

70443-J

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No. 70443-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES FEY,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

A host of damaging evidentiary errors occurred in the case at bar because the court used the wrong legal standards, in addition to the defense attorney's decision to elicit powerful, damaging evidence for no reasonable purpose. In his reply brief, Mr. Fey focuses on the novel legal arguments offered by the State's response brief. He relies on his opening brief for a detailed and accurate assessment of most of the remaining legal errors because the prosecution's brief mimics the arguments raised in the trial court.

B. ARGUMENT.

1. **When a child is court-ordered to meet with a therapist and she does not believe these court mandated sessions are conducted to aid her treatment, the medical hearsay exception does not apply.**

- a. *Mr. Fey objected to therapist's hearsay testimony because the declarant did not think court-ordered therapy was for treatment purposes.*

The prosecution claims the court's pretrial ruling deciding the State's in limine request to offer hearsay from a therapist was tentative. But the court's ruling was firm. The court first reasoned that it could not conceive of a child being court-ordered to submit to treatment for non-treatment purposes, thus rejecting the defense argument that the

court-ordered therapy sessions did not fit within the hearsay exception for statements made for medical purposes. 1RP 19-21. Then the court ruled that testimony by the therapist would be admissible under ER 803(a)(4) based on the following determination:

So long as you can lay a foundation that from the therapist's perspective that the purpose behind this treatment is to treat the mental state of the child, then I believe it is an exception to the hearsay rule and it's admissible.

1RP 19-21. The prosecution's assertion that the trial court never issued a ruling on the motion is contrary to the record, and as discussed below, the court applied the wrong legal rule.

The prosecution takes another stab at avoiding the merits of the issue by claiming that the trial objection was fundamentally different than the appellate assignment of error. But this argument rests on a mischaracterization of the argument on appeal. By further explaining the legal basis of the defense attorney's original well-taken objection, Mr. Fey provides support for the inadmissibility of the therapist's testimony repeating hearsay statements from the child. As Mr. Fey told the trial court, the medical hearsay exception should not apply because the child was not seeing the therapist for treatment. 1RP 18. This is not

a new legal theory unadvanced at trial and the State's efforts to dance around the legal error should be disregarded.

b. *The court misapplied the law when admitting a child's statements made during a court mandated therapy session.*

The prosecution's efforts to defend the admission of Ms. Jordan similarly fall flat. First, it ignores KR's undisputed statement of belief that she was not meeting with Ms. Jordan for treatment purposes and second, it misrepresents the legal standard under which KR's statements to Ms. Jordan could be admitted under ER 803(a)(4).

The only evidence the State musters to show KR's understanding of the treatment purposes of her meetings with Ms. Jordan is that KR described meeting with Ms. Jordan as involving talking and playing a game, including a feeling game. Resp. Brief at 11. Then the State focuses on Ms. Jordan's wish that her time with KR was in fact, treatment. *Id.* But Ms. Jordan's professional goals do not override KR's testimony to the contrary.

Entirely omitted from the State's analysis is KR's explanation of why she saw and spoke with Ms. Jordan. KR did not believe she met with Ms. Jordan for treatment purposes. KR believed the reason she was required to see Ms. Jordan was "to get me ready" for court. 2RP

178. She and Ms. Jordan “went over . . . what I was going to say” in court. 2RP 179. Litigation preparation is not the equivalent of treatment of a medical condition, and it is not what ER 803(a)(4) contemplates.

And Ms. Jordan nowhere emphasized to KR that her statements need to be truthful in order to receive successful treatment. The truthfulness of KR’s statements had no bearing on whether she would meet with KR.RP 353.

Additionally, Ms. Jordan reinforced the court-mandated nature of the sessions by telling KR their conversations would not be private and her records were available to the court . 3RP 338.

The Response Brief ignores KR’s testimony and her explanation that she did not believe that her meetings with Ms. Jordan were for purposes of treatment. Just as defense counsel told the court at the start of trial, KR saw Ms. Jordan because she was court-ordered to do so. 1RP 18; 3RP 354-55. She believed Ms. Jordan’s purpose was to help prepare her to testify at trial. This is not a treatment purpose that permits the admission of her hearsay discussions with Ms. Jordan under ER 803(a)(4). 2RP 179.

In its pretrial ruling on the admissibility of KR’s statements to Ms. Jordan, the court misconstrued the law by ruling that this testimony

was admissible so long as “from the therapist’s perspective,” the sessions were for the purpose of treatment. 1RP 21. The court applied the wrong rule because it is not Ms. Jordan’s perspective that controls. The declarant’s state of mind is the touchstone of ER 803(a)(4) and the declarant was speaking to Ms. Jordan because she had to, by court order, for the purpose of preparing in-court testimony.

The prosecution misrepresents the law on this point. It relies on *State v. Kilgore*, 107 Wn.App. 160, 183, 26 P.3d 308 (2001), *aff’d on other grounds*, 147 Wn.2d 288 (2002), to claim that a child would necessarily understand she was seeing a doctor for purposes of treatment. But *Kilgore* is unhelpful to the State’s position for several reasons: (1) factually, it involves a child’s medical care; (2) it relies on pre-*Crawford*<sup>1</sup> confrontation clause case law, holding that the firmly rooted nature of the medical hearsay exception overcomes cures confrontation clause problems, rendering its legal analysis outmoded, and (3) it expressly distinguishes that case from the legal rule that would apply in exact same circumstances as are present in Mr. Fey’s case.

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<sup>1</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).



*Kilgore* involved a child's statements to a medical provider. 107 Wn.App. at 170, 183. The child admitted she understood she was at the doctor's office because she had been raped and the doctor needed to see if she was healthy. *Id.* at 183 n.25. The court explained the controlling law regarding whether the child needed to have a treatment purpose when speaking to a medical provider. *Id.* at 183-84. It agreed that in some circumstances, the court may not simply assume a child's statements to a medical professional were made for treatment purposes sufficient for ER 803(a)(4). In those cases, the law requires the State to "affirmatively establish" the child's treatment motive before her statements would be admissible under ER 803(a)(4). *Id.* (citing *State v. Carol M.D.*, 89 Wn.App. 77, 948 P.2d 837 (1997)).

The reason *Kilgore* distinguished *Carol M.D.* was "because it involved a therapist and the child explicitly denied knowing what a therapist did." *Id.* at 184. The child in *Kilgore* knew she went to the doctor's office for medical purposes, but therapy sessions are controlled by a different legal standard.

The rule announced in *Carol M.D.*, and affirmed in *Kilgore*, is that:

in the case of a child who has *not* sought medical treatment, but makes statements to a counselor procured for him or her by a state social agency, the State's burden under ER 803 is more onerous. The record must *affirmatively demonstrate* the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition.

*State v. Carol M.D.*, 89 Wn.App. at 86 (emphasis in original). Here, KR did not seek treatment from Ms. Jordan and did not like going. She was forced to go and she denied knowing that she spoke to a therapist for purpose of treatment. Therefore, *Carol M.D.* and *Kilgore* hold that "the party offering the statement must affirmatively establish the declarant had a treatment motive." *Kilgore*, 107 Wn.App. at 184; *Carol M.D.*, 89 Wn.App. at 86.

Absent evidence showing that the child was motivated to tell the truth by her self-interest in obtaining proper treatment, the hearsay exception does not apply. *Carol M.D.*, 89 Wn.App. at 87. The purpose of the medical treatment exception is the declarant's strong motive in speaking truthfully and accurately because successful treatment depends upon it. *Id.*

The trial court impermissibly admitted Ms. Jordan's recollection of KR's statements based on its misperception that so long as Ms. Jordan intended to provide treatment, the child's statements to her were

admissible under ER 803(a)(4). 1RP 21. The State did not affirmatively prove that KR believed her statements to Ms. Jordan were for purpose of treatment or that she had a strong motive to speak truthfully and accurately so she could succeed in treatment. The court erroneously admitted KR's statements to Ms. Jordan.

*c. The cumulative error doctrine demonstrates the harmful nature effect of the numerous errors in the case.*

“[W]here there is a risk of prejudice and ‘no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.’” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

In Mr. Fey's opening brief, he detailed multiple evidentiary errors and instances of misconduct. Opening Brief at 17-27. The prosecution's closing argument heavily relied on inadmissible evidence, particularly Ms. Jordan's testimony about what KR had told her, demonstrating its importance to the State's case. *See, e.g.*, 5RP 624, 627, 629, 630, 631, 657. This error, considered in conjunction with the myriad of ways the State prodded the jury to sympathize with KR and

dislike Mr. Fey and his wife led the jury to convict Mr. Fey for impermissible reasons.

The court let the prosecution show KR had been forced from her home and not allowed to see the family she loved due to her allegations against Mr. Fey. This evidence was used to engender sympathy for KR for reasons unrelated to whether the initial allegations were true. A witness's truthfulness is not measured by her failure to recant, and the prosecution offers no legal authority that it may bolster a witness's testimony by telling the jury how hard life has been because of the allegations she made. This classically prejudicial evidence is not cured by a limiting instruction offered only at the end of the case, long after the jury had heard about how KR suffered after her allegations when such suffering was not probative of the credibility of the allegations.

The court permitted the prosecution to argumentatively cast aspersions on Mr. Fey's parenting choices for allowing all of his children to watch a certain movie when the evidence showed Mr. Fey did not select the movie or know what it was about before his children saw it. 4RP 448-49; 502, 579, 610-11; 5RP 659.

The State now agrees the court erred when it let a teacher repeat the details of KR's claim Mr. Fey was the person who abused her, over defense objection and contrary to the fact of complaint doctrine. 3RP 275; Resp. Brief at 24. The State paints its elicitation of inadmissible evidence as harmless, but this error must be viewed together with the rest of the improperly admitted, prejudicial evidence.

The State insists that Ms. Jordan's testimony about KR's "medical" reason for failing to offer more accurate testimony was merely "content neutral" testimony about a medical problem. Resp. Brief at 29. But it ignores its heavy reliance on Ms. Jordan's opinions in its closing argument, including her belief in KR's claim of abuse. 5RP 629, 631. It used Ms. Jordan as a tool to bolster KR's credibility for impermissible reasons, when a large part of Ms. Jordan's testimony should never have been admitted.

In sum, the jury heard impermissible evidence prejudicing it against Mr. Fey and taken together, the value the jury would put on this evidence requires a new trial. *Salas*, 168 Wn.2d at 673.

**2. The State agrees that defense counsel stipulated to the admission of an inadmissible videotape containing numerous allegations not otherwise before the jury, showing the deficient performance of counsel and its undeniable prejudicial effect.**

- a. *Counsel had no valid reason to stipulate to the admission of an otherwise inadmissible video-recorded interview of the complainant containing many new allegations.*

KR's videotaped interview with a child interview specialist would not have been presented at trial as substantive evidence without defense counsel's stipulation, as the prosecution implicitly concedes. The entire interview was inadmissible for its truth and the jury would not have seen it absent defense counsel's pretrial stipulation to its admission. *See* Opening Brief at 32-34.

This interview contained multiple allegations of abuse by KR, against Mr. Fey. It features KR sitting next to and continually petting a large fluffy dog while a gentle interviewer repeats and prods her to give details about her claims of multiple improper touching by Mr. Fey and it is far more detailed than KR's trial testimony. Ex. 33. In its closing argument, the prosecution urged the jury to "consider very carefully the child forensic interview" and to base its verdict on incidents discussed in the video even if they were not mentioned during live trial testimony. 5RP 625, 636.

Because the videotape was unquestionably inadmissible absent defense counsel's stipulation, the State claims that defense counsel must have had a strategic purpose to admit the entire videotape and invite the jury to consider KR's out of court allegations as substantive evidence against Mr. Fey. But the reasons the State concocts are inadequate.

The videotape was not merely a minor tool of impeachment, it contained multiple substantive allegations that alone could prove the case against Mr. Fey and featured KR in a highly flattering light. Ex. 33. The complainant's trial testimony was brief, vague, and did not include many of the critical details supplied by the videotape. 2RP 152-53, 183. On the other hand, the videotape was specific, lengthy, and far more wide-reaching than the trial testimony, not to mention she gently pets a docile dog while appearing to forthrightly answer questions from the child interviewer. Ex. 33.

Its admission was unnecessary for impeachment of KR's trial testimony, because she could be questioned about inconsistencies without providing the jury the entire videotape to watch at its leisure. Mr. Fey did not need to open the door wide to new allegations that were not otherwise before the jury to question KR about whether her

allegations were a mirror image of the play she saw, because that same testimony could be and was elicited from KR, the people who testified about the play, and the school teachers who testified about KR's initial allegations. 2RP 197, 231-32; 3RP 274-75. Indeed, defense counsel barely referred to the videotape when questioning KR because he had ample avenues for impeachment based on statements KR had made to a defense investigator and the prosecutor. 2RP 200-09.

Stipulation to its admission was unreasonable because any conceivable impeachment could be accomplished without giving the State platform to allege multiple offenses and provide evidence that alone could constitute the charged crime. Impeachment is the only reason the State can conceive of for counsel to offer the entire videotape to the jury but this tactic is not legitimate, reasonable, or logical. The prosecution agrees the videotape would never have otherwise been admitted and, because defense counsel approved of its use for any purpose at trial, the prosecution used this videotape as stand-alone evidence of Mr. Fey's guilt and told the jury to convict Mr. Fey based on the videotape alone.



- b. *The jury relied on inadmissible and compelling videotape evidence that defense counsel unreasonably agreed to admit.*

The prejudicial effect of unreasonable attorney performance requires a new trial if it is reasonably probable that the jury's verdict might have been different. *See Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The evidence in the case was not overwhelming and the trial court's erroneous evidentiary errors also undermine confidence in the verdict. Had the court properly barred evidence bolstering KR's allegations and credibility from Ms. Jordan, and not let the State press the jury to sympathize with KR based on how sad and lonely she was after the allegations, there is ample reason to believe the jury would not have convicted Mr. Fey. Adding to this prejudice assessment is the defense counsel's unreasonable decision to supply the jury with otherwise inadmissible allegations contained in a lengthy videotape sufficiently undermines confidence that the outcome would have been the same absent this evidence. The trial court errors and defense counsel's illogical decision to supply a basis to convict his client that was otherwise inadmissible constitute a deprivation of Mr. Fey's rights

to effective assistance of counsel and due process of law, requiring reversal.

**3. Mr. Fey is constitutionally entitled to have contact with his own children and the court's blanket prohibitions must be stricken**

Contrary to *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010), the court entered a blanket order barring Mr. Fey from having contact with any minor child without any individual consideration. Individualized sentencing is required before a court denies a parent the ability to have a meaningful relationship with his child. Such a limitation is unconstitutional without a fact-specific inquiry weighing the compelling nature of a parent's rights and narrowly setting limitations on the exercise of that right based on the particular circumstances of the case. The court imposed conditions lasting the duration of Mr. Fey's life and this extreme duration "must also be reasonably necessary" for a restriction on a person's liberty to be permitted. *Id.* at 381. The court's blanket order must be vacated and the case remanded for the court to weigh the circumstances of the case and the reasonableness of alternatives.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Fey respectfully requests this Court vacate his conviction and remand his case for further proceedings.

DATED this 15<sup>th</sup> day of May 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Nancy P. Collins', written over a horizontal line.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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	)	
Respondent,	)	NO. 70443-5-I
	)	
JAMES FEY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF MAY, 2014, 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:

- |     |  |                   |                                     |
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| [X] | JAMES FEY<br>365493<br>AIRWAY HEIGHTS CORRECTIONS CENTER<br>PO BOX 1899<br>AIRWAY HEIGHTS, WA 99001        | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 15<sup>TH</sup> DAY OF MAY, 2014.

X \_\_\_\_\_ 

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STATE OF WASHINGTON