72411-8

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Sep 11, 2015
Court of Appeals
Division I
State of Washington

No. 72411-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JENARO HERNANDEZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

1. The statements made by Y.M., Miguel Cruz, and Olga Mendez-Cruz were not admissible under the forfeiture by wrongdoing doctrine because the witnesses were not "unavailable."

a. In order to divest Mr. Hernandez of his Sixth Amendment right to confront the witnesses against him, the State was required to demonstrate the witnesses were "unavailable."

Only in very limited circumstances may a defendant forfeit his right to confront the witnesses against him. *State v. Dobbs*, 180 Wn.2d 1, 11, 16, 320 P.3d 704 (2014). The State acknowledges that the test for forfeiture by wrongdoing is as follows:

> a defendant forfeits the Sixth Amendment right to confront a witness when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying.

Id.; Resp. Br. at 15. Despite conceding that this is the test, the State argues it had no obligation to secure the witnesses against Mr. Hernandez because the court ruled "his own wrongdoing dissolved those rights." Resp. Br. at 18-19.

This assertion ignores the fact that in order to determine whether Mr. Hernandez forfeited his right to confrontation through wrongdoing, the court was required to first find that the witness was "unavailable."

As explained in Mr. Hernandez's opening brief, when testimonial statements are at issue, unavailability "requires the prosecutor to make a good faith effort to obtain the witness's presence at trial." *State v. Ryan*, 103 Wn.2d 165, 171, 691 P.2d 197 (1984); *see also State v. Beadle*, 173 Wn.2d 97, 113, 265 P.3d 863 (2011); *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

It is not sufficient, as the State suggests, to find Mr. Hernandez engaged in wrongdoing and dispense with the rest of the requirements of the forfeiture by wrongdoing doctrine. Resp. Br. at 16-17, 18-19. This Court must examine whether the statements admitted at trial were testimonial, and if so, whether the State fulfilled its obligation to make a good faith effort to obtain the witnesses' presence at trial, in order to evaluate whether the forfeiture by wrongdoing doctrine has been satisfied.

b. Use of the "declarant-centric" test to determine whether a statement is testimonial is contrary to the recent holding in *Ohio v. Clark*.

The State concedes that the recent United States Supreme Court opinion, *Ohio v. Clark*, __ U.S. __, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015), sets forth the appropriate test for examining whether a statement is testimonial. Resp. Br. at 27. Under *Clark*, the "declarant-

centric" test adopted in *State v. Shafer*, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006), and employed by the trial court, is no longer valid.

In *Clark*, the Court examined statements made by a three year-old to her preschool teachers. __ U.S. __, 135 S.Ct. at 2181. Although the statements were not made to law enforcement, the Court applied the "primary purpose" test, finding that the statements occurred in the context of an ongoing emergency because the teachers were acting to protect a very young, very vulnerable child from harm rather than gather information for the State. *Id*. It found the conversation between the teachers and the preschooler was spontaneous and informal, and noted that the age of the child "fortifies our conclusion that the statements in question were not testimonial" because "[f]ew preschool students understand the details of our criminal justice system."[1] *Id*. 2181-82.

The State argues *Clark* validates the trial court's use of the declarant-centric test because the analysis in *Clark* "turned more" on the preschooler's purpose in making the statements than the teacher's purpose in eliciting them. Resp. Br. at 28. This misconstrues *Clark*.

[1] Although the State attempts to draw a comparison between Y.M. and the young preschooler in *Clark*, Y.M. was in third grade, rather than preschool, at the time she made the allegations against Mr. Hernandez. 3 RP 297.

In *Clark*, the Court applied the primary purpose test to find the statements non-testimonial. *Id*. at 2181 ("There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect [the preschooler]."). It found the preschooler's limited ability to anticipate how her statements would be used, given her very young age, simply bolstered its holding that the statements were nontestimonial. *Id*. The primary purpose test provided the basis for the Court's decision, revealing that statements made by nongovernmental witnesses are properly evaluated according to this objective test, rather than the declarant-centric test adopted in *Shafer*.[2]

c. Under the primary purpose test, the witnesses' statements were testimonial.

Because the declarant-centric test is no longer valid, the trial court erred when it applied that standard to evaluate whether Y.M.'s statements were nontestimonial. *See* 2 RP 219. It also erred when it

[2] Months after the declarant-centric test was first adopted in *Shafer*, the United States Supreme Court decided *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In *Davis*, the Court developed the primary purpose test for examining whether statements were testimonial in the police interrogation context. *Davis*, 547 at 822. In *State v. Ohlson*, our Supreme Court adopted the primary purpose test to examine statements made to law enforcement, but maintained the declarant-centric test for nongovernmental witnesses. 162 Wn.2d 1, 12, 168 P.3d 1273 (2011). *See Beadle*, 173 Wn.2d at 108-09 (discussing this history). The holding in *Clark* clarifies that the primary purpose test should be applied in all circumstances.

failed to apply the primary purpose test to the statements made by the other witnesses. *See* 2 RP 219. Under the primary purpose test, there is no question that Y.M.'s statements to the investigator were testimonial. *See* Op. Br. at 10-14. Similarly, the statements made by Y.M.'s mother and brother were clearly testimonial under this test. *See* Op. Br. at 17.

The State argues that Y.M.'s statements to the school personnel were not testimonial because the circumstances of that interaction were similar to those in *Clark*. Resp. Br. at 29. However, as explained in Mr. Hernadez's opening brief, while the initial questioning by Y.M.'s teacher was done with the purpose of assisting Y.M., the additional questioning in the nurse's office was investigative. Op. Br. at 15. In the nurse's office, the school psychologist took over the questioning because she expected to make a report to Child Protective Services. 1 RP 43. Y.M.'s statements in response were testimonial under the primary purpose test.

d. <u>The State failed to engage in reasonable, good faith efforts to secure the witnesses' presence at trial.</u>

Given that the witnesses' statements were testimonial, the State was required to show it made a good faith effort to secure the witnesses' presence at trial. *See Ryan*, 103 Wn.2d at 171. It failed to

do this. In its response, the State erroneously alleges the appellant's opening brief contains misstatements of fact when discussing the steps the State took to locate and contact the witnesses. Resp. Br. at 20. In support of its claim, it relies on its trial memorandum, claiming this provides a "detailed offer of proof." CP 178.

In fact, the State's trial memorandum just generally addresses, and to some extent exaggerates, the steps taken to contact Y.M.'s mother. *See* CP 196-97. For example, in its trial memorandum, the State claims Detective Karen Kowalchyk "placed numerous calls" to Olga Mendez-Cruz's mother in Mexico, and that "[t]hese calls have been answered by a female who usually hangs up when she realizes who is calling." CP 197. But in its affidavit in support of its motion to continue the trial date, the State provides a more detailed explanation of the State's efforts. CP 108. It explains that on June 12, 2014, the detective called the mother's home, and on the third attempt a young woman answered and informed the detective she had the wrong number and should not call again. CP 108. No other attempts were made to contact Ms. Mendez-Cruz at her mother's home.

The State argues that it did engage in further efforts because it attempted to determine when, and by what means, the family arrived in

Mexico. Resp. Br. at 20-21. This argument is disingenuous. The State investigated the details of the family's travel to Mexico in order to gather evidence that Mr. Hernandez had caused Ms. Mendez-Cruz to leave the country. *See* CP 111 (discussing this investigation as seeking "corroborative evidence" for the information learned from the phone call recordings). Had the State actually wished to engage in further efforts to secure the witnesses' presence at trial, it needed to do nothing more than ask Ms. Mendez-Cruz's brother, who was in contact with Ms. Mendez-Cruz and had willingly spoken to law enforcement, for more information.

At trial, the brother testified he had spoken to Ms. Mendez-Cruz and she told him she arrived in Mexico and was on her way to their mother's home, who lived in a small town where "everybody knows each other." 4 RP 417-19. Had the State made the effort, it could have easily obtained the address of the mother's home. It did not need to track the witnesses' route to Mexico in order to accomplish this.

The State attempts to excuse its failure to take this simple step by claiming that Ms. Mendez-Cruz was only planning on visiting her mother and there was no confirmation as to whether she had done so. Resp. Br. at 21. However, a fair reading of the brother's testimony

demonstrates that Ms. Mendez-Cruz informed him that she had arrived in Mexico and that her mother's home, four or five hours from Oaxaca, was her final destination. 4 RP 417-18. In addition, even if Ms. Mendez-Cruz had only planned on visiting, a letter to the mother's address would have demonstrated at least minimal effort on the part of the State. *See United States v. Pena-Gutierrez*, 222 F.2d 1080, 1088 (9th Cir. 2000) (the government's failure to make any effort to contact a witness when it had his address in hand was "per se unreasonable").

One phone call to the mother's home does not satisfy the State's burden to show it used all available means or procedures at its disposal to bring the witnesses to trial. *See State v. Hobson*, 61 Wn. App. 330, 336, 810 P.2d 674 (1991); Op. Br. at 9. The trial court erred when it declined to consider whether the witnesses were unavailable and then later found, during its ruling on child hearsay, that being in Mexico made them "per se, unavailable." 2 RP 228. The court's finding that their statements were admissible under the forfeiture by wrongdoing doctrine violated Mr. Hernandez's Sixth Amendment confrontation rights.

2. The witnesses' statements were not admissible under the forfeiture by wrongdoing doctrine because the State did not satisfy the "wrongdoing" requirement.

The State concedes Mr. Hernandez did not commit violence or threaten to commit violence against Ms. Mendez-Cruz, but instead interacted with Ms. Mendez-Cruz in a way that was "manipulative and effective." Resp. Br. at 17-18. Engaging in an act that is manipulative and effective is not a sufficient basis upon which to divest a defendant of his constitutional right to confront the witnesses against him. Mr. Hernandez must have been "*the reason* that the State must rely on out-of-court statements." *Dobbs*, 180 Wn.2d at 16.

The State cites no case where a defendant has been held to have forfeited his confrontation rights absent an act of violence, or threatened act of violence, against a witness. Although Mr. Hernandez supported Ms. Mendez-Cruz's decision to leave, he did nothing wrong to make her unavailable. Contrary to the trial court's finding, Ms. Mendez-Cruz was the first to propose returning to Mexico, and particularly given that Mr. Hernandez was incarcerated, she was free to do as she wished. The State did not prove, by clear, cogent, and convincing evidence, that Mr. Hernandez's actions permitted the trial court to strip him of his Sixth Amendment right to confrontation.

3. Y.M.'s statements were inadmissible under the child hearsay statute.

For the reasons discussed above and in Mr. Hernandez's opening brief, Y.M.'s statements were inadmissible under the child hearsay statute.

4. The State cannot show, beyond a reasonable doubt, that any reasonable jury would have reached the same result absent the error.

Even if this Court finds that only Y.M.'s statements to the investigator were improperly admitted, the State cannot show that any reasonable jury would have returned a verdict of guilty on the seven charges against him. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 825, 17 L.Ed.2d 705 (1967); *Beadle*, 173 Wn.2d at 119. The State claims it had an "exceptionally strong" case, but its description of the physical evidence is incorrect and misleading. *See* Resp. Br. at 35.

The State claims that swabs taken from Y.M.'s underwear and genitals "contained the defendant's semen." Resp. Br. at 35. In fact, the sample collected from the perineal vulvar swab contained only trace DNA, which could not be tested. Ex. 51 at 30:32. The sperm fraction of the DNA in Y.M.'s underwear, which appeared to match Mr. Hernandez's sample, was so small that it was entirely consumed during the DNA testing. Ex. 51 at 48:02.

In addition, the State asserts that notches and the thickening of Y.M.'s hymen was "consistent with sexual abuse." Resp. Br. at 35. In fact, the forensic nurse examiner testified the irregularities in Y.M.'s hymen could have been the result of sexual assault injuries, or it could have been an anatomical finding, or variant. 3 RP 284. Without Y.M.'s statements, the State could not have proven its case. This Court should reverse.

B. CONCLUSION

For the reasons stated above and in his opening brief, the trial court violated Mr. Hernandez's Sixth Amendment right to confront the witnesses against him. Because the court's errors were not harmless beyond a reasonable doubt, this Court should reverse.

DATED this 11th day of September, 2015.

Respectfully submitted,

KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72411-8-I
	)	
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JENARO HERNANDEZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF SEPTEMBER, 2015, I 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:

[X]	ANDREW ALSDORF, DPA [aalsdorf@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON, THIS 11TH DAY OF SEPTEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711