

No. 42054-6-II

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

STATE OF WASHINGTON, RESPONDENT

V.

LEOVIGILDO LEAL-LEON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Judge Amber L. Finlay

No. 10-1-00247-2

BRIEF OF RESPONDENT

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A. STATE'S COUNTERSTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Although, other than through logical inference, the record does not show that M.D.'s hearsay statements to Nurse Wahl during a medical assessment were for the purpose of diagnosis or treatment, M.D.'s statements are nevertheless admissible because corroborating evidence supports the statements and it appears unlikely that M.D. would have fabricated the statements.
2. Admission of M.D.'s hearsay statements to Nurse Wahl, even if erroneous, was harmless beyond a reasonable doubt.
3. Some of the terms of community custody imposed by the sentencing court are not authorized by law.
 - a) The sentencing court erred when it ordered Leal-Leon not to go into any place where the primary business is the sale of alcohol.
 - b) The sentencing court erred when it ordered Leal-Leon not to purchase or possess alcohol.
 - c) The sentencing court erred when it ordered Leal-Leon not to use or access the internet.
 - d) The sentencing court erred when it ordered Leal-Leon not to purchase, possess or use pornographic materials.
 - e) The sentencing court erred when it ordered Leal-Leon to obtain a chemical dependency evaluation.

B. FACTS AND STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts Leal-Leon's recitation of the procedural history and facts, except for the following distinctions and additional facts, which are limited to facts relevant to the issues presented for review:

C. ARGUMENT

1. Although, other than through logical inference, the record does not show that M.D.'s hearsay statements to Nurse Wahl during a medical assessment were for the purpose of diagnosis or treatment, M.D.'s statements are nevertheless admissible because corroborating evidence supports the statements and it appears unlikely that M.D. would have fabricated the statements.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Leal-Leon asserts that his counsel was ineffective for not objecting to the testimony of Lisa Wahl, a sexual assault nurse, about what the child

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victim told Wahl about the sexual assaults committed against the child victim. However, counsel was not ineffective if the objection would have been overruled. *Id.*

"Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as generally pertinent to diagnosis or treatment," are admissible. ER 803(a)(4). Leal-Leon contends that the victim's statements in this case were not admissible under the medical diagnosis or treatment exception of ER 803(a)(4) because law enforcement referred the victim to Nurse Wahl and because the statements were incriminating against Leal-Leon. The State counters that even though the statements proved to have evidentiary value in the prosecution of Leal-Leon, this circumstance does not nullify the legitimate value and purpose of the statements for medical diagnosis or treatment. *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994).

The child victim's statements to Wahl were admissible because those statements were reasonably pertinent to medical diagnosis or treatment. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004). One of the important, legitimate purposes of a sexual assault nurse's assessment is to prevent further harm to the child victim. *State v.*

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Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007); *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006).

Leal-Leon contends that the child victim's statements are not admissible because, he contends, there is insufficient evidence that the child victim understood that her statement was needed for treatment. But our Supreme Court has recognized that "it is not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability." *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 20-21, 84 P.3d 859 (2004), quoting *State v. Ashcraft*, 71 Wn. App. 444, 457, 859 P.2d 60 (1993).

If it appears unlikely that the child victim would have fabricated the statement and there is corroborating evidence to support the statement, then the statement may be admissible under the medical diagnosis or treatment exception even if the child did not understand the medical purpose of her statements. *Grasso*, 151 Wn.2d at 20.

In the instant case, the child victim, M.D., was thirteen years old when she testified at Leal-Leon's trial. RP 141. She testified with detail, which corroborated her statements to Nurse Wahl, that when she was eleven years old, Leal-Leon sexually abused her. RP 144-173, 211. Nurse Wahl's testimony about what M.D. told her was short, general or abbreviated. RP 211-212.

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Nurse Wahl testified that part of the reason for her sexual assault assessment is to determine risks such as viruses, bacteria, and pregnancy. RP 207. Nurse Wahl testified as to how the medical history is a necessary component of the sexual assault exam. RP 207-208. She described the medical assessment process and described M.D.'s demeanor and the circumstances under which M.D. gave information to Nurse Wahl. RP 212-214, 228-229, 231. The totality of the circumstances under which M.D. gave her statement to Nurse Wahl indicate that she was telling the truth when she made those statements and that she had no reason to fabricate her statement; thus, the statement is admissible even if the record lacks evidence that M.D. understood the medical purpose of the medical assessment. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 20, 84 P.3d 859 (2004); *State v. Florczak*, 76 Wn. App. 55, 64-65, 882 P.2d 199 (1994).

2. Admission of M.D.'s hearsay statements to Nurse Wahl, even if erroneous, was harmless beyond a reasonable doubt.

The State maintains, as argued above, that M.D.'s statements to Nurse Wahl were admissible as a hearsay exception allowed by ER 803(a)(4).

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Even if the statements were not admissible, however, admission of the statements was harmless beyond a reasonable doubt. *State v. Anderson*, 171 Wn.2d 764, 254 P.3d 815 (2011). Wahl's testimony about M.D.'s statements is little more than a mere summary. RP 211-212. M.D. testified at the trial and gave details about specific acts that Leal-Leon committed against her. RP 144-173. Nurse Wahl's cursory testimony concerning Leal-Leon is short and general. M.D.'s testimony is detailed and specific. Because it is therefore clear beyond a reasonable doubt that the jury's verdict is not attributable to Nurse Wahl's testimony about M.D.'s hearsay statement, the error, if any, in admitting the statement, is harmless. *State v. Anderson*, 171 Wn.2d 764, 254 P.3d 815 (2011), citing *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

3. Some of the terms of community custody imposed by the sentencing court are not authorized by law.

The jury convicted Leal-Leon on two counts, child molestation in the first degree and child molestation in the second degree. RP 350-351. When a defendant is convicted of child molestation in the first degree, he must be sentenced under RCW 9.94A.507, which requires a term of community custody under RCW 9.94A.507(5). Child molestation in the

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second degree requires a separate term of community custody under RCW 9.94A.701.

RCW 9.94A.703 specifies the conditions of community custody that the sentencing court may impose. The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009).

- a) The sentencing court erred when it ordered Leal-Leon not to go into any place where the primary business is the sale of alcohol.

There is no evidence located in the record to indicate that Leal-Leon's crimes of conviction were alcohol related. No statutory authority was located to authorize the court to prohibit Leal-Leon from going into places where the primary business is the sale of alcohol. Therefore, the State concedes that this term of community custody is error. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

- b) The sentencing court erred when it ordered Leal-Leon not to purchase or possess alcohol.

For the reasons stated in item "a" above, the State concedes that the sentencing court erred when it ordered Leal-Leon not to purchase or

possess alcohol. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

- c) The sentencing court erred when it ordered Leal-Leon not to use or access the internet.

There is no evidence located in the record where a finding can be supported that Leal-Leon's crimes in this case are related to access to or use of the internet. As such, this condition is not adequately crime-related. The State, therefore, concedes error. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

- d) The sentencing court erred when it ordered Leal-Leon not to purchase, possess or use pornographic materials.

The State respectfully concedes that this term of community custody as it is currently phrased is error. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).

- e) The sentencing court erred when it ordered Leal-Leon not to obtain a chemical dependency evaluation.

The State concedes that on the facts of this case there is insufficient evidence in the record to sustain a finding that a chemical dependency has contributed to Leal-Leon's commission of the crimes of

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conviction and that this condition is, therefore, error. *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003); RCW 9.94A.607.

D. CONCLUSION

Hearsay statements that the child victim in this case made to a sexual assault nurse were for the purpose of medical diagnosis or treatment and were, therefore, properly admissible under ER 803(a)(4). The record does not indicate specifically that the child victim understood the medical purpose of her statements, but the statements were corroborated by the totality of the circumstances under which her statement was given, and there is no reason for her to fabricate her statement. Her statements were, therefore, properly admitted by the trial court. Because the statements were properly admitted, trial counsel was not ineffective for failing object to admission of the statement.

Still more, because the nurse's testimony about the child victim's statement was brief and general, and because the victim testified in detail about the crimes that Leal-Leon committed against her, the jury's guilty verdicts are not attributable to the hearsay statements. Therefore, although the State maintains that admission of the hearsay was not error, even if it was error, it was harmless beyond a reasonable doubt.

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The State asks that the court sustain the jury's guilty verdicts in this case.

Finally, the sentencing court included several terms of community custody that are not authorized by statute. The matter should be returned to the trial court to modify the judgment and sentence by striking the terms of community custody that are error.

DATED: January 4, 2012.

MICHAEL DORCY
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Tim Higgs
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

| | | |
|-----------------------|---|------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 42054-6-II |
| Respondent, |) | |
| |) | DECLARATION OF |
| vs. |) | FILING/MAILING |
| |) | PROOF OF SERVICE |
| LEOVIGILDO LEAL-LEON, |) | |
| |) | |
| Appellant, |) | |
| _____ |) | |

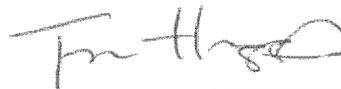
I, TIM HIGGS, declare and state as follows:

On Tuesday, January 4, 2012, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas E. Doyle
Attorney for Appellant
PO Box 510
Hansville, WA 98340

I, TIM HIGGS, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 4th day of January, 2012, at Shelton, Washington.



Tim Higgs (25919)

MASON COUNTY PROSECUTOR

January 04, 2012 - 3:47 PM

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