

NO. 43438-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BARRY,

Appellant.

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

The Honorable Jeanette Dalton, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
A. ASSIGNMENTS OF ERROR	1
Issues pertaining to assignments of error	1
B. STATEMENT OF THE CASE	2
1. Procedural History	2
2. Substantive Facts	2
a. Admission of child hearsay	5
b. Court’s instruction to consider Barry’s demeanor	7
C. ARGUMENT	9
1. THE IMPROPER ADMISSION OF UNRELIABLE CHILD HEARSAY DENIED BARRY A FAIR TRIAL	9
2. BY ERRONEOUSLY INSTRUCTING THE JURY IT COULD CONSIDER BARRY’S COURTROOM DEMEANOR, THE TRIAL COURT VIOLATED BARRY’S CONSTITUTIONAL RIGHTS NOT TO TESTIFY AND TO A VERDICT BASED SOLELY ON THE EVIDENCE	13
D. CONCLUSION	17

TABLE OF AUTHORITIES

Washington Cases

<u>Henriod v. Henriod</u> , 198 Wash. 519, 89 P.2d 222 (1938).....	14
<u>State v. Kennealy</u> , 151 Wn. App. 861, 214 P.3d 200 (2009), <u>review denied</u> , 168 Wn.2d 1012 (2010).....	12
<u>State v. Klok</u> , 99 Wn.App. 81, 992 P.2d 1039, <u>review denied</u> , 141 Wn.2d 1005 (2000)	14, 15
<u>State v. Knapp</u> , 14 Wash.App. 101, 540 P.2d 898, <u>review denied</u> , 86 Wn.2d 1006 (1975)	14
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	16
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245, 39 P.3d 2994 (2001)	14
<u>State v. Woods</u> , 154 Wn.2d 613, 114 P.3d 1174 (2005).....	10
<u>State v. Young</u> , 62 Wn. App. 895, 802 P.2d 829 (1991)	13

Federal Cases

<u>Turner v. Louisiana</u> , 379 U.S. 466, 85 S. Ct. 546, 13 S. Ed. 2d 424 (1965)	14
<u>United States v. Carroll</u> , 678 F.2d 1208 (4th Cir. 1982).....	13
<u>United States v. Pearson</u> , 746 F.2d 787 (11th Cir. 1984).....	13
<u>United States v. Schuler</u> , 813 F.2d 978 (9th Cir. 1987).....	13, 14
<u>United States v. Wright</u> , 489 F.2d 1181 (D.C. Cir. 1973).....	14

Statutes

RCW 9A.44.083	2
RCW 9A.44.120	10

Constitutional Provisions

U.S. Const. Amend. V..... 13
U.S. Const. Amend. VI..... 14

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding C.C. did not have an apparent motive to lie when making allegations about appellant. CP 145 (Finding of Fact XIV).

2. The trial court erred in finding that general character of C.C. was a neutral factor regarding admission of his hearsay statements. CP 145 (Finding of Fact XV).

3. The trial court erred in concluding that the time, content, and circumstances of C.C.'s statements provided sufficient indicia of reliability. CP 146 (Conclusion of Law IV).

4. The trial court erred in admitting unreliable child hearsay.

5. The court violated appellant's constitutional rights against self incrimination and to a verdict based on the evidence by instructing the jury to consider appellant's courtroom demeanor as evidence.

Issues pertaining to assignments of error

1. Appellant was convicted of one count of child molestation in the first degree. Over defense objection, the court admitted the child's hearsay statements alleging sexual contact by appellant. Where the balance of circumstances failed to demonstrate that the statements were reliable, did their admission deny appellant a fair trial?

2. Although appellant exercised his right not to testify at trial, the court instructed the jury in response to a question during deliberations that it could consider appellant's demeanor in the courtroom as evidence. Did the court's instruction violate appellant's constitutional rights not to testify and to a verdict based solely on the evidence?

B. STATEMENT OF THE CASE

1. Procedural History

On April 8, 2011, the Kitsap County Prosecuting Attorney charged appellant Robert Barry with one count of rape of a child against C.C. CP 1-8. The information was amended on January 23, 2012, changing the charge to child molestation in the first degree and adding a second charge of child molestation against B.C. CP 9-13; RCW 9A.44.083. The case proceeded to a jury trial before the Honorable Jeanette Dalton. The jury entered a guilty verdict on count I, involving C.C., but was unable to reach a verdict as to the charge involving B.C. CP 137-39. The court imposed a sentence of 68 months to life imprisonment, and Barry filed this timely appeal. CP 149-58, 161-62.

2. Substantive Facts

Gwen Barry and Richard Catledge were married, and they have two sons, C.C. and B.C. 1RP 122-23. They divorced in 2010. 5RP 605. The divorce was very contentious, and it had a negative impact on the

children. 1RP 49, 148. C.C. was aware of the tension between his parents, and their issues had played out in front of him. 1RP 160, 198. As a result, C.C. needed a lot of attention and constantly needed to have people acknowledge him. 1RP 148.

The children were also aware of conflict between Richard and Gwen¹'s father, Robert Barry. The children had witnessed a dispute between Richard and Barry which resulted in the two men obtaining mutual restraining orders. 1RP 196-97; 4RP 338.

In February 2011, Richard and his wife, Lindsay Lohrenz, discovered that C.C. had engaged in sexual activities with his cousin. 1RP 124. During a sleepover, C.C. had his cousin put his mouth on C.C.'s penis, and C.C. attempted to put his penis in his cousin's bottom. 1RP 21. When asked about it, C.C. said he had learned the behavior from another boy, T.T. 1RP 23, 127. C.C. maintained that story for couple of weeks. 5RP 637.

C.C.'s parents took him to a mental health therapist, Jenny Fisher. 1RP 19; 5RP 614. During the course of counseling, C.C. admitted that he had initiated the behavior with T.T., as well as with another boy, and possibly with his brother. 1RP 46, 77; 5RP 616.

¹ Appellant Robert Barry is referred to as Barry. Other family members are referred to by their first names for the sake of clarity; no disrespect is intended.

Fisher believed that C.C. had learned about the sexual behavior he was engaging in from an adult, and she shared that information with his parents. 1RP 31, 133. Richard and Lindsay started questioning C.C. about who taught him this behavior. 1RP 137; 5RP 594-96.

About a month after C.C. had begun therapy with Fisher, C.C. changed his story. 1RP 40. One night after going to a movie, Richard and Lindsay questioned C.C. about who might have taught him this sexual behavior, telling C.C. it had to have been an adult. 5RP 595, 638. C.C. first accused Dennis, one of Gwen's ex-boyfriends. According to C.C., Richard gave him a look like he did not believe it was Dennis. 5RP 597. C.C. said that Richard and Lindsay told him it had to be someone other than Dennis, so he told them it was some guy off the street. 5RP 596.

According to Richard, when C.C. accused Dennis, Richard told C.C. that they had to report that information to the police because that was a serious accusation. 1RP 166; 5RP 621. C.C. then said it was not Dennis. 1RP 166. About ten to 15 minutes later, Richard left the room to check on B.C., and Lindsay called him back. 1RP 138, 166. Lindsay told C.C. to repeat what he had said, and C.C. said "It's my papa." 1RP 138; 5RP 623. Richard explained that C.C. called Barry "papa." 1RP 139; 5RP 623. Once C.C. named Barry, Richard and Lindsay ended the conversation. 1RP 139.

The next morning C.C. repeated the statements about Barry to Fisher. 1RP 33-34. Fisher referred C.C. to Tom Sherry, a therapist who works with children who act out sexually, and she told him there were allegations that C.C. had been abused by Barry. 1RP 57, 68. C.C. told Sherry that some “touching stuff” had happened with Barry. 1RP 73-74.

C.C. repeated the allegations against Barry when he was interviewed by the prosecutor’s office. 3RP 291; Exhibit 1. After Barry was charged based on C.C.’s allegations, B.C. made allegations about Barry. 1RP 152. B.C. was interviewed by the prosecutor’s office, and a new charge was added. 1RP 150; 3RP 292.

a. Admission of child hearsay

Prior to trial, the court held a hearing to determine whether C.C.’s and B.C.’s out of court statements would be admitted at trial. Richard, Lindsay, and C.C. testified regarding C.C.’s initial statements. C.C. also described the acts he said Barry committed, said they occurred in the back bedroom at Barry’s house, there was more than one incident, and Barry told him that if he told anyone what happened, he would never see his family again. 1RP 99, 101, 107. In addition, Fisher and Sherry testified about C.C.’s statements during counseling sessions, and the recorded interview with the prosecutor’s office was played for the court. 1RP 33, 77; 3RP 295.

Sherry also testified at the hearing that C.C. was aware of the tension between his parents, and he believed C.C. felt torn apart by trying to please each parent against the other. 1RP 85. Sherry explained that C.C.'s interpretation of events changed from time to time, depending on which parent he was with when describing the event. He would describe an event as positive with one parent and the same event as negative when he was with the other parent. 1RP 90.

Defense counsel argued that C.C.'s hearsay statements should be excluded from trial. The evidence showed a connection between the family dynamics and the boys' disclosures, in that their description of events changed depending on which parent they were with. 4RP 377. Counsel argued that the impact of these family dynamics and the circumstances of C.C.'s initial allegations against Barry rendered those statements and his subsequent repetition of the accusations unreliable. 4RP 373-383.

The court acknowledged that the children were aware of and stressed by the acrimonious relationship between their parents, and it was possible to infer that C.C. was lying in order to please his father. 4RP 400. It also noted that a motive to lie could be found from Richard's testimony that C.C. was needy for attention, but it felt defense counsel would be able to cross examine C.C. to reveal the truth. 4RP 402-03. The

court ruled that the boys' statements showed sufficient indicia of reliability to present at trial. 4RP 408; CP 143-48.

b. Court's instruction to consider Barry's demeanor

During the course of child hearsay hearing, there was some visible reaction from members of the audience. 1RP 104. The court admonished those present, saying

I need to have all of you keep your faces and your physical reactions to [C.C.'s] testimony stoned; stoney. At this point do not make any movements. Do not have any physiological reaction to his testimony... I will also not have anyone in the courtroom make any motions in any way, shape, or form reflecting on the credibility of this particular witness or any other witness in this case.... I will not have any member of the audience interfere with that process.

1RP 104-05.

Again prior to trial, the court admonished the attorneys to instruct family members or friends who come to watch the proceedings that they must keep their remarks to themselves, to watch their faces, their physical language because it could have an adverse affect on Mr. Barry because what will happen is that I will eject them if I see it happening, and it could result in a mistrial depending on how serious the behavior is, and we start all over again. So I just don't want to do that, so I just simply ask you, as an officer of the Court, to make sure that you have a serious discussion with them.

4RP 450-51. Then, specifically addressing Barry, the court stated that an expression of emotion before the jury often backfires, and that everyone should keep their thoughts and opinions to themselves. 4RP 451.

After these warnings from the court, the case proceeded to trial. The DVDs of the boys' interviews with the prosecutor's office were played for the jury. 4RP 483, 487. The State also presented testimony from Richard, Sherry, and Fisher, each repeating C.C.'s out of court statements alleging abuse by Barry. 5RP 623, 663, 697-98.

C.C. also testified that Barry hurt him sexually. He said Barry rubbed his penis on C.C.'s and tried to stick his penis in C.C.'s butt. 5RP 573. C.C. said that this happened every day for about three years. 5RP 588. For the first time, C.C. said that Barry had told him to go do these acts to other kids. 5RP 580, 677, 703, 754.

Gwen testified that she lived with her parents after she and Richard separated, and her parents provided child care for the boys. Gwen testified that she would put C.C. on the school bus in the morning, and B.C. stayed with her parents when she went to work. After work she would meet C.C.'s school bus at the end of the day. 5RP 709. This arrangement ended when C.C. made allegations about Barry. 5RP 726.

Barry did not testify at trial.

During deliberations, the jury asked the court "Can we use as 'evidence,' for deliberation, our observations of the Defendant's – actions – demeanor during the court case?" CP 115. When the court asked the parties to comment, defense counsel suggested referring the jury to the

court's instructions defining evidence and forbidding them to use the fact that Barry chose not to testify against him. 5RP 824.

The court responded that case law indicates that jurors may consider not only what they hear on the stand but also what they witness in the courtroom. 5RP 824. The court noted that neither attorney called attention to Barry's demeanor during closing argument, and there was no record of Barry's demeanor, but the court believed it was appropriate for the jury to consider anything it observed regarding Barry's demeanor in its deliberations. 5RP 826-27, 832. The court answered the jury's question, "Evidence includes what you witness in the courtroom." CP 115. Defense counsel objected to this answer. 5RP 829.

C. ARGUMENT

1. THE IMPROPER ADMISSION OF UNRELIABLE CHILD HEARSAY DENIED BARRY A FAIR TRIAL.

By statute, hearsay statements of a child under the age of 10 concerning sexual contact are admissible 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: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if

there is corroborative evidence of the act.

RCW 9A.44.120. Because C.C. testified at trial, the issue for this court is whether the trial court abused its discretion in finding his out of court statements reliable. See State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).

Reliability is analyzed according to the nine factors identified in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984): (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. Ryan, 103 Wn.2d at 175-76. Although not every factor need be established, this test must be substantially satisfied for the child's hearsay statements to be admissible. Woods, 154 Wn.2d at 623-24.

In this case, C.C. was caught engaging in sexual behavior with his younger cousin. Although he maintained for some time that he had

learned the behavior from another boy, his therapist was sure he had been taught by an adult. She shared this information with his father and stepmother, and they began questioning C.C. One evening, after the family had been to a movie, Richard and Lindsay questioned C.C. about who had taught him this behavior. C.C. first named one of his mother's former boyfriends. C.C. felt that Richard did not believe him, so he gave another name. C.C. was tired and wanted the questions to stop. 4RP 373-74; Exhibit 1. He finally named Barry, at which point Richard and Lindsay ended the conversation. 1RP 139. C.C. repeated the accusations to his therapists and to the interviewer for the prosecutor's office, and these statements were all admitted at trial.

The court's conclusion that the statements were sufficiently reliable is not supported by the evidence. First, C.C. had an apparent motive to lie when he named Barry. There was no dispute that Richard and Gwen had been involved in a contentious divorce and that the children were aware of the conflict between their parents. C.C. felt torn apart by the tension between his parents, always trying to please the parent he was with, and his interpretation of events changed depending on which parent he was with at the time. 1RP 85, 90. C.C. also knew of the animosity between Richard and Barry. 1RP 196-97.

Given the situation Richard and Lindsay put C.C. in when the initial allegations were made, it is apparent that C.C. had a reason to accuse Barry, even if Barry was not at fault. C.C. was tired and wanted the questioning to stop, and Richard had already shown that he did not believe the first two names C.C. had given. He knew Richard had a conflict with Barry, and C.C. would try to please Richard, since C.C. was living with him. This apparent motive to lie and the circumstances surrounding the statements weigh against a finding of reliability.

Moreover, C.C. had already demonstrated a willingness to lie about this situation. He maintained for a couple of weeks that T.T. had taught him the sexual behavior he engaged in with his cousin, although it later came out that C.C. had initiated the sexual contact with T.T. 1RP 46. The character factor in the reliability determination goes to the child's reputation for truthfulness. State v. Kennealy, 151 Wn. App. 861, 881, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012 (2010). No evidence other than C.C.'s persistent lies about sexual contact was introduced as to C.C.'s character. In the absence of other evidence, this factor weighs in favor of exclusion of the hearsay statements, and the court's conclusion that this factor was neutral is in error.

Next, as the trial court recognized, C.C.'s statements were not spontaneous, but rather they were produced by directed questioning. 4RP

404; See e.g. State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991) (child's statements are not spontaneous if the product of leading or suggestive questions). This factor, too, weighs in favor of exclusion.

The balance of reliability factors weighs in favor of exclusion of C.C.'s hearsay statements, and the court erred in admitting them. Barry's conviction should be reversed and the case remanded for a new trial with instruction to exclude the hearsay from evidence.

2. BY ERRONEOUSLY INSTRUCTING THE JURY IT COULD CONSIDER BARRY'S COURTROOM Demeanor, THE TRIAL COURT VIOLATED BARRY'S CONSTITUTIONAL RIGHTS NOT TO TESTIFY AND TO A VERDICT BASED SOLELY ON THE EVIDENCE.

Under the Fifth Amendment privilege against self incrimination, a defendant has a constitutional right not to testify. U.S. Const. Amend. V. When a defendant chooses not to testify, "the fact of his presence and his non-testimonial behavior in the courtroom [may] not be taken as evidence of his guilt." United States v. Carroll, 678 F.2d 1208, 1209 (4th Cir. 1982); accord United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987) (defendant's laughter during witness testimony could not be considered as evidence in guilt determination); United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (defendant's behavior off of the witness stand, i.e., nervous shaking of his leg, was not evidence to be considered by jury);

United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (defendant's demeanor and emotional response to testimony was not evidence to be used in determining guilt or innocence); Henriod v. Henriod, 198 Wash. 519, 524-525, 89 P.2d 222 (1938) (jury may consider defendant's demeanor during trial only if defendant offers himself as a witness); cf. State v. Klok, 99 Wn.App. 81, 992 P.2d 1039 (a prosecutor may not comment on a nontestifying defendant's demeanor during trial), review denied, 141 Wn.2d 1005 (2000). Thus, when the defendant has not testified, it is improper to comment on his demeanor, so as to invite the jury to draw a negative inference about his character. See State v. Smith, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 2994 (2001).

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; Turner v. Louisiana, 379 U.S. 466, 472, 85 S. Ct. 546, 13 S. Ed. 2d 424 (1965). Where the defendant exercises his right not to testify, his demeanor is not evidence, and it may not be considered by the jury in deliberations. Schuler, 813 F.2d at 981 n.3; see also State v. Knapp, 14 Wash.App. 101, 110-11, 540 P.2d 898 (where defendant testified and main task before jury was to determine credibility of various witnesses, prosecutor's remarks about defendant's demeanor on the stand were not improper), review denied, 86 Wn.2d 1006 (1975).

Here, Barry exercised his right not to testify. Moreover, no statements of his were in evidence, and neither party offered any evidence of Barry's character. There were no issues of credibility or character for the jury to decide, and Barry's behavior in the courtroom was therefore irrelevant to the jury's verdict.

The trial court's initial instruction to the jury regarding evidence is consistent with the principle that a non-testifying defendant's demeanor may not be considered by the jury. Instruction No. 1 stated:

Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

CP 119.

While neither attorney commented on Barry's demeanor during trial, the jury clearly took note of it and asked the court whether it could consider that demeanor in reaching its verdict. CP 115. The proper response from the court would have been, as defense counsel argued, to refer the jury to the instruction defining evidence, assuring they understood that Barry's courtroom demeanor could not be considered. 5RP 824; Klok, 99 Wn.App. at 85 (if trial counsel had objected to prosecutor's remarks about defendant's courtroom demeanor, court could

have corrected the error by instructing the jury that the remark was improper, was not evidence, and should be completely disregarded). Instead, the court responded that everything the jury observed in the courtroom could be considered as evidence. CP 115. Because Barry did not testify at trial, his demeanor was not evidence in the case, and the jury should not have been instructed to consider it.

By instructing the jury it could consider Barry's courtroom demeanor when he had exercised his right not to testify, the trial court impacted both his privilege against self incrimination and his right to a verdict based solely on the evidence. Because the court's error impacts Barry's constitutional rights, it is presumed prejudicial and reversal is required unless the prosecution proves the error is harmless beyond a reasonable doubt. See State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). The State cannot meet that burden.

As the court acknowledged below, there was no record of Barry's demeanor during trial. But the record does show that the court made it clear to Barry before trial that any display of emotion before the jury could backfire on him. 4RP 453. The court admonished those in the courtroom to remain stone-faced, to show no reaction to the children's testimony²,

² IRP 104-05; 4RP 450-51.

and it was likely Barry's compliance with these comments by the court which the jury noticed.

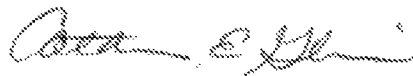
The record was also full of evidence that C.C.'s story changed over time, including on the day of trial. There is a reasonable likelihood that the jury was on the edge regarding the State's case, and its consideration of Barry's demeanor during the proceedings pushed them to convict. The court's erroneous instruction to the jury to consider Barry's demeanor was not harmless beyond a reasonable doubt, and Barry's conviction must be reversed.

D. CONCLUSION

The erroneous admission of unreliable hearsay and the improper jury instruction to consider Barry's demeanor as evidence denied Barry a fair trial. His conviction must be reversed and the case remanded for a new trial.

DATED this 1st day of November, 2012.

Respectfully submitted,



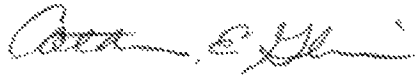
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