NO. 39282-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES PATRICK WHEAT,

Appellant.

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

The Honorable Robert L. Harris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court's erroneous admission of prejudicial hearsay likely affected the jury's verdict, and reversal is required.

Issue pertaining to assignment of error

Over defense objection, the State's witness testified that she overheard another witness say to appellant over the phone that he had said he committed the charged offense. Where there was no evidence regarding appellant's response to this statement, did the trial court err in admitting it as an adoptive admission by appellant? Where the State's reliance on the statement to prove appellant admitted the offense likely affected the jury's verdict, is reversal required?

B. STATEMENT OF THE CASE

1. Procedural History

On July 17, 2007, the Clark County Prosecuting Attorney charged appellant James Patrick Wheat with one count of rape of a child in the first degree. CP 1; RCW 9A.44.073. The case proceeded to jury trial before the Honorable Robert L. Harris, and the information was amended at the close of the State's case as to the charging period. CP 38. The jury returned a guilty verdict, and the court imposed a standard range sentence

of 160 months to life. CP 82, 137. Wheat filed this timely appeal. CP 147, 154.

2. Substantive Facts

In May 2006, when MW was 10 years old, she moved from her mother's home out of state to live with her father, James Wheat, in Vancouver. 5RP[1] 476. MW has three adult half sisters, Kelli Orthmeyer, Leanne Wheat, and Christy Childs, who also lived in the Vancouver area. 2RP 89. When MW first arrived, she and Wheat stayed with Orthmeyer for a short time and then moved into another house across the street from her. 2RP 90, 94. Orthmeyer lived with Wheat and MW for about a month in the summer of 2006, and Leanne Wheat lived with them for two to four weeks in the spring of 2007. 2RP 98-99.

While she was living with her father, MW spent time with her sisters and their children. 3RP 257-58. She sometimes spent the night at their houses, and they sometimes spent the night at hers. 3RP 263-64. When Orthmeyer was living with MW and Wheat, she talked to MW about sex. MW was very open and asked a lot of questions. 4RP 349-50.

In March 2007, MW and Leanne Wheat were at Orthmeyer's house when Leanne asked MW if Wheat had been molesting her. MW

[1] The Verbatim Report of Proceedings is contained in 10 volumes, designated as follows: RP—1/8/09; 1RP—1/12/09; 2RP—1/13/09 (a.m.); 3RP—1/13/09 (p.m.); 4RP—1/14/09 (a.m.); 5RP—1/14/09 (p.m.); 6RP—1/15/09; 7RP—2/24/09; 8RP—3/27/09; 9RP—4/17/09.

said no, but when Leanne insisted that she knew he was, MW agreed. 2RP 119-20. MW did not describe any acts of molestation in detail. 2RP 121. She then talked to both Leanne and Orthmeyer, while Wheat and his sister were in the room. 2RP 122-23.

MW returned to her mother's home on March 29, 2007. 2RP 95-96. Her sisters reported her allegations to the police, and the charge in this case was filed. 3RP 220-21, 228-29; CP 1.

MW testified at trial that on various occasions Wheat put his mouth, hand, and penis on her vagina. 2RP 103. She said the first time it happened, Wheat was sitting in a recliner, he told her to come over, and when she did, he put his mouth on her vagina. 2RP 105. It ended when MW heard Orthmeyer, who was sleeping upstairs, get up to use the bathroom. MW testified that she jumped off and ran upstairs to bed. 2RP 105. While MW testified at trial that Wheat's tongue went inside her vagina, she had said during a defense interview that his tongue had barely touched the surface. 2RP 120; 3RP 187.

Christy Childs testified that she was present for discussions between Wheat and her sisters relating to this case. 3RP 258. She explained that Orthmeyer came to her house after MW had made the allegations and carried on a conversation in the driveway on her cell phone. Childs testified that she heard Wheat's voice on the phone, and

then Orthmeyer screamed at him, "You're the one that said you had your head between her legs." 3RP 258. Orthmeyer denied making this statement or that Wheat had ever admitted having oral-genital contact with MW. 3RP 297.

Defense counsel immediately objected to Childs' testimony, arguing that there was no foundation and the statement was hearsay. 3RP 258. The prosecutor responded that the foundation had been laid, and the statement was not hearsay because "it's related to a conversation between two people." 3RP 259. The court overruled the objection, stating "Means of identification." 3RP 259.

Childs then repeated that she had recognized Wheat's voice on the phone, and she was positive Orthmeyer was talking to Wheat. 3RP 259. When the prosecutor asked her to repeat the conversation she heard, defense counsel again objected on the basis of hearsay. 3RP 259. The court overruled the objection, and Childs testified "I heard James Wheat say something. And Kelli...Orthmeyer responded and said, 'You're the one that had – you're the one that said you had your face between her legs.'" 3RP 260. Again, defense counsel asserted a hearsay objection, and again the court told the prosecutor to continue. 3RP 260. Childs did not describe the phone conversation any further.

When Childs finished testifying, defense counsel moved for a mistrial. He argued that Childs' testimony regarding what Orthmeyer said was hearsay, there was no basis for admitting it, and it was highly prejudicial to the defense. 3RP 268. The court denied the motion, calling the statement an adoptive admission. When defense counsel pointed out that there was no foundation for admitting the statement as an adoptive admission, the court replied that it was part of the conversation with Wheat. 3RP 277.

Defense counsel later asked the court to reconsider its ruling that the statement was an adoptive admission. He pointed out that, as the proponent of the statement, the State was required to produce facts from which the jury could reasonably conclude Wheat heard the statement, understood it, was able to respond, and would have responded if he did not acquiesce. Because there was no evidence about what Wheat said in response to the statement, the State did not meet this burden. 4RP 435-36. The court denied the motion. 4RP 442.

C. ARGUMENT

THE COURT IMPROPERLY ADMITTED ORTHMEYER'S HIGHLY PREJUDICIAL HEARSAY STATEMENT AS AN ADOPTIVE ADMISSION.

Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). Under ER 801(d)(2)(ii), a

statement is not hearsay if it is offered against a party and if "the party has manifested an adoption or belief in its truth[.]" The reasoning behind this rule is that

> when a statement is made in the presence and hearing of an accused that is accusatory or incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and fact of his failure to deny, contradict, or object are admissible [in] a criminal trial as evidence of his acquiescence in its truth.

State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (quoting State v. Redwine, 23 Wn.2d 467, 470, 161 P.2d 205 (1945), overruled on other grounds, State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946)), review denied, 110 Wn.2d 1025 (1988).

A party opponent may manifest adoption of a statement by words, gestures, or silence. State v. Cotton, 75 Wn. App. 669, 689, 879 P.2d 971 (1994) (citing Neslund, 50 Wn. App. at 550-51), review denied, 126 Wn.2d 1004 (1995). "Because of the inherently equivocal nature of silence, however, such evidence must be received with caution." Neslund, 50 Wn. App. at 551. Silence by a party will only constitute an adoptive admission if the party heard the statement and was able to respond, and the circumstances surrounding the statement were such that the party would have responded if there was no intention to acquiesce. Cotton, 75 Wn. App. at 689; Neslund, 50 Wn. App. at 551. "An adoptive admission is

attributed to the defendant and becomes the defendant's own words." Cotton, 75 Wn. App. at 689.

In Cotton, a witness testified that the defendant and another man had a conversation about the shooting in which the first person would say something and the other person would add to it. This Court found that the defendant had adopted the other person's words as his own. Even if his statements did not explicitly constitute an adoption, he clearly heard the statements, was able to respond, and under the circumstances would have responded if he did not agree. Cotton, 75 Wn. App. at 689-90.

Similarly, in Neslund, a witness's testimony that he heard the defendant and her brother participate in a detailed conversation describing the killing and disposal of the victim's body was sufficient to support a finding that the defendant heard and understood the incriminating statements and had the ability to but did not respond. The statements were therefore properly admitted as adoptive admissions. Neslund, 50 Wn. App. at 553.

Here, by contrast, the State failed to prove that Wheat manifested an adoption of Orthmeyer's statement in any way. There was no evidence of any words or gestures which could be construed as an adoption of the statement. See e.g., State v. Lounsbery, 74 Wn.2d 659, 445 P.2d 1017 (1968) (defendant in indecent liberties case failed to deny accusation,

visited psychologist as required by victim's mother, and complained he was being persecuted for "one mistake"); State v. Anderson, 44 Wn. App. 644, 723 P.2d 464 (1986) (defendant manifested adoption of statement by nodding head "yes"). And while a defendant's silence may constitute adoption of a statement in some circumstances, there was no evidence that Wheat remained silent in response to Orthmeyer's statement.

Unlike the witnesses in Cotton and Neslund, Childs did not testify that she heard the entire conversation between Orthmeyer and Wheat. Although she recognized Wheat's voice on the other end of the phone, she did not testify to anything that he said. Childs heard Orthmeyer's statement to Wheat, but there was simply no evidence as to what occurred after she made the statement. 3RP 258-60. The court therefore abused its discretion in permitting the State to attribute Orthmeyer's statement to Wheat as an adoptive admission.

When defense counsel objected to Orthmeyer's statement at trial, the State repeatedly argued that the statement was admissible because it "related to a conversation between two people," and the court seemed to accept this argument at one point. 3RP 259, 268, 277. While there is no "conversation" exception to the hearsay rule, statements in a telephone conversation have been held admissible when offered to prove the nature

of the conversation. State v. Collins, 76 Wn. App. 496, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995).

In Collins, while police officers were executing a search warrant for illegal drugs, one of the officers answered several telephone calls to the apartment. Two of the callers referred to what the officer believed were cocaine transactions, one saying he or she wanted to pick up something and the other saying she needed a "half". The officer was permitted to testify to these conversations over defense objection. Collins, 76 Wn. App. at 497-98. The Court of Appeals held the statements were properly admitted. Because they were not offered to prove that the callers in fact wanted to pick up something and needed a half, the statements were not hearsay. They were relevant, not to prove the truth of the matter asserted, but to establish the callers' beliefs that they could obtain drugs from the apartment. Collins, 76 Wn. App. at 499.

Under the reasoning in Collins, if the State had offered Orthmeyer's statement to establish that she had had a conversation with Wheat about MW's allegation, the statement might have been admissible. That was not the State's purpose in admitting the statement, however. Instead, the State used Orthmeyer's statement to prove the truth of the matter asserted, that Wheat admitted having oral-genital contact with MW.

In fact, the prosecutor relied heavily on this statement for that purpose in closing argument. Although MW described numerous acts, with varying levels of detail and consistency, the State elected to rely on the alleged oral-genital contact. In closing, the prosecutor explained that this election had been made because, from the telephone conversation and from the acts MW described, it was pretty clear oral-genital contact had occurred. 5RP 529.

Next, in comparing the State's case to the defense, the prosecutor argued there were numerous inconsistent statements by the defense witnesses, "and, in essence, ladies and gentlemen, an adoptive admission to the oral sex, on the phone." 5RP 536. Then, after telling the jury the State was not required to produce evidence corroborating MW's allegations, the prosecutor stated, "Well, here we have corroboration, because we have a statement basically put it, or – by an adoptive admission – by the defendant[.]" 5RP 538. In rebuttal, the prosecutor again argued that the allegation was corroborated by "a heated discussion between the defendant and Ms. Orthmeyer, witnessed by his – his own daughter, Ms. Childs." 5RP 580.

Although evidentiary rulings lie within the trial court's discretion, the court abuses its discretion when its ruling is based on untenable grounds. State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000).

A decision is based on untenable grounds if it rests on facts unsupported in the record or is reached by applying the wrong legal standard. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). Because there was no factual or legal basis for admitting Orthmeyer's statement as an adoptive admission by Wheat or as "related to a conversation," the court abused its discretion.

The trial court's erroneous evidentiary ruling requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such is the case here.

The State's complaining witness had enormous credibility problems. Her description as to the number and details of the alleged incidents varied from statement to statement. See 2RP 155; 3RP 187. For example, while two of MW's sisters testified MW told them she woke up on the couch with Wheat's head between her legs, MW denied making that statement and further testified that it never happened. 2RP 140-41; 3RP 182; 4RP 366, 398. And while she refused to answer some of defense counsel's questions on cross examination saying it was too embarrassing to talk about, MW's mother testified that MW told everyone she came into contact with after returning home that she had been molested. 2RP 150, 153, 161; 5RP 481-82. Moreover, both MW's

mother and Orthmeyer testified MW has a bad reputation for truth and veracity. 4RP 367; 5RP 484.

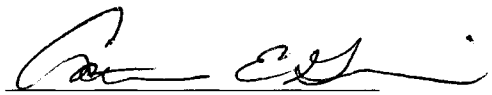
Given MW's questionable credibility and the lack of physical or other evidence to corroborate MW's allegations, the State depended on Orthmeyer's statement to prove its case. The prosecutor repeatedly told the jury that Wheat had admitted committing the charged offense by adopting the statement. Under these circumstances, it is reasonably likely the court's erroneous admission of Orthmeyer's statement affected the outcome of the trial, and reversal is required.

D. CONCLUSION

The court's improper admission of Orthmeyer's highly prejudicial hearsay statement likely affected the jury's verdict. The Court should reverse Wheat's conviction and remand for a new trial.

DATED this 18th day of September, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. James Patrick Wheat,* Cause No. 39282-8-II directed to:

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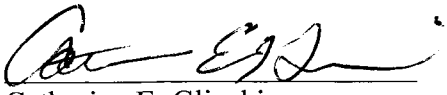
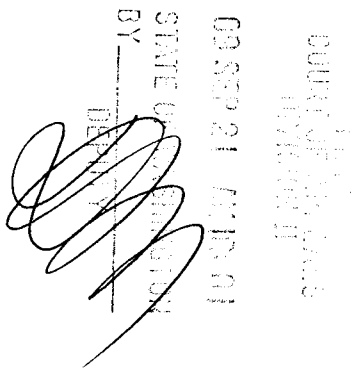
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
September 18, 2009