

02162-9

021629

NO. 62162-9-I

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Respondent,

v.

BRYON KOELLER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, ISLAND COUNTY

REPLY BRIEF

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2010 JAN 20 AM 10:31

SUZANNE LEE ELLIOTT
Attorney for Appellant

705 Second Ave.
Suite 1300
601 Union Street
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

A. REPLY ARGUMENTS..... 1

1. PERMITTING THE WITNESS TO TESTIFY FROM A
SECLUDED LOCATION WITHOUT HAVING TO FACE THE
DEFENDANT, THE JUDGE OR THE JURY UNDERMINES THE
RELIABILITY OF THE TESTIMONY 1

2. THE TRIAL COURT ERRED IN FINDING THAT REQUIRING
VM TO TESTIFY IN THE PRESENCE OF KOELLER WOULD
CAUSE VM TO SUFFER SERIOUS EMOTIONAL OR MENTAL
DISTRESS 4

3. THE TRIAL COURT FAILED TO PROTECT THE
DEFENDANT’S RIGHT TO COMMUNICATE CONSTANTLY
WITH HIS DEFENSE ATTORNEY DURING THE EXAMINATION
OF THE CHILD WITNESS 4

4. THE TRIAL COURT ERRED IN FINDING THAT V.M. WAS
COMPETENT TO TESTIFY BECAUSE THERE WAS NO
TESTIMONY ABOUT WHEN THE ALLEGED ABUSE OCCURRED

5. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE
THAT VM SUFFERED FROM POST TRAUMATIC STRESS
DISORDER..... 6

B. CONCLUSION..... 7

TABLE OF AUTHORITIES

Cases

Coy v. Iowa, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857
(1988)..... 2

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2nd 177
(2004)..... 1

Maryland v. Craig, 497 U.S. 1012, 124 S.Ct. 3157, 111 L. Ed. 2nd 666,
868-69 (1990)..... 2

State v. Ulestad, 127 Wn. App. 209, 111 P.3d 276 (2005)..... 5, 6

Statutes

RCW 9A.44.01 4

A. REPLY ARGUMENTS

1. *PERMITTING THE WITNESS TO TESTIFY FROM A SECLUDED LOCATION WITHOUT HAVING TO FACE THE DEFENDANT, THE JUDGE OR THE JURY UNDERMINES THE RELIABILITY OF THE TESTIMONY*

This case cannot be distinguished from *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2nd 177 (2004) in any meaningful way. First, in this case, as in *Crawford*, the witness was just as “unavailable” to testify in court in the presence of the defendant and the jury.

Second the procedure utilized to present the absent witness’s testimony did not satisfy the ultimate goals of the of the Confrontation Clause – ensuring the reliability of the evidence. It is true in this case that defense counsel had the opportunity to cross-examine V.M. But the virtual “confrontations” offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. “It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’ ” *Coy v. Iowa*, 487 U.S. 1012, 1019, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

As Justice Scalia (the author of the majority opinion in *Crawford*) noted in his dissent in *Maryland v. Craig*, 497 U.S. 1012, 124 S.Ct. 3157,

111 L. Ed. 2nd 666, 868-69 (1990), this substantial step away from face-to-face confrontations results in a diluted truth-inducing effect. He said:

The “special” reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by “special” reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in *Children's Eyewitness Memory* 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 Am.J.Crim.L. 227, 230-233 (1987); Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash.L.Rev. 705, 708-711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983-1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra*, at 239-240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, concluded that there was an “absence of credible testimony and [a] lack of significant corroboration” to support reinstatement of sex-abuse charges, and “no credible evidence of murders.” H. Humphrey, *Report on Scott County*

Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.*, at 9; answers were suggested by telling the children what other witnesses had said, *id.*, at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.*, at 9. The report describes the consequences as follows:

As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them. . . . In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide. *Id.*, at 10-11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.*, at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

While it is true that *Crawford* did not expressly overrule *Craig*, the State is simply incorrect when it argues that the technology here aided in the truth seeking process. In fact, it eliminated one of the Confrontation Clause's

primary protections, the fact that face-to-face confrontations reduce the likelihood that a witness will lie. For these reasons, RCW 9A.44.0150 is unconstitutional.¹

2. *THE TRIAL COURT ERRED IN FINDING THAT REQUIRING VM TO TESTIFY IN THE PRESENCE OF KOELLER WOULD CAUSE VM TO SUFFER SERIOUS EMOTIONAL OR MENTAL DISTRESS*

The State's arguments in rebuttal here are not convincing. There was insufficient evidence to demonstrate the kind of emotional distress that would justify depriving Koeller of his fundamental right to confront his accuser face-to-face.

Moreover, the State fails to explain why it would be proper for the trial judge to make any findings on this issue without first bringing VM into the courtroom to determine if he could testify. RCW 9A.44.150(d) clearly contemplates that there will first be an effort to have the child testify in open court. For example, it provides for alternative arrangements if the child can testify in front of the defendant but not in front of the jury.

3. *THE TRIAL COURT FAILED TO PROTECT THE DEFENDANT'S RIGHT TO COMMUNICATE CONSTANTLY WITH HIS DEFENSE ATTORNEY DURING THE EXAMINATION OF THE CHILD WITNESS*

¹ The decisions from Kansas, Utah and Missouri cited by the State fail to examine in any depth the questions of whether "virtual" cross-examination provides reliable testimony.

Koeller clearly preserved all of his objections to the closed circuit procedure. He repeated his objections at every opportunity. The defense gave the state and the trial judge every opportunity to correct its errors in this case. The presentation of testimony via closed circuit TV occurs only on the *State's* motion. RCW 9A.44.150. It is an extraordinary procedure and the State has the burden of strictly complying with the statute. *State v. Ulestad*, 127 Wn. App. 209, 111 P.3d 276 (2005) was published in 2005. If the State did not have the proper equipment to ensure that Koeller was in continual contact with his lawyer and did not have to delay or interrupt the proceedings in order to speak to his lawyer, they it should not have proceeded as it did.

The violation of Koeller's right to "constant communication" in this case was equal to or greater than the violations that resulted in reversal in *Ulestad*. The communication was delayed. Koeller had to interrupt the proceedings to call his counsel in front of the jury. But, even worse, he would have had to converse with his counsel in open court in front of the jury. When counsel pointed this out to the trial judge, his concerns were ignored.

4. *THE TRIAL COURT ERRED IN FINDING THAT V.M. WAS COMPETENT TO TESTIFY BECAUSE THERE WAS NO TESTIMONY ABOUT WHEN THE ALLEGED ABUSE OCCURRED*

The charging period spanned 3 years, between June 1, 2004 and March 31, 2007. But V.M. was never asked when the abuse occurred. During the competency hearing he stated that he knew the defendant “when I was like three-years old.” 3/6/08 at 186. He did not remember “sucking pee-pee.” Id. at 193. He did not remember the defendant helping him take a shower. Id. at 194. He did not remember going with his Grandmother to the hospital to talk about the abuse. Id. at 195. He did say that the defendant hurt him once by “making me puke.” Id. at 197. He also stated that he remembered his fourth birthday. Id. at 202.

The defense moved to dismiss the charges at the conclusion of V.M. testimony because the state had failed to establish that V.M. recalled any abuse at any time. Id. at 209.

5. *THE TRIAL COURT ERRED IN ADMITTING EVIDENCE THAT VM SUFFERED FROM POST TRAUMATIC STRESS DISORDER*

Ms. Satsuma testified that V.M. suffered from PTSD. She testified that PTSD occurred only after a child suffered from a traumatic event. 5/14/08 at 166. She said that her job was to “desensitizing the client to their experience.” Id. at 177. She said that V.M. engaged in sexualized behaviors.” Id. at 174. She said that he feared adults and that showers triggered his anxieties. Id. She discounted the possibility that witnessing

domestic violence between his parents as the source of V.M.' trauma. Id. at 182.

The sum total of Ms. Satsuma testimony was that the only source of trauma that could have possibly caused VM's PTSD was sexual abuse.

B. CONCLUSION

For the reasons stated above and for the reasons stated in his opening brief, Koeller was denied a fair trial and this Court should reverse his conviction.

Respectfully submitted this 19th day of January, 2009.


Suzanne Lee Elliott
WSBA 12634

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on January 19, 2010, I placed a copy of this document in the U.S. Mail, postage prepaid, to the following:

Mr. Bryon Koeller #318732
HB – 15
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Island County Prosecuting Attorney
Island County Superior Court
101 NE Sixth Street
Coupeville, WA 98239-5000


Suzanne Lee Elliott