

No. 48181-2-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Latrina Deshell McNair,

Appellant.

Reply Brief of Appellant

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1. Introduction

McNair's Brief of Appellant argued that hearsay statements made by Z.M. during the investigation identifying McNair as the cause of Z.M.'s injuries violated McNair's constitutional right to confront the witnesses against her when Z.M. was called as a witness at trial but was not available for cross-examination. McNair also argued that Z.M.'s hearsay statements were the only evidence corroborating McNair's alleged confession to the *corpus delicti* of striking Z.M. with a belt. Under Washington's *corpus delicti* rule, the evidence that remained was insufficient to convict McNair of the crime.

The State argues that McNair waived her confrontation clause argument by not objecting at trial. However, the law is not entirely settled on this point. Washington Supreme Court precedent, the manifest constitutional error, and the unique circumstances of this case favor review of this issue. The State also argues that sufficient evidence exists to corroborate the alleged confession, but the State's evidence is not "inconsistent with innocence," as required to overcome the *corpus delicti* rule. This Court should reverse the conviction.

2. Reply Regarding Assignments of Error

The State asks the Court to disregard McNair's assignment of error #2 (regarding denial of a directed verdict) and issues relating to insufficient evidence, alleging the errors are abandoned for lack of argument. However, McNair **did** develop the insufficient evidence argument, in connection with discussion of the *corpus delicti* rule: Because there was no evidence inconsistent with innocence to corroborate the alleged confession, there was insufficient evidence to prove that McNair struck Z.M. with a belt or other instrument or otherwise caused bodily injury to Z.M.—both essential elements of the crime. Brief of Appellant at 6-9. This argument addresses issues 2 and 3 identified in McNair's Brief. Those issues both relate to assignment of error #2: because the evidence was insufficient, the trial court erred in denying McNair's motion for a directed verdict.

The State correctly notes that McNair abandoned issue 4. Upon further review, counsel determined not to argue the issue, but inadvertently neglected to remove it from the list of issues at the front of the Brief. The Court need not address issue 4.

3. Argument

3.1 Admission of hearsay statements by Z.M. violated the Confrontation Clause when Z.M. was unable to testify and was not subject to cross-examination.

McNair's Brief argued that hearsay statements by Z.M. were testimonial statements that should have been excluded under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution because McNair had no opportunity to cross-examine Z.M. regarding those statements. Br. of App. at 5-6. Multiple State witnesses testified that Z.M. said that McNair had caused her injuries. RP 97:20-23 (CPS social worker, Bridget Spence), 111:19-21 (Officer Flippo), 162:3-4 (child forensic investigator, Stacia Adams), 194:21-25 (pediatric nurse-practitioner, Michelle Breland).¹ Each of these statements was testimonial for purposes of Confrontation Clause analysis—a point the State concedes by its silence.

The State argues that McNair waived the Confrontation Clause by not objecting at trial. However, the law is not entirely settled on this point. Washington Supreme Court precedent, the manifest constitutional error, and the unique circumstances of this case favor review of this issue. In the alternative, the State

¹ The State excludes Ms. Breland's testimony from its list (Br. of Resp. at 13-14) because she did not directly identify McNair. However, the hearsay statement is still testimonial for purposes of the Confrontation Clause and should have been excluded.

argues that any error in admitting the statements was harmless. The error was not harmless beyond a reasonable doubt.

3.1.1 The Court should review this manifest constitutional error based on Washington Supreme Court precedent and the unique circumstances of this case.

The State's waiver argument relies on a bright-line rule adopted by Division I of the Court of Appeals in *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012)—a rule from which Division I appears to have immediately backpedaled in *State v. Fraser*, 170 Wn. App. 13, 282 P.3d 152 (2012). The still-valid Washington Supreme Court precedent on the question of waiver of a Confrontation Clause claim, *State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007), permits the Court to review the issue under RAP 2.5(a)(3) as a manifest constitutional error. The unique circumstances of this case also favor review.

In *O'Cain*, Division I analyzed numerous statements in the U.S. Supreme Court's opinion in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), which emphasize the Defendant's burden to raise a Confrontation Clause objection either before or during trial. *O'Cain*, 169 Wn. App. at 235-39. Reading between the lines, Division I concluded that *Melendez-Diaz* requires that a

Defendant who fails to object before or during trial absolutely and forever waives the objection. *E.g., O’Cain*, 169 Wn. App. at 247-48.

The *Melendez-Diaz* opinion clearly allowed that “States are free to adopt procedural rules governing objections,” including the *timing* of objections. *Melendez-Diaz*, 129 S.Ct. at 2541. Nevertheless, Division I held that RAP 2.5(a)(3), which allows review of manifest constitutional errors for the first time on appeal, should no longer be available for Confrontation Clause claims.

However, in *State v. Fraser*, Division I retreated from this bright-line rule. Although initially following *O’Cain*, the court recognized that RAP 2.5(a)(3) was, arguably, the kind of procedural rule allowed by *Melendez-Diaz*. *Fraser*, 170 Wn. App. at 26-27. The court conducted a manifest constitutional error analysis under RAP 2.5(a)(3), concluding that the error was not “manifest” because it did not have practical consequences at trial. *Fraser*, 170 Wn. App. at 27-28.

The Washington Supreme Court has not addressed this issue after *Melendez-Diaz*. Because *Melendez-Diaz* expressly **allowed** State-level procedural rules governing objections, this Court should decline to follow *O’Cain* and instead continue to follow existing Washington Supreme Court precedent on RAP 2.5(a)(3). In the context of the Confrontation Clause, that

precedent is *State v. Kronich* (overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876 (2012) (overruling *Kronich* on the sole issue of whether certain records were testimonial for purposes of Confrontation Clause analysis)).

In *Kronich*, the State presented two public documents setting forth details of Kronich’s driver’s license suspension, in support of the charge of third degree driving with license suspended. *Kronich*, 160 Wn.2d at 897-98. The documents were admitted without objection. *Id.* On appeal, Kronich argued that the documents were testimonial and therefore violated his rights under the Confrontation Clause. *Id.* at 898-99. Our Supreme Court held that the error was subject to review under RAP 2.5(a)(3):

Kronich’s claim regarding the admission of the DOL certification at his trial is unquestionably constitutional in nature, as it is grounded in his rights under the Confrontation Clause. His claim of error may also be deemed manifest in that, had he successfully raised his Confrontation Clause challenge at trial, the DOL certification would have been excluded. Consequently, the State’s case against Kronich for DWLS would have been fatally undermined. In other words, assuming there was an error, it clearly had “practical and identifiable consequences in the trial of the case.” In accordance with the above analysis, we hold that Kronich’s Confrontation Clause claim involves a manifest error affecting a constitutional right and is, thus,

subject to review despite his failure to properly preserve the issue at trial. RAP 2.5(a)(3).

Kronich, 160 Wn.2d at 900-01 (citations omitted). Because *Melendez-Diaz* did not foreclose review for the first time on appeal and because the Washington Supreme Court has not overruled this portion of *Kronich*, this Court should follow *Kronich* and review McNair's Confrontation Clause claim despite counsel's failure to object during the trial.²

An error asserted for the first time on appeal is reviewable when it is a manifest constitutional error. RAP 2.5(a)(3). An error is "manifest" when it has "practical and identifiable consequences in the trial of the case." *Kronich*, 160 Wn.2d at 899. Here, as in *Kronich*, the error is clearly a constitutional one, grounded in McNair's rights under the Confrontation Clause. It is also "manifest." If Z.M.'s statements had been excluded, the state would have had no evidence other than McNair's uncorroborated, alleged confession, which is insufficient under the *corpus delicti* rule. The State would have

² The State also argues that McNair's only option for preserving the issue would have been through a claim of ineffective assistance of counsel. The *O'Cain* court said as much, but then immediately undermined any ineffective assistance claim by noting that "defense counsel will often decline to raise a confrontation clause objection to proffered evidence due to 'strategic considerations.'" *O'Cain*, 169 Wn. App. at 244-45. The option of an ineffective assistance claim is an empty promise. This Court should look instead to the manifest constitutional error standard of RAP 2.5(a)(3).

been unable to prove essential elements of its case. This is the kind of “practical and identifiable consequence” that favors review under RAP 2.5(a)(3). *See Kronich*, 160 Wn.2d at 899.

The unique circumstances of this case also favor review for the first time on appeal. Both *Melendez-Diaz* and *O’Cain* emphasize the need for objections before or during trial **when a defendant has notice** that evidence will be proffered without an opportunity for cross-examination. *E.g.*, *Melendez-Diaz*, 129 S.Ct. at 2541 (approving of notice-and-demand statutes). Here, McNair never received notice that the statements would be proffered without an opportunity to cross-examine Z.M. By the time it became clear that Z.M. would not be subject to cross-examination, the statements had all been presented to the jury.

Z.M. was the second witness called by the State at trial. RP 45. After some questions to try to make Z.M. comfortable, the State attempted to elicit information relevant to the case, such as the identity of the defendant, Z.M. shut down emotionally and would not answer. *E.g.*, RP 47-48; *see, generally*, RP 47-57. After numerous attempts to elicit relevant testimony failed, the State asked to excuse Z.M. “subject to recall.” RP 57.

The State presented the remainder of its case, including testimony from Bridget Spence (RP 97:20-23), Officer Flippo (RP 111:19-21), Stacia Adams (RP 162:3-4), and Michelle Breland (RP 194:21-25) regarding statements made by Z.M.

during the State’s investigation. Throughout this testimony, it appears from the record that Z.M. remained “subject to recall,” at which time McNair would have had the opportunity to cross-examine her regarding the hearsay statements. Counsel could not have been expected to raise a Confrontation Clause objection; any objection would have been overruled because Z.M. was still expected to testify and be subject to cross-examination. There is no sign in the record that counsel ever had notice that Z.M. would not be returning to the stand until the State rested its case. *See* RP 211. There is no surprise that counsel did not object during trial testimony. These unique circumstances favor review of the issue for the first time on appeal under RAP 2.5(a)(3).

3.1.2 Admission of Z.M.’s statements was not harmless beyond a reasonable doubt.

The State argues in the alternative that even if review is proper, any error would be harmless. The State is incorrect.

Confrontation Clause violations are subject to a harmless error analysis. An error is harmless if we are persuaded beyond a reasonable doubt that the jury would have reached the same result in absence of the error. The test is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt.

State v. Fisher, ___ Wn.2d ___, No. 91438-9, slip op. at 11 (July 7, 2016) (citations omitted).

Here, as demonstrated in Brief of Appellant at 6-9, if the hearsay statements had been properly excluded, there would have been insufficient evidence to prove that McNair struck Z.M. with a belt or other instrument or otherwise caused serious bodily injury, both essential elements of the crime.

The State argues that there would still be evidence of McNair's alleged confession to Ms. Spence and Officer Flippo. Spence testified, "[McNair] did acknowledge that the bruising on [Z.M.] was from her whooping her ass from getting in trouble." RP 94. Flippo testified that McNair told him her normal discipline was to spank with a belt and that Z.M.'s injuries occurred because Z.M. was trying to get away when McNair was spanking her. RP 112.³

However, these alleged confessions, alone, cannot support a finding of guilt, under the *corpus delicti* rule. *See below and* Br. of App. at 6-9. Without other corroborating evidence that is inconsistent with innocence, it cannot be said beyond a reasonable doubt that a jury would have found McNair guilty in the absence of Z.M.'s statements.

The untainted evidence does not lead to a finding of guilt. Quite the opposite: it necessarily leads to acquittal. The error is

³ Even this alleged confession is actually consistent with McNair's testimony—that she attempted normal discipline, but Z.M. bolted away before any spanking actually occurred.

not harmless beyond a reasonable doubt. This Court should reverse the conviction and dismiss the charges.⁴

3.2 Without Z.M.'s hearsay statements, there is no evidence to corroborate McNair's alleged confession to the *corpus delicti* of striking Z.M. with a belt.

In Br. of App. at 6-9, McNair argued that once Z.M.'s inadmissible hearsay statements are excluded, there remains insufficient evidence to prove essential elements of the crime, namely that McNair struck Z.M. with a belt or other instrument and that McNair caused serious bodily injury. The alleged confessions of McNair are insufficient under the *corpus delicti* rule because there is no other corroborating evidence that is inconsistent with innocence. Without such evidence, the State cannot prove that McNair ever struck Z.M. and cannot prove that McNair was the cause of Z.M.'s bodily injury.

The State agrees that there must be other corroborating evidence. The State argues that the evidence need only support a logical inference of the fact the State is seeking to prove. But

⁴ In *Jasper*, the Washington State Supreme Court held that the proper remedy for a confrontation clause violation is to remand for a retrial, even when without the inadmissible evidence there would be insufficient evidence to support a conviction. *Jasper*, 174 Wn.2d at 120. Appellate counsel believes that remand would be a waste of judicial resources, as acquittal is the certain result. The State did not comment on counsel's requested remedy. However, under RPC 3.3(3), counsel is obligated to disclose this authority.

the State also agrees that “The independent evidence must be consistent with guilt **and inconsistent with innocence.**” Br. of Resp. at 17 (emphasis added) (citing *State v. Aten*, 130 Wn.2d 640, 660, 927 P.2d 210 (1995)). This is the key in this case.

A conviction cannot be supported solely by a confession. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

Aten, 130 Wn.2d at 656. The corroborating evidence must itself be sufficient to prove every element of the crime charged, even without the alleged confession. *Dow*, 168 Wn.2d at 254. In addition to corroborating the alleged confession, the independent evidence “must be consistent with guilt and inconsistent with a hypothesis of innocence.” *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). If the independent evidence supports an inference of a criminal explanation of what caused the injuries **and** one that does not involve a criminal cause, the evidence is **not sufficient** to corroborate an alleged confession. *Id.* at 329-30.

Even if the evidence highlighted by the State supports an inference that McNair struck Z.M. with a belt, it is not inconsistent with the hypothesis of innocence presented by

McNair at trial. The State's evidence supports a reasonable inference that McNair **did not strike Z.M.** and that Z.M.'s injuries had some other, noncriminal cause. The State's evidence is insufficient to overcome the *corpus delicti* rule.

The State highlights two key pieces of evidence to support an inference that McNair struck Z.M.: 1) Breland's opinion testimony that Z.M.'s injuries "seemed consistent with what she was saying about getting a whooping" and that "they are really unusual areas to bruise accidentally," RP 196; and 2) O.M.'s testimony that "my sister got a spanking from my mom ... she used ... a belt," and that he knew Z.M. got a spanking because he "heard her screaming and crying." RP 148-49. Neither of these pieces of evidence is inconsistent with McNair's innocence.

McNair testified that she was following a course of family discipline, but before she could spank Z.M. on the buttocks, Z.M. had a breakdown and ran around uncontrollably, screaming and throwing herself into walls and furniture. RP 304-08. At least some of the bruises were caused directly by Z.M.'s outburst, and other injuries were playground injuries or caused by Z.M.'s friend. RP 246-49, 327-29.

Breland testified that she could not say specifically what caused the bruises. RP 206. Though she said the bruises were "more consistent" with a "whooping," RP 206-07, she could not conclude that McNair struck Z.M. with a belt. She could not rule

out the possibility that some bruises had been caused by Z.M.'s outburst and others caused on the playground or by Z.M.'s friend. *See* RP 202:9-15. Breland offered no testimony regarding the identity of the supposed assailant.

O.M. testified that he was in a different room when Z.M. was being disciplined by McNair. RP 148. He did not see McNair strike Z.M.; his testimony is merely an inference from the sounds he heard coming from the other room—sounds entirely consistent with McNair's version of events. RP 153-54.

Without Z.M.'s hearsay statements or McNair's alleged confession, the State has no evidence that independently establishes, inconsistent with any hypothesis of innocence, that McNair ever struck Z.M. with a belt or other instrument or otherwise caused bodily injury. Without such evidence, the State cannot prove essential elements of the crime. The State's evidence, even if it supports an inference of guilt, also simultaneously supports an inference of innocence. Under the *corpus delicti* rule, the evidence is insufficient to support a conviction. This Court should reverse the conviction.

4. Conclusion

Admission of Z.M.'s testimonial out-of-court statements violated McNair's rights under the Confrontation Clause because McNair had no opportunity to cross-examine Z.M. This

is a manifest constitutional error that this Court should review under RAP 2.5(a)(3). It was not harmless beyond a reasonable doubt because, without the statements, the State could not prove essential elements of the crime independent of McNair's alleged confession, which is itself insufficient to support a conviction, under the *corpus delicti* rule. This Court should reverse the conviction.

Respectfully submitted this 11th day of July, 2016.

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I certify, under penalty of perjury under the laws of the State of Washington, that on July 11, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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