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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY LS
DEPUTY

No. 36851-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

PATRICK HANNON

Appellant.

Lewis County Superior Court

Cause No. 05-1-00707-3

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
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by

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STATEMENT OF THE CASE

With the exception of the following facts, the statement of the case as set out by the Appellant is adequate for purposes of responding to this appeal. Because Appellant has taken issue with the court's ruling regarding admissibility of an alleged "recantation" of a prior allegation against a different defendant by the victim in this case, what follows are excerpts from the transcript of the hearing and the court's ruling regarding that issue.

DEFENSE COUNSEL: As an offer of proof, I have declarations signed by both Kelli Jones and William Peppers, the parents of the alleged victim here, filed in the Grandchamp case. Both say basically the same thing, that [the victim] had made up the story regarding Donald Grandchamp and she made that statement about being sexually touched by Donald at the beginning of the trouble and admitted that the sexual touching never happened, that she made up the story because she was mad at Donald, who was her uncle. [8/29/07 RP 23]

* * *

PROSECUTOR: [The incident described above] happened at the same time as an actual incident of abuse that did take place. The first allegation is in 2001 against Christopher Grandchamp. Immediately after that investigation was initiated, she then came up with allegations against Donald, and it's unclear whether she made them up or not. I'm not sure if we could prove that one way or another. [8/29/07 RP 24, 25]

* * *

[PROSECUTOR CONTINUED]: I did look at the Donald Grandchamp file, and he did admit to at one point pulling down her pants, not her underwear, but at some point he pulled down her pants, but he said that's all he did. So it's not quite as straightforward as she just made this up and, you know, decided it wasn't true. It came during an actual abuse. And it was six years ago, 2001, when she was six years old. . . . It's completely removed in time. A six-year-old it not even always competent to testify in trial. Bringing this up now would be extremely prejudicial. If the jury hears that she may have made a false allegations about this kind of thing once before, we might as well send the jury home, because the case is going to be over at that point. Once they hear that, they're not going to believe anything she says. The prejudice is so high and the probative value so low, that the State didn't feel it should come in at all. [8/29/07 RP 25, 26]

THE COURT: Does anybody know whether the case against Donald Grandchamp with respect to this victim went away and was dismissed because of a ruling made as a result of a child hearsay hearing? . . .

PROSECUTOR: I honestly don't know exactly. It was dismissed after that hearing. . . .

THE COURT: So it's entirely possible that the case against Mr. Grandchamp went away not because it was proven necessarily that the allegation made by this victim was false, but rather that she was found to be not credible and therefore statements made to third parties were not admissible, and nobody seems to know whether she could or couldn't testify. [8/29/07 RP 27]

* * *

THE COURT: [I]s there any evidence that the alleged victim in this case actually recanted or stated in any court proceeding that the allegation was false?

PROSECUTOR: Not that I'm aware of. [8/29/07 RP 28]

THE COURT: So all we have are hearsay statements from other people? [8/29/07 RP 28]

PROSECUTOR: I believe that's all there are.

THE COURT: Is that the situation, Mr. Johnson?

DEFENSE COUNSEL: I can't contradict that. I can't say that she made a statement under oath in court.

THE COURT: Do you have anything in the way of an offer of proof to demonstrate other than through extrinsic evidence of third-party statements, which would be hearsay, to the effect that she recanted the statement and admitted that it was in fact false? [8/29/07 RP 28]

DEFENSE COUNSEL: That would be the testimony. That would be the testimony, statements that she made to her parents that her allegation against Donald Grandchamp was not true and was made because she was mad at him and apparently in an effort to get him into trouble. [8/29/07 RP 29]

* * *

THE COURT: Has her deposition been taken or has she been questioned as to the incident that you're referring to in this proceeding? In other words, have you asked her questions in this proceeding in a prior hearing or an interview dealing with the issue of whether she would, if she were asked, admit that she had previously made up statements? [8/29/07 RP 29]

DEFENSE COUNSEL: We interviewed her, and in her interview, I asked her over and over about the summer of 2005, and she did not in that interview indicate that there was any sexual contact with Mr. Hannon. The prosecutor was there. He also asked her questions and got the same response. So she's got inconsistent statements that are going to be forthcoming. . . [8/29/07 RP 29, 30]

THE COURT: Well, the issue is whether she's made false accusations. Did anybody ask anything about the supposed false accusations that were made six years ago involving Mr. Grandchamp? [8/29/07 30]

PROSECUTOR: No.

DEFENSE COUNSEL: She was not asked about that.

* * *

THE COURT: Well, first of all, the general rule, as I understand it from the cases cited, is that evidence of a prior claim of sexual abuse or rape is inadmissible in a prosecution against someone else because it's irrelevant. [8/29/07 RP 31] Secondly, the only way that it can possibly be relevant is if it's demonstrably false and shown to be demonstrably false, and then even if we get to that point, it's still within my discretion to admit it or not admit it based upon a balancing of the probative value versus the prejudice.

Under the circumstances, given that nobody seems to know what really happened with respect to the case involving Donald Grandchamp and this victim, this alleged victim, and we don't know if the case was dismissed as an act of discretion by the prosecutor's office after the ruling that was made apparently on a child hearsay hearing, and we don't know if it was dismissed for other reasons, and there's nothing in the way of a definitive record other than hearsay statements that the statement was in fact admitted to be false. [8/29/07 RP 32]

I find that the statement is inadmissible as irrelevant based upon those factors, but I also find that even if the statement were shown to be false, in my view the prejudice of having the jury hear that on a prior occasion an alleged victim has made a claim of abuse at the hands of a relative -- and we don't know all of the particulars as to why that case was not prosecuted to fruition and an ultimate verdict being reached -- the prejudice of admitting that evidence that the alleged victim supposedly recanted, as far as I'm concerned, far outweighs any probative value of attempting to

demonstrate that she made this up, especially when you stop and consider that the victim at the time was six. She's now 12. And there's a substantial difference between a six-year-old and her ability to observe, perceive and testify truthfully as to what she's observed and perceived, and that of a 12-year-old.

And that does not by any stretch of the imagination mean that Mr. Johnson cannot aggressively cross-examine her as to any and all claims made with respect to Mr. Hannon, but the case is going to be tried on the evidence or lack of evidence against Mr. Hannon and not on what did or did not happen with respect to the Grandchamp matter, so I'm granting the motion in limine.

8/29/07 RP 33.

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE ABOUT THE VICTIM'S PRIOR, ALLEGEDLY FALSE ALLEGATIONS OF SEXUAL ABUSE BY A DIFFERENT DEFENDANT.

Hannon claims the trial court erred when it refused to allow the defense to cross examine the victim about her prior, allegedly false allegations of sexual abuse against her uncle, Donald Grandchamp. The trial court did not abuse its discretion in refusing to allow this evidence.

A trial court's limitation on the scope of cross-examination is reviewed for a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). A trial court has broad discretion in evaluating this evidence because the trial court is in a

superior position to evaluate the impact of the evidence. State v. Hughes, 106 Wn.2d 176, 201, 721 P.2d 902 (1986)(quoting State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)). As to cross examination, "[t]he Confrontation Clause does not guarantee defendants cross-examination to whatever extent they desire." Bigby v. Dretke, 402 F.3d 551, 573 (5th Cir. 2005). A trial judge has discretion to "impose reasonable limits on cross-examination based on concerns about 'harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); ER 403 (evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury). "Unfair prejudice" generally means an undue tendency to suggest a decision on an improper basis, often an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). In general, evidence that a victim of sexual abuse has accused others is not relevant, unless the defendant can show that the previous accusation was false. State v. Harris, 97 Wn.App. 865, 872, 989 P.2d 553 (1999), *review denied*, 140 Wn.2d 1017 (2000) (citing State v. Demos, 94 Wn.2d 733, 736-737, 619 P.2d 968

(1980)(unless a prior rape report is demonstrably false, evidence concerning the allegation is irrelevant and inadmissible).

Washington courts have upheld decisions by trial courts to exclude extrinsic evidence that an alleged victim has falsely accused others of sexual abuse in the past. See e.g., State v. Mendez, 29 Wn.App. 610, 630 P.2d 476 (1981); State v. Williams, 9 Wn.App. 622, 513 P.3d 854 (1973). A defendant's right to cross examine a witness is subject to certain limitations: the evidence must be relevant and the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

In the present case the trial court did not abuse its discretion in refusing to allow inquiry on cross examination into evidence that the victim in this case had allegedly falsely accused another person of sexual abuse in the past. The trial court correctly weighed the probative versus prejudicial value of the proffered evidence and determined that its prejudicial value outweighed the probative value of the evidence. 8/29/07 RP 32, 33. Furthermore, the trial court was not convinced that the prior allegations made by the victim against the other defendant were actually false. 8/29/07 RP 30-32.

Trial counsel had an opportunity to interview the victim in this case and could have questioned her about her prior allegations, but trial counsel decided not to ask her about the prior allegations in his interview. 8/29/07 RP 29,30. The trial court was correct in refusing to allow inquiry into these allegations because it properly weighed the evidence and because there had been no definitive showing that the prior allegations were actually false. 8/29/07 RP 32 (trial court noting about the allegations, "there's nothing in the way of a definitive record other than hearsay statements that the statement was in fact admitted to be false). Accordingly, this argument by the appellant is without merit.

II. ASSESSMENT OF ATTORNEY FEES AGAINST THE DEFENDANT WAS PROPER.

Hannon argues that he was "deprived of the effective assistance of counsel when his attorney breached his duty of loyalty by facilitating imposition of additional punishment" when trial counsel drafted an order seeking payment for attorney fees. Hannon goes on to claim that such an action by his counsel meant that his counsel "ceased to act as an advocate and joined the state's effort to punish Mr. Hannon." Brief of Appellant 8,9. Under the current state of the law regarding assessment of attorney fees,

Hannon's argument is preposterous. Moreover, Hannon cannot cite to any on-point authority for his proposition that his counsel's requesting recoupment of attorney fees meant that his attorney "breached the duty of loyalty" or violated his due process rights because the fees were added without Hannon being present. First of all, Hannon signed the Judgment and Sentence which clearly states that attorney fees were "TBD" (to be determined). Second, Washington law allows for the assessment of attorney fees for the services of a court-appointed attorney against a convicted defendant. CrR 3.1(d)(2) states, in pertinent part: "[t]he assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection." In addition, RCW 10.01.160 permits the court to order a convicted defendant to repay the costs of a lawyer as part of the judgment and sentence. Additionally, RCW 9.94A.030(28) further explains: "Legal financial obligation" means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include . . . court costs. . . court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligations that is assessed to the offender as a result of a felony conviction." RCW 9.94A.030(28) (emphasis added). Thus, because the costs levied

against Hannon for his attorney's fees are allowed under Washington law, and because the judgment and sentence clearly indicated that Hannon would be responsible for such fees "to be determined" ("TBD), Hannon's arguments to the contrary are simply without merit.

Hannon further claims that the Court's amending the judgment and sentence to add costs of attorney fees without him being present violated Hannon's Due Process right to be present at a critical stage of the proceeding. Brief of Appellant 10. This claim is also without merit.

A "defendant does not have a blanket constitutional right to appear at all meetings between court and counsel. In cases decided under the federal constitution, the courts hold the defendant has the right to be present at every state of his trial for which 'his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.'" State v. Ahern, 64 Wn.App. 731, 734-35, 826 P.2d 1086 (1992)(emphasis in original), citing State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332-33, 78 L.Ed. 674, 90 A.L.R. 575 (1934)), cert. denied, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989)

(other citations omitted). As the Ahern court continued, "[w]e are of the opinion. . . that [the constitutional] provision has reference to matters connected with the trial." Ahern, 64 Wn.App. 734 (emphasis added). Here, the complained-of issue (order for attorney fees) was not "connected with the trial," nor did the setting of attorney fees in Hannon's absence in any way impact Hannon's ability to "defend against the charge." Ahern, supra. Instead, all that occurred was defense counsel submitted his affidavit and order for attorney fees. CP 40-46; CP 36-38. Hannon had been informed in the Judgment and Sentence that attorney fees were "TBD" --to be determined. Furthermore, at his sentencing hearing the trial judge told Hannon there would be "[a]ttorney fee by separate billing." 10/10/07 RP 11. Despite being vocal about his displeasure with his trial counsel, Hannon made no objection at the time to the fact that he would be assessed attorney fees "by separate billing." Id. In sum, Hannon's presence at the proceeding to set the amounts of attorney fees-- which he was informed would be forthcoming-- had no relation to his opportunity to defend against the amount of attorney fees requested. This is in part because the appropriate time to assess a defendant's ability to pay is when the State seeks to enforce payment of the fee.

Mahone, infra. Accordingly, Hannon's "Due Process" rights were not violated by the court's entering the order for attorney fees.

Hannon also argues that the trial court "was obligated (by statute) to inquire into Mr. Hannon's ability to pay." Brief of Appellant 11. This argument is also misplaced.

Inquiry into the defendant's ability to pay is necessary only when the State enforces collection under the judgment, or imposes sanctions for nonpayment. Thus, a defendant's indigent status at the time of sentencing does not bar an award of costs. State v. Mahone, 98 Wn.App. 342, 348, 989 P.2d 583 (1999); State v. Blank, 131 Wn.2d 230, 242, 252-53, 930 P.2d 1213 (1997); State v. Curry, 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), *aff'd*. 118 Wn.2d 911, 829 P.2d 166 (1992) (the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation). Put another way, "[c]onstitutional principles will be implicated . . . only if the government seeks to enforce collection of the [costs] at a time when [the defendant is] unable, through no fault of his or her own, to comply." Curry, 62 Wn.App. at 681 (quoting United States v. Pagan, 785 F.3d 378, 381 (2nd Cir. 1986 (internal quotes omitted)). So, "it is at the point of enforced collection . . . where an indigent may be faced with the alternatives

of payment or imprisonment, that he 'may assert a constitutional objection on the ground of his indigency.'" Id. quoting Pagan, 785 F.3d at 382 (emphasis added). As another court explained, "the inquiry at sentencing as to *future* ability to pay is somewhat speculative. . . .Accordingly, we hold that formal findings of fact are not required for imposition of recoupment of attorney fees at sentencing." State v. Baldwin, 63 Wn.App. 303, 310-312, 818 P.2d 1116 (1991) ("[w]hether a defendant has the ability to pay should be determined when the State seeks to collect the obligation due it"). To the State's knowledge, there has been no attempt to enforce collection of Hannon's legal financial obligations. Accordingly, Hannon's protestation about the court's failing to ascertain his ability to pay before imposing costs is premature.

CONCLUSION

The trial court did not abuse its discretion when it refused to allow inquiry by the defendant into alleged prior false allegations of sexual abuse by the victim against a different person. Hannon could not prove that the prior allegations were false, and the trial court properly weighed all relevant factors before making its decision. Additionally, attorney fees were properly assessed against Hannon because he knew at the time he signed the

judgment and sentence that the assessment of attorney fees was forthcoming. Moreover, Hannon had no absolute right to be present when those fees were added to his judgment and sentence. Accordingly, all of Hannon's arguments are without merit and his convictions should be upheld in all respects.

DATED THIS 24 day of July, 2008.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by:



LORI SMITH, WSBA 27961
Deputy Prosecutor

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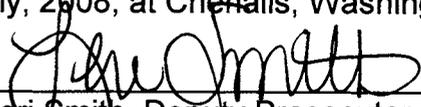
NO. 36851-0-II

DECLARATION OF
MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington,
declare under penalty of perjury of the laws of the State of Washington that
the following is true and correct: On 7/24/08, I served
appellant with a copy of the **RESPONDENT'S BRIEF** by depositing same in
the United States Mail, postage pre-paid, to attorney for Appellant at the name
and address indicated below:

Backlund & Mistry
203 East 4th Avenue, Suite 404
Olympia, WA 98501

DATED this 24 DAY OF July, 2008, at Chehalis, Washington.



Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Lewis County Prosecuting Attorney's Office,