72411-8

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Court of Appeals
Division I
State of Washington

NO. 72411-8-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JENARO De JESUS HERNANDEZ,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the defendant forfeit his Sixth Amendment right to confront three material witnesses, including the 8 year-old victim, when he manipulated, instructed, and paid the victim's mother to move to Mexico for the express purpose of preventing their testimony?

2. If not, were the 8 year-old victim's hearsay statements to three school employees, a forensic nurse, and a child interview specialist testimonial even though the child had no idea that her statements might later be used in a trial?

II. STATEMENT OF THE CASE

A. THE DEFENDANT'S SEXUAL ABUSE OF Y.M.-C.

On November 21, 2013, eight year old Y.M-C. (born in July, 2005) approached her third grade teacher during class, pointed to her groin, and said, "It hurts." When her teacher asked why, Y.M-C. said, "My step dad." 3 RP 299. Y.M-C.'s teacher took her out of class and arranged an informal interview of Y.M-C. conducted primarily by the school psychologist, with the teacher and school nurse in the room observing. The three public school employees heard Y.M-C. describe repeated, painful incidents of sexual abuse occurring multiple times per week since she was about six years

old. 3 RP 262-265. The school psychologist, who is also a mandatory reporter by law, called CPS and the Everett Police Department. The Everett Police officer who responded to the school determined that Y.M-C. should be placed into protective CPS custody, because after speaking with Y.M-C.'s mother (Olga C-M.) and with the defendant he had a "legitimate fear for her safety." 3 RP 313-315.

After school on November 21, 2013, Y.M-C. went to a medical exam at the Swedish Mill Creek Hospital. 4 RP 330. A forensic nurse talked to Y.M-C. about the abuse she had reported, learning that it usually happened in Y.M-C.'s mother's bedroom while the mother was at work. The defendant subjected Y.M-C. to painful sexual intercourse, which sometimes made her bleed afterwards. She reported that the last time it happened was a few days ago, but it had been happening repeatedly since she was six. Y.M-C. also told the nurse that she told her mom about the abuse, but her mom just "looked down there" and told her it "wasn't red or anything." Even though Y.M-C. had told her mom about the abuse when it started at age six, the defendant didn't stop. He told Y.M-C. not to tell anyone about it. 4 RP 336-343.

Although Y.M-C. did not allow the forensic nurse to conduct a thorough examination of Y.M-C.'s genital injuries, she did allow the collection of her underwear and some swabs from her perineal-vulvar region. 4 RP 352. A forensic scientist at the Washington State Patrol crime laboratory later concluded that there was semen present on Y.M-C.'s perineal-vulvar swabs and on the interior crotch panel of her underwear. When the DNA from that semen was compared to a known reference sample of the defendant, the DNA matched. The chance of randomly selecting someone from the U.S. population with the same DNA profile as the semen found on those samples was 1 in 3.4 quintillion. Ex. 51 at 42:00 – 43:30.

On November 22, 2013, after spending her one and only night in protective CPS custody, Y.M-C. was examined by another forensic nurse. This time Y.M-C. did allow the genital exam to proceed, and the nurse observed three notches and an area of significant thickening on her hymen. These injuries were consistent with injuries sustained from sexual assault. 3 RP 283-284.

Later on November 22, 2013, Y.M-C. spoke with a child interview specialist at Dawson Place Child Advocacy Center, a multi-agency center for victims of sexual abuse to obtain services from police, prosecutors, medical providers, and counselors. 4 RP

381; See 3 RP 274, 275. This interview was audio and video recorded in a neutral environment.[1] Although Y.M-C. became visibly tired by the end of the interview, she provided graphic detail about the sexual abuse she experienced from the defendant, including a description of him ejaculating and cleaning it up afterwards. Ex. 10 at 7. Within the first 24 hours after she disclosed the abuse to her teacher, Y.M-C. answered questions from five different women and submitted to two medical exams.

Still on November 22, 2013, Detective Karen Kowalchyk's investigation of the defendant led her to the Marysville apartment rented by the mother of two of the defendant's children. The defendant hid in the attic and had to be tazed twice before complying with commands to leave the attic. 5 RP 597; 4 RP 428; 1 CP 163. Detective Kowalchyk arrested the defendant and brought him to the Everett Police Department, where he agreed to a lengthy, audio-video recorded interview with the detective. 5 RP 602-603.

The defendant denied Y.M-C.'s accusations about sexual intercourse happening on a routine basis, but he did admit to touching her vagina with his hand. He told the detective that he was

[1] The recording was played for the jury, who also had a transcript of the interview. 4 RP 383-384, 388; Ex. 10.

just experimenting, and that he was asking himself "What the f___? What's wrong with me?" as it was happening. 1 CP 163; Ex. 31 at 62-63, 139.

In December, 2013, the State charged the defendant with two counts of Rape of a Child in the First Degree. 1 CP 166. By June, 2014, the State added four additional charges, alleging a total of three counts of Rape of a Child in the First Degree and three counts of Child Molestation in the First Degree. 1 CP 150.

B. COUNT VII: TAMPERING WITH A WITNESS.

Meanwhile, the trial date of June 13, 2014 was just over a month away when, on May 8, 2013, the State learned that Y.M-C. and her 10 year old brother Miguel had stopped attending school. A CPS social worker discovered that their apartment had been recently vacated and all personal effects removed. 1 CP 107. While Detective Kowalchyk began to investigate the disappearance of the three material State's witnesses, the State obtained copies of all of the recorded phone calls made by the defendant while in custody at the Snohomish County Jail.[2] Id. at 107-108.

[2] The recorded jail phone calls were notable for their quantity and length even before the content was translated and transcribed: There were 142 calls from the defendant to the cell phone number of Y.M-C.'s mother (Olga) and 16 calls from the defendant to Olga's land line number, for a total of more than 14.5 hours of audio, all in Spanish. 1 CP 108, 111.

Detective Kowalchyk went to Olga C-M.'s work, a local Everett motel, and learned that she stopped coming to work on April 27, 2014. Id. at 107. Olga C-M.'s sister-in-law worked there as well, and told the detective that she received a recent phone call from Olga C-M. via calling card. During the call Olga C-M. told her sister-in-law that she had arrived safely in Mexico with her children after travelling there by bus. Id.

The detective also contacted Olga C-M.'s brother Manuel, who confirmed that he, too, had received a phone call from Olga C-M. in May, 2014. Manuel told the police that during the call his sister Olga C-M. reported her safe arrival in Mexico with her children. He also learned that Olga C-M. and her children (including Y.M-C.) were going to visit their mother soon. He provided the detective with the phone number for his mother in Mexico. Id. at 108. According to Manuel, his mother lives in a very small town where everyone knows each other, located approximately 4-5 hours' drive from Oaxaca City. 4 RP 418-419.

On June 12, 2014, Detective Kowalchyk used an interpreter to call Olga's mother's phone number in Mexico. On the third attempt a young woman answered and denied knowing who Olga

C-M. was. The young woman assertively told Detective Kowalchyk never to call back. 1 CP 108.

Detective Kowalchyk continued to investigate Y.M-C.'s disappearance to Mexico with her mother and siblings. She called an agent with the federal Department of Homeland Security and tried to determine whether Olga C-M. had recently crossed the U.S. – Mexico border. She learned that this information is only available for air travel between the two countries, not for bus travel. The federal DHS agent searched but located no relevant records. 6 RP 628-629. Detective Kowalchyk also checked the local Greyhound bus terminal and asked the ticket agent to check whether Olga C-M. purchased any bus tickets to Mexico or Southern California recently. The search did not yield any results. 6 RP 629.

The State received audio recordings of the defendant's jail phone calls on June 10th, 2014 and provided them to the defense the next day.1 CP 111. [3] The content of these calls, which were all in Spanish, proved that the defendant had motivated, financed, and helped to organize Olga C-M.'s departure to Mexico with Y.M-C. and her siblings. Due to the labor-intensive process of translating

[3] The defense attorney in this case speaks fluent Spanish, so she would have been able to assess the evidence in audio format well before the State had the audio translated. Id.

more than 14.5 hours of audio, then transcribing the most relevant portions into documentary form, the court granted the State's request for a one week continuance of the June 13, 2014 trial date. See 1 CP 105-119; 1 CP 103-104.

Prior to trial the State added a seventh criminal count for Tampering With a Witness. 1 CP 62-64. Also prior to trial, the State provided the trial court with transcripts of some of the recorded jail phone calls. Ex 15.[4] The phone calls illustrated not only the defendant's involvement in the plan to remove Y.M-C. from the country, but also revealed his intent to prevent her from testifying. Each of the defendant's phone conversations with Y.M-C.'s mother violated the court's pretrial order prohibiting him from contacting the victim or any State's witnesses. See 5 RP 458-459 (discussing the court's order); 5 RP 530-531 (Olga C-M, Y.M-C., and Miguel C. were all State's witnesses).

For example, on April 10, 2014 the defendant was heard speaking with an unknown male, asking him to research something

[4] The State incorrectly identified the transcripts as Exhibit 13 when discussing them verbally in open court. 2 RP 180. The real Exhibit 13 was a diagram of the suspect's body, used by Y.M-C. in her interview with the child interview specialist. 2 RP 149. Defendant's appellate counsel has correctly designated Exhibit 15 as the transcripts of jail phone calls reviewed by the trial court. Unfortunately the 58 page exhibit is not marked with page numbers, but subsequent references to specific portions of Exhibit 15 will nonetheless include page numbers assigned by counting from the beginning of the document.

that could "free [him] from all this mess." Id. at 5-6. He posed a hypothetical to his friend where a shooting victim ("the only witness") decided to go to Mexico instead of testify. He wanted the friend to ask a lawyer about his theory that "without the victim, how could there be a crime?" Id.

The earlier jail phone calls show the defendant being careful not to incriminate himself in the recordings. On April 10, 2014, Olga C-M. asked the defendant, "Should I go to Mexico with the kids?" Id. at 7. The defendant told her to do it "as soon as possible" and "before trial," predicting, "If that happens, I would win the trial for sure... But we cannot talk about that over the phone, my love. It's your decision, not mine." Id. at 7-8. Later in the same day, the defendant offered to pay for Olga C-M.'s trip "to the movies." Id. at 9. The next day, the defendant unintentionally revealed his thinly-veiled metaphor by telling an unknown male that "they can't prove the charges, and if that happens...the way I told you, and...the victim goes to the movies." Id. at 11. He predicted that it would take the authorities "their whole life" to find the victim in Mexico. Id. at 12.

As the plan began to take shape, on April 11 the defendant warned Olga C-M. not to tell anyone else about the plan. He said

he would provide more details in a letter. Id. at 14. On April 12, 2014, the defendant told Olga C-M. that "the herd has to leave. All sheep." He promised to provide Olga C-M. with "ten big chocolates so you can do everything that you need to do." The defendant insisted that the "goats" could not fly to their new destination, because in order to fly the "goats" would need passports. Instead, they had to go by bus. Id. at 15-17. He promised Olga that "[i]n Mexico, I think with ten chocolates you can live for a good period of time, more or less. Plus, other five that I will send you later. You can live well with that." Id. at 23.

The defendant instructed Olga C-M. to switch her cell phone number before she leaves, "so they don't trace anything." He insisted that Olga C-M. provide her new phone number to the defendant's sister, so he could call Olga while she was "on the road." Id. at 29-30. Secrecy was of the utmost importance to the defendant's plan, so he forbade Olga from saying goodbye to her friends. Id. at 31.

As the planned departure date approached, on April 28, 2014, the defendant told Olga what to say if "Wendy" (a reference to CPS social worker Wendy Radillo, whose testimony is at 5 RP 534-539) had questions about why her apartment looked so empty.

Ex. 15 at 48-49. The defendant even told Olga C-M. that Mt. Rainier was going to erupt and that Olga would learn about it on television (a television he promised to buy her), and she would think of him when she saw the eruption. Id. at 46-47. On April 29, 2014, the two calculated how many "chocolates" Olga had left. The defendant had been keeping track and insisted that she should have "one thousand six hundred left." He promised to "try to have them deposit [Olga] a little bit more." Id. at 52. Finally, on May 2, 2014, the last day Olga C-M. and Y.M-C. were seen in Washington, the defendant told Olga what to do with the car she was going to drive to the bus departure point. He told her to leave the car there and ask her brother to pick it up. Id. at 58. Olga C-M.'s brother testified that he did in fact pick up his sister's car after she delivered the surprising news, via phone call, that she had relocated to Mexico. 4 RP 417-418.

The trial court made a very detailed determination, based primarily on the content of the recorded phone calls, that the defendant had forfeited his Sixth Amendment right to confront the three missing witnesses under the forfeiture by wrongdoing doctrine. 2 RP 170-178. This included a factual finding that the witnesses were unavailable. Id. at 171. The result of the ruling was

that the State was allowed to admit most hearsay made by Olga C-M. and her son Miguel, but as for the victim's hearsay statements, the court didn't "necessarily believe in the context of a child hearsay issue...that that's really...what's implied." Id. at 177. The court then made a separate determination that all of Y.M-C.'s hearsay statements were also admissible under the child hearsay statute. 2 RP 227-233.

The jury returned unanimous verdicts of guilt on all seven counts. 1 CP 28-34. The court imposed a high end indeterminate sentence of 318 months to life in prison. 1 CP 6.

III. ARGUMENT

A. FORFEITURE BY WRONGDOING.

1. Sufficient Evidence Supported The Trial Court's Finding That The Defendant Engaged In Wrongful Conduct Intended To Prevent Three Material State's Witnesses From Testifying.

Evidence Rule 804 governs the interplay between witness unavailability and the admissibility of hearsay from that witness.[5]

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[5] In relevant part, ER 804 states:

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant: . . .

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

Although the doctrine of forfeiture by wrongdoing has long been an accepted rule of equity in common law, the Washington Supreme Court first adopted the doctrine in the 2007 case State v. Mason, 160 Wn.2d 910, 924, 162 P.3d 390, 403 (2007). The Mason court held that under the doctrine of forfeiture by wrongdoing, "defendants who are responsible for a witness'[s] unavailability at trial forfeit their right to confront the missing witness." The court held that "[s]pecific intent to prevent testimony is unnecessary" and the "[k]nowledge that the foreseeable consequences of one's actions include a witness'[s] unavailability at trial is adequate to conclude a forfeiture of confrontation rights." Id. at 926.

Subsequent to Mason, The United States Supreme Court held that the forfeiture by wrongdoing doctrine is to be applied only in situations where the defendant engaged in the conduct with the specific intent to prevent a witness from testifying. Giles v. California, 554 U.S. 353, 361, 128 S.Ct. 2678, 2684, 171 L.Ed.2d 488 (2008).

The Giles Court noted that under common law "forfeiture by wrongdoing ...permitted the introduction of statements of a witness

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(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." Giles, 554 U.S. at 359. In defining the specific intent required by these terms, the Court indicated that the doctrine is not limited to direct acts of wrongdoing by the defendant, as it defined the term "means" as follows: "while the term 'means' could sweep in all cases in which a defendant caused a witness to fail to appear, it can also connote that a defendant forfeits confrontation rights when he uses an intermediary for the purpose of making a witness absent." Id. at 360. Additionally, the Court noted with approval that "[a]n 1858 treatise made the purpose requirement more explicit still, stating that the forfeiture rule applied when a witness 'had been kept out of the way by the prisoner, *or by someone on the prisoner's behalf*, in order to prevent him from giving evidence against him.'" Id. at 361 (*emphasis* added). The Court also held that the act of wrongdoing need not be violent when it stated "[w]e are aware of no case in which the exception was invoked although the defendant had not engaged in conduct designed to prevent a witness from testifying, *such as offering a bribe*." Giles, 554 U.S. at 361 (*emphasis* added).

In the most recent analysis of the forfeiture by wrongdoing doctrine in Washington, State v. Dobbs, the State argued forfeiture

by wrongdoing when the defendant both threatened the witness and pleaded with her not to testify against him. State v. Dobbs, 180 Wn.2d 1, 7, 320 P.3d 705, 708 (2014). The Washington Supreme Court recognized that an act of wrongdoing need not be violent: "Without such a forfeiture rule, defendants would have 'an intolerable incentive ... *to bribe*, intimidate, or even kill witnesses against them.'" See Dobbs, 180 Wn.2d at 4 (*emphasis* added).

Reading Mason and Giles together, the Dobbs court held that "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." Dobbs, 180 Wn.2d at 11. As such, "[a] court does not need to rule out all possibilities for a witness's absence; it needs only to find that it is highly probable that the defendant intentionally caused it." Id.

The Dobbs court also explained that when a defendant has forfeited his confrontation right by wrongdoing, he has also waived all hearsay objections applicable to the missing witness:

> Both [the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule] are designed to protect against the dangers of using out-of-court statements as

> proof. But when the defendant's actions are the reason that the State must rely on out-of-court statements, he is hardly in a position to complain about the use of those out-of-court statements, whether through an assertion of confrontation rights or a hearsay objection. For the same reasoning that underlies the forfeiture by wrongdoing doctrine, we hold that a defendant who procures a witness's absence waives his hearsay objections to that witness's out-of-court statements.

State v. Dobbs, 180 Wn.2d 1, 16, 320 P.3d 705, 712 (2014).

In light of this, the Court held that "when considering whether forfeiture of confrontation rights also waives one's hearsay objections, we find it reasonable to conclude that '[t]he same equity and policy considerations apply with even more force to a rule of evidence without constitutional weight.' Id. at 17.

In this case the trial court made very detailed findings about the defendant's plan to prevent Y.M-C. from testifying. Unpersuaded by the argument that the code words used by the defendant and Olga C-M. were too vague to interpret with confidence, the court found that deciphering the code required no speculation at all. 2 RP 173.[6] The court applied the correct standard set forth in Dobbs, determining that the State had proved

[6] The court ruled, in part, as follows: "It is not speculation to understand that the words 'goats' and 'herd' refer to the children. 'Shepherd' refers to Olga. 'Movies' refers to Mexico. 'Chocolate' refers to cash. He knows this, he knows he's being recorded, and he makes these references in code that Olga understands in order to manipulate her and to have the effort to get her out of the country established." 2 RP 173.

by "clear, cogent, and convincing evidence that Mr. Hernandez has engaged in activity specifically designed to prevent the witnesses . . .from testifying." 2 RP 176-177.

The trial court's findings included the dual and equally critical findings of wrongful acts and a specific intent to prevent testimony. Both findings are supported by sufficient evidence from the record. Like most illegal plans, the defendant's began with intent and the wrongful acts were part of the implementation. The defendant's intent could not have been more clear when he asked his friend to "research" what might happen if a hypothetical victim moved to Mexico. Ex. 15 at 5-6. Later in the same day he encouraged Y.M-C.'s mother to move herself and her children to Mexico "as soon as possible" because it would "help him win the trial for sure." Id. at 7-8. The intent was clear even before the defendant developed "agricultural euphemisms" to speak about his plan in code.

Likewise, there is ample support in the record to support the court's finding that the defendant committed wrongdoing in order to effectuate his plan. The court correctly observed that every communication between the defendant and Olga C-M., regardless of content, was a violation of the court's pretrial no-contact order and therefore illegal. 2 RP 172. While the content was not violent

or overtly threatening, the defendant's interactions with Y.M-C.'s mother were certainly manipulative and effective. Olga C-M. expressed reluctance at the beginning stages of the plan. Id. at 16. He fueled Olga C-M.'s fear that CPS would take her children away if she stayed, and immediately offered "support so [she] could live well with [her] herd." Id. at 17. He provided the money for bus tickets to Mexico, and he promised even more money (for things like a television or a milk cow) when she arrived at her destination. Id. at 44-48, 51, 53. Remarkably, he even raised the prospect of leaving Washington to avoid the inevitable and impending eruption of Mt. Rainier. Id. at 46-48.

The court did not commit error on this issue because it applied the correct evidentiary standard and made findings supported by substantial evidence in the record.

2. The State Demonstrated Good Faith and Reasonable Efforts to Locate the Missing Witnesses, Even Though Such Efforts Were Not Required After The Defendant Forfeited His Sixth Amendment Right to Confront Them.

The defendant alleges that the State violated his Sixth Amendment right to confront witnesses by failing to secure the presence of the three material witnesses discussed above. Br. App. at 2-3. The argument assumes the defendant maintained any right

to confront these witnesses at all, despite the court's ruling that his own wrongdoing dissolved those rights.

Assuming *arguendo* that the defendant maintains a constitutional right to confront the three missing witnesses, the burden of proving unavailability for constitutional purposes lies with the proponent of the child hearsay statement (here, the State). State v. Smith, 148 Wn.2d at 132. Unavailability in the constitutional sense requires the prosecutor to make a good faith effort to obtain the witness' presence at trial. State v. Ryan, 103 Wn.2d 165, 171, 691 P.2d 197, 202 (1984). The lengths to which the prosecution must go to produce the witness is 'a question of reasonableness.' State v. Smith, 148 Wn.2d at 133. In particular, the "good faith" standard does not require the State to undertake a "futile act" to satisfy the confrontation clause. State v. Ryan, 103 Wn.2d at 172. However, if the State makes no effort whatsoever to produce the witness, the State cannot rely on the mere possibility that the witness would resist such efforts. State v. Beadle, 173 Wn.2d 97, 112-13, 265 P.3d 863 (2011). Both our State Supreme Court and the U.S. Supreme Court have acknowledged that a witness's permanent relocation to a foreign country renders a State prosecutor "powerless" to compel the witness's attendance. See

State v. DeSantiago, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003); Mancusi v. Stubbs, 408 U.S. 204, 212, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

The defendant asserts that the State's efforts to locate and communicate with the three missing witnesses fell short of the good faith and reasonableness required by law, yet he does not suggest what additional steps would have met this standard. Br. App. at 20. The argument also contains false information, such as:

- "[Olga C-M.] and her children appeared to be living at an easily ascertained location in a small town in Mexico." Br. App. at 20.
- The State only made one phone call and abandoned all efforts to contact the witnesses. Id.
- The State did not present all of the available information to the trial court when arguing the motion in-limine regarding unavailability. Id. at 18.

In fact, the State presented a detailed offer of proof on this issue in its trial memorandum, which included the fact that the detective made numerous calls to Olga C-M.'s mother's house. 2 CP __ (sub #50 at 19-20). Beyond the multiple phone calls, the detective also communicated with U.S. federal agents and with the

Greyhound bus company in an effort to determine when and how the missing witnesses may have crossed the border. Id.; 6 RP 628-629. The information provided by Olga C-M.'s brother was that Olga C-M. and her children had arrived safely in Mexico as of June 10, 2014, and were *planning* on visiting Olga's mother in Oaxaca but had not yet done so. 1 CP 108; 4 RP 418. There was never any confirmation that Olga C-M. and her children ever arrived at this location, and in fact when the Detective called the location the woman on the other end claimed she had never heard of Olga. 2 CP __ (sub #50 at 20).

Taken at face value, the unidentified woman's denial of Olga's presence (or any knowledge of who Olga C-M. is at all) refutes the defendant's contention that her location was easily ascertained. It is also contradicted by Manuel C-M.'s testimony that the small village in question is a place where "everybody knows each other." 4 RP 418-419. However, there is at least some possibility that the unidentified woman was Olga herself or someone who knew Olga and was lying about that fact. Accepting these possibilities as true leads to the conclusion (abundantly supported by Ex. 15) that Olga C-M. had decided not to cooperate

with the prosecution and would resist any requests to voluntarily return to Washington.

The defendant claims that the State needed to do more to establish good faith and reasonable efforts to secure the missing witnesses. Br. App. at 20 (citing U.S. v. Pena-Gutierrez, 222 F.3d 1080 (9th Cir. 2000)). The attempted analogy to Pena-Gutierrez is misplaced. In that case, the prosecution knew the missing witness's exact address in Mexico and failed to make *any* effort to contact him. Id. at 1088. The court condemned this lack of effort by finding that the witness was not unavailable, but also cited numerous cases in which the finding of unavailability was appropriate. Cf. U.S. v. Medjuck, 156 F.3d 916, 920 (9th Cir.1998) ("Here, the Canadian witnesses were unavailable for trial because they were beyond the subpoena power of the United States and refused voluntarily to attend."), cert. denied, 527 U.S. 1006, 119 S.Ct. 2343, 144 L.Ed.2d 239 (1999); Christian v. Rhode, 41 F.3d 461, 467 (9th Cir. 1994) (finding that the prosecution's efforts were reasonable and that witnesses were "unavailable" under Rule 804 when "the prosecution asked the witnesses if they would come to the United States to testify at trial," and "they refused"); U.S. v. Sines, 761 F.2d 1434, 1441 (9th Cir.1985) (finding that a witness was

"unavailable" under Rule 804 when, "after a series of contacts through various diplomatic channels, the Thai government had clearly indicated its unwillingness to permit [the witness] to leave Thailand to testify").

In this case the State did make reasonable efforts to locate and secure the testimony of the three missing witnesses, which is far more than the complete lack of effort displayed by the State in Pena-Gutierrez. Further efforts would have been futile acts given the witnesses' location in a foreign sovereign nation and the existing knowledge from the recorded phone calls that the mother, Olga C-M., had herself committed the crime of Tampering With a Witness against her eight year old daughter.

B. THE VICTIM'S HEARSAY STATEMENTS WERE ADMISSIBLE UNDER THE CHILD HEARSAY STATUTE.

A trial court's decision to admit hearsay statements under RCW 9A.44.120 is reviewed for abuse of discretion. State v. Smith, 148 Wn.2d 122, 134, 59 P.3d 74, 80 (2002). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds. State v. Beadle, 173 Wn.2d 97, 112, 265 P.3d 863, 871 (2011). In this case the defendant does not challenge the court's determination that Y.M-

C.'s hearsay statements were sufficiently reliable under the nine well-established Ryan factors. State v. Ryan, 103 Wn.2d at 175-176. Instead, the argument is that such an analysis is "unnecessary" because the statements were testimonial and Y.M-C. was not unavailable. Br. App. 25.

Likewise, there is no challenge to the court's finding that corroborative evidence supported the admission of the child hearsay. This is a finding required by statute if the child declarant is unavailable to testify at trial. RCW 9A.44.120(2)(b). The court found Y.M-C. was unavailable for the purpose of the child hearsay statute even though it had already found her unavailable in the context of the forfeiture by wrongdoing analysis. 2 RP 171, 227-228.

The State's position is that this court need not decide whether Y.M-C.'s hearsay statements were testimonial, because that analysis goes directly to the Sixth Amendment confrontation right the defendant forfeited through his actions. Nonetheless, analysis of the issue is appropriate in the event the defendant prevails in his claim that he did not forfeit his Sixth Amendment rights.

Alleged violations of the Confrontation Clause are subject to de novo review. When a violation has occurred, a harmless error analysis under the constitutional standard must follow. State v. Hurtado, 173 Wn. App. 592, 598, 294 P.3d 838 (2013) review denied, 177 Wn.2d 1021, 304 P.3d 115 (2013). The U.S. Supreme Court has been reluctant to provide bright-line rules for whether an otherwise-admissible hearsay statement is testimonial and therefore inadmissible due to the protections of the Confrontation Clause:

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In Washington, our Supreme Court has developed two different tests to determine whether an out of court statement is testimonial. If the statement was made to a "nongovernmental witness" the court uses a "declarant-centric" analysis:

> The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position

> would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. This inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made."

State v. Hurtado, 173 Wn. App. at 599 (internal citations omitted).

On the other hand, if the statement was made to "law enforcement"[7] the court uses the "primary purpose" test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Id. at 599-600.

The trial court's ruling on the testimonial or nontestimonial nature of the hearsay in this case was based on Hurtado, which at

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[7] Even the initial classification of the hearsay recipient (nongovernmental vs. law enforcement) can be difficult, as illustrated by this case. For example, the three public school employees who received Y.M-C.'s earliest disclosures clearly work for the government, so the defendant argues that the "primary purpose" test applicable only to law enforcement applies. Br. App. at 15. This begs the question whether the "declarant-centric" test would be used if Y.M-C. had attended a private school, despite no clear reason why that fact alone should justify a different test.

If an off-duty police officer happens upon an ongoing emergency in the aftermath of a crime, and knows due to her training and experience that her observations will likely be important to any future prosecution, does the off-duty officer's professional status mandate the use of the "primary purpose" test even though a similarly-situated civilian passerby would be subject to the "declarant-centric" test? A similar difficulty attends the hybrid classification of Heidi Scott, the civilian employee of Compass Health who provides a "service to law enforcement" in her capacity as a child interview specialist. 2 RP 133.

the time was the most recent pronouncement of the law in Washington. 2 RP 216-220. Subsequent to the court's ruling, the U.S. Supreme Court issued a thorough discussion of these issues which appears to blend Washington's "primary purpose" and "declarant-centric" approaches. Ohio v. Clark, 135 S.Ct. 2173 (June 18, 2015).

In Ohio v. Clark a three year old boy, L.P., was informally questioned in his classroom by two preschool teachers who observed injuries consistent with child abuse. Id. at 2178. The Court recited the post-Crawford cases which focused on statements to *law enforcement officers*, with that analysis influenced by whether the "primary purpose" of the questions was to meet an ongoing emergency, or the relative informality of the setting and the questions. See Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

The Court addressed head-on the previously-reserved issue of "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." Although it declined to adopt a bright line rule, it held that "such statements are much less likely to be testimonial than statements to law

enforcement officers." Ohio v. Clark, 135 S.Ct at 2181. Even though the Court adhered to the "primary purpose" language from its previous cases, the analysis turned more on the *declarant's* primary purpose than on the recipient's. See Id. ("At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser. L.P. never hinted that he intended his statements to be used by the police or prosecutors"); Id. at 2182 ("Statements by very young children will rarely, if ever, implicate the Confrontation Clause."); Id. ("it is extremely unlikely that a 3–year–old child in L.P.'s position would intend his statements to be a substitute for trial testimony. On the contrary, a young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.")

The recent Ohio v. Clark opinion validates the trial court's use of the "declarant-centric" test from Hurtado, because none of the five hearsay recipients in this case (a teacher, a school psychologist, a school nurse, a Sexual Assault Nurse Examiner, and a Child Interview Specialist) were law enforcement officers. While the 8 year-old victim in this case certainly presents a closer question than the 3 year-old victim in Ohio v. Clark, the trial court was correct to focus primarily on Y.M-C.'s perception of how her

statements would be used, with due consideration for how the *recipents'* primary purpose would have affected that perception. See 2 RP 214-220. This is consistent with the Supreme Court's directive to consider "all of the relevant circumstances." Ohio v. Clark, 135 S.Ct at 2180.

To that end, the trial court made detailed findings supported by substantial evidence. The court described 8 year-old Y.M-C. as a "typical" child of that age in her intellect and maturity. 2 RP 214; 1 RP 139. Her behavioral disposition was shy, somewhat reticent, and somewhat reluctant to disclose what happened. Id. at 215; 1 RP 73. In that context, the court analyzed Y.M-C.'s interactions with each of the five hearsay recipients.

1. Y.M-C.'s Statements To The Three Public School Employees Were Nontestimonial.

Y.M-C.'s interaction with the three school employees closely mirrored the 3 year-old victim's informal interrogation by his teachers in Clark. It occurred within minutes of Y.M-C.'s disclosure in the middle of class. Her teacher described her as "very timid" and "unsure of what was happening and what was going on." 1 RP 78. The court found that the intent of the school employees was to make sure "that the child is capable of functioning in school" even

though they have a secondary purpose of collecting information as statutorily mandated reporters of potential child abuse. See 2 RP at 215-216. Because the hearsay recipients were not acting with the primary purpose of collecting information for law enforcement, it is nearly impossible that their conversation with Y.M-C. could have altered her timid and unsure disposition into one of intentionally providing facts as a substitute for future trial testimony. Nothing in the record supports a conclusion that Y.M-C. viewed her interaction with the school employees with an eye towards prosecution. The trial court's consideration of both the declarant's and the recipients' primary purposes, with greater emphasis on the declarant's, is exactly the approach taken by the U.S. Supreme Court in Ohio v. Clark. The court was correct in reaching the same conclusion, even though the Clark opinion had not yet issued.

2. Y.M-C.'s Statements To The Sexual Assault Nurse Examiner Were Nontestimonial.

The court found that Y.M-C.'s statements to the Sexual Assault Nurse Examiner, Lori Moore, were "clearly for treatment and diagnosis," a reference to the firmly-rooted hearsay exception for statements made in the medical context. 2 RP 216; ER 804(a)(4). Not only did the defendant fail to object to the admission

of this evidence at trial, he conceded that this analysis was correct. 2 RP 207. He now raises the issue for the first time on appeal, and therefore must demonstrate that the alleged violation of the Sixth Amendment was manifest error. "An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error." State v. Jones, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Defendant now cites only a non-binding case from Nevada in support of his theory that the forensic nurse in this case was actually a "police operative" for the purpose of a Confrontation Clause analysis. Br. App. at 16. Such a conclusion cannot survive the binding precedent of Hurtado, a case in which the hearsay statements were testimonial not because of the nurse who received them, but because of the police officer sitting in the room while collecting physical evidence. See Hurtado, 173 Wn. App. at 602, 605-606 ("There is nothing in the record to show that the testifying nurse was employed or working with the State"); Giles v. California, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) ("[O]nly testimonial statements are excluded by the Confrontation Clause. Statements to friends and neighbors about abuse and intimidation

and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules....").

Like Hurtado, the record in this case contains no evidence that the nurse was "working with the State." The defendant's argument to the contrary is particularly unpersuasive in citing to 1 RP 68 for the proposition that the forensic nurse acted with the intent to "gather evidence for the prosecution." Br. App. 16. A fair reading of that portion of the record leads to the opposite conclusion; that the nurse had independent medical reasons to identify the abuser in order to prevent future injuries, and that she only testifies in court "because you guys [the State] subpoena me." 1 RP 68-69.

3. Y.M-C.'s Statements To The Child Interview Specialist Were Nontestimonial.

Y.M-C. met with Child Interview Specialist Heidi Scott on November 22, 2014, the day after she disclosed at school. 4 RP 381. The court watched the video recording of that interview and determined "it's clear she doesn't know why she's there." 2 RP 219. While it's true that the interviewer made periodic references to the detective observing the interview via closed circuit television, the record contains no evidence that Y.M-C. connected the

detective's presence to a potential future prosecution. The detective gave her no such information. 5 RP 586-587. Neither did the child interview specialist. 2 RP 143. To the contrary, Y.M-C.'s teacher testified that she instructs her students "police are there to help people." 1 RP 82. Y.M-C. asked no questions during her recorded interview about the detective's role or what consequences the defendant might face down the road. See Ex. 10.

On these facts the court concluded that a reasonable 8 year-old would not know that her interview might be used in a trial. 2 RP 220. This conclusion is consistent with the declarant-centric analyses in both Hurtado and Clark. As the Court observed in Clark, "It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution." Ohio v. Clark, 135 S.Ct. at 2183. Likewise, in this case it is just as irrelevant that Y.M-C.'s statements to the child interview specialist ended up serving as compelling evidence of the defendant's guilt. The trial court properly focused on the declarant-centric question, "Does [Y.M-C.] know why she's there? Not do other people know why she's there." 2 RP 219. Using this standard, the court reached the correct conclusion that Y.M-C.'s statements to the child interview specialist were non-testimonial.

4. Even If The Defendant Did Not Forfeit His Sixth Amendment Rights, AND Even If Some Of Y.M-C.'s Admitted Hearsay Was Testimonial, Any Error Was Harmless Beyond A Reasonable Doubt.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In making this determination the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

In this case the defendant seeks to excise all of Y.M-C.'s hearsay to five separate sources by claiming that all five of those interactions were testimonial in nature. The effort falls particularly short with regard to the forensic nurse, because the defendant agreed at trial that her testimony was properly based on the medical hearsay exception. 2 RP 216; ER 804(a)(4). As discussed above, the claimed error on the forensic nurse's testimony would not have changed the result of the trial because so much untainted evidence remained.

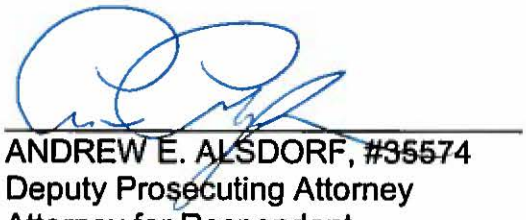
The State's evidence was exceptionally strong. When Y.M-C. approached her teacher to complain of pain in her genitals and disclose the defendant's sexual abuse, she was wearing underwear that would be collected by a forensic nurse later that day. 4 RP 361-363. The interior crotch of that underwear, and a swab taken from Y.M-C.'s genitals, contained the defendant's semen. Ex. 51 at 42:00 – 43:30. Y.M-C. had notches and thickening on her hymen, indications consistent with sexual abuse. 3 RP 283-284. The defendant confessed to one incident of molesting Y.M-C.'s vagina with his hand (Ex. 31 at 62-63), a fact that surely increased the credibility of Y.M-C.'s descriptions of rape and molestation occurring in a long-term and frequent pattern of abuse. Finally, the defendant's desperate plan to remove Y.M-C. from the country and prevent her from testifying provided unrebutted evidence of just how damaging the defendant knew Y.M-C.'s live testimony would be to his case. See Ex. 15. Even if the court excises all of Y.M-C.'s hearsay except for the statements to the forensic nurse, the State's evidence would have been just as strong and the resulting verdict just as inevitable. Although there was no error, any error was harmless beyond a reasonable doubt.

IV. CONCLUSION

The State respectfully requests that the court affirm all seven convictions in this case.

Respectfully submitted on July 27, 2015.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

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

THE STATE OF WASHINGTON, Respondent, v. JENARO De JESUS HERNANDEZ, Appellant.	No. 72411-8-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of July, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Kathleen A. Shea, Washington Appellate Project, kate@washapp.org and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of July, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office