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STATE OF WASHINGTON

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Nº. 34721-1-II

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

STATE OF WASHINGTON
Respondent,

v.

ROBERT D. HEAGY,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 04-1-01712-1
The Honorable Sally F. Olsen, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Mr. Heagy received ineffective assistance of counsel.
2. The second trial court erred in adopting the first trial court's evidentiary rulings where the rulings had not been finalized as written orders.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a defendant receive ineffective assistance of counsel where trial counsel stipulates that the evidentiary rulings made by the first trial court, which were not formally reduced to a written order and which deprived the defendant of his right to present a defense, were binding in the second trial? (Assignments of Error Nos. 1 & 2)
2. Does a defendant receive effective assistance of counsel where trial counsel fails to object to the introduction of highly prejudicial hearsay and where trial counsel elicits highly prejudicial hearsay from witnesses? (Assignment of Error No. 1)
3. Are the oral evidentiary rulings of a trial court binding on the second trial court following a mistrial due to a hung jury? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

In November of 2004, Mr. Heagy was living with Ladonna Henderson and her family, including her then eleven-year-old daughter, T.D., on Warner Road in Bremerton. 2/13/06, RP 109-112, 127.¹ In the evening of November 2, 2004, Ms. Henderson and her husband went into Ms. Henderson's room to watch a movie. 2/13/06, RP 114. Mr. Heagy was on a mat in the living room and T.D. was in a bedroom next to the living room. 2/13/06, RP 112-114.

In the early morning hours of November 3, 2004, T.D. began screaming in the living room. 2/13/06, RP 115. Ms. Henderson went to the living room and saw T.D.

¹ There were two trials, and the transcripts for each trial are numbered separately. Reference to the record will be made by giving the date the hearing was held followed by the page number.

standing on the bed in the living room screaming. 2/13/06, RP 115. Mr. Heagy was on the cot, apparently sleeping. 2/13/06, RP 115. Ms. Henderson asked T.D. what was wrong and T.D. told Ms. Henderson that Mr. Heagy had put his hands in her pants. 2/13/06, RP 115-116; 127-128. Ms. Henderson ripped the blanket off of Mr. Heagy and attacked him. 2/13/06, RP 116, 136. Mr. Henderson also assaulted Mr. Heagy. 2/13/06, RP 117; 128-129; 136. The Hendersons did not have a phone, so at some point Ms. Henderson left the house to call 911. 2/13/06, RP 117. While Ms. Henderson was on the phone with the 911 operator, she heard screaming and yelling coming from her house. 2/13/06, RP 117-118.

Mr. Henderson threw Mr. Heagy out of the house and Mr. and Ms. Henderson threw all of Mr. Heagy's belongings onto the front lawn, including his teeth. 2/13/06, RP 118-119; 128-129.

On November 3, 2004, Deputy Matthew Hill responded to a 911 call at 5418 Warner Street in Bremerton. 2/9/06, RP 18. Deputy Herrin arrived at the location shortly after Deputy Hill. 2/9/06 RP 20; 2/10/06 RP 57. Deputy Hill had been informed by dispatch that there was a physical dispute in progress at the house and that an 11-year-old girl woke up screaming and told the individual who called 911 that somebody had touched her. 2/9/06, RP 19.

When Deputy Hill arrived at the scene he saw Mr. Heagy standing in the yard, and there was clothing and other items strewn about the yard. 2/9/06, RP 20-21. As Deputy Hill approached Mr. Heagy, Mr. Heagy told Deputy Hill that he hadn't done anything wrong and another man came out of the house yelling at Deputy Hill and Mr. Heagy. 2/9/06, RP 22. Deputy Hill handcuffed Mr. Heagy and placed him in the back of

his patrol car. 2/9/06, RP 22. Deputy Herrin arrived and took the second man back into the house. 2/9/06, RP 23. Deputy Hill told Mr. Heagy that he was being detained until Deputy Hill could determine what was going on then went into the house to assist Deputy Herrin. 2/9/06, RP 24.

Deputy Herrin took T.D.'s mother and father into the kitchen to talk to them. 2/10/06, RP 61-62. Deputy Herrin learned that T.D. had told her parents that on two separate occasions during that night Mr. Heagy came into her room. 2/10/06, RP 62. The first time, T.D. woke up and Mr. Heagy had one of his hands down T.D.'s pants and was rubbing one of her arms or hand areas. 2/10/06, RP 62. T.D. told Mr. Heagy that he needed to leave and that her mother would not want Mr. Heagy in T.D.'s room. 2/10/06, RP 62. Mr. Heagy indicated that he was cold, so T.D. gave him a blanket and he left. 2/10/06, RP 62. The second time Mr. Heagy came into T.D.'s room, Mr. Heagy laid down on the bed and whispered something to himself to the effect of "Bob, don't move." 2/10/06, RP 63. T.D. was scared and told Mr. Heagy to go get her dog, then ran into the living room and began screaming. 2/10/06, RP 63.

When Deputy Hill entered the house he observed Deputy Herrin talking to a male and female in the kitchen area. 2/9/06, RP 42. Deputy Hill identified the angry person he had seen outside as T.D.'s father. 2/9/06, RP 26. After Deputy Herrin had finished questioning the parents, Deputy Hill spoke with T.D. 2/9/06, RP 27. T.D. told Deputy Hill that she had been in her bedroom sleeping when Mr. Heagy put his hands in her pants from the rear and up around towards her vagina. 2/9/06, RP 29-30.

After speaking to T.D., Deputy Hill went out and spoke with Mr. Heagy. 2/9/06, RP 31. Deputy Hill gave Mr. Heagy his *Miranda* warnings. 2/9/06, RP 31. Mr. Heagy

told Deputy Hill that he was not drunk and that he understood the *Miranda* warnings. 2/9/06, RP 34. Deputy Hill asked Mr. Heagy what happened (2/9/06, RP 34) and Mr. Heagy told Deputy Hill that he had been sleeping in the living room when the Henderson's dog started whining. 2/9/06, RP 35-36. Mr. Heagy took the dog into T.D.'s room where he fell over onto her. 2/9/06, RP 36. Deputy Hill asked Mr. Heagy if he touched T.D. and Mr. Heagy said he may have. 2/9/06, RP 36. Mr. Heagy did not remember where he might have touched T.D. but denied having put his hands into T.D.'s pants. 2/9/06, RP 37. Mr. Heagy told Deputy Hill that he might have told T.D. not to tell her mother that he had touched her. 2/9/06, RP 38-40.

After Deputy Hill went back outside, Deputy Herrin collected three blankets as evidence. 2/10/06, RP 63-64.

Deputy Hill took Mr. Heagy to jail and booked him. 2/9/06, RP 40. Mr. Heagy told Deputy Hill that he had been assaulted by Mr. Henderson. 2/9/06, RP 41.

On November 5, 2004, Mr. Heagy was charged with one count of child molestation in the first degree. CP 5-9. On September 1, 2005, a jury trial commenced on this charge. 9/1/05, RP 67.

At the first trial, Mr. Heagy's defense was that the Hendersons had been forcing Mr. Heagy to give them his prescription methadone pills as rent for his staying with them, and that when he threatened to stop giving his pills to them, the Hendersons had T.D. make up a story that Mr. Heagy had touched her. 3/16/05, RP 1; CP 38-40.

The trial court granted Mr. Heagy's request to have hair follicles from Mr. and Ms. Henderson tested for methadone use. CP 47-48. Ultimately, the hair tested negative for methadone because more than 90 days had passed since the alleged methadone use,

and methadone is only detectible in hair for a period of 90 days. 8/31/05, RP 51-52. Mr. Heagy attempted to present both his own testimony and testimony of other witnesses who had seen the Hendersons take methadone, but the first trial court ruled pre-trial that the issue of the Hendersons' drug use was irrelevant except for as it related to their credibility and ability to perceive the events on the night of November 2, 2004. 8/31/05, RP 52-56.

Trial counsel for Mr. Heagy objected to the court's ruling and informed the court that evidence of the Hendersons' drug use was not being offered for the purpose of attacking their credibility, but as proof of motive for the Hendersons to fabricate a story about Mr. Heagy molesting their daughter. 8/31/05, RP 55. The trial court responded by telling trial counsel that he would have to "argue it when we get closer to it." 8/31/05, RP 56.

In the first trial, Mr. Heagy chose to testify. 9/06/05, RP 243-276. Mr. Heagy attempted to testify that the Hendersons required Mr. Heagy to give them his prescription methadone as his rent payment, but the prosecutor objected to the testimony on grounds that it was speculation. 9/06/05, RP 248-250. The jury was excused and trial counsel for Mr. Heagy informed the court that Mr. Heagy was going to testify that he was told by the Hendersons to give them his pills or he couldn't stay in their house. 9/06/05, RP 250.

Trial counsel for Mr. Heagy also informed the court that he intended to call at least one other witness who would testify to observing the Hendersons using Mr. Heagy's methadone pills. 9/06/05, RP 250. The trial court agreed with the State that this evidence was hearsay and irrelevant. 9/06/05, RP 250-251. Over trial counsel's objection, the trial court ruled that because there was "no testimony of the daughter, and

there [was] no connection that [the court could] see, [sic] between what the daughter testified to and what may have been, assuming for the sake of argument, the understanding between the adults,” that “[t]here [was] nothing in the record to indicate that [the Hendersons were demanding Mr. Heagy give them his methadone]. That’s pure speculation and irrelevant.” 9/06/05, RP 251. The trial court would not even allow Mr. Heagy to testify whether or not he had to fill his prescription early because his pills were being used up. 9/06/05, RP 252.

The first trial ended with a hung jury, and the trial court declared a mistrial. 9/08/05, RP 316-324.

Prior to the second trial, counsel for Mr. Heagy stipulated to all the evidentiary rulings made by the first trial court while maintaining all objections previously raised during the first trial. 2/08/06, RP 2. Trial counsel specifically stipulated that the witnesses which Mr. Heagy had intended to call in the first trial to support his defense that the Hendersons were extorting methadone from Mr. Heagy could not testify in the second trial. 2/08/06, RP 6-7. The second trial court excluded these witnesses. 2/08/06, RP 8.

At the second trial the State presented the testimony of Deputy Hill (2/09/06, RP 14-51), Deputy Herrin (2/10/06, RP 56-78), T.D. (2/13/06, RP 85-108), Ladonna Henderson (2/13/06, RP 102-126), Andre Henderson (2/13/06, RP 127-138), Ellen Schupay (2/13/06, RP 143-172), and Megan Inslee (2/13/06, RP 173-187). Aside from T.D. herself, all of the State’s witnesses who testified regarding the events of the night in question relied on what T.D. told the witness or told her parents as the basis of their testimony regarding what happened on the night of November 2-3, 2004: Deputy Hill,

2/13/06, RP 26-30, Deputy Herrin, 2/10/06, RP 60-64, Ms. Henderson, 2/13/06, RP 115-117, Mr. Henderson, 2/13/06, RP 127-128,, Ellen Schupay, 2/13/06, RP 158-163.

No witnesses were called on Mr. Heagy's behalf in the second trial.

The jury returned a verdict of guilty. 2/15/06, RP 2-4.

The trial court found that Mr. Heagy was a persistent offender and sentenced him to life imprisonment without the possibility of parole. 4/14/06, RP 16; CP 324-333.

Notice of Appeal was timely filed on April 14, 2006. CP 334-335.

D. ARGUMENT

1. **It was ineffective assistance of counsel for Mr. Heagy's trial counsel to stipulate that the evidentiary rulings of the first trial court were binding on the second trial court where the first court's rulings had not been reduced to written orders and where the first trial court's rulings deprived Mr. Heagy of his ability to present his defense.**

In order to show that he received ineffective assistance of counsel, an appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

- a. *The first trial court's ruling barring the introduction of evidence that the Hendersons were forcing Mr. Heagy to give them his methadone violated Mr. Heagy's right to present a defense.*

A criminal defendant has a constitutional right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The *Washington* Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19, 87 S.Ct. at 1923, *cited with approval* by *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Washington defines the right to present witnesses as a right to present material and relevant testimony. *See State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless. *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

Here, in the first trial Mr. Heagy sought to introduce testimony both from himself and other witnesses that the Hendersons were forcing Mr. Heagy to give them his methadone pills in return for being able to stay at the Hendersons' house. 8/31/05, RP 52-56; 9/06/05, RP 252; CP 38-40. The trial court ruled that this evidence was irrelevant and inadmissible since no evidence had been presented by the State that the Hendersons used drugs. 8/31/05, RP 52-56; 9/06/05, RP 251. The trial court's ruling was an abuse of discretion and highly prejudicial to the defense.

Mr. Heagy's defense was that the Hendersons were extorting his methadone pills from him as rent and that when he threatened to stop giving them his pills, the Hendersons had T.D. fabricate the accusation that Mr. Heagy molested her. The evidence sought to be introduced by Mr. Heagy was therefore relevant, material, and admissible. Further, the evidence would have been be far more probative of the Hendersons' motivations and Mr. Heagy's innocence than it would have been prejudicial

to any party. Because this evidence was Mr. Heagy's defense, introduction of this evidence would not have been confusing or a waste of time or needlessly cumulative.

The first trial court's ruling that this evidence was irrelevant and inadmissible because the State had not introduced any evidence to establish that the Hendersons used Mr. Heagy's methadone is patently erroneous. In denying Mr. Heagy the ability to present evidence that the Hendersons were forcing him to give them his methadone, the trial court violated Mr. Heagy's constitutional right to present a defense and his right to compulsory process. Because the violation of the right to compulsory process is presumed prejudicial, the State bears the burden of showing the trial court's error was harmless.

b. The evidentiary rulings of the first trial court had not been reduced to a written order and were therefore not binding on the second trial court.

"A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is rendered. It has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." *State v. Mallory*, 69 Wn.2d 532, 533-534, 419 P.2d 324 (1966).

Here, the only written order regarding admissibility of evidence entered by the trial court was the "Order in Limine" filed on August 31, 2005. CP 131-132. This Order was entered pre-trial and did not address any of the objections made by defense counsel during trial or the first trial court's rulings regarding those objections, including defense counsel's objection to the trial court's refusal to allow witnesses to testify regarding the Hendersons' use of Mr. Heagy's methadone. 9/06/05, RP 250-252.

Because none of the first trial court's rulings on objections and admissibility of evidence made during the first trial were reduced to written orders, none of the trial court's oral rulings were binding on the second trial court. Mr. Heagy's trial counsel had the opportunity to re-argue the admissibility of all of the State's as well as Mr. Heagy's evidence, but instead chose simply to stipulate that the first trial court's rulings were binding on the second trial court and informed the second trial court that all of the objections made by defense counsel in the first trial were being renewed in the second trial. 2/8/06, RP 2-7.

As discussed above, the first trial court's ruling on the admissibility of evidence relating to the Hendersons' methadone use was an error and deprived Mr. Heagy of the ability to present a defense. Trial counsel's stipulation to the inadmissibility of evidence relating to the Hendersons' methadone use was tantamount to voluntarily waiving the ability to present a defense. Mr. Heagy was prejudiced because he was unable to present his defense to the charges brought against him.

Further, even if the ruling regarding the evidence of the Hendersons' drug use is ignored, trial counsel's abandonment of Mr. Heagy's right to contest the introduction of the State's evidence in the second trial constituted ineffective assistance of counsel. Had Mr. Heagy's trial counsel not stipulated that the first trial court's rulings governed the admissibility of evidence in the second trial, Mr. Heagy would have been able to present his own testimony and testimony of his other witnesses to support Mr. Heagy's defense that the charge against him was fabricated and, as discussed below, could have objected to the introduction of highly prejudicial hearsay testimony offered by the State.

The trial court's oral rulings were not binding and had no authority over the second trial court. The voluntary relinquishment of Mr. Heagy's right to present a defense and contest the admissibility of the State's evidence cannot be considered to be a legitimate trial tactic. Mr. Heagy received ineffective assistance of counsel.

2. It was ineffective assistance for Mr. Heagy's trial counsel to fail to object to highly prejudicial hearsay and double hearsay offered by the State and then to compound the prejudice by eliciting the same highly prejudicial hearsay and double hearsay on cross examination.

Hearsay is an out of court statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. ER 801. Hearsay is not admissible except as provided by the Washington Rules of Evidence, by other court rules, or by statute. ER 802.

With the exception of T.D. herself, no witness presented by the state who testified regarding the events of the night of November 2, 2004 actually observed those events, but instead, based their testimony on T.D.'s or T.D.'s parents' out-of-court statements to the witness.

Deputy Hill testified that his knowledge was based on his asking T.D. what happened to her and T.D.'s response that "she told me that she was in her bedroom sleeping, and the defendant put his hands in her pants." 2/9/06, RP 27-29. Deputy Herrin testified that he spoke to T.D.'s parents and they repeated to him what T.D. had told them. RP 2/10/06, 62-63. Ms. Henderson testified that she was awakened by T.D. screaming in the living room and T.D. told Ms. Henderson that Mr. Heagy had put his hands in her pants. 2/13/06, RP 115-116. Mr. Henderson testified that he followed his wife into the living room where T.D. was screaming that Mr. Heagy had touched her, and that he spoke to T.D. further after Ms. Henderson had left to call 911. 2/13/06, RP 127-

131. Ellen Schupay, the Sexual Assault Nurse Examiner for Harrison Medical Center, testified that she had asked T.D. what had happened and that T.D. had told her that Mr. Heagy had touched T.D. 2/13/06, RP 158-171.

Aside from T.D. herself, the State's witnesses who testified about the alleged molestation all confirmed that they were repeating the statements T.D. had made to them. This was cumulative hearsay. Further, Deputy Herrin repeated the statements that the Hendersons had made to him, but which were actually repetitions of what T.D. had said to the Hendersons. Hearsay is admissible in certain situations and there are exceptions to the hearsay rule (*see* ER 803 and 804), however, T.D. was competent, available to testify, and in fact did testify, and the State never indicated which hearsay exception, if any, applied to the introduction of T.D.'s statements through any of the State's witnesses.

The in-court repetition of T.D.'s statements to other witnesses was clearly hearsay, but trial counsel for Mr. Heagy failed to object to it. Further, not only did trial counsel for Mr. Heagy fail to object to the admission of highly prejudicial hearsay testimony in direct examination of the State's witnesses, but on cross examination of each of the State's witnesses, trial counsel elicited the same hearsay, sometimes in more detail than then State had gone into on direct.

Failure by trial counsel to object to the introduction of highly prejudicial hearsay and double hearsay and trial counsel's eliciting of the same highly prejudicial hearsay and double hearsay on cross examination cannot be characterized as a legitimate trial tactic.

Mr. Heagy was prejudiced by his trial counsel's failure to object to the introduction of the hearsay testimony because rather than hear the details of the alleged

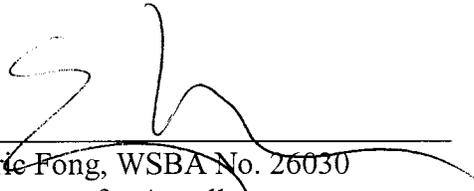
molestation once from the alleged victim, T.D., the jury heard the details numerous times from police officers, the alleged victim's parents, and the sexual examination nurse for the State. This overemphasized the hearsay testimony and, when coupled with the inability of Mr. Heagy to present a defense due to trial counsel's stipulations, deprived Mr. Heagy of a fair trial. Mr. Heagy received ineffective assistance of counsel.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Heagy's conviction and remand for a new trial.

DATED this 3rd day of November, 2006.

Respectfully submitted,



Eric Fong, WSBA No. 26030
Attorney for Appellant

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**IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,)
)
 Respondent,) Appeal No. 34721-1-II
) Superior Court No. 04-1-01712-1
)
 vs.)
) **AFFIDAVIT OF MAILING**
)
 ROBERT HEAGY,)
)
 Appellant.)
 _____)

The undersigned, being first duly sworn, under oath, states: That on the 6th day of November, 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

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Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Robert Heagy
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Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

a true copy of the Brief of Appellant.

Ann Blankenship

ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 6th day of November, 2006.

Meredith Nora Orpilla

MEREDITH NORA ORPILLA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard
My commission expires 9/9/10

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