72411-8

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Court of Appeals
Division I
State of Washington

No. 72411-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JENARO HERNANDEZ,

Appellant.

---

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

---

# BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

The State proceeded to trial against Jenaro Hernandez based almost entirely on the hearsay statements made by a child, Y.M, who did not testify at trial. After Mr. Hernandez was charged with multiple counts of first degree child rape and first degree child molestation, Y.M.'s mother left for Mexico, taking Y.M. and Y.M.'s brother with her. The trial court found the statements made by Y.M, her brother, and her mother, were admissible under the forfeiture by wrongdoing doctrine because Mr. Hernandez supported the mother's plans to leave the country before trial. The trial court also found Y.M.'s statements were separately admissible under the child hearsay exception.

The trial court's rulings were made in error. The State failed to show the witnesses were "unavailable," making the statements inadmissible under the forfeiture by wrongdoing doctrine and the child hearsay exception. In addition, the statements were inadmissible because Y.M.'s statements were testimonial and the State did not show Mr. Hernandez engaged in wrongdoing. The court's admission of the witnesses' statements violated Mr. Hernandez's Sixth Amendment right to confront the witnesses against him. Because the State could not have proven its case absent these errors, this Court should reverse.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Hernandez's Sixth Amendment confrontation right when it admitted the witnesses' statements under the forfeiture by wrongdoing doctrine.

2. Mr. Hernandez's constitutional right to confront the witnesses against him was violated when the trial court admitted Y.M.'s testimonial statements at trial.

3. The trial court violated Mr. Hernandez's right to confrontation when it admitted Y.M.'s statements under the child hearsay exception statute.

4. The trial court erred when it found Olga Mendez-Cruz did not initiate the plan to leave for Mexico with her children.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment requires that criminal defendants be given the opportunity to confront the witnesses against them. A defendant may forfeit this right under the forfeiture by wrongdoing doctrine, but only if the defendant's "wrongdoing" caused the witness to be "unavailable." Where the witnesses' testimonial hearsay statements were admitted at trial but the State failed to demonstrate it

made reasonable efforts to secure the witnesses' presence or that Mr. Hernandez engaged in wrongful conduct, should this Court reverse?

2. Like the forfeiture by wrongdoing doctrine, the child hearsay exception statute requires the child be "unavailable" if she does not testify at trial, and any statements are subject to the Confrontation Clause. Where Y.M. did not testify, her statements were testimonial, and the State had access to Y.M.'s precise location in Mexico but did nothing more than make a phone call, should this Court reverse because the trial court improperly admitted Y.M.'s statements under the child hearsay statute?

## D. STATEMENT OF THE CASE

The State charged Jenaro Hernandez with multiple counts of first degree child rape and first degree child molestation, alleging he assaulted his girlfriend's daughter. CP 150. Before trial, Mr. Hernandez moved to compel the State to produce the daughter, Y.M., and her mother, Olga Cruz-Mendez, for defense interviews. Supp. CP __ (sub no. 31); 6/5/14 RP 42. In response, the deputy prosecutor explained it had come to his attention several weeks before that Ms. Mendez-Cruz had unexpectedly vacated her apartment and moved to

Mexico, taking Y.M. and Y.M.'s older brother, Miguel Cruz, with her. 6/5/14 RP 42.

The State acknowledged it had "some obligation to make diligent efforts" to put its witnesses in contact with the defense but that "those efforts can't really extend into Mexico for all practical purposes" and that the State intended to proceed at trial "by way of child hearsay and corroborative evidence." 6/5/14 RP 43. In ruling on Mr. Hernandez's motion, the court ordered the State to "make reasonable and diligent efforts to locate and produce witnesses Y.M. and Olga Mendez for defense interviews before trial." Supp. CP __ (sub no. 37); 6/5/14 RP 45-46.

A few days later, the State moved to continue the trial date, arguing it needed more time to investigate an additional charge of witness tampering because, upon reviewing recorded jail phone calls between Mr. Hernandez and Ms. Mendez-Cruz, it appeared the two discussed Ms. Mendez-Cruz's departure for Mexico before she left. CP 107-111; 6/13/14 RP 3-4. According to the deputy prosecuting attorney's affidavit attached to the motion, Ms. Mendez-Cruz's sister-in-law reported Ms. Mendez-Cruz had chosen to leave because of the

difficulty in managing all of the appointments the State required her to attend related to the charges against Mr. Hernandez. CP 107.

According to the State, Ms. Mendez-Cruz's brother reported Ms. Mendez-Cruz had arrived safely in Oaxaca and would be visiting their mother soon. CP 108. The brother provided his mother's phone number, but when a detective called the number a young woman answered, said she did not know who Ms. Mendez-Cruz was, and instructed the detective not to call again. CP 108. The State made no additional efforts to locate Ms. Mendez-Cruz or Y.M. Finding the State had demonstrated good cause, the trial court granted the State's motion to continue. CP 103. Mr. Hernandez was later arraigned on an additional charge of tampering with a witness. CP 63.

In a motion in limine, the State sought the admission of statements made by Y.M., Ms. Mendez-Cruz, and Miguel under the forfeiture by wrongdoing doctrine.[1] 2 RP 152. The court granted the State's motion, allowing the admission of all of Y.M.'s statements, as well as limited statements made by Ms. Mendez-Cruz and Miguel. 2 RP 177. Finding no guidance regarding how the forfeiture by wrongdoing doctrine interacts with the admission of child hearsay, the

[1] For purposes of clarity, Y.M.'s older brother will be referred to herein by his first name.

court performed a separate child hearsay analysis and determined Y.M.'s statements were nontestimonial and admissible pursuant to the child hearsay exception as well. 2 RP 216-220, 233.

At trial, the State offered Y.M.'s statements through school personnel and the forensic nurse examiner. 3 RP 254, 297, 326; 5 RP 520. It also played Y.M.'s interview with an investigator for the jury. 4 RP 388. It offered Miguel's statement that Mr. Hernandez and Y.M. had once been in the bedroom behind a locked door, which Miguel thought was strange. 6 RP 618. It offered statements by Ms. Mendez-Cruz that Miguel had told her about this incident and she had questioned Y.M., as well as information about Ms. Mendez-Cruz's work hours and when Mr. Hernandez typically stayed at the house. 5 RP 591-96. A jury convicted Mr. Hernandez of all seven charges and the trial court imposed an indeterminate sentence of 318 months to life. CP 3, 6.

E. ARGUMENT

**1. The statements made by Y.M., Miguel Cruz, and Olga Mendez-Cruz were not admissible under the forfeiture by wrongdoing doctrine because the witnesses were not "unavailable."**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to be confronted with

the witnesses against him." Const. Amend. VI; Const. art. I, 22. A defendant can forfeit this right through his actions, but only in very limited circumstances. *State v. Dobbs*, 180 Wn.2d 1, 11, 16, 320 P.3d 705 (2014). In order to find the defendant has forfeited his confrontation rights, the court must determine by clear, cogent, and convincing evidence that the witness was made unavailable by the wrongdoing of the accused and that the defendant engaged in the wrongful conduct with the intention of preventing the witness from testifying. *Dobbs*, 180 Wn.2d at 11; ER 804(6).

Evidence is clear, cogent, and convincing when the facts have been shown to be "highly probable." *Dobbs*, 180 Wn.2d at 12. Because the forfeiture of wrongdoing doctrine was not adopted in Washington until 2007, there is little precedent to guide the trial courts in its application. *Id*. at 12-13. This Court reviews a violation of the Sixth Amendment right to confront witnesses de novo. *Id*. at 10.

In a motion in limine, the State sought to admit out-of-court statements made by Y.M., Miguel, and Ms. Mendez-Cruz, for their truth under the forfeiture by wrongdoing doctrine. 2 RP 159. The trial court granted the State's motion. 2 RP 177. In doing so, it failed to address whether the witnesses were "unavailable," as required by

*Dobbs* and ER 804(b)(6), which provides that a statement is not excluded by the hearsay rule if the declarant is "unavailable as a witness" and the statement is "offered against a party that has engaged directly or indirectly in wrongdoing that was intended to, and did, procure the *unavailability* of the declarant as a witness." (emphasis added).

There is a difference between unavailability for Confrontation Clause purposes and unavailability for evidentiary purposes. *State v. Beadle*, 173 Wn.2d 97, 115, 265 P.3d 863 (2011). "[W]here testimonial evidence is at issue… the Sixth Amendment demands what the common law required; unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, only testimonial statements are subject to the constitutional requirements for unavailability. *Beadle*, 173 Wn.2d at 115.

In the constitutional sense, unavailability "requires the prosecutor to make a good faith effort to obtain the witness' presence at trial." *State v. Ryan*, 103 Wn.2d 165, 171, 691 P.2d 197 (1984); *see also State v. Beadle*, 173 Wn.2d 97, 113, 265 P.3d 863 (2011); *Barber v. Page*, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

"[T]he lengths to which the prosecution must go to produce the witness is a 'question of reasonableness.'" *State v. Smith*, 148 Wn.2d 122, 132, 59 P.3d 74 (2002); *California v. Green*, 399 U.S. 149, 189 n. 22, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

The State is required to use all available means or procedures at its disposal in order to bring the witness to trial. *State v. Hobson*, 61 Wn. App. 330, 336, 810 P.2d 70 (1991); *State v. Goddard*, 38 Wn. App. 509, 513, 685 P.2d 674 (1984). It is not required to perform a futile act, but if there is even a remote possibility that affirmative measures might produce the declarant, the obligation of good faith may demand the State undertake them. *Smith*, 148 Wn.2d at 132. The burden of proving unavailability for constitutional purposes lies with the proponent of the hearsay statement or, in this case, the State. *Id*.

a. <u>The witnesses' statements were testimonial.</u>

The trial court failed to make any specific findings about whether the witnesses were actually unavailable, so it did not evaluate whether the witnesses' statements were testimonial during its forfeiture by wrongdoing analysis. Instead, it found only that Y.M.'s statements were nontestimonial during its child hearsay analysis. 2 RP 216-220. The court erred when it failed to consider whether the other witnesses'

statements were testimonial for an "unavailability" analysis under the forfeiture by wrongdoing doctrine and found that Y.M.'s statements were nontestimonial.

i. *Y.M.'s Recorded Statements to the Investigator*

The United States Supreme Court has yet to provide a comprehensive definition of what constitutes a testimonial statement. *State v. Hurtado*, 173 Wn. App. 592, 599, 294 P.3d 838 (2013). However, our Supreme Court has developed two tests. *Beadle*, 173 Wn.2d at 107-09. When the statement is made to law enforcement, the courts employ the "primary purpose" test:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Beadle*, 173 Wn.2d at 108.

Here, the police department performed its interview of Y.M. through a "child interview specialist," Heidi Scott. Ex. 10. Ms. Scott testified at the child hearsay hearing that she was "employed through

Dawson Place Child Advocacy Center," which houses the prosecutor's office, the Snohomish County Sherriff's Office, and Compass Health. 2 RP 132. She later specified that she was employed only by Compass Health, but explained she does not offer any counseling or clinical services. 2 RP 144. Instead, she provides "a service to law enforcement" by interviewing children when there has been an allegation of abuse or neglect. 2 RP 133, 144.

Ms. Scott's role, as an arm of law enforcement, was evident during the interview. Before beginning her questioning of Y.M., she showed Y.M. where the detective would sit and explained the detective would be able to see and hear them during the interview. Ex. 10 at 1. At one point, Ms. Scott informed Y.M. she was taking a document Y.M. had marked out to the detective. Ex. 10 at 26.

Other courts have found statements made in this type of interview are testimonial. *See In the Interest of S.R.*, 920 A.2d 1262, 1268, 2007 PA Super 79 (2007) (statements to a "forensic interview specialist" were testimonial because the interview was the functional equivalent of a police interrogation and an obvious substitute for live testimony); *People v. Warner*, 119 Cal. App. 4$^{th}$ 331, 14 Cal.Rptr.3d 419, 429 (2004) (because an interview by a specially trained child

interview specialist is similar to a police interrogation, statements made by the child were testimonial), *reversed on other grounds* 18 Cal.Rptr.3d 869, 97 P.3d 811 (Cal.2004).

This Court has found that even statements made to a CPS social worker are testimonial where the interaction "had the potential to lead to criminal prosecution." *State v. Hopkins*, 137 Wn. App. 441, 456, 154 P.3d 250 (2007). In *Hopkins*, the court found the social worker was a government officer but noted that her initial role was to ensure the child's safety rather than investigate the alleged abuse. 137 Wn. App. at 444-45. However, the court found the social worker's second visit with the child, although still designed to ensure the child's safety, "had the potential to lead to criminal prosecution." *Id*. at 456. Because the meeting was closer on the continuum to a criminal investigation, the child's statements were testimonial. *Id*. at 456-57. The fact that the social worker was not working at the behest of law enforcement officers did not matter because she was a government employee and her CPS investigatory role overlapped with and aided law enforcement. *Id.* at 457. In reaching this conclusion, the Court applied the "primary purpose" test adopted in *Beadle*, 173 Wn.2d at 108. *Hopkins*, 137 Wn. App. at 458.

In contrast, the trial court in this case applied the "declarant-centric" standard when evaluating Y.M.'s statements, which is the appropriate test for determining whether a statement made to a *nongovernmental* witness is testimonial. *Beadle*, 173 Wn.2d at 107-108. This test examines:

> [W]hether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime.

*Id.* at 108. Applying this test, the court found:

> The question becomes: Does she know why she's there? Not do the other people know why she's there. And in looking at it from the standpoint of this 8-year-old, it's clear she doesn't know why she's there. She doesn't know that the testimony that she is giving, and I call it testimony for lack of a better term, is being given for use at trial. She doesn't even know if it's being given for medical purposes or to make her feel better or to put an end to what she thinks is harm.

2 RP 219.

When the court applied the "declarant-centric" test, it erred. The court should have evaluated the statements made by Y.M. during the recorded interview under the "primary purpose" test, as the evidence undisputedly demonstrated she was performing a service for law enforcement. In *State v. Ohlson*, our Supreme Court identified four

factors to determine whether a statement is testimonial under the "primary purpose" test: (1) the timing relevant to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation. 162 Wn.2d 1, 12, 168 P.3d 1273 (2007).

Applying these factors, Y.M.'s statements were testimonial. Ms. Scott's questioning of Y.M. was very formal. It was recorded and the detective investigating the charges against Mr. Hernandez observed the interview and provided feedback to Ms. Scott during the questioning. The purpose of the interview was to gather evidence against Mr. Hernandez rather than meet an ongoing emergency. Thus, the primary purpose of the questioning was to establish past events potentially relevant to a later criminal prosecution. Y.M.'s statements to the investigator were testimonial.

ii. *Y.M.'s Statements to School Personnel*

The first allegation Y.M. made was to her third grade teacher. 1 RP 74. Her teacher immediately took her to see the school "nurse," who was actually a "house services paraeducator" with training only in First Aid and CPR. 1 RP 74, 85. The teacher also contacted the school psychologist. 1 RP 27. The school psychologist questioned Y.M.

because she expected to be the one to make the report to CPS. 1 RP 43. However, Y.M. required prompting from her teacher in order to repeat the allegation. 1 RP 32.

Unlike like the details Y.M. provided during the interview with Ms. Scott, Y.M. told the school personnel only that Mr. Hernandez had hurt her with his "man part" and that this had happened repeatedly while her mother was at work. 1 RP 32-35. Like the CPS social worker in *Hopkins*, the teacher's initial questioning of Y.M. was done with the purpose of assisting Y.M. 137 Wn. App. at 444-45. However, the additional questioning of Y.M. in the nurse's office turned investigative. The school psychologist knew that she would be making a report to CPS and testified that many of the questions she asked Y.M. were designed to elicit the information she knew CPS would be seeking. 1 RP 43. Because the three women were public school personnel acting to assist CPS, Y.M.'s statements in response to their questioning were testimonial under the primary purpose test.

iii. *Y.M.'s Statements to the Forensic Nurse Examiner*

The Court also admitted Y.M.'s statements to the forensic nurse examiner, finding they were not testimonial because they met the hearsay exception as statements made for purposes of medical

treatment and diagnosis. 2 RP 216. When statements are made to medical personnel, they are nontestimonial only when three factors are present: (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State. *Hurtado*, 173 Wn. App. at 600.

Here, the forensic nurse was clearly working with the State. While she testified the questions she asked Y.M. would assist in her diagnosis and treatment, the purpose of her forensic exam was to gather evidence for the prosecution. 1 RP 68. Ultimately the DNA samples she collected from Y.M. were compared against samples taken from Mr. Hernandez, eliminating any doubt that she was acting as an investigative arm of the State. 4 RP 361-62; 5 RP 552, 555; *see also Medina v. State*, 122 Nev. 346, 354-55, 143 P.3d 471 (2006) (finding a "forensics nurse" is a "police operative" who gathers evidence for the prosecution). The trial court erred when it failed to apply the test articulated in *Hurtado*, and instead simply found that Y.M.'s statements to the forensic nurse examiner fell under the medical diagnosis and treatment exception and were therefore nontestimonial.

iv. *The Statements Made by Ms. Mendez-Cruz and Miguel*

The record shows Ms. Mendez-Cruz and Miguel were questioned by law enforcement after Y.M. made the allegations against Mr. Hernandez. 5 RP 591, 595; 6 RP 618. At trial, the detective testified she spoke with Ms. Mendez-Cruz and Miguel after obtaining permission from Ms. Mendez-Cruz to search the apartment for evidence. 6 RP 614. Given that the detective had gone to the apartment to collect evidence, there can be no doubt that her primary purpose in speaking with Ms. Mendez-Cruz and Miguel was to establish past events potentially relevant to the prosecution of Mr. Hernandez. *See Beadle*, 173 Wn.2d at 108. Their statements were testimonial.

b. <u>The State failed to engage in reasonable, good faith efforts to secure the witnesses' presence at trial.</u>

i. *The State had the ability to identify the witnesses' precise location in Mexico.*

As evident from the State's motion for a pre-trial continuance, the State learned from Ms. Mendez-Cruz's brother, Manuel Cruz, that Ms. Mendez had arrived safely in Mexico. CP 108. Although the caller identification on his phone indicated the phone number was "private," Mr. Cruz told a detective his mother had later called and

informed him that Ms. Mendez-Cruz had arrived in Oaxaca and planned to visit her soon. CP 108. At trial, Mr. Cruz testified that, in fact, Ms. Mendez-Cruz was planning to stay with her mother, not simply visit. 4 RP 418. Mr. Cruz testified that his mother lives in a small town in Oaxaca where everyone knows each other. 4 RP 418.

Mr. Cruz provided the detective with his mother's phone number. CP 108; 4 RP 419. When the detective called this number, a young woman answered the phone, said she did not know Ms. Mendez-Cruz, and instructed the detective not to call again. CP 108. The State made no further attempts to contact Ms. Mendez-Cruz or secure her presence at trial.

The State did not present this information to the court when arguing its motion in limine and the court did not make a specific finding that the witnesses were unavailable. When arguing its pre-trial motion to continue, the State presented its view that it had "some obligation to make diligent efforts" but that "those efforts can't really extend into Mexico for all practical purposes." 6/5/14 RP 43.

The first time the trial court addressed the issue of whether the witnesses were "unavailable" was in the course of its ruling on child hearsay. 2 RP 228. The court found, "we have the physical fact that

[Y.M.], her mother, and her brother are now in Mexico, which we all know that to be the fact, makes her, per se, unavailable." 2 RP 228. The court's finding that the witnesses were "per se" unavailable is unsupported by authority.

ii. *Given the State's ability to locate the witnesses' precise location, the mere fact they were in Mexico did not support a finding they were "unavailable."*

Where the State makes no effort to produce a witness, it cannot rely on the mere possibility that the witness would resist such efforts. *Hurtado*, 173 Wn. App. at 607. Yet this is what appears the State did here. It presumed, after one phone call in which a detective spoke with an unidentified woman, that Ms. Mendez-Cruz would resist any efforts to return to Washington for trial and made no further attempts to secure her presence at trial.

When a witness is out of the country *and* cannot be located, she is sufficiently unavailable to satisfy the Confrontation Clause. *State v. DeSantiago*, 149 Wn.2d 402, 412, 68 P.3d 1065 (2003). However, these were not the circumstances presented here. Although Ms. Mendez-Cruz and her children were in Mexico, the State could have easily learned the witnesses' exact location if it had simply asked Mr. Cruz for his mother's address. Contrary to the trial court's assertion

that the witnesses being in Mexico made them "per se unavailable," the Ninth Circuit has found that the government's failure to make any effort to contact a witness when it had his address in hand was "per se unreasonable." *United States v. Pena-Gutierrez*, 222 F.3d 1080, 1088 (9th Cir. 2000).

Given that Ms. Mendez-Cruz and her children appeared to be living at an easily ascertained location in a small town in Mexico, it was unreasonable for the State to make one phone call and abandon all efforts to contact Ms. Mendez-Cruz and explain the importance of her returning to Washington with her children. The State's actions fell far short of using all available means to bring the witnesses to trial. *See Hobson*, 61 Wn. App. at 336. Thus, the witnesses were not "unavailable" and the trial court's finding that their statements were admissible under the forfeiture by wrongdoing doctrine violated Mr. Hernandez's Sixth Amendment confrontation right.

**2. The witnesses' statements were not admissible under the forfeiture by wrongdoing statute because the State did not satisfy the "wrongdoing" requirement.**

The trial court's finding that the witnesses' statements were admissible under the forfeiture by wrongdoing doctrine was also made in error because the State failed to show Mr. Mendez-Cruz engaged in

"wrongdoing." Under *Dobbs*, the court must find both that the witness was made unavailable by the wrongdoing and that the defendant engaged in the wrongful conduct with the intention of preventing the witness from testifying. 180 Wn.2d at 11.

The doctrine is designed to present defendants from having an incentive to "bribe, intimidate, or even kill witnesses against them." *Id.* at 4 (quoting *Giles v. California*, 554 U.S. 353, 365, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)). Thus, courts have found wrongful conduct where the defendant committed an act of violence against a witness. *See State v. Mason*, 160 Wn.2d 910, 916, 162 P.3d 396 (2007) (defendant killed his friend); *Giles*, 554 U.S. at 356 (defendant shot and killed his ex-girlfriend). Courts have also found wrongful conduct where the defendant threatened violence against a witness. *See State v. Fallentine*, 149 Wn. App. 614, 622, 215 P.3d 945 (2009) (witness feared for his life if he testified); *Dobbs*, 180 Wn.2d at 12-13 (defendant brandished a gun and threatened to kill his ex-girlfriend if she testified against him).

Here, there is no indication Mr. Hernandez induced Ms. Mendez-Cruz to leave for Mexico through a wrongful act of bribery, intimidation, or violence. Instead, the transcript of the jail phone calls

demonstrate Mr. Hernandez offered support for Ms. Mendez-Cruz's decision to leave the state.

When determining whether to admit the witnesses' statement under the forfeiture by wrongdoing doctrine, the trial court rejected the State's concession that Ms. Mendez-Cruz was the first to propose returning to Mexico before trial. 2 RP 154, 173. However, the transcript shows the court erred in making this finding and that, in fact, Ms. Mendez-Cruz did broach the subject first:

> Olga – Should I go to Mexico with the kids?
>
> Jenaro – Eh?
>
> Olga – Should I go to Mexico with the kids?
>
> Jenaro – If you do it, you should do it as soon as possible.
>
> Olga – That's what I'm telling you. I think it would be easier, no?
>
> Jenaro – Yeah. But if you do that you should decide it right away, before trial.
>
> Olga – That's why I'm saying.
>
> . . . .

> Jenaro – Yeah, but… But I don't want that either, I don't want you to go to Mexico.
>
> Olga – Why?
>
> Jenaro – Well no, I don't know. It doesn't give me a good feeling.
>
> Olga – But then you can go to trial, and even win it.
>
> Jenaro – If that happens, I would win the trial for sure. But we cannot talk about that over the phone, my love. It's your decision, not mine. I don't know, I don't know what you can do about that so… understand?
>
> . . . .
>
> Jenaro – But if you want, think about it. I don't know what you'll decide. You can do it, and maybe it can be good, it can be bad. I don't know.
>
> Olga – It's the only option too.
>
> Jenaro – Oh yeah, it's a very good option, and I had never thought about that one either.
>
> Olga – But I'm telling you, is [sic] the only option I have.

Ex. 15 at #118, 8:01.

Mr. Hernandez later offered to help Ms. Mendez-Cruz with the cost of going to Mexico. Ex. 15 at #128, 17:02. While she expressed

hope that she would not have to leave, he did not threaten or intimidate her, and she proceeded to discuss the details with him at great length over the course of several weeks. Ex. 15 at #128, 1:18 - #157, 2:50. Evidence presented at the child hearsay hearing suggested Ms. Mendez-Cruz's primary motivation for leaving for Mexico was a fear that her children would be removed from her care, after CPS indicated as much when it discovered she was leaving the kids home alone.[2] 1 RP 72.

The State claimed Mr. Hernandez's actions constituted "wrongdoing" because a court order prohibited Mr. Hernandez from contacting Ms. Mendez-Cruz. 2 RP 153. However, the violation of the court order is not what caused Ms. Mendez-Cruz to take her children and leave for Mexico. *See Dobbs*, 180 Wn.2d at 11 (a defendant forfeits his confrontation rights when "the witness had been made unavailable *by* the wrongdoing." (emphasis added)). Unlike an act of bribery, intimidation, or violence, Mr. Hernandez's assistance with a plan that Mr. Mendez-Crus initiated was not "wrongful conduct." The

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[2] This is unsurprising, given evidence presented at the child hearsay hearing and trial indicated Mr. Hernandez watched the children while Ms. Mendez-Cruz worked. 1 RP 34; 3 RP 263; 5 RP 592.

court erred when it determined the forfeiture by wrongdoing doctrine applied, and this Court should reverse.

**3. Y.M.'s statements were inadmissible under RCW 9A.44.120.**

a. Y.M.'s statements were testimonial.

"[T]estimonial statements may not be introduced against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." *Beadle*, 173 Wn.2d at 110 (citing *Crawford*, 541 U.S. at 53-54). As explained above, Y.M.'s statements were testimonial. It is unnecessary to engage in an analysis under RCW 9A.44.120 because any statements sought to be admitted under the child hearsay statute remain subject to exclusion under the Confrontation Clause. *Beadle*, 173 Wn.2d at 110-11. Because Y.M.'s statements were testimonial, the court erred when it found them admissible under RCW 9A.44.120.

b. Y.M. was not "unavailable."

Even if this Court finds some of Y.M.'s statements were not testimonial, those statements were not admissible under RCW 9A.44.120 because the statute requires the witness be unavailable. Pursuant to this statute:

> 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*.

(emphasis added).

"[U]navailability for purposes of nontestimonial child hearsay statements are properly evaluated under ER 804(a)." Pursuant to 804(a)(6), a witness is unavailable when she is absent from the hearing "and the proponent of the statement has been unable to procure the declarant's attendance… by process or other reasonable means." *See Beadle*, 173 Wn.2d at 115. As discussed above, the State did not engage in reasonable means to procure Y.M.'s attendance at trial. The address of the home where Y.M. was staying was easily ascertainable and yet the State did nothing but place a phone call to Mexico.

Because the State failed to show Y.M. was unavailable, the court erred in admitting her statements pursuant to RCW 9A.44.120.

**4. Reversal is required.**

Where a constitutional right is at stake, the State must convince this Court, beyond a reasonable doubt, that any reasonable jury would have reached the same result absent the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Beadle*, 173 Wn.2d at 119. The State cannot do that here. Because Y.M.'s statements were not admissible under the forfeiture by wrongdoing doctrine or the child hearsay statute, her statements would have been excluded if not for the court's errors. Without Y.M.'s hearsay statements, the State could not have proven its case.

Indeed, even if this Court finds that only Y.M.'s statements to Ms. Scott were improperly admitted, the State cannot show that any reasonable jury would have reached the same result absent the error because it was only in this interview that Y.M. described the acts in any detail. *See* Ex. 10. Because the State cannot meet its burden of showing the trial court's errors were harmless, this Court should reverse.

F. CONCLUSION

Mr. Hernandez's Sixth Amendment right to confront the witnesses against him was violated when the trial court wrongly found that the witnesses' statements were admissible under the forfeiture by wrongdoing doctrine and that Y.M.'s statements were nontestimonial and admissible under the child hearsay exception. Because the State could not have proven its case to the jury without the trial court's erroneous admission of these hearsay statements, this Court should reverse.

DATED this 29th of May, 2015.

Respectfully submitted,

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Attorneys for Appellant

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | NO. 72411-8-I |
| v. | ) | |
| | ) | |
| JENARO HERNANDEZ, | ) | |
| | ) | |
| Appellant. | ) | |

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MAY, 2015, 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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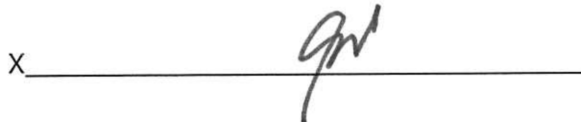
| [X] KING COUNTY PROSECUTING ATTORNEY<br>[paoappellateunitmail@kingcounty.gov]<br>APPELLATE UNIT<br>KING COUNTY COURTHOUSE<br>516 THIRD AVENUE, W-554<br>SEATTLE, WA 98104 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>AGREED E-SERVICE<br>VIA COA PORTAL |
| [X] JENARO HERNANDEZ<br>375573<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>____________ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29TH DAY OF MAY, 2015.

X 

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