No. 95572-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYLER J. MCVEY
Petitioner.

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

The Honorable Carol Murphy, Judge
Cause No. 15-1-00783-5

ANSWER TO PETITION FOR REVIEW

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B. STATEMENT OF THE CASE.

1. Procedural Facts

On August 29, 2016, the State filed a First Amended Information alleging one count of Rape of a Child in the First Degree occurring on or between March 1, 2015 and April 7, 2015, and one count of Child Molestation in the First Degree occurring on or between March 1, 2015 and April 7, 2015. CP 42. On September 1, 2016, the jury found the appellant, McVey, guilty of both charges. CP 126-127. The Court of Appeals affirmed his convictions. Unpublished Opinion, No 49635-6-II, Appendix A to Petition for Review.

2. Substantive Facts

Kecia Johnson and Jason Seevers are the parents of E.S., who was born on October 21, 2010. RP 39:13-40: 18. Ms. Johnson and Mr. Seevers separated when E.S. was approximately two years old. RP 41: 3-10. Ms. Johnson began a relationship with Tyler McVey in 2014. RP 42:2-15; 43: 2-6. Mr. McVey would stay at Ms. Johnson's residence often and would be at her house when she was not there. RP 43: 14-24. Ms. Johnson would usually

leave for work about 6:30 or 6:45 and Mr. McVey would watch E.S. RP 48: 3-11. This arrangement occurred three or four times. RP 48: 12-13.

Mr. Seevers indicated that he picked up E.S. when Mr. McVey was there and not Ms. Johnson on April 7, 2015, March 11, 2015, March 14, 2015 and March 24, 2015. RP 97: 6-25; 99: 21-25; 100:1-2. On April 7, 2015, Mr. Seevers picked up E.S. and Mr. McVey came to the door and said "Here you go, here is your daughter." RP 101-102. Mr. Seevers noticed that E.S. wouldn't say anything, which was very unusual. RP 102: 9-11. E.S. was also skittish and acting funny, in a manner that Mr. Seevers had not seen her act before. RP 102: 22-24. Mr. Seevers asked E.S. what was wrong and E.S. stated, "Tyler touches me, and I don't like it." RP 103: 6-10. When Mr. Seevers asked E.S. where did he touch you, E.S. clammed up and was quiet. RP 103:25-104:2.

Mr. Seevers called Ms. Johnson and E.S. told Ms. Johnson what she had said to Mr. Seevers. RP 104: 15-20. When he got home, Mr. Seevers and his wife gave E.S. a doll and asked her where Tyler had touched her and she pointed to the doll's vaginal area. RP 106:17- 108:7. The next day, Mr. Seevers made an

appointment at Oakland Bay Pediatrics and was referred to the sexual assault clinic. RP 109:21-22, 111:2-6.

Detective Alfred Stanford testified regarding his role in the investigation of the case. Detective Stanford contacted Monarch Children's Justice and Advocacy Center to set up a forensic interview for E.S. RP 140:16-19. During his investigation, Detective Stanford determined that Mr. McVey's date of birth was October 7, 1989. RP 143: 18-23.

Sue Villa, also known as Sue Batson, a child forensic interviewer at Monarch Children's Justice and Advocacy Center in Lacey, WA, interviewed E.S. on April 30, 2015, at the Monarch Children's Justice and Advocacy Center. RP 163:25-164:1; 164:6; 165: 6-7; 172: 12-21. Ms. Villa described E.S. as kind of a spunky little girl with a bit of an opinion of her own and giving an unusually clear statement. RP 174:14-19. E.S. communicated very effectively and was very articulate. RP 175:14-17. When asked "Why are you here to talk to me?" E.S. stated that she was there to talk about Tyler. RP 176: 13-14. E.S. stated that he had touched her with his hands and she didn't like it. She specifically identified him as touching the area of her body that she used to go potty and said he "screwed" it and it hurt. RP 177: 1-14. E.S. clarified that

his hand went inside her body and that stated that Tyler was her mom's boyfriend. RP 177:16-19. E.S. told Ms. Villa that it happened more than one time in the dining room. RP 177: 20 – 178:8.

E.S. described specific details to Ms. Villa about an incident where his hand went inside her body where E.S. used the term screwed. RP 178:12-24. E.S. indicated that the touch was inside her underpants. RP 181:17-18.

Dr. Joyce Gilbert, a Pediatrician at Providence St. Peter's Sexual Assault Clinic and Child Maltreatment Center, conducted an examination of E.S. on April 10, 2015. RP 198:13-25; 230: 6-7. Dr. Gilbert indicated that E.S. had great communication skills for a four-year-old. RP 223: 4-5. Dr. Gilbert conducted a medical interview with E.S. RP. 225. When asked why she was at the doctor's office, E.S. stated it was because Tyler pinched her and she immediately pulled down her leggings and showed Dr. Gilbert her upper thigh and pinched it in three different areas. Dr. Gilbert asked her if Tyler pinched her anywhere else and E.S. would look down, say no, or just be quiet. RP 226: 2-17. Dr. Gilbert stated that E.S. brought up the name Tyler when asked why she was at the doctor's office by stating because Tyler pinched me and saying

that in was inappropriate. RP 227: 1-8. When E.S. demonstrated the pinching she pinched her anterior thigh close to the groin but not in the genital area three times and twisted and said, "This is what Tyler did." RP 227: 15-21. Dr. Gilbert asked E.S. if it hurt when Tyler pinched her and she said yes. E.S. described that he pinched her in the dining room when mommy was at work. E.S. also stated that Tyler was mommy's boyfriend. RP 228: 4-19.

Dr. Gilbert then conducted an examination using a colposcope. As soon as a blanket was pulled back and E.S. visualized her genital area, as Dr. Gilbert was using the colposcope, E.S grabbed her clitoral hood, pulled it out and twisted it and said, "This is what Tyler does." RP 237: 5-18. During the next part of the exam, the nurse was assisting with the labia traction where she gently has her hands on the labia, one hand on each one, and she just separates them, and that way the inner opening area can be visualized. When the nurse did this, E.S. put her hands inside the nurse's hands, pushed the nurse's hands away and said, "I can do this." Dr. Gilbert asked how she knew how to do that and she said, "This is what Tyler taught me to do when he puts in fingers in here" and she pointed with her fingers right into the vaginal opening. RP 238: 9-24. E.S.'s examination

was normal which Dr. Gilbert testified was not surprising medically because 95 percent of the children who describe or disclose penetrating injury have a normal exam. RP 241:3- 242:6.

E.S. testified that she told her dad that Tyler touched her private and identified Mr. McVey as Tyler in the courtroom. RP 124:23- 125:13. E.S. described her privates as being below the waist and stated that it happened once in the dining room of her mom's old house while her mom was at work. RP 126 3-18.

C. ARGUMENT.

1. This Court should not accept review where the Court of Appeals correctly noted that the holding of *State v. Alexander* was inapplicable to the facts of this case.

McVey fails to give any reason why this Court should accept review pursuant to RAP 13.4(b). Under that rule, a petition for review will be accepted by this Court only:

> "(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

RAP 13.4(b). McVey's Petition for Review rests on whether or not the Court of Appeals decision in this case conflicts with the holding of Division I of the Court of Appeals in State v. Alexander, 64 Wn.App. 147, 822 P.2d 1250 (1992). The Court of Appeals decision does not conflict with Alexander. There is no basis upon which this Court should accept review.

In State v. Alexander, Division I of the Court of Appeals found that improper testimony, inadmissible hearsay, and improper conduct by the prosecution had prevented the defendant from obtaining a fair trial and stated, "we cannot conclude that a rational jury would have returned the same verdict had [the improper testimony] and prosecutor's improper remarks been properly excluded." 64 Wn.App. 147, 158, 822 P.2d 1250 (1992). While Division I ultimately concluded that "without [the] inadmissible testimony, the evidence presented to [that] jury was too confused to allow it to find Alexander guilty of either count beyond a reasonable doubt," the facts of that case are easily distinguishable from the facts of this case. Id.

In this case, E.S. consistently indicated that she was sexually touched both inside and outside of her body. Pursuant to RCW 9A.44.120, Mr. Seevers, Dr. Gilbert and Sue Villa (Batson),

were permitted to testify as to statements that E.S. made to them in regard to the sexual acts that occurred, by order of the Court entered after a Child Hearsay hearing had occurred on December 28, 2015. CP 16-20. McVey did not assign error to the trial Court's findings in regard to Child Hearsay. This case did not involve the plethora of issues that occurred in Alexander. Here, the jury was provided with admissible evidence and ultimately found Mr. McVey guilty beyond a reasonable doubt. The Court of Appeals noted, Seevers, Villa and Dr. Gilbert all testified regarding E.S.'s statements and those statements were properly admitted following a hearing under the child hearsay statute. Unpublished Opinion, at 4.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In this case, in order to prove the charge of Rape of a Child in the First Degree, the State was required to prove that on or between March 1, 2015 and April 7, 2015, in the State of Washington, Tyler McVey did have sexual intercourse with E.S. who was less than 12 years old, not married to the defendant and

that the defendant was at least 24 months older than E.S. CP 42; RCW 9A.44.073. All of the elements of that offense were presented to the jury at trial. E.S. testified that the touching occurred at her mom's old house while her mommy was at work. RP 126. Ms. Johnson testified that the Mr. McVey watched E.S. when she went to work at her home. She testified that the home was in Lacey. RP 43: 6-11; 48:11. Officer Heather Stetler testified that she went to Ms. Johnson's residence in Lacey and that it is in Thurston County, Washington. RP 159:11-13.

Both Mr. Seevers and Ms. Johnson testified that E.S. has never been married, and Ms. Johnson testified specifically that E.S. has never been married to Mr. McVey. RP 77:4-12; 94:13-16. E.S. was born on October 21, 2010 and Mr. McVey was born on October 7, 1989. RP 39; 143:22-23. Simple math shows that E.S. was four years old at the time of the offenses and Mr. McVey was far more than 24 months older than E.S.

Sexual intercourse has its ordinary meaning and occurs upon any penetration, however slight, and also means any penetration of the vagina or anus, however slight, by an object. RCW 9A.44.010(1). E.S. told Mr. Seever that "Tyler touches me and I don't like it." RP 103. She also demonstrated where he had

touched her on a doll and showed that the touching was in the vaginal area. RP 106:17-108:7. When E.S was interviewed by Sue Villa, she indicated that Tyler had touched her with his hands and she didn't like it. She specified that he touched the part of her body that she used to go pee and said he "screwed" it and it hurt. RP 177:1-14. She also stated that his hand went inside her body and that it happened more than one time in the dining room. RP 177-178. When examined by Dr. Gilbert, E.S. grabbed her clitoral hood and twisted it and said, "This is what Tyler does." RP 237: 5-18. When the nurse assisted with labia traction, E.S. stated "I can do this," and clarified saying, "this is what Tyler taught me to do when he puts his fingers in here" while pointing to her vaginal opening. RP 238: 9-24. Based on that evidence, viewed in a light most favorable to the State, any rational trier of fact could find that sexual intercourse occurred.

To prove the crime of Child Molestation in the First Degree Count II, the State was required to show that on or between March 1, 2015 and April 7, 2015, in the State of Washington, the defendant did engage in sexual contact with E.S. an was at least thirty-six months older than E.S, who was less than 12 years old and not married to the accused. CP 42. As discussed above with

regard to Count I, there was ample testimony that the acts occurred in the State of Washington, that Mr. McVey was not married to E.S. and there was an age difference far greater than thirty-six months.

Mr. Seevers testified that there were four occasions when he picked up E.S. when Mr. McVey was watching her and Ms. Johnson was not present and that those occurred on March 11, 2015, March 14, 2015, March 24, 2015, and April 7, 2015. RP 97:6-25; 99:21-25; 100: 1-2. Sue Villa testified that E.S. described acts of sexual contact on more than one occasion in the dining room. RP 177:20-178:8. Dr. Gilbert indicated that E.S. described pinching on her upper thigh in three different areas, close to her groin. RP 227-226. She further testified that he touched her in the dining room when mommy was at work. RP 228: 4-19. Later, while using Dr. Gilbert used the colposcope, E.S. grabbed her clitoral hood, pulled it out and twisted it and said, "This is what Tyler does." RP 237: 5-18. During the labia traction portion of the exam, E.S. said, "this is what Tyler taught me to do when he puts his fingers in here, while attempting to help the nurse and pointing to her vaginal opening. RP 238: 9-24.

Sexual contact is defined as any touching of the sexual or other intimate parts or a person done for the purpose of gratifying

the sexual desire of either party. RCW 9A.44.010(2). Contact is intimate within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be known to expect that, under the circumstances, the parts touched were intimate and therefore the touching was proper. A jury may determine that "parts of the body in close proximity to the primary erogenous areas" are intimate parts. State v. Harstad, 153 Wn.App 10, 21, 218 P.3d 624, (2009). In Harstad, the Court of Appeals found that touching the upper inner thigh can constitute sexual contact, stating, "We conclude that a person of common intelligence could be expected to know that [the victim's] upper inner thigh, which puts the defendant's hand in closer proximity to a primary erogenous zone than touching the hip does, was an intimate part." Id. at 22.

McVey cites to State v. Bridge, 91 Wn.App. 98, 966 P.2d 418 (1998) for the proposition that "when the evidence presented is consistent with both an inculpatory hypothesis and exculpatory hypothesis, such evidence is insufficient to support a conviction. Petition for Review, at 11. This is an incorrect statement of holding of that case and the law of sufficiency of the evidence. In Bridge, the court looked at a second degree burglary conviction where the

only evidence linking the defendant to the burglary was a latent fingerprint on a magnetic tool that had been purchased a month or two before the burglary. 91 Wn.App. at 99.

The court correctly stated the standard for sufficiency of the evidence, stating, "We review the evidence in a light most favorable to the State and then determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 100 (internal quotations and citations omitted). The Court further stated, "While the government need not exclude all inferences or reasonable hypotheses consistent with innocence,...the record must contain sufficient probative facts from which a factfinder could reasonable infer a defendant's guilt under the beyond a reasonable doubt standard." Id. at 100 (internal citations omitted). Ultimately, the Court held that "evidence of a latent fingerprint absent proof by the State that the print could only have been impressed at the time of the crime was committed, is insufficient to support a conviction for burglary." Id., at 101 (internal quotation omitted).

McVey attempts to argue that the holdings of Bridge and Alexander combined together with the forensic testimony that did not note any recent trauma lead to a conclusion that no rational jury

could find that McVey committed the offenses. Rape of a Child in the First Degree and Child Molestation in the First Degree are not the same as latent fingerprint burglary charges. McVey's claim that the forensic medical evidence somehow negates the sufficiency of the other evidence is not consistent with the medical testimony provided at trial. Dr. Gilbert testified that while E.S.'s examination was normal, that finding was not surprising medically because 95 percent of children who describe or disclose penetrating injury have a normal exam. RP 241:3-242:6.

The forensic examination was also not the only evidence against McVey. As noted above, there was ample evidence for a rational juror to find that McVey committed the offenses that he was charged with. McVey continues to argue that E.S.'s testimony had inconsistencies. However, the evidence presented at trial showed the four year old E.S consistently described the sexual abuse that she endured. The law recognizes that medical evidence is often inconclusive in sexual assault cases. RCW 9A.44.020 states, "In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated."

In this case, the evidence was sufficient to convict McVey of both Rape of a Child in the First Degree and Child Molestation in the First Degree. The decision of the Court of Appeals is not contrary to the holding of State v. Alexander and there is no reason that this Court should accept review.

D. CONCLUSION.

The evidence presented at trial was sufficient to support McVey's convictions. The holding of the Court of Appeals does not conflict with the Division I's holding in State v. Alexander. As the Court of Appeals correctly affirmed McVey's convictions, the State respectfully requests that this Court deny McVey's Petition for Review.

Respectfully submitted this 21 day of March, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Answer to Petition for Review on the date below as follows:

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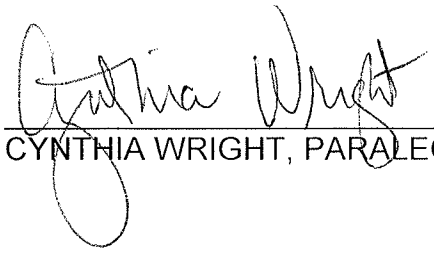
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 21 day of March, 2018, at Olympia, Washington.



CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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