No. 46357-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justin Moses,

Appellant.

Pierce County Superior Court Cause No. 12-1-03277-9

The Honorable Judge Stephanie Arend

Appellant's Opening Brief

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>
> **ISSUE 2:** Under CrR 4.4(c), a motion to sever defendants must be granted unless sanitizing a codefendant's out-of-court statements eliminates "any prejudice." Here, the trial judge refused to sever Mr. Moses's case from his wife Mrs. Moses's case, but admitted Mrs. Moses's redacted statements, which remained prejudicial to Mr. Moses. Did the trial court abuse its discretion by failing to sever Mr. Moses's trial from his wife Mrs. Moses's trial?

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9. Pursuant to RAP 10.1, Mr. Moses adopts and incorporates the assignments of error set forth in Mrs. Moses's Opening Brief.

   ISSUE 5: Pursuant to RAP 10.1, Mr. Moses adopts and incorporates the issues set forth in Mrs. Moses's Opening Brief.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

CPS removed 18-month-old M.A. from his mother's home in mid-2008. His mother had abused and neglected him. RP (5/5/14) 1201-1202. Over the next three years, he lived in at least two different foster homes, where he also suffered abuse. RP (4/25/14) 630, 676; RP (5/5/14) 1201-1202. By the time he was five years old, M.A. had developed an eating disorder. He was at risk of developing diabetes, he overate to the point of illness, and he even tried to eat garbage and other non-food items such as lotion and chicken bones. RP (4/25/14) 631, 666-667, 678-681; RP (5/5/14) 1213-1216; RP (5/6/14) 1318.

At the end of September, 2011, the Muckleshoot Tribe's social services department placed M.A. with Mr. and Mrs. Moses. The two were not licensed foster parents. RP (4/30/14) 728-732. M.A.'s mother was a member of the Muckleshoot tribe, and Mr. Moses was her cousin. RP (4/30/14) 699, 728-732, 740, 785; RP (5/5/14) 1200.[1] Mr. and Mrs. Moses had other children, but had no experience caring for children with eating issues. RP (5/5/14) 1217-1218.

The tribal social worker told the Moseses that M.A. overate. The former foster parents said he was at risk for diabetes. RP (5/5/14) 1213.

The tribe did not provide any information to the Moseses about his eating disorder. Nor did the tribe provide any information or training about the diet that would be appropriate for M.A., given his emotional issues and health problems. In fact, the couple was not even told that M.A. had a MRSA[2] infection at the time of his placement. RP (4/30/14) 793-794, 839.

Mrs. Moses assumed primary responsibility for M.A. Under her care, M.A. began to lose weight. Mrs. Moses maintained contact with the tribe via email. RP (2/25/14) 224-225. She updated the social worker on M.A.'s weight loss; in one email (dated January 22nd, 2012), she wrote:

> These kids are wonderful and are coming along very nicely and [V.] is getting better at reading and [M.A.] is super smart and has been working with me on slowing down when he eats, I have him count to five before taking another bite, that way he [doesn't gorge] himself and get sick… he's been doing really well with it and we [haven't] had any problems with sicknesses, other than on visit day because mom lets them overeat and over drink!
> Ex. 37.

After M.A. lost eight pounds, he proudly showed off his weight loss at his ECEAP class.[3] RP (4/29/14) 641, 643, 656.

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[1] M.A.'s sister V. had also been removed from their mother's care, and was also placed with the Moses family. RP (4/30/14) 788-790.

[2] Methicillin-resistant Staphylococcus aureus is an antibiotic-resistant bacterial infection.

[3] The assigned social worker may have seen him appearing healthy in December. However, she provided inconsistent information on the point. RP (4/30/14) 843, 848-850.

In February of 2012, M.A. stopped attending school. RP 1319-1323. One of the family cars became undrivable, and Mrs. Moses gave different explanations for his absences. RP (4/29/14) 644-647, 654; RP (5/5/14) 1167; RP (5/6/14) 1344-1347. She also canceled a home visit. RP (5/5/14) 1169; RP (5/6/14) 1324-1327. The ECEAP teacher contacted the Department of Social and Health Services, who contacted the tribe. RP (5/6/14) 1328-1330.

Eventually, the social worker called the home and spoke with Mr. Moses. Mr. Moses immediately brought M.A. to see the case worker. She found M.A. to be emaciated. RP (4/30/14) 801-805, 807; RP (5/6/14) 1340-1343. An ambulance took M.A. to the hospital, where doctors determined that he was severely malnourished. RP (4/30/14) 808-819.

Police conducted a joint interview of Mr. and Mrs. Moses. Mrs. Moses did most of the talking. RP (4/29/14) 522; RP (5/5/14) 1171; Ex. 71, 73, 74. During the interview, she made statements inconsistent with prior statements she had made to others. Mr. Moses remained quiet throughout the interview. He did tell police that he hadn't noticed any problems with M.A. RP (4/29/14) 522; RP (5/5/14) 1171; Ex. 71, 73, 74.

The state charged both Mr. and Mrs. Moses jointly with second-degree criminal mistreatment. CP 205.

Mr. Moses asked to have his trial severed from his wife's.[4] CP 198-199. He argued that Mrs. Moses's statements were not admissible against him, that the statements could not be effectively redacted to remove references to him, and that introduction of her statements would violate his confrontation right. CP 201-204; RP (3/14/14) 4-44; RP (4/21/14) 81, 85-95.

The trial judge refused to suppress Mrs. Moses's statements, and denied the motion to sever the trials. RP (3/14/14) 35-39. Mr. Moses renewed the motion to sever during trial. RP (5/7/14) 1549-1550; RP (5/8/14) 1772.

At trial, the prosecutor introduced a redacted version of Mrs. Moses's statement (over defense objection). Ex. 71, 73, 74; RP (5/7/14) 1590-1598. The court instructed jurors not to consider her statement against Mr. Moses. CP 245; RP (5/7/14) 1595-1596.

In the redacted statement, Mrs. Moses frequently used the first person plural to refer to herself and her husband. Ex. 74; *see, e.g.,* Transcript, p. 4 ("[W]e don't really talk to [M.A.'s mother] that much"); p. 5 ("[W]e got the paperwork and we filled it out, we just never turned 'em in;" "And so we took 'em"). The interviewer also asked Mrs. Moses

[4] In the alternative, he asked that her statements be suppressed.. RP (3/14/14) 4-44; RP (4/21/14) 81, 85-95.

questions relating to both Mr. Moses and Mrs. Moses. Ex. 74; *see, e.g.*, Transcript p. 5 ("Now are you guys a licensed foster…?"); p. 11 ("[W]ould the whole family eat together?") Throughout the interview, both the officer and Mrs. Moses used the word "here" to refer to the family home in a way that implicated Mr. Moses. Ex. 74; *see, e.g.*, Transcript p. 4 ("Q: And how did [M.A. and his sister] come to live here with you? A: Their mom asked ICW to place them here.")

The prosecutor also sought to introduce M.A.'s out-of-court statements under RCW 9A.44.120, the child hearsay statute. CP 176-177. Mr. Moses objected, arguing that the statute applied only to statements describing acts of abuse, and did not apply in cases of neglect. CP 178-181. The trial court overruled the objection, and M.A.'s out-of-court statements to forensic interviewer Cornelia Thomas were admitted at trial. RP (5/6/14) 1376-1399; CP 210; Ex 46, 47.

M.A. also testified at trial. RP (5/1/14) 978-1028; RP (5/5/14) 1040-1059. He said that he got enough to eat at the Moses home. RP (5/1/14) 998-1004.[5] He also said that he sometimes ate jalapenos and hot sauce at dinner. At one point, he said that he liked them both; at another

[5] He also said he was starved at that home, though he stated he didn't know what "starved" meant and that he'd heard the word from an adult. RP (5/1/14) 1023-1024; RP (5/5/14) 1040, 1044.

point, he said he did not like them. RP (5/1/14) 1011-1016; RP (5/5/14) 1047-1049.

Neither of the accused testified. RP (5/12/14) 1886. The jury convicted Mr. Moses of second-degree criminal mistreatment. CP 284. By special verdict, the jury indicated that Mr. Moses recklessly caused M.A. substantial bodily harm by withholding the necessities of life. CP 290. The jury also found that M.A. was particularly vulnerable, and that Mr. Moses abused a position of trust.[6] CP 288, 289.

The court found that Mr. Moses had an offender score of zero, and imposed an exceptional sentence of 40 months. CP 294-307, 318-327. Mr. Moses appealed. CP 328.

ARGUMENT

I. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. MOSES'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Alleged violations of the confrontation clause are reviewed *de novo*. *State v. Fisher*, No. 43870-4-II, 2014 WL 6778287, at *2 (Wash. Ct. App. Dec. 2, 2014). A confrontation error is presumed prejudicial, and the

[6] The jury did not find that Mr. Moses acted with deliberate cruelty. CP 287.

state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Jasper*, 174 Wn.2d 96, 117, 271 P.3d 876 (2012).

B. The admission of Mrs. Moses's testimonial statements to police violated Mr. Moses's confrontation rights.

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI.[7] A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The core definition of testimonial hearsay includes statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52.

The admission of a non-testifying codefendant's statement violates the confrontation clause unless the statement is (1) redacted so that it is

[7] This provision is applicable to the states through the due process clause of the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965);

facially neutral, (2) modified so it is free of obvious deletions, and (3) accompanied by an instruction prohibiting jurors from using it against the defendant. *State v. Larry*, 108 Wn. App. 894, 905, 34 P.3d 241 (2001) (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), *Gray v. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), and *Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). Even when all three steps are followed, a redacted statement violates the confrontation right if "the only reasonable inference" drawn from the statement implicates the defendant. *State v. Vincent*, 131 Wn. App. 147, 154, 120 P.3d 120 (2005).[8]

In *Vincent,* a non-testifying codefendant's statement was sanitized by replacing references to the defendant's name with "the other guy." *Id, at* 151. The trial court instructed jurors it could not consider the codefendant's statement against the defendant. *Id.* Despite these measures, the Court of Appeals found a confrontation violation and distinguished cases in which similar substitutions had been made, noting that in *Vincent,*

> [T]here were only two participants in the crimes and only two defendants... [T]he only reasonable inference the jury could have drawn from... references to the "other guy" was that the other guy was [the defendant]. The redaction thus failed in its purpose, and

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U.S. Const. Amend. XIV. The state constitution guarantees an accused person's right "to meet the witnesses against him [or her] face to face." Wash. Const. art. I, § 22.

[8]But see *Larry*, 108 Wn. App. at 906-907. The *Vincent* court made no reference to *Larry*.

> admission of [the] testimony in the joint trial violated [the defendant's] rights under *Bruton*.
> *Id, at* 154.

In this case, the prosecution introduced excerpts of Mrs. Moses's statements to police. Ex. 74. The statements fall within *Crawford's* core definition of testimonial hearsay. *Crawford,* 541 U.S. at 52. Mr. Moses had no prior opportunity for cross-examination. Their admission violated Mr. Moses's confrontation rights. *Id.*

First, the redactions did not actually remove references to Mr. Moses. On more than one occasion, Mrs. Moses used the first person plural pronouns 'we,' 'us,' 'our.' Ex. 74; *see e.g.* Transcript pp. 4, 5, 7, 8, 15. On several occasions, the officer asked questions explicitly referring to both Mr. and Mrs. Moses, for example by calling them "you guys." Ex. 74; Transcript p. 5. Many of the officer's other questions called for Mrs. Moses to make statements that clearly applied to Mr. Moses. *See, e.g.,* Ex. 74, Transcript p. 6 ("And when were they placed here with you?"), p. 9 ("[W]hat were [M.A.'s] eating habits while he was here?"), p. 11 ("[W]ould the whole family eat together?")

As in *Vincent,* "there were only two [alleged] participants… and only two defendants." *Vincent,* 131 Wn. App at 154. Because of this, "the only reasonable inference the jury could have drawn" from Mrs. Moses's statements was that much of what she said referred to both her

and Mr. Moses. *Id.* Accordingly, "[t]he redaction…failed in its purpose, and admission of [the] testimony in the joint trial violated [Mr. Moses's] rights under *Bruton*." *Id.*

Second, because the Moseses are married, jurors would naturally understand that nearly everything she said applied to him as well. For example, both the officer and Mrs. Moses often used the word "here" to refer to the Moses household. Ex. 74; *see e.g.* Transcript pp. 3, 4.

Even with the court's limiting instruction, it would be impossible for a reasonable juror to completely ignore Mrs. Moses's statements when considering the prosecution's case against her husband. A juror who made a sincere attempt to consciously separate the evidence in accordance with the court's instructions would have no ability to control subconscious thoughts based on Mrs. Moses's out-of-court statements.

The admission of testimonial hearsay violated Mr. Moses's Sixth and Fourteenth Amendment right to confront adverse witnesses. *Crawford,* 541 U.S.at 58-59. It also violated his confrontation right under art. I, § 22. His conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT ERRED BY DENYING MR. MOSES'S SEVERANCE MOTION.

A. Standard of Review

The interpretation of a court rule is an issue of law, reviewed *de novo*. *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011). Denial of a motion to sever is reviewed for abuse of discretion. *State v. Rodriguez*, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011). The appellant must show that the joint trial resulted in "specific unfair prejudice" that outweighed the need for judicial economy. *Id.* The admission of a codefendant's statement inculpating the accused person creates the specific prejudice necessary for reversal. *Larry,* 108 Wn. App. at 911.

B. Severance should have been granted under CrR 4.4(c) because sanitizing Mrs. Moses's statement did not "eliminate" all prejudice.

Court rules are interpreted with reference to principles of statutory construction. *City of Seattle v. Holifield*, 170 Wn.2d 230, 237, 240 P.3d 1162 (2010). Interpretation starts with the plain language of the rule. *Id.* If the plain language is subject to only one interpretation, the inquiry ends, "because plain language does not require construction." *Id.*

Under CrR 4.4(c),

> A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless… deletion of all references to

> the moving defendant will eliminate *any* prejudice to him from the admission of the statement.
> CrR 4.4 (emphasis added).

Under the plain language of CrR 4.4(c), the admission of a nontestifying codefendant's statement requires severance unless "any prejudice" can be eliminated by deleting references to the defendant. This rule thus provides greater protection than the Sixth Amendment's confrontation clause. CrR 4.4(c); *cf. Bruton,* 391 U.S. 123.

Here, Mr. Moses sought severance from his codefendant because of the potential for prejudice created by the introduction of his wife's testimonial hearsay. CP 198-199, 201-204. Redactions to her statement may have mitigated the prejudice against Mr. Moses; however, they did not eliminate all prejudice.

Instead, jurors were likely to consider Mrs. Moses's statement as proof of Mr. Moses's guilt. This is so for the reasons outlined above—because Mrs. Moses repeatedly used first person plural pronouns ('we,' 'us,' etc.), because jurors understood that much of what she said applied to her husband, and because some of the officers' questions referred to the couple or called for a response that implicated him. Ex. 73.

Severance should have been granted under CrR 4.4(c). The court's order denying severance prejudiced Mr. Moses. The redaction of Mrs. Moses's statement did not eliminate all prejudice against him. *Larry,* 108

Wn. App. at 911. Accordingly, Mr. Moses's convictions must be reversed and the case remanded for a new trial. *Id.;* CrR 4.4(c).

III. THE ERRONEOUS ADMISSION OF M.A.'S HEARSAY STATEMENTS UNDER RCW 9A.44.120 PREJUDICED MR. MOSES.

A. Standard of Review

Statutory interpretation is an issue of law reviewed *de novo*. *State v. Kipp*, -- Wn.2d --, 317 P.3d 1029, 1033 (Wash. 2014). The erroneous admission of evidence requires reversal if, within reasonable probabilities, it materially affected the outcome of trial. *State v. Gunderson*, No. 89297-1, 2014 WL 6601061, at *4 (Wash. Nov. 20, 2014).

B. The plain language of an unambiguous statutory provision must be given effect.

In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004). Absent evidence of a contrary intent, words in a statute must be given their plain and ordinary meaning. *State v. Lilyblad,* 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The meaning of an undefined word or phrase may be derived from a dictionary. *Lindeman v. Kelso Sch. Dist. No. 458,* 162 Wn.2d 196, 202, 172 P.3d 329 (2007). Courts must read

statutory provisions in their entirety, examining them as a whole, rather than piecemeal. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 439-40, 275 P.3d 1119 (2012).

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009); *see also State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction."). A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wn. App. 471, 477, 248 P.3d 121 (2011). Nor may a reviewing court "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

If a statute is "susceptible to two or more reasonable interpretations, it is ambiguous," and courts "may turn to additional tools of statutory construction in determining the meaning of the statute." *In re Det. of Hawkins*, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010).

Statutes that are in derogation of the common law must be strictly construed. *See, e.g., Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012); *Potter v. Washington State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008).

When a provision is ambiguous, a court may "compare the wording of statutes that 'relate to the same person or thing, or the same class of persons or things.'" *State v. Reeves*, 336 P.3d 105, 108 (Wash. Ct. App. 2014). Where the same word appears in different statutes governing the same subject matter, the word is given the same meaning, unless the context dictates otherwise. *In re Farina*, 94 Wn. App. 441, 450, 972 P.2d 531 (1999), *as amended on reconsideration* (Apr. 13, 1999).

Under the *maxim expressio unius est exclusio alterius*, any omissions from a statute are presumed intentional. *Ellensburg Cement Products, Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014).

C. The child hearsay statute does not apply to neglect; it applies only when the child describes "any act of" sexual contact or physical abuse.

The child hearsay statute outlines the prerequisites for introduction of

> [a] statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110.

RCW 9A.44.120. By its plain terms, the statute applies to "any act of physical abuse." It does not apply to chronic neglect.[9]

In this case, the trial court improperly broadened the reach of RCW 9A.44.120. The court examined the words "physical" and "abuse" in isolation, and concluded that "physical abuse" can mean "maltreatment that results in malnutrition." CP 189. The court did not harmonize this definition with the statute's focus on "any *act* of physical abuse." RCW 9A.44.120 (emphasis added). This interpretation conflicts with the legislative intent.[10]

The statute is unambiguous, and its plain language indicates the legislature's intent to limit applicability to abusive acts. This can also be seen when the phrase "any act of physical abuse" is taken in conjunction with the phrases "any act of sexual contact" and "any attempted act of sexual contact." RCW 9A.44.120. All three phrases reflect the legislative purpose: to allow the introduction of testimony regarding specific harmful acts. This reinforces the legislative intent to limit the statute's reach. *Bunch*, 174 Wn.2d at 439-40.

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[9] Nor does it apply to individual "acts" of neglect.

[10] The trial court's decision may have rested, in part, on the prosecutor's repeated assertion that second-degree criminal mistreatment requires proof of intent. RP (2/24/14) 29-30. This is incorrect; the statutory *mens rea* is recklessness.. RCW 9A.42.030.

Even if the statute were considered ambiguous, the rules of statutory construction favor limiting its reach to statements involving specific harmful acts. First, no child hearsay rule existed at common law. *State v. O'Cain*, 169 Wn. App. 228, 258, 279 P.3d 926 (2012). Accordingly, the statute must be strictly construed. *Fellows,* 175 Wn.2d at 649; *Potter*, 165 Wn.2d at 77.

Second, the statute does not mention "neglect." RCW 9A.44.120. Under the *maxim expressio unius est exclusio alterius*, the omission of the word "neglect" is presumed intentional. *Ellensburg Cement*, 179 Wn.2d at 750. This shows that the legislature did not intend the statute to apply where the child's statement describes neglect rather than abuse.

Third, the legislature often uses the word "abuse" to describe harmful acts perpetrated against children or other vulnerable people.[11] When used in this way, the word almost invariably appears in the phrase "abuse or neglect."[12] This suggests that "abuse" has a different meaning from "neglect." *Farina*, 94 Wn. App. at 450. [13]

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[11] The statute does not define the term "abuse" or the phrase "act of physical abuse." Nor are these terms defined elsewhere in RCW Title 9, 9A, or 10.

[12] *See, e.g.,* RCW 9.94A.655 (parenting sentencing alternative), Chapter 9A.72 RCW (addressing interference with official proceedings), Chapter 13.32A RCW (Family Reconciliation Act), Chapter 13.34 RCW (Dependency and Termination of Parent Child Relationship), Title 26 RCW (domestic relations).

[13] Indeed, one statute defines "[a]buse or neglect" in a manner suggesting that abuse means "sexual abuse, sexual exploitation, or injury," while neglect means "negligent treatment or maltreatment." RCW 26.44.020(1).

Here, the trial court admitted M.A.'s statements describing (at worst) chronic neglect. RP (5/6/14) 1376-1399; Ex 46, 47. The child hearsay statute does not apply to statements such as these. RCW 9A.44.120. Accordingly, the trial court applied the wrong legal standard. The state should not have been allowed to introduce M.A.'s hearsay statements.

The error requires reversal because there is a reasonable probability that it materially affected the outcome of trial. *Gunderson*, --- Wn.2d at ___. Thomas repeatedly characterized M.A.'s statements as "disclosures," implying that they were truthful and established neglect. RP (5/6/14) 1386-1406; RP (5/7/14) 1418-1486. She even testified that M.A. was "credible." RP (5/7/14) 1481. Furthermore, introduction of the hearsay statements improperly bolstered M.A.'s testimony: by showing that M.A. made similar statements on more than one occasion, the state was able to imply that he spoke truthfully. But repetition is not generally a valid test for veracity. *State v. Thomas*, 150 Wn.2d 821, 867, 83 P.3d 970 (2004).[14]

[14] The hearsay statements might have been admissible to rebut a claim of recent fabrication or improper motive. *Id.;* ER 801(d)(1)(ii). Here, Mr. Moses did not make a claim of recent fabrication or improper motive. Furthermore, he might have chosen not to limit cross examination of M.A. had the statements been excluded, in order to minimize the risk that they'd be admitted under ER 801(d)(1)(ii).

The trial court misinterpreted RCW 9A.44.120, and erred by admitting M.A.'s out-of-court statements. Mr. Moses's conviction must be reversed and the case remanded with instructions to exclude the statements on retrial.

IV. CUMULATIVE ERROR REQUIRES REVERSAL OF MR. MOSES'S CONVICTION.

The cumulative error doctrine requires reversal "when the combined effect of errors during trial effectively denied the defendant… a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Here, the trial judge erred by admitting out-of-court statements made by Mrs. Moses and M.A. Whether or not each error requires reversal, the combined effect of the two errors prejudiced Mr. Moses. Accordingly, cumulative error requires a new trial. *Id.*

V. MR. MOSES ADOPTS AND INCORPORATES THE ARGUMENTS SET FORTH IN MRS. MOSES'S OPENING BRIEF.

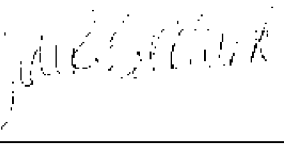
Pursuant to RAP 10.1, Mr. Moses adopts and incorporates the arguments set forth in Mrs. Moses's Opening Brief.

CONCLUSION

The trial court erred by admitting Mrs. Moses's testimonial hearsay. The court also erred by denying Mr. Moses's severance motion. The court misinterpreted the child hearsay statute and erred by admitting M.A.'s out-of-court statements. For all these reasons, Mr. Moses's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on December 23, 2014,

BACKLUND AND MISTRY



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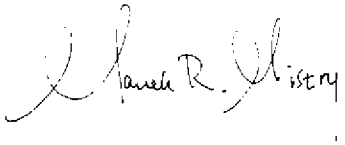


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Justin Moses, DOC #374786
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

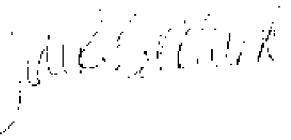
and to

Jennifer Winkler, attorney for co-defendant
winklerj@nwattorney.net

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 23, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

December 23, 2014 - 11:08 AM

Transmittal Letter

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Case Name: State v. Justin Moses

Court of Appeals Case Number: 46357-1

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Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us
winklerj@nwattorney.net