None of the statements were the product of leading or suggestive questioning. The first witness is D.B.'s mother. The other witnesses have no personal relationship with DB. They are all professionals working in their professional capacity. Case law indicates that statements made to professionals are seen as more objective and as such enhances their reliability. There was nothing unusual about the timing of the disclosures, particularly the initial one to mother.
10. D.B.'s statements reflect factual assertions not assertions based on her opinion.

11. DB testified at trial and was subject to cross examination.

12. D.B. has no issues with regard to memory. In addition, her recitations to the four individuals in question were quite consistent. Any inconsistencies go to weight not to admissibility.

13. Three of the listeners were professionals. The first interviewed the child when the mother was not present and had actually resisted the interview from a remote location over the phone. So if there is any influence present in that instant, it is close to zero. And generally the statements themselves suggest that there have been no influence. The statements were essentially outbursts, not the product of interrogation.

14. The Respondent touched D.B. in her private area under her clothes. The reason for this touching was for the purpose of sexual gratification.

15. None of D.B.'s testimony was inconsistent or lacking credibility.

16. On a specific date between on or about the 20th day of March, 2010 and the 23rd day of of July, 2012, the respondent (D.O.B. 4/29/97) had sexual contact with D.B. (D.O.B. 3/20/08).

17. D.B. was less than twelve years old at the time of the sexual contact and was not married to the respondent and not in a state registered domestic partnership.

18. D.B. was at least thirty six months younger than the respondent.

19. This act occurred in the State of Washington.

20. Findings of fact 16, 17, 18, and 19 have been proved beyond a reasonable doubt.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding.

2. D.B. is competent to testify in this matter. D.B.'s statements at issue meet all nine of the Ryan factors. With regard to time, content and circumstances the child statements made in this case show sufficient indicia of reliability to be admissible.

3. The child testified in this case. Accordingly, in total compliance with the statute, no corroboration, in terms of evidence, is required in order to admit the child's statements.

4. The child's statements to the four individuals at issue are admitted.

5. With regard to Nurse Newman-Skomski, the statements that the child made to her are admissible independently for purposes of statements made for a medical diagnosis.

6. The Respondent is guilty of the crime of First Degree Child Molestation, as charged in the Information.

DATED this 25th day of June, 2013.

JUDGE/~~COMMISSIONER~~

Presented by:

Laura E. Twitchell

LAURA E. TWITCHELL, 28697
Deputy Prosecuting Attorney

Copy received this 24th day of June, 2013.

D. Olef

Attorney for Respondent #26930

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70561-0-I
	)	
	)	
TRENT Y.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING 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:

[X]	ETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	TRENT Y. 3928 154TH PL SE BOTHELL, WA 98012	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 10TH DAY OF MARCH, 2014.

X_____

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