73699-0



No. 73699-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LITTLE,

Appellant.

---

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

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# BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

A jury convicted Nicholas Little of six counts of first degree child molestation based mostly on the hearsay testimony of three children, which did not satisfy the "reliability" exception. Although the initial complaint (made by two of the children) alleged a grandfather-like figure, living at the location of the maternal grandfather's home, had committed the crimes, the trial court prevented Mr. Little from presenting "other suspect" evidence tending to show that the children's maternal grandfather was connected to the crimes.

Mr. Little did not testify at trial. In the State's closing argument, it called the defense "cagey," and suggested that only Mr. Little knew what had happened. Mr. Little's objections to these improper statements were erroneously overruled. After the jury convicted Mr. Little, he filed a motion for a new trial, explaining that his attorney had prevented him from testifying by instructing him that, because he smelled of alcohol, the court might throw him in jail if he took the stand. For all of these reasons, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The court violated Mr. Little's constitutional right to present a defense when it erroneously excluded his "other suspect" evidence.

2. The trial court erred when it admitted the children's hearsay statements.

3. Mr. Little was denied his constitutional right to a fair trial when the prosecuting attorney suggested during his closing argument that the defense was being "cagey" and commented on Mr. Little's decision not to testify at trial.

4. The trial court erred when it denied Mr. Little an evidentiary hearing to determine whether his attorney had "actually prevented" him from testifying.

5. The trial court erred when it entered Finding of Fact 12. CP 439.

6. The trial court erred when it entered Finding of Fact 13. CP 439.

7. The trial court erred when it entered Finding of Fact 14. CP 439.

8. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 1. CP 439.

9. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 2. CP 440.

10. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 3. CP 440.

11. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 4. CP 440.

12. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 5. CP 440.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Pursuant to the Due Process Clause and the Sixth Amendment, a defendant must be given a meaningful opportunity to present a complete defense. He is entitled to present evidence of another suspect where it tends to connect the other person with the crime. Where the initial report suggested that a grandfather-like figure had committed the crime and the children's maternal grandfather had lived with the children for periods of time, did the trial court's exclusion of this other suspect evidence violate Mr. Little's constitutional rights and prejudice Mr. Little, requiring reversal?

2. Under RCW 9A.44.120, hearsay statements made by young children may be admissible at trial when they are determined to be reliable. The reliability of the statements is assessed according to nine factors articulated in *State v. Ryan*.[1] These factors must be "substantially met" before the hearsay statements may be admitted. The evidence showed the children had an apparent motive to lie, made the claims in response to the CPS worker's leading questions, and that two of the children changed their stories after spending unsupervised time with the other child. Did the court err when it admitted the children's hearsay statements despite the fact that the *Ryan* factors were not substantially met?

3. Hearsay statements may be admitted under the medical diagnosis or treatment exception in ER 803(a)(4), but the declarant's motive must have been to promote treatment and the medical professional must have reasonably relied on the statement for purposes of treatment. Where the children's hearsay statements to the forensic nurse examiner were admitted at trial but the children had no incentive to be truthful to the nurse in order to obtain proper care, did the court commit reversible error?

[1] 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

4. A defendant may be denied his constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. Where the prosecuting attorney improperly suggested the defense was being "cagey" with its words, and later commented on Mr. Little's right to remain silent at trial, must this Court reverse?

5. When a defendant presents specific, credible allegations that his attorney actually prevented him from testifying at trial, he is entitled to an evidentiary hearing to determine whether his waiver was knowing and voluntary. Where Mr. Little explained his attorney had instructed him that, because he smelled of alcohol, he could be thrown in jail if he testified, did the trial court err in denying his request for a hearing?

D. STATEMENT OF THE CASE

Nicholas Little met Sherri Kidney through his sister, who attended Bastyr University with Ms. Kidney. 10 RP 59. When Ms. Kidney accompanied the sister on a family vacation to La Push, Mr. Little and Ms. Kidney met and had an immediate connection. 10 RP 60; 16 RP 60. The next year, the two began dating. 10 RP 63.

Ms. Kidney has three children. 10 RP 51. At the time of trial, her oldest daughter, A.M., was 10 and her twin daughters, H.M. and J.M., were 8. 10 RP 51. About a year after they began dating, Ms.

Kidney entered a graduate program at the University of Washington and Mr. Little and Ms. Kidney moved in together in a duplex in West Seattle. 10 RP 70. Mr. Little got along well with Ms. Kidney's daughters and often babysat them while Ms. Kidney was at work or school. 10 RP 72-73. They discussed getting married after Ms. Kidney graduated. 10 RP 83.

Before Mr. Little took an active role in the girls' lives, they attended daycare and Ms. Kidney's father, Alan Kidney, helped out by babysitting. 2 RP 21. When Ms. Kidney graduated from Bastyr, she moved in with her father for several months. 2 RP 25. Later, after Ms. Kidney moved to West Seattle, her father lived with the family for a few weeks, sleeping on one of their living room couches. 2 RP 171.

After Ms. Kidney and her daughters moved in with Mr. Little, the twins were playing a game of "telephone" with a friend, H.B., when they told her that Mr. Little's father had touched them inappropriately. 8 RP 125, 127; 8 RP 72. H.B. told her mother, who contacted Child Protective Services (CPS). 8 RP 72, 76.

The following Monday, a CPS worker, Ana Mejia, arrived at the children's elementary school to interview them. 8 RP 173. In separate

interviews, the twins informed Ms. Mejia that no one had touched them inappropriately. 9 RP 106, 120.

Ms. Mejia then interviewed A.M. 9 RP 34. Ms. Mejia was an inexperienced CPS worker and admitted she was "absolutely overwhelmed" by the situation. 9 RP 167-68. Ms. Mejia asked A.M. if anyone had touched her private parts and A.M. nodded. 9 RP 38. When Ms. Mejia asked who had done this, A.M. shrugged. 9 RP 39. Rather than ask another open-ended question, Ms. Mejia responded to A.M.'s gesture by listing off the names of adults she knew in A.M.'s life. 9 RP 39. When she got to Mr. Little's name, A.M. nodded, and Ms. Mejia stopped offering names. 9 RP 39. Ms. Mejia acknowledged that she would have asked about Alan Kidney, but did not get that far down her list. 9 RP 137. She also did not think to audio record her interviews with the children, despite conceding that this would have been best. 9 RP 110.

A.M. repeated the allegations against Mr. Little to a police officer and the children were removed from the home. 15 RP 66; 9 RP 163. They were placed together, overnight, in a visitation center, and then moved to their maternal grandmother's house the next day. 9 RP 163, 165. Only after the children were alone with each other did H.M.

and J.M. recite allegations matching A.M.'s. 12 RP 118, 149, 187 (interviews with State investigator).

Mr. Little was charged with six counts of first degree child molestation. CP 13. At Mr. Little's trial, the court admitted the children's hearsay statements over Mr. Little's objection. This included oral statements to H.B., Ms. Mejia, the police officer, Ms. Kidney, the State investigator, two nurses, and written statements and a drawing by A.M. 8 RP 113; 10 RP 47, 123; 11 RP 149; 12 RP 118, 149, 187; 14 RP 144; 15 RP 38.

The trial court precluded Mr. Little from presenting evidence tending to suggest that Alan Kidney, the girls' maternal grandfather, had perpetrated the crimes, despite the fact that the initial allegation involved a grandfather-like figure and Mr. Kidney had spent considerable time with the kids, including sleeping on the couch where some of the incidents were alleged to have occurred. 5 RP 112; 2 RP 25, 171.

Mr. Little did not testify at trial. In the State's closing argument, the prosecutor suggested the defense was "cagey" with words and that only Mr. Little could tell the jurors what had happened

between him and A.M. 18 RP 94, 100. Mr. Little objected each time, and the trial court overruled Mr. Little's objections. 18 RP 94, 100.

The jury convicted Mr. Little of the counts as charged. CP 71-76. Mr. Little filed a motion for a new trial, explaining his attorney prevented him from testifying by threatening that, because he smelled of alcohol, the court might throw him in jail if he took the stand. CP 77-78, 188. Despite Mr. Little's representations, the trial court denied Mr. Little an evidentiary hearing to determine whether his counsel had actually prevented him from testifying, thereby rendering ineffective assistance of counsel, and whether Mr. Little was prejudiced by his attorney's actions. CP 440.

The trial court sentenced Mr. Little to an indeterminate sentence of 198 months to life. CP 412.

E. ARGUMENT

**1. When the trial court erroneously excluded Mr. Little's "other suspect" evidence, it violated his constitutional right to present a defense.**

a. A defendant has a fundamental constitutional right to a meaningful opportunity to present a complete defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal

defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed. 636 (1986)). In essence, this is a defendant's "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (2010); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22.

A defendant's right to an opportunity to be heard in his defense, including the right to offer testimony, "is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. In order for the jury to decide "where the truth lies," a defendant must be given the opportunity to present his version of the facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

This right is, of course, not absolute. Courts are constitutionally permitted "to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (quoting *Holmes*, 547 U.S. at 326-27). And "the exclusion of other suspect evidence is a 'specific application' of [this]

general rule." *Franklin*, 180 Wn.2d at 378 (quoting *Holmes*, 547 U.S. at 326-27).

b. The trial court improperly excluded other suspect evidence about the children's maternal grandfather.

The State moved to exclude all other suspect evidence, including any evidence about Alan Kidney, the children's maternal grandfather. 5 RP 70. The trial court granted the State's motion, relying on *Franklin*. 5 RP 112.

This ruling was made in error. "The standard for relevance of other suspect evidence is whether there is evidence 'tending to connect' someone other than the defendant with the crime." *Franklin*, 180 Wn.2d at 381 (quoting *State v. Downs*, 168 Wn.2d 664, 667, 13 P.2d 1 (1932)). The *Downs* test merely requires that "some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." *Franklin*, 180 Wn.2d at 381.

While the State claimed nothing could be said other than Mr. Kidney was "around the children on occasion," the defense's offer of proof demonstrated this was incorrect. 5 RP 78. First, Mr. Kidney was not simply in proximity to the children "on occasion." Ms. Kidney and the children lived with Mr. Kidney for several months, from August 2011 to February 2012, in his home in Tacoma. 2 RP 25. After Mr.

Kidney lost his home, he stayed with Ms. Kidney, Mr. Little, and the girls for two to three weeks. 2 RP 171. While in the West Seattle house, he slept on the couch in the living room, where the girls claimed several of the acts of touching took place. 2 RP 171. He also babysat the girls alone during that time. 2 RP 171.

When the twins made the initial allegation to their friend, they reported that it was Mr. Little's father, a grandfather-like figure, who had touched them inappropriately. 8 RP 72. However, when the friend's mother relayed the twins' accusations to CPS, she reported the "boyfriend's father lives about a mile from the family in the Alki Beach area off of Admiral Way." 5 RP 80. This information actually described where Mr. Kidney lived, not where Mr. Little's father lived. 5 RP 82. And although A.M. later identified Mr. Little, rather than Mr. Little's father or Mr. Kidney, she did so only in response to a series of leading questions from the CPS worker. 4 RP 63.

In *State v. Maupin*, our supreme court held a trial court's failure to admit evidence that a kidnapping victim was observed with someone other than the defendant after the kidnapping violated the defendant's Sixth Amendment and article I, section 22 rights. 128 Wn.2d 918, 924-28, 913 P.2d 808 (1996). The court determined this evidence was both

relevant and sufficiently probative to satisfy *Downs*. *Id*. at 928. In *Franklin*, the court explained that in addition to the type of other suspect evidence presented in *Maupin*, "motive, ability, opportunity, and/or character evidence" could establish a sufficient connection in other cases. 180 Wn.2d at 381. As long as some fact or circumstances pointed to a nonspeculative link, the evidence should be admitted. *Id*.

Here, Mr. Kidney had the opportunity to commit the alleged crime *and* the initial report to CPS indicated that a grandfather-like figure, who was described to live precisely where Mr. Kidney lives, committed the offense. Combined, this evidence presented more than simply a speculative link. The trial court erred when it granted the State's motion to exclude other suspect evidence as it related to Alan Kidney.

c. Reversal is required.

Because the court's error directly affected Mr. Little's constitutional right to present evidence on his own behalf, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Thus, this Court may find the error harmless only if it "cannot reasonably doubt that the jury would

have arrived at the same verdict in its absence." *Id*. at 383 (citing *Jones*, 168 Wn.2d at 724.

The State cannot meet this burden because the children's stories repeatedly changed. The twins initially suggested Mr. Little's father committed the crime, and then later told CPS no crime had occurred. 8 RP 72; 4 RP 31, 56. A.M. identified Nick as the individual who touched them, but the twins only adopted this story after spending time alone with A.M. 4 RP 63. Given these conflicting accounts, if the defense had been permitted to point to Alan Kidney as an alternative suspect, the jury may have reached a different verdict. This Court should reverse and remand for a new trial.

**2. The trial court committed reversible error when it admitted hearsay statements made by A.M., H.M., and J.M.**

a. A child's hearsay statements are admissible under RCW 9A.44.120 only when they are reliable.

The State relied primarily on the children's hearsay statements to present its case-in-chief. Out-of-court statements made by young children may be admissible at trial under RCW 9A.44.120, but only in specific circumstances and only when the statements are determined to be reliable. *State v. Ryan*, 103 Wn.2d 165, 177, 691 P.2d 197 (1984). Pursuant to RCW 9A.44.120,

> 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… is admissible in evidence in… criminal proceedings, including juvenile offense adjudications, in the court of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness.

In order to assess the reliability of child hearsay statements, the trial court must consider nine factors: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the

declarant misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76.

No single factor, taken alone, is decisive. *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). However, "the factors must be 'substantially met' before a statement is demonstrated to be reliable." *Id*. A trial court's decision to admit child hearsay statements is reviewed for an abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).

b. The children's hearsay statements were not admissible under the "reliability" exception.

Over Mr. Little's objection, the trial court permitted several witnesses to testify to the children's accusatory out-of-court statements. Officer William Askew (a Seattle police officer), Sherri Kidney (the children's mother), and H.B. (an eight-year-old neighbor) testified to statements made by A.M., H.M., and J.M.[2] 8 RP 113; 10 RP 47; 15 RP 38. It also admitted a drawing and written statements made by A.M. and shared with Ms. Kidney. 10 RP 123. In addition, the court admitted the children's recorded statements to a child interview specialist, Carolyn Webster. 12 RP 118, 149, 187. Without the

[2] Ana Mejia, a CPS worker, also testified to the children's out-of-court statements, but Mr. Little did not contest this hearsay. 5 RP 130, 133.

recorded statements to Carolyn Webster, the State could not have proven all six counts against Mr. Little.

When the court found these hearsay statements admissible under the *Ryan* factors, it erred. First, as to the statements made to H.B., it is impossible to determine whether the statements made by the twins were reliable because it is unclear which twin made which statement. 3 RP 162. The plain language of RCW 9A.44.120 requires the statement be made by "a child." *State v. Larson*, __ Wn.2d __, 2015 WL 9360073 at *2 (No. 91457-5, December 24, 2015) (to determine the meaning and scope of a statute, a court must look first to its plain language). If the child cannot be identified, the analysis cannot be conducted. Second, consideration of the *Ryan* factors as to the other three witnesses reveals that the factors were not substantially met here.

i. *Apparent Motive to Lie*

In its oral ruling, the trial court found the children had no motive to lie because the evidence showed they liked Mr. Little and feared their mother would be upset, or they would be in trouble, if they told anyone. 7 RP 37-38. When examining this factor, "[t]he critical inquiry is whether the child was being truthful at the time the hearsay

statements were made." *State v. Gribble*, 60 Wn. App. 374, 383, 804 P.2d 634 (1991).

The evidence at the child hearsay hearing demonstrated that, at some point, both of the twins lied. When they spoke to the CPS worker, Ana Mejia, they told her that no one had touched them inappropriately. 4 RP 36, 51. When they spoke to Carolyn Webster, in a recorded interview for the prosecution, both stated Mr. Little had touched them inappropriately. 3 RP 124, 4 RP 181. Both of these statements cannot be true.

The trial court determined it was the twins' second statements that were truthful. However, it failed to properly consider that Ms. Mejia had rejected the twins' first statements and repeatedly directed them to "tell the truth," after A.M. contradicted the twins' reports. 4 RP 162. As Mr. Little explained to the trial court, this had the effect of signaling to the twins that their first answer was not acceptable and they needed to change it. 5 RP 133. H.M. and J.M. therefore had a clear motive to lie during their interviews with the State.

In addition, although A.M. told Ms. Mejia that Mr. Little had touched her inappropriately, she did so only in response to Ms. Mejia's leading questions. 4 RP 63. Ms. Mejia specifically asked A.M. if Mr.

Little had touched her private parts and A.M. nodded in response. 4 RP 63. As Ms. Webster explained, this method of questioning children is undesirable, as it increases the likelihood that, rather than identify the true perpetrator, the child will simply pick a name from the list provided. 5 RP 31-32.

A.M.'s acquiescence to Ms. Mejia set off a chain of events that caused A.M. and her sisters to be removed from their mother's care and placed in a temporary foster care home. This brought to fruition one of A.M.'s worst fears, as she suffered from separation anxiety and feared her mother would leave them. 2 RP 134, 147; 4 RP 53. A.M.'s anxiety was so severe that Ms. Kidney put A.M. in counseling to help address it, a move which Mr. Little strongly supported. 2 RP 147. Faced with these circumstances, the CPS worker's admonitions to "tell the truth" suggested to A.M. that she needed make an allegation against Mr. Little in order to return home to her mother. Like the twins, A.M. had a strong motive to lie to Officer Askew, Ms. Webster, and her mother.

ii. *Spontaneity of the Statements*

For purposes of determining reliability, statements made by an alleged child victim of sexual abuse are "spontaneous" if they are not the result of leading or suggestive questions. *State v. Lopez*, 95 Wn.

App. 842, 853, 980 P.2d 224 (1999). While the initial statement by the twins to their friend, H.B., was spontaneous, it is unclear who actually made this report. 3 RP 162. And the subsequent statement, made by A.M., was in response to the CPS worker's leading questions.

> Ms. Mejia described her exchange with A.M. as follows:
>
> "Has anyone else touched your private parts?"[3] [A.M] nodded yes.
>
> "Who?" [A.M] shrugged her shoulders.
>
> "Your mom?" [A.M] nodded no.
>
> "Doug?" [A.M] nodded no.
>
> "Nick?" [A.M] nodded yes.

4 RP 63. In its oral ruling, the trial court found that Ms. Mejia's approach providing a list of names was preferable to suggesting just one name to A.M. 7 RP 41. However, as Ms. Webster explained, informing the child of the allegations and providing a list of possible suspects is not the proper method of interviewing a child, and under a *Ryan* analysis, a statement cannot be "spontaneous" if it was in response to a leading question. *Lopez,* 95 Wn. App. at 853.

[3] "[A]nyone else" referred to A.M.'s earlier denial that Mr. Little's father, Doug Little, had touched her private parts.

A.M.'s statements to Officer Askew were also in response to leading questions. Officer Askew began his questioning of A.M. by asking what Mr. Little had asked her to do. 1 RP 122. His question assumed, without any information from A.M., that Mr. Little inappropriately touched her. 1 RP 123. Only after A.M. acquiesced to Ms. Mejia's and Officer Askew's leading questions did Ms. Webster question the children without using this improper technique.

The trial court failed to consider how Ms. Mejia's leading questions impacted the children's responses to questioning thereafter. It analyzed the subsequent statements made to Ms. Webster and Ms. Kidney in isolation, without taking into account that this initial highly suggestive questioning contaminated all of the children's statements. 7 RP 40-41.

This was error. Ms. Mejia's leading questioning of the children suggests that all of the statements they made are unreliable. *In the Matter of the Dependency of A.E.P.*, 135 Wn.2d 208, 231, 956 P.2d 297 (1998) (a court should consider the possibility of suggestive interviews leading to tainted child hearsay statements).

iii. *The Timing and Relationship*

When the witness is in a position of trust with a child, the child's statements are more likely to be reliable. Unlike a teacher or family member, a CPS worker is not in a position of trust with a child. *State v. Swan*, 114 Wn.2d 613, 650, 790 P.2d 610 (1990) (finding statements reliable where daycare operators, who were in a position of trust with children, sat in on the interviews with the CPS worker, who was not). A.M. had never met Ms. Mejia and had no reason to trust her. Similarly, the children had no history with Officer Askew or Ms. Webster that would foster a trusting relationship.

On the contrary, the actions taken by Ms. Mejia and Officer Askew quickly informed the children they were not to be trusted. A.M. told Ms. Mejia that her mother was unaware that any abuse had occurred, yet the CPS worker acted against her wishes and removed her and her sisters from their home. 4 RP 64; 1 RP 110 (A.M. expressing distress when she was removed from her mother). The trial court's reliance on the fact that these were individuals in positions of authority, who therefore could be trusted, failed to consider that it was just as likely the children feared being at the whim of these individuals, who

did not act in accordance with the children's expressed interests. 7 RP 42.

The timing of the children's statements also suggests they were unreliable. Reliability is indicated where the information is volunteered by the children immediately after the topic is broached, and the children make the same statements on consecutive days without the opportunity to discuss the matter between themselves. *Swan*, 114 Wn.2d at 650. Here, the exact opposite occurred: the twins flatly denied the allegations when questioned by Ms. Mejia, and changed their story when speaking to Ms. Webster, which occurred after they had spent time alone with A.M. and in the care of their maternal grandmother. 3 RP 38; 4 RP 18-19, 22, 88 (showing Ms. Mejia removed the girls on Monday, they were placed with their maternal grandmother on Tuesday, and they were questioned by Ms. Webster on Wednesday).

Given the facts presented at the child hearsay hearing, the timing of the children's statements and the fact that they were initially made to individuals they did not trust, the statements were not reliable.

iv. *Express Assertions of Past Fact*

The trial court did not examine whether the children's statements contained express assertions of past fact, and our Supreme Court has found this factor does not weigh in favor of reliability or unreliability because any statements at issue will usually contain statements about past facts. *Swan*, 114 Wn.2d at 650-51 (citing *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988)). However, complaints of pain or discomfort at the time of making the statement, which describe a present, rather than past, fact, may indicate reliability. Here, there were no such allegations.

v. *The Surrounding Circumstances*

All of the surrounding circumstances indicate the statements were unreliable. The twins initially denied that anyone had ever touched them, and A.M. made an allegation against Mr. Little only after she was pressed by the CPS worker with leading questions. Even then, she acquiesced only with a nod of the head, rather than an affirmative statement. Only after the children were removed from their home, and placed together in the care of the State and then their maternal grandmother, did the twins adopt A.M.'s story. Thus, a careful analysis of the *Ryan* factors demonstrates the children's hearsay

statements should not have been admitted as substantive evidence at trial. *See Kennealy*, 151 Wn. App. at 881.

c. The statements to the forensic nurse examiner were not admissible under the hearsay exception for statements made for purpose of medical diagnosis or treatment.

In addition to the statements admitted under the child hearsay exception, the trial court admitted the statements made to forensic nurses during their exams under ER 803(a)(4) over Mr. Little's objection. 1 RP 22; 1 RP 50; 11 RP 106. This ruling was made in error.

In order for the children's statements to be admissible under this hearsay exception, their motive in making the statement must have been to promote treatment and the medical professional must have reasonably relied on the statement for purposes of treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). "Statements admitted under this exception to the hearsay rule are commonly those made by a patient to a medical care provider, where the reliability of the statements is established by the patient's incentive to be truthful in order to obtain proper care." *Doerflinger*, 170 Wn. App. at 664 (citing *State v. Bishop*, 63 Wn. App. 15, 24 n.8, 816 P.2d 738 (1991)).

Here, the State failed to establish the children had an incentive to be truthful in order to obtain appropriate medical care. Rather than seeking out medical assistance, the children reported no complaints upon their initial examination, and resisted the physical exam. Pretrial Ex. 1 at 5; Pretrial Ex. 3 at 5; Pretrial Ex. 5 at 5; Pretrial Ex. 10 at 11-12; Pretrial Ex. 11 at 11-12; Pretrial Ex. 12 at 11-12.

In addition, the reports from the first exams indicated that there was "nothing wrong on the exam" of H.M. and J.M. Pretrial Ex. 11 at 2; Pretrial Ex. 12 at 2. While A.M.'s exam indicated she suffered from a urinary tract infection, this was later found to be incorrect. Pretrial 10 at 3; 1 RP 26-27. Thus, the children were referred to the second nurse not to address any unresolved medical issues but purely to gather evidence for the State. Pretrial Exs. 2, 4, 6. Because the children were not seeking medical treatment, a court could not properly find they hado an incentive to be truthful in order to seek appropriate medical care. *Doerflinger*, 170 Wn. App. at 664.

The forensic nurses were not the children's regular medical provider and not individuals whom they would see for any follow-up appointments. Indeed, a forensic nurse is more akin to a police operative than a primary care provider. *Medina v. State*, 122 Nev. 346,

354-55, 143 P.3d 471 (2006). Absent this necessary showing, the children's statements to the forensic nurses were inadmissible under ER 803(a)(4).

d. The trial court's error in admitting the children's hearsay statements requires reversal.

A trial court's evidentiary error is reversible if it prejudices the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is prejudicial where, within reasonable probabilities, the outcome would have differed but for the error. *Bourgeois*, 133 Wn.2d at 403. There is no question that, in order to prove all six counts against Mr. Little, the State needed the trial court to admit this hearsay evidence, particularly the children's statements to Ms. Webster, substantively.

The children's testimony at trial, particularly that of A.M. and H.M., was limited, and only the children's statements to Ms. Webster described specific incidents of touching. Because there is a reasonable probability the outcome of the trial would have been different if not for the trial court's error, reversal is required.

### 3. Mr. Little was denied a fair trial when one of the deputy prosecutors suggested defense counsel acted unethically and commented on Mr. Little's exercise of his constitutional right not to testify.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id.*; *see also Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*. A prosecutor's misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App.

953, 327 P.3d 67, 69-70 (2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675).

a. The prosecuting attorney suggested during closing argument that defense counsel acted unethically by challenging A.M.'s credibility.

A prosecutor is prohibited from impugning the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defence counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Id*. (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983)). When a prosecuting attorney makes statements that suggest defense counsel acted with deception or dishonesty, this directly impugns defense counsel's integrity and reversal is warranted. *Id*. at 433.

During his closing argument, the deputy prosecutor told the jury:

> The defense, make no mistake about it, is *cagey* with the words, but they're trying to essentially assassinate –
>
> MR COHEN: Objection, Your Honor.
>
> MR. GAUEN: – [A.M.]'s character.
>
> ….

> Just because she's chatty or had emotional problems, because she's been to therapy or what-have-you, I don't know that she would make this stuff up.
>
> There are a lot of problems. I guess the idea is that she seeks attention, and there's a lot of problems with that because you saw that [A.M.] did not use this stuff to seek attention.

18 RP 100-01 (emphasis added). Before the prosecutor could complete his sentence, defense counsel objected. 18 RP 100. The trial court overruled the objection, choosing instead to admonish the jury that they "are reminded to be the determiners of evidence in accordance with the Court's instructions on the law." 18 RP 100.

A prosecutor commits misconduct when he disparages defense counsel by suggesting counsel has acted with deception or dishonesty. *State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011). In *Thorgerson*, the prosecutor referred to the defense's presentation at trial as involving "sleight of hand." *Id*. The context of that statement was similar to the context here, in that the State in *Thorgerson* suggested that the defense was engaging in deceptive tactics to confuse the jury. *Id*. at 451. In *Thorgerson*, the deputy prosecutor stated:

> So what does a molester look like? Think you can pick him out of crowd?
>
> The entire defense is sl[e]ight of hand. Look over here, but don't pay attention to there. Pay attention to relatives

> that didn't testify that have nothing to do with the case… Don't pay attention to the evidence.

*Id.*

While the court found the error harmless, it determined "the prosecutor went beyond the bounds of acceptable behavior in disparaging defense counsel." *Id*. at 452; *see also State v. McCreven*, 170 Wn. App. 444, 473, 284 P.3d 793 (2012).

Like "sleight of hand," referring to the defense as "cagey" suggests that defense counsel is attempting to intentionally mislead the jury. It implies defense counsel is withholding information or engaging in trickery. This statement was improper, and the trial court erred when it overruled Mr. Little's objection.

b. <u>The prosecuting attorney improperly commented on Mr. Little's exercise of his constitutional right not to testify.</u>

The Fifth Amendment and article I, section 9 guarantee a defendant the right to remain silent. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). It is well-settled that when a prosecutor comments on, or otherwise exploits, the defendant's exercise of this right the State violates the defendant's right to Due Process. *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing *Doyle*

*v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979)).

A "[c]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice.'" *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). A defendant's Fifth Amendment rights have been violated where "the prosecutor's statement was of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Ramirez*, 49 Wn. App. at 336 (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)); *see also State v. Brett*, 126 Wn.2d 136, 176, 892 P.2d 29 (1995) (finding a prosecutor's comments are improper where they indicate that certain testimony is undenied *and* the defendant is the one in position to deny it).

In closing argument, the deputy prosecuting attorney told the jury:

> By no means were these family members and friends and such lying about the timing of events in La Push. They simply had no way of remembering whether [A.M.] left that fire for a short slice of time. We're talking about ten to twenty minutes, folks. *The reality is that only the*

> *Defendant and [A.M.] knew what happened behind that closed bedroom door –*
>
> MR COHEN: Objection, Your Honor.
>
> JUDGE BRADSHAW: Overruled.
>
> Mr. GAUEN: – *when [A.M.] walked up the path to go use the restroom.*

18 RP 94 (emphasis added).

When the deputy prosecutor made this statement, he directly commented on Mr. Little's failure to testify. By suggesting that the truth could only come from Mr. Little, his statement allowed the jury to "naturally and necessarily" accept it as a comment on Mr. Little's failure to take the stand and give them his side of the story. *Ramirez*, 49 Wn. App. at 336. This was error.

c. <u>These errors were not harmless beyond a reasonable doubt.</u>

When the prosecuting attorney improperly impugned defense counsel's integrity and commented on Mr. Little's failure to testify, he committed constitutional errors. *Bruno*, 721 F.2d at 1195 (attacks on the integrity of defense counsel is an error of constitutional dimension); *State v. Ramirez*, 49 Wn. App. at 339 ("Drawing attention to the defendant's failure to testify is constitutional error.") (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). Such

error is presumed prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. *Id*.; *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

The State cannot meet this burden here. The only evidence at trial was the children's accusations. There was no physical evidence. When the State suggested that defense counsel had acted dishonestly, it suggested Mr. Little was engaging in trickery to achieve an acquittal. When it commented on Mr. Little's decision not to testify, it emphasized to the jurors that he had not taken the stand to dispute the children's allegations and signaled they could use his silence against him. Each instance of improper conduct by the State resulted in prejudice to Mr. Little, denying him a fair trial. This Court should reverse.

**4. Mr. Little was entitled to an evidentiary hearing to determine whether his attorney prevented him from testifying and if so, whether Mr. Little suffered prejudice as a result.**

a. A defendant is entitled to an evidentiary hearing when he presents specific, credible allegations that his counsel prevented him from testifying.

A defendant's right to testify is protected by our federal and state constitutions. U.S. Const. amends. V, VI, XIV; Const. Art. I, § 22. "This right is fundamental, and cannot be abrogated by defense counsel

or by the court." *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999) (citing *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). A defendant may waive this right, but any waiver must be made knowingly, voluntary, and intelligently. *Robinson*, 138 Wn.2d at 758; *United States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9th Cir. 1999).

When a defendant alleges his attorney actually prevented him from testifying at trial, he is entitled to an evidentiary hearing to determine whether his waiver was knowing and voluntary. *Id*. at 764-65; *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994); *Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991). While a bare assertion by the defendant is not sufficient, a hearing is required once the defendant presents specific, credible factual allegations. *Robinson*, 138 Wn.2d at 760; *Underwood*, 939 F.2d at 476.

b. Mr. Little presented specific, credible allegations by affidavit and the trial court erred when it denied his request for a hearing.

After the jury entered its verdict, Mr. Little moved for a new trial. CP 77; CrR 7.5. His counsel submitted an affidavit in support of the motion, explaining that on the day Mr. Little was scheduled to testify, he appeared with "a very strong odor of alcohol about him." CP

78. During the proceedings that day, the State had twice remarked on Mr. Little's inappropriate conduct, first because Mr. Little was "smiling inappropriately at the prosecutors for an extended period of time," and second because Mr. Little wrote, "[y]ou are an asshole" on a pad of paper and showed it to one of the prosecutors. CP 78-79.

For the post-trial motion, defense counsel appeared with his own attorney, and the trial court granted defense counsel's motion to withdraw and appointed new counsel. 19 RP 4, 15; CP 186.

In affidavits subsequently submitted by the State, the prosecutors questioned whether, and to what degree, Mr. Little was intoxicated that day. One prosecutor acknowledged he smelled an odor of alcohol on Mr. Little that morning and had commented to defense counsel about it. CP 85. However, he believed Mr. Little was paying attention to the morning proceedings. CP 86. A second prosecutor stated that she made no observations that Mr. Little was intoxicated that morning, and explained, at great length, that Mr. Little had been rude on other occasions, including raising his eyebrows during testimony and staring, laughing, and glaring at her during parts of the trial. CP 82-84. In addition, the State submitted transcripts of phone conversations Mr.

Little had with family members and his girlfriend while incarcerated. CP 104, 132, 170.

However, whether Mr. Little was competent to testify was not at issue. In the recorded phone calls Mr. Little indicated he was not drunk that morning and that the larger issue was that his counsel had instructed him not to testify. CP 128-29. In an affidavit, Mr. Little explained he drank heavily the night before he was scheduled to testify, and that his drinking lasted into the early morning hours. CP 187. He also consumed two beers immediately before leaving for court in order to alleviate the effects of his hangover. CP 187. However, he did not feel intoxicated during that morning's proceedings. CP 188.

Thus, the issue before the court was not whether Mr. Little was intoxicated, but whether defense counsel actually prevented Mr. Little from testifying. In Mr. Little's affidavit, and the supplemental affidavit prepared by defense counsel, Mr. Little presented specific, credible allegations that his defense counsel had denied his unequivocal request to testify. *Robinson*, 138 Wn.2d at 760; *Underwood*, 939 F.2d at 476.

Throughout the trial, defense counsel represented to the court that Mr. Little would be testifying. 17 RP 85. However, during the morning recess on the day Mr. Little would have testified, defense

counsel informed Mr. Little he smelled like alcohol and that even the prosecutor had commented on it. CP 188. Because of this, defense counsel instructed Mr. Little that if he testified, the court might hold him in contempt or revoke his bond. CP 188. Faced with the threat of incarceration, Mr. Little allowed defense counsel to override his decision to testify. CP 188.

Defense counsel's supplemental affidavit largely supported Mr. Little's account of what transpired. Defense counsel explained one of the prosecutors had told him Mr. Little "reeked of alcohol" and that he was concerned the jury would also smell the alcohol. CP 212. However, rather than suggest a continuance request to allow Mr. Little to testify the following day, he told Mr. Little he could not put him on the stand. CP 213.

This satisfied the requirements for an evidentiary hearing under *Robinson*, where the court held:

> We agree that defendants who can show that their attorneys used coercion to prevent them from testifying are entitled to an evidentiary hearing. When an attorney tells the defendant that he is "legally forbidden to testify or in some other way compel[s] [the defendant] to remain silent," the attorney has actually prevented the defendant from testifying…
>
> [A]ttorneys who misinform the defendant of the consequences of taking the stand or make other

> misrepresentations to induce the defendant to remain silent… prevent their clients from testifying. Defendants who can prove that their attorneys used such coercive tactics have unquestionably proven that their attorneys actually prevented them from testifying.

138 Wn.2d at 762 (quoting *Passos-Paternina v. United States*, 12 F.Supp.2d 231 (D.P.R. 1998)).

In *Robinson*, the court acknowledged that distinguishing between cases where the attorney actually prevented the defendant from testifying, and cases in which the attorney merely advised against it, it can be difficult. 138 Wn.2d at 763. These are "close cases." *Id.* at 764. However, where a defendant presents specific, credible allegations, he is entitled to an evidentiary hearing to show upon which side of the line his case falls. *Id.* at 760.

In denying Mr. Little's request for an evidentiary hearing, the trial court determined Mr. Little's statements were not credible. CP 439 (Finding of Fact 12). This finding was made in error. The trial court found defense counsel did not recall Mr. Little indicating he wanted to testify on the day in question. CP 439 (Findings of Fact 13, 14). But in defense counsel's supplemental affidavit, he stated that during the morning recess he had a conversation with Mr. Little, in which he told Mr. Little he did not see how he could permit Mr. Little

to testify. CP 213. The trial court's ruling conflicts with defense counsel's statement, in that this statement clearly indicates defense counsel had a discussion with Mr. Little on the day of question, and informed him he could not testify. CP 213. Given that Mr. Little's account is supported by his attorney's affidavit, the trial court erred when it found Mr. Little's statements were not credible.

The trial court denied Mr. Little's request for an evidentiary hearing because it found he had failed to meet his burden to show Mr. Little met the first prong of the *Strickland* test. CP 440; *Strickland v. Washington*, 466 U.S. 668, 765-66, 104 S.Ct. 668 (1984). While a claim that defense counsel prevented his client from testifying is properly analyzed under the ineffective assistance framework, a defendant does not have to satisfy the first prong of the *Strickland* test in order to be entitled to an evidentiary hearing. *Robinson*, 138 Wn.2d at 765-66. He simply needs to present specific, credible allegations that his attorney prevented him from testifying. *Id*. at 760. Only at the evidentiary hearing must the defendant show, by a preponderance of the evidence, that his attorney actually prevented him from testifying. *Id*. at 764-65.

Mr. Little met the standard for an evidentiary hearing, and the trial court's finding to the contrary was error. CP 439 (Findings of Fact 12, 13). This court should remand to the trial court for an evidentiary hearing to determine whether Mr. Little can show his counsel actually prevented him from testifying, and if so, whether this resulted in prejudice to Mr. Little. *Robinson*, 138 Wn.2d at 766.

**5. The Court should not impose costs against Mr. Little on appeal.**

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015); *State v. Sinclair*, __ Wn. App. __, 2016 WL 393719 at *7 (No. 72102-0-I, January 27, 2016).

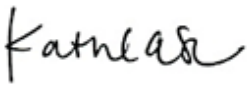
F. CONCLUSION

This Court should reverse Mr. Little's convictions for all of the reasons stated above. The trial court violated his constitutional right to present a defense when it excluded his "other suspect" evidence and it erred when it admitted the children's hearsay over his objection. In addition, the State denied Mr. Little his right to a fair trial when it suggested his defense counsel was unethical and commented on his right to remain silent.

In the alternative, this court should remand Mr. Little's case for an evidentiary hearing because he presented specific, credible allegations that his attorney prevented him from testifying at trial.

DATED this 18th day of March, 2016.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>NICHOLAS LITTLE,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 73699-0-I |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 18TH DAY OF MARCH, 2016.

X_____

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