73699-0

FILED
August 30, 2016
Court of Appeals
Division I
State of Washington

No. 73699-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LITTLE,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Decisions of Other Courts

A. ARGUMENT IN REPLY

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

a. The exclusion of other suspect evidence regarding the maternal grandfather was error.

The initial report to Child Protective Services (CPS) made no allegation against Mr. Little. Ex. 2 at 4. Instead, it stated that someone other than Mr. Little had abused the children. According to this CPS report:

> Referrer is a neighbor of the family. Referrer does not know the family very well and would like to remain anonymous due to fears of repercussions. Referrer does not have last names or exact address for the family.
>
> ….
>
> The boyfriend's father (name is not known) lives about 1 mile from the family in Alki Beach area off of Admiral Way.
>
> The twins told referrer's daughter they had a secret to tell about their mother's boyfriend's father (name unknown). It was reported that the boyfriend's father sometimes babysits the children. The boyfriend's father has invited the girls into a room and locks the door. The boyfriend's father then asks the children to get undressed. He then asks the girls to "wiggle his penis until white bubbly stuff comes out." The twins also said that the boyfriend's father had also done this to their sister, Alex.

Ex. 2 at 4.

The referrer described the individual as "the boyfriend's father" but then identified the individual's home as being where the maternal grandfather lived. 5 RP 81. As the defense explained to the trial court when it sought to present other suspect evidence about the maternal grandfather, an individual "who lives about 1 mile from the family in the Alki Beach area off of Admiral Way" described the location of the maternal grandfather's trailer. 5 RP 80-81.

The State argues the location of the home matched both the maternal grandfather's home and the home of Mr. Little's father, because Ms. Kidney testified both men lived about a mile away from the family. Resp. Br. at 12; 5 RP 105-06. However, Ms. Kidney did not testify that Mr. Little's father also lived off of Admiral Way in the area of Alki Beach. In addition, her estimate contradicted the offer of proof provided by Mr. Little, which was that his father actually lived five miles away. 5 RP 82. The evidence before the trial court demonstrated that the location described by the referrer in the initial report matched the home of the maternal grandfather, not Mr. Little's father.

This information must be considered in conjunction with the fact that the maternal grandfather had lived in the same home as the

children, babysat the children, and slept on the couch in the children's home where several of the alleged acts of touching took place. 2 RP 21, 25, 171. When evaluated in this context, it provides a nonspeculative link between the maternal grandfather and the alleged crimes. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014); *State v. Downs*, 168 Wn.2d 664, 667, 13 P.2d 1 (1932).

In its response, the State focuses on the fact that there was no evidence the maternal grandfather exhibited a "lustful disposition" toward the children. Resp. Br. at 11. However, there was no evidence that *anyone* had exhibited a lustful disposition toward the girls, and such evidence was unnecessary to establish a sufficient connection between the maternal grandfather and the alleged crimes. Under *Franklin*, "motive, ability, opportunity, and/or character evidence" is enough. 189 Wn.2d at 381. Here, the evidence demonstrated that the maternal grandfather had both the ability and the opportunity, and a witness described the perpetrator as living at the location of his home. This was sufficient under *Franklin* and the defense should have been permitted to present other suspect evidence about the maternal grandfather.

b. The error was not harmless.

In addition, the State's claim that such error was harmless is without merit. According to the State, the only issue at trial was whether Mr. Little committed the alleged offenses. Resp. Br. at 13. It claims identity was not at issue, so therefore any error in denying Mr. Little the opportunity to present other suspect evidence was harmless. Resp. Br. at 13.

The State's circular argument only illustrates why it is so important that a defendant be afforded his constitutional right 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); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Mr. Little was barred from presenting evidence that would have put the identity of the alleged perpetrator at issue. Had he been permitted to introduce other suspect evidence about the maternal grandfather, the jury would have had the opportunity to consider that the children had been abused, but by someone other than Mr. Little.

Given that the children's reports of whether they were touched inappropriately by an adult, and who that adult was, repeatedly changed, the State cannot show the court's error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Had Mr. Little been

permitted to point to the maternal grandfather 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. The children's hearsay statements were not admissible under the "reliability" exception.

The State relied on the children's hearsay statements to convict Mr. Little. Such statements are admissible only under certain circumstances and only when the statements are determined to be reliable under *State v. Ryan*, 103 Wn.2d 165, 177, 691 P.2d 197 (1984). An analysis of the *Ryan* factors demonstrates the children's statements were not reliable.

i. *Apparent motive to lie*

In its response, the State ignores the fact that the twins' story changed multiple times. The first allegation the twins made implicated someone other than Mr. Little. Ex. 2 at 4. When later questioned, they said that no one had touched them in appropriately. 4 RP 36, 51. Only when later interviewed by Carolyn Webster did they make an allegation against Mr. Little. 3 RP 124; 4 RP 181. As the trial court

acknowledged, this inconsistency weighed against a finding of reliability. 7 RP 43.

The State also wrongly disregards the possible impact of Ms. Mejia's statements on the twins. It claims that her admonitions to "tell the truth," after they denied anyone had touched them could not have possibly affected the statements, as the admonition was also made to A.M., and she had already made an allegation against Mr. Little. Resp. Br. at 26.

In fact, Ms. Mejia's directive to "tell the truth," was effectively an instruction to make an allegation against Mr. Little. The children were aware of what Ms. Mejia believed the truth was, as she had removed the children from their home and their mother's custody in response to A.M.'s claims. Indeed, H.M. indicated as much when she told Ms. Webster that, "[Ms. Mejia] said we have to tell the truth, the whole truth, and you're not in trouble," and then followed that statement with, "[a]nd Alex was confident and told the truth." 4 RP 181.

In addition, as explained in the opening brief, A.M.'s statements are called into question by the fact that she made the allegation against Mr. Little in response to a leading question. 4 RP 63. A.M. then

continued to make these statements after Ms. Mejia made it clear that A.M.'s statements were believed to be the truth, and she should tell this "truth" in order to return home to her mother. The evidence suggested that A.M. act would in whatever way necessary to return home to her mother, as being away from her mother was one of her worst fears. 2 RP 134; 4 RP 53. This evidence does not demonstrate that the children were being truthful at the time the incriminating hearsay statements were made against Mr. Little. *State v. Gibble*, 60 Wn. App. 374, 383, 804 P.2d 634 (1991).

ii. *Spontaneity of the Statements*

A.M.'s statements to Ms. Mejia and Officer Askew were made in response to leading questions. The State's characterization to the contrary misapprehends the record. Resp. Br. at 28. As Carolyn Webster noted, when Ms. Mejia asked A.M. if anyone else had touched her, and A.M. shrugged, it would have been appropriate to ask A.M. what the shrug meant. 13 RP 38. Instead, Ms. Mejia began to list the individuals in A.M.'s household, phrasing the question so as to suggest the answer being sought. 4 RP 63.

Contrary to the State's assertion, the fact that A.M. responded affirmatively to Ms. Mejia's third suggestion fails to demonstrate that

the questions did not suggest a desired response. Resp. Br. at 28. Each question offered the answer to A.M. in the question itself, and cannot be construed as open-ended. A statement cannot be "spontaneous" if it was in response to a leading question. *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999).

Similarly, A.M.'s statements to officer Askew were also made in response to leading questions. Without citation to record, the State argues Officer Askew did not begin his questioning of A.M. by asking about Mr. Little, instead engaging her in preliminary conversation first. Resp. Br. at 29. However, while Officer Askew testified that he asked for identifying information from A.M., he could not recall asking anything else before questioning her about Mr. Little. 1 RP 117. At that point, he informed A.M. that he had been told about unwanted touching within her family and began asking for specific details, acting under the assumption that the Mr. Little was the children's abuser. 1 RP 118; Ex. 54.

Suggestive interviews, like the one conducted by Ms. Mejia and Officer Askew, taint all of the statements that follow. *In re Matter of the Dependency of A.E.P.*, 135 Wn.2d 208, 231, 956 P.2d 297 (1998). Once Ms. Mejia intervened in this way, and directed A.M. to an

answer, all of the subsequent statements made by the children were unreliable.

iii. *The Timing and Relationship*

The State claims it is illogical that A.M. would not trust the State after it removed her from her home, but this assertion demonstrates ignorance of the harm children incur when they are removed from their primary caregiver. Resp. Br. at 30. A.M.'s biggest fear was being separated from her mother. 2 RP 134, 147; 4 RP 53. Her anxiety was so severe that her mother sought out therapy for her. 2 RP 147. Yet, despite the fact A.M. had made no allegations against her mother, and in fact specifically informed CPS that her mother was unaware of the abuse, the State immediately pulled her out of her home. 4 RP 164; 1 RP 110.

The children did not know the social worker or the police officer, and removing the children from the home under these circumstances did not instill trust. If anything, it triggered the children's self-preservation instincts, and the State's initial leading questions told the children exactly what they needed to say to return home.

In addition, the timing of the children's statements suggest they are unreliable. Reliability is indicated where information is volunteered by children immediately after the topic is raised, and the children make the same statements on consecutive days without the opportunity to discuss the allegations between themselves. *State v. Swan*, 114 Wn.2d 613, 650, 790 P.2d 610 (1990). This is not what happened in this case.

The State's claim that there is no evidence the twins were persuaded to make a false accusation against Mr. Little misses the point. While only the children know what was discussed when they were alone together in foster care and at their grandmother's home, the fact that they had the opportunity, over the course of two days, to discuss the case and what they planned to say, suggests their statements were not reliable.

In addition, the State's reliance on the fact the twins had already made an allegation is meritless. Resp. Br. at 31. The evidence did not demonstrate the twins had made an allegation against Mr. Little. Instead, the evidence showed the twins had made an allegation against someone other than Mr. Little, had later denied those allegations, and then only made an allegation against Mr. Little after being alone with

A.M. and the maternal grandmother. 3 RP 37; 4 RP 18-19, 22, 88. Both the timing of the statements and the relationship to the witnesses weighs against a finding of reliability.

iv. *The Surrounding Circumstances*

The fact that the children had a precocious knowledge of sexual activity does not suggest, as the State argues, that the children's accusations against Mr. Little were reliable. Resp. Br. at 32. This knowledge was not specific to Mr. Little, but instead general knowledge about sexual acts. Having knowledge of sexual acts does not implicate Mr. Little, and other evidence indicated that in this case such knowledge had come from a family member and television. *See* 1 RP 30 (discussion of prior report of sexual abuse where cousin was alleged perpetrator); 9 RP 18 (children conducted Internet search for a "sex video").

In addition, the State's assertion assumes that the identity of the perpetrator was known, but this is not true, as the twins had initially alleged someone else had abused them. The trial court also failed to appreciate this fact when it considered the reliability of the statements, as it improperly started its analysis at the point at which the twins

denied that any abuse had occurred, rather than the first report that identified the perpetrator as someone other than Mr. Little. 7 RP 37.

The timeline of the children's contradictory statements was critical, however, as it demonstrated that they were not reliable. The twins first reported that someone other than Mr. Little harmed them. Ex. 2 at 4. The twins then denied that anyone had touched them. 4 RP 36, 51. When the children were examined after being removed from school, the nurse practitioner directed them to return for further examination within one to three days. Pretrial Ex. 1 at 5; Pretrial Ex. 3 at 5; Pretrial Ex. 5 at 5. However, these exams did not take place until 16 days later. Pretrial Exs. 2, 4, 6. By the time the children had spoken to the child interview specialist, they had the opportunity to speak with each other and their maternal grandmother alone. By the time they attended the follow up appointment for the collection of evidence, they had been back in their mother's care for weeks.

The surrounding circumstances indicated that the statements were not reliable. The trial court erred when it admitted the children's statements as substantive evidence.

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

The ER 803(a)(4) hearsay exception is designed to admit statements that were both made to promote medical treatment and were reasonably relied on by the medical provider for the purposes of treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). The State cannot demonstrate that the children had an incentive to be truthful in order to obtain appropriate medical care because they did not report any medical complaints and actually 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. Unlike the 18-year-old victim in *State v. Williams*, who initially did not believe she needed medical treatment but sought assistance for the collection of evidence, the children in this case were uninterested in cooperating with medical care. 137 Wn. App. 736, 746, 154 P.3d 322 (2007). Because the children were not seeking the assistance of the forensic nurse, they had no incentive to be truthful.

In addition, the forensic nurse who evaluated the children was not their regular treatment provider. Paula Newman-Skomski's clinic

was physically located within the Dawson Place Child Advocacy Center, which she described as engaging in both "medical and advocacy." 11 RP 133. Although she mentioned treatment, Ms. Newman-Skomski's focus was on the collection of evidence. She testified that she liked to see children quickly because she was "more likely to see any injuries and more likely to be able to collect DNA evidence at that point."[1] 11 RP 168-69. Treatment of any injuries was a possible benefit, but the primary goal was gathering evidence. Admitting the statements made to the forensic nurse was error.

As discussed in Mr. Little's opening brief, the erroneous admission of the children's statements was not harmless. Op. Br. at 27-28. This Court should reverse.

3. The State's misconduct denied Mr. Little a fair trial.

a. <u>The prosecutor improperly described defense counsel as "cagey."</u>

A prosecutor may not impugn the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). The State argues the prosecutor's use of the word "cagey" to

[1] This comports with the referral directing the children to have this exam performed within one to three days of the initial exam. Pretrial Ex. 1 at 5; Pretrial Ex. 3 at 5; Pretrial Ex. 5 at 5.

describe defense counsel was "far less derogatory" than the "bogus" and "sleight of hand" comments in *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011), and therefore does not constitute reversible misconduct. Resp. Br. at 43. It claims when the prosecutor said "cagey," he really meant "noncommittal and shrewd." Resp. Br. at 45. However, if the prosecutor intended to say defense counsel was noncommittal or shrewd, he could have used one of those words. Instead, the prosecutor elected to use a word with a negative connotation that suggested the defense was hiding something.

Contrary to the State's claim, the circumstances in this case are not similar to those in *State v. Brown*, 132 Wn.2d 529, 565, 940 P.2d 546 (1997). In *Brown*, the prosecutor responded to the defense's assertion that the victim was asleep while the defendant was nearby, despite the fact that he had admitted to raping and torturing her over a prolonged period of time. *Id*. Mr. Little made no similar argument. He simply suggested that the jury did not have to find the children were lying in order to find that their testimony was insufficient to convict. 18 RP 84-85.

The State's response, that such an argument was "cagey," was improper and the trial court erred when it overruled Mr. Little's objection.

b. The State improperly commented on Mr. Little's right not to testify.

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,'" a defendant's Fifth Amendment rights have been violated. *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1978) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). Here, the prosecutor directly commented on Mr. Little's failure to testify when he said that only Mr. Little and A.M. knew what happened behind the closed door at the cabin in La Push. 18 RP 94.

The State argues that the focus of prosecutor's argument was that it was impossible for other witnesses to know what happened. Resp. Br. at 47. However, this does not change the prosecutor's statement, which effectively told the jury that only Mr. Little and A.M. could say what happened, and Mr. Little had failed to take the stand. 18 RP 94.

The State's improper conduct denied his right to 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.

Mr. Little presented specific, credible allegations that his defense counsel had denied his unequivocal request to testify in his affidavit and in the supplemental affidavit prepared by defense counsel. CP 188, 213. Under *State v. Robinson*, this entitled Mr. Little to an evidentiary hearing. 138 Wn. 2d, 753, 762, 982 P.2d 590 (1999).

The State argues Mr. Little did not satisfy the requirements for an evidentiary hearing because defense counsel's supplemental affidavit did not support Mr. Little's contention. Resp. Br. at 53-54. This is incorrect. Defense counsel concedes in the affidavit that he was concerned about Mr. Little's demeanor and a smell of alcohol, and informed Mr. Little he did not see how he could possibly put him on the stand. CP 212-13. While defense counsel indicates he was referencing Mr. Little's lack of preparation, he could not possibly know, as the State suggests, whether Mr. Little understood the reason behind this statement. Resp. Br. at 54. Contrary to the State's assertion that Mr. Little understood defense counsel to be referencing

the lack of preparation, defense counsel said only that he "believed" Mr. Little to understand this. Resp. Br. at 54; CP 213.

In fact, as Mr. Little explained in his affidavit, he did not understand this to be the case at all. CP 188. He was frustrated with defense counsel's statement, given that he had recently passed his attorney a note indicating he believed he should testify. CP 188. Ultimately, Mr. Little agreed not to testify only after defense counsel informed him that he smelled of alcohol and there was a possibility his bond would be revoked if the court noticed this. CP 188.

When a defendant is able to demonstrate that his attorney used coercive techniques to prevent him from testifying, he is entitled to an evidentiary hearing. *Robinson*, 138 Wn.2d at 762; *Passos-Paternina v. United States*, 12 F.Supp.2d 231 (D.P.R. 1998). Defense counsel admitted that he told Mr. Little he did not see how he could put him on the stand. CP 213. Instructing him that he risked being jailed if he testified undoubtedly qualifies as coercion.

The State's second claim, that Mr. Little revealed he made a tactical decision not to testify in recorded phone calls, is meritless. Resp. Br. 54-55. In the portion of the phone call relied upon by the State, Mr. Little expresses regret at not insisting he be put on the stand

despite defense counsel's threats. CP 108. He indicates had he known he would be found guilty, he would have testified. CP 108. This is not inconsistent with his affidavit, as Mr. Little explained in his affidavit that he feared his bond would be revoked if he testified. CP 188. Obviously, this threat would have carried little weight had he known that after not testifying, he would be sent to prison.

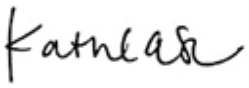
The court acknowledged in *Robinson* that distinguishing between cases where the attorney actually prevented the defendant from testifying, and those in which the attorney merely advised against it, can be difficult. 138 Wn.2d at 763. Here, Mr. Little made the necessary showing for an evidentiary hearing. Defense counsel admitted to saying that he could not imagine how Mr. Little could take the stand and that he was concerned the jury might notice an odor of alochol, one prosecutor acknowledged Mr. Little was intoxicated, and Mr. Little explained that defense counsel had suggested he could be jailed if the court smelled alcohol on him. CP 85, 188, 212-13. All of this evidence supported Mr. Little's specific, credible allegation that his attorney presented him from testifying. *Robinson*, 138 Wn.2d at 760. This court should remand Mr. Little's case for an evidentiary hearing under *Robinson*. 138 Wn.2d at 766.

B. CONCLUSION

This Court should reverse Mr. Little's convictions for all of the reasons stated above and in his opening brief.

DATED this 30th day of August, 2016.

Respectfully submitted,



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

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DONALD PORTER, DPA [paoappellateunitmail@kingcounty.gov] [donald.porter@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] NICHOLAS LITTLE 383972 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF AUGUST, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710