

No: 49658-5
Pierce County Superior Court No: 16-8-00030-1

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

STATE OF WASHINGTON,

Respondent,

v.

MARC ANTHONY GRUBB,

Petitioner.

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

The Honorable John R. Hickman

APPELLATE COUNSEL'S MOTION TO WITHDRAW AS COUNSEL
AND DISMISS APPEAL PURSUANT TO RAP 18.3

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TABLE OF CONTENTS

Table of Authorities ii-iii

A. IDENTITY OF MOVING PARTY 1

B. STATEMENT OF RELIEF REQUESTED 1

C. FACTS RELEVANT TO MOTION 1

D. GROUNDS FOR RELIEF 1-2

E. STATEMENT OF THE CASE 2-6

F. RAP 18.3(2) IDENTIFICATION OF ISSUES..... 6-11

 1. Did Defense Counsel Provide Ineffective Assistance by
 Failing to a Request a Continuance as a Remedy for the Late
 Amendment of the Information? 6

 2. Did the Trial Court Err by Admitting the Child Hearsay?..... 7

 3. Was it Error to Admit Respondent’s Statements to Detective
 Anderton?..... 9

 4. Do Respondent’s Adjudications of Guilt for Attempted First
 Degree Rape of a Child and First Degree Child Molestation
 Violate Double Jeopardy Principles? 10

H. CONCLUSION..... 12

I. Certificate of Service 13

TABLE OF AUTHORITIES

| | Page |
|--|-------|
| <u>UNITED STATES SUPREME COURT CASES</u> | |
| <i>Anders v. California</i> 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)..... | 2 |
| <i>Oregon v. Kennedy</i> 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)..... | 10 |
| <u>WASHINGTON CASES</u> | |
| <i>State v. Brown</i> 74 Wn.2d 799 (1968)..... | 6-7 |
| <i>State v. Cole</i> 128 Wn.2d 262 (1995)..... | 10 |
| <i>State v. Estill</i> 50 Wn.2d 245 (1957)..... | 7 |
| <i>State v. Freeman</i> 153 Wn.2d 765 (2005)..... | 10-11 |
| <i>State v. French</i> 157 Wn.2d 593, 610 (2011)..... | 11 |
| <i>State v. Hairston</i> 133 Wn.2d 534 (1997)..... | 2 |
| <i>State v. Harris</i> 106 Wn.2d 784 (1986)..... | 9 |
| <i>State v. Heritage</i> 152 Wn.2d 210 (2004)..... | 9 |
| <i>State v. Johnson</i> 119 Wn.2d 143 (1992)..... | 6 |
| <i>State v. Land</i> 171 Wn.App. 593 (2013)..... | 11 |

| | |
|---|------|
| <i>State v. Leavitt</i> 111 Wn.2d 66 (1988)..... | 8 |
| <i>State v. Rapozo</i> 114 Wn.App. 321 (2002)..... | 6 |
| <i>State v. Ryan</i> 103 Wn.2d 165 (1984)..... | 7-8 |
| <i>State v. Sargent</i> 111 Wn.2d 641 (1988)..... | 9 |
| <i>State v. Strange</i> 53 Wn.App. 638 (1989)..... | 8 |
| <u>RULES, STATUTES AND OTHER AUTHORITIES</u> | |
| CrR 3.5..... | 10 |
| RAP 15.2(i)..... | 2 |
| RAP 18.3(a)..... | 2, 6 |
| RCW 9.44.120..... | 7 |

A. IDENTITY OF MOVING PARTY

Bret Roberts, of the Law Office of Bret Roberts, PLLC., appointed as counsel for the appellant, respectfully requests the relief designated in section “B” of this motion.

B. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant, Marc Grubb, requests permission to withdraw pursuant to the terms of RAP 15.2(i) and RAP 18.3(a).

C. FACTS RELEVANT TO MOTION

By letter dated November 29, 2016, this Court appointed the undersigned counsel to review Mr. Grubb’s adjudication of guilt to the charges of Attempted First Degree Rape of a Child and First Degree Child Molestation.

In the process of handling Mr. Grubb’s appeal, undersigned counsel performed the following tasks:

1. Read and reviewed the Verbatim Report of Proceedings, Trial Record, and communicated via telephone and email with trial counsel, Clarence Henderson.
2. By written correspondence, invited Mr. Grubb to make contact to discuss his case and any issues he wanted considered on appeal.
3. Researched the relevant legal issues
4. Conferred with other experienced attorneys regarding the legal issues presented by Mr. Grubb’s case.

time of the alleged acts and was a cousin to Respondent. (VRP 17, 60, 62) (Trial Findings and Conclusions, CP 32).

Mr. Grubb was alleged to have sexually assaulted K.E. after a family dinner at a residence where he was staying with numerous members of his extended family in the lower Key Peninsula area of Pierce County, Washington. (VRP 51, 67, 74) (CP 33). K.E. claimed that Mr. Grubb gave her a piggyback ride from the garage to a nearby dilapidated carport. (VRP 33) (CP 33). Upon arrival at the carport, K.E. alleged that Mr. Grubb pulled down his pants and underwear and then pulled down her pants and underwear as well. (VRP 33-34). She alleged that Mr. Grubb put his private on her private and her butt. (VRP 33). K.E. clarified during direct examination that she used the word “private” to refer to her vagina and to Mr. Grubb’s penis. (VRP 34). K.E. claimed that Mr. Grubb put his private on her butt “quite a few times” that seemed like he was “trying to hump [her].” (VRP 36). K.E. further advised that Mr. Grubb touched her vagina with his hand. (VRP 37). K.E. claimed that Mr. Grubb held her in place during the incident and instructed her to keep it a secret. (VRP 35, 38). K.E. testified that Mr. Grubb stopped what he was doing because both he and she heard Jonda Smith coming out of the house. (VRP 39). K.E. said that she and Mr. Grubb pulled up their pants when they heard Ms. Smith and the dogs. (VRP 39-40).

Jonda Smith, Mr. Grubb's grandmother, testified that she came outside and saw Mr. Grubb standing about six to eight inches from K.E. in the carport canopy area; and that K.E.'s back was to Mr. Grubb. (VRP 134). As she approached, but before she saw the two, she testified that she heard a sound like elastic snapping into place and Mr. Grubb saying, "there." (CRP 135). To Jonda Smith, Mr. Grubb did not appear to have an erection, and she thought she would have noticed because his clothing was tight. (VRP 141). Ms. Smith sent K.E. in the house, and got her son, Marc Grubb, Sr. to talk with Marc Grubb, Jr. (VRP 137). Respondent, Marc Grubb Jr., explained that K.E. asked to go to the bathroom outside, and that he helped her pull her underwear back up after it was caught on her dress. (VRP 138).

After Jonda Smith's conversation with Respondent Marc Grubb, Jr. and his father, Marc Grubb Sr., she went to talk to K.E. in the house. (VRP 138). K.E. did not initially report the alleged assault to Jonda Smith. (VRP 139). Jonda Smith later spoke with K.E.'s mother, Tonya Martinez, about the event, even though Ms. Smith did not think that Mr. Grubb had done anything inappropriate. (VRP 154, 161).

Even though she testified that she had not yet been advised of the incident between K.E. and Mr. Grubb, Tonya Martinez testified that her daughter, K.E. was sullen and anxious when she arrived home from the family event. (VRP 77). Ms. Martinez testified that K.E. disclosed the

incident “a few days after she came home.” (VRP 80). After K.E.’s disclosure, Ms. Martinez contacted Pierce County law enforcement. (VRP 88).

Ms. Martinez made K.E. available for a forensic child interview, which was conducted by Stacia Adams on September 24, 2015. (VRP 177). The interview was observed by detective Todd Anderton. (VRP 177-178). After the forensic child interview, Detective Anderton went to Marc Grubb’s school and interviewed him in a conference room after giving *Miranda* warnings. (VRP 182-186)

Two weeks prior to Mr. Grubb’s September 9, 2016, bench trial, the State had notified Mr. Grubb’s counsel of its intent to file an amended information. (VRP 4) (CP 26). Both parties filed pretrial motions regarding child hearsay. (CP 2) (CP 14). Rather than being addressed at a pretrial hearing, the child hearsay issue was considered on the morning of the bench trial. (VRP 5). The defense noted a standing objection to the admissibility of K.E.’s hearsay statements to her mother, Tonya Martinez, and Stacia Adams, the forensic child interviewer. (VRP 81). The parties agreed that any issues CrR 3.5 suppression issues regarding the voluntariness of Mr. Grubb’s alleged statements to Detective Anderton would be addressed during the trial. (VRP 181).

Mr. Grubb's arraignment on the amended information was held on the morning of trial. (VRP 4). Defense counsel objected, but did not ask for a continuance, indicating he was "prepared to proceed" despite the late amendment. (VRP 4). The matter proceeded to trial; and Pierce County Superior Court Judge John R. Hickman adjudicated Mr. Grubb guilty of Attempted First Degree Rape of a Child and First Degree Child Molestation. (CP 38-39). Mr. Grubb timely filed a notice of appeal. (CP 54).

F. RAP 18.3(2) IDENTIFICATION OF ISSUES

The following is a discussion of issues which may have been raised on appeal, but which appointed appellate counsel for Mr. Grubb believes would not have been availing. They are offered with a brief citation to applicable law and relevant areas of the record, pursuant to the instruction of RAP 18.3(a)(2):

1. Did Defense Counsel Provide Ineffective Assistance by Failing to Request a Continuance as a Remedy for the Late Amendment of the Information?

"Generally, amending charges is liberally allowed." *State v. Rapozo*, 114 Wn.App. 321, 323, (2002) (citing *State v. Johnson*, 119 Wn.2d 143, 150 (1992)). Normally, the State may amend the information, provided the defendant is not substantially prejudiced thereby. *Id.* The defendant carries the burden of establishing prejudice. *Id.* (citing *State v. Brown*, 74 Wn.2d 799 (1968)). The absence of prejudice and surprise is persuasively

established where an accused fails to request a continuance after a late amendment to an information. *Brown*, at 801 (citing *State v. Estill*, 50 Wn.2d 245 (1957)).

In the instant case, the amendment to the information added a count of First Degree Child Molestation. (CP 1, 26-27). Trial counsel for Mr. Grubb admitted he had been aware of the proposed amendment for approximately two weeks before trial. (VRP 4). Trial counsel maintained an objection to the timeliness of the amended information, but represented, without even a hint of pressure from the bench, that he was prepared to proceed and did not request a continuance of the bench trial. (VRP 4).

2. Did the Trial Court Err by Admitting the Child Hearsay?

A trial court is required to determine the admissibility of a child victim's out-of-court statements regarding alleged sexual abuse. RCW 9A.44.120. To aid its decision regarding admissibility of such statements, the Washington State Supreme Court identified a nine-factor test to ascertain the reliability of a child's out-of-court statements:

Those factors are: "(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness." We added that these factors were not exclusive and should be considered with the additional factors: "(1)

the statement contains no express assertion about past fact; (2) cross-examination could not show the declarant's lack of knowledge; (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented the defendant's involvement."

State v. Ryan, 103 Wn.2d 165, 175-76 (1984) (internal citations omitted).

As noted by the State, the factors regarding "no assertion of past fact" and "cross-examination exposing a lack of knowledge" have been eliminated in child hearsay cases. *State v. Strange*, 53 Wn.App. 638, 646-47 (1989) (citing *State v. Leavitt*, 111 Wn.2d 66, 75 (1988)). "The real question becomes whether the other indicia of reliability are sufficiently strong to justify admission." *Id.*

The trial court issued a ruling allowing child hearsay through the testimony of K.E.'s mother, Tonya Martinez and the forensic child interviewer, Stacia Adams. (CP 40). On the record, the court discussed its consideration of the *Ryan* factors. (VRP 224-229). The trial court noted specifically that the fact that the child hearsay declarant, K.E., testified at trial and was subject to cross-examination was significant to the outcome of its hearsay analysis. (VRP 229). The trial court also noted that the statements attributed to K.E. by her mother, Tonya Martinez, and the forensic interviewer, Stacia Adams, were generally consistent. (CP 40). The

trial court also observed that K.E.'s assertions about the "nature and extent of the sexual contact" in her testimony and the forensic interview were consistent. (VRP 321).

3. Was it Error to Admit Respondent's Statements to Detective Anderton?

Miranda warnings were developed to protect a defendant's constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody. *State v. Heritage*, 152 Wn.2d 210, 214 (2004) (citing *State v. Harris*, 106 Wn.2d 784, 789 (1986)). In the absence of such warnings, a defendant's statements during custodial interrogation are presumed to be involuntary. *Id.* (citing *State v. Sargent*, 111 Wn.2d 641, 647-48 (1988)).

Detective Anderton testified that he interviewed Mr. Grubb in a conference room at his school. (CP 182). Only the detective and Mr. Grubb were present during the interview. (CP 182). Detective Anderton was in plain clothes, but was armed. (CP 183, 207). Prior to discussing the case, Detective Anderton read Mr. Grubb the juvenile *Miranda* warnings. (CP 184, 186). Detective Anderton testified that Mr. Grubb was sweating and appeared nervous, but appeared to understand the questioning and did not express confusion. (CP 192,194).

By agreement of the parties and trial court, the CrR 3.5 "hearing" was conducted during Mr. Grubb's bench trial. (VRP 8-9, 180-197).

Defense counsel indicated to the trial court that he **did not** have any objection to the statements of the respondent which were offered during Detective Anderton's testimony. (VRP 181, 196). The trial court admitted Mr. Grubb's statements to Detective Anderton. (CP 28).

4. Do Respondent's Adjudications of Guilt for Attempted First Degree Rape of a Child and First Degree Child Molestation Violate Double Jeopardy Principles?

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution protect criminal defendants from repeated prosecutions for the same crimes. *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S. Ct. 2083, 72 L.Ed.2d 416 (1982); *State v. Cole*, 128 Wn.2d 262, 274 n.7, (1995) (Washington's double jeopardy clause is coextensive with the federal double jeopardy clause and is given the same interpretation).

The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding. Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense."

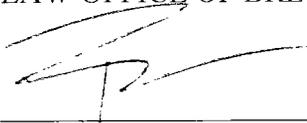
State v. Freeman, 153 Wn.2d 765, 770-71 (2005) (en banc) (internal citations omitted).

G. CONCLUSION

Counsel respectfully requests the Court's permission to withdraw from the appeal and representation of Mr. Grubb in this matter. Counsel believes that the Court's independent review of the record and legal authority in appellate counsel's brief will lead it to the same conclusion: there is no genuine appealable issue; and proceeding with the appeal would be frivolous.

Respectfully Submitted this 11 day of April, 2017.

LAW OFFICE OF BRET ROBERTS, PLLC.



BRET ROBERTS, WSBA No. 40628
Attorney for Appellant

PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed Appellate Counsel's Motion to Withdraw electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the same through the Court's filing portal to:

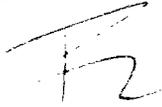
Michelle Hyer
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I delivered a true and correct hard copy of Appellate Counsel's Motion to Withdraw in the U.S. mail, postage prepaid, to:

Marc Grubb, Jr.
c/o Oakridge Community Facility
8701 Steilacoom Boulevard, S.W.
Tacoma, WA 98498

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

Signed at Port Townsend, Washington, on April 11, 2017.



Bret Roberts, WSBA 40628
Attorney for Marc Grubb

JEFFERSON ASSOCIATED COUNSEL
April 11, 2017 - 10:17 AM
Transmittal Letter

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Appellate Counsel's RAP 18.3(a) Ander's Motion to Withdraw

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