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NO. 51410-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

LARRY FRENCH,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Stephen E. Brown, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted B.I.'s hearsay statements to her mother into evidence as an excited utterance because B.I. was no longer under the influence of the startling event.
2. The trial court abused its discretion when it admitted B.I.'s hearsay statements into evidence as statements made for the purpose of medical diagnosis or treatment because the statements were made for investigatory purposes.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by admitting B.I.'s hearsay statements to her mother into evidence as an excited utterance when B.I. was no longer under the influence of the traumatic event?
2. Did the trial court abuse its discretion by admitting B.I.'s hearsay statements to the forensic interviewer into evidence as statements made for the purpose of medical diagnosis or treatment when the questions were asked to identify Mr. French as the perpetrator and have B.I. describe the allegations against him?

B. STATEMENT OF THE CASE

Substantive Facts

Larry French is the step-grandfather of B.I. RP 127. Since B.I. met Mr. French and his wife several years ago, they developed a loving grandparent-grandchild relationship. RP 127-28, 193. B.I. would frequently come visit the French's home, sometimes spending the night multiple nights a week. RP 128, 176, 193. B.I. never showed any hesitation or fear of going over to the French's home before April 19, 2016. RP 177, 195.

On April 19, 2016, B.I. came home from the French's house and her mother thought she appeared upset. RP 129. She did not initially claim anything bad had happened to her while at the French's. RP 130. However, later that night B.I. approached her mother and claimed that Mr. French "had been hurting her." RP 130. When her mother asked for clarification, B.I. said that Mr. French had been "touching her." RP 130. She later claimed that Mr. French had been touching her vaginal area. RP 131.

B.I.'s mother called the police and reported B.I.'s disclosure. RP 132. She provided some of B.I.'s clothing to the police. RP 132, 143. B.I. would later claim that Mr. French also took nude

photographs of her. RP 112-14. From the record, it appears the only person B.I. told about the photographs before testifying at trial was her mother and step-father. RP 114. Her mother testified that the alleged photographs were not reported to law enforcement. RP 134-36.

Investigators scheduled B.I. to be forensically interviewed regarding her disclosure. RP 142. B.I. was interviewed regarding the incident she had reported. RP 153. During the interview, she identified Mr. French as the person who had touched her. RP 153. She also revealed new allegations, including Mr. French touching her nipples and buttocks. RP 154. B.I.'s physical examination did not reveal any physical trauma or injury. RP 156.

Police also contacted Mr. French. RP 143. He denied having any sexual contact with B.I. and voluntarily provided a DNA sample. CP 17-18. This DNA sample later matched DNA found on B.I.'s clothing. RP 172. This clothing had been stored at the French's house as a change of clothes for B.I. when she visited. RP 181. Police arrested Mr. French on November 2, 2016. CP 47.

Procedural Facts

The State charged Mr. French with Child Molestation in the

First Degree on November 28, 2016. CP 1-2. The State also alleged the aggravating factor of an ongoing pattern of sexual abuse of the same victim under RCW 9.94A.535(3)(g). CP 1-2. Mr. French elected to proceed to a jury trial. CP 40.

During pretrial motions, the State moved to admit hearsay statements B.I. made during the initial disclosure to her mother and during her forensic interview. CP 47-49. The defense objected to the admission of both statements on hearsay grounds. RP 130, 153. The trial court overruled both objections and admitted the statements. RP 130, 153. The trial court admitted B.I.'s initial disclosure to her mother as an excited utterance. RP 130. The statements B.I. made during her forensic interview were admitted as statements made for the purpose of medical diagnosis or treatment. RP 153-54.

The jury found Mr. French guilty as charged. CP 63. The jury also answered "yes" on a special verdict form regarding the ongoing sexual abuse aggravator. CP 64. The State sought an exceptional sentence upwards based on the jury's finding of ongoing sexual abuse of the same victim. CP 76-78; RP 231. The trial court sentenced Mr. French to an exceptional sentence of 96

months in prison despite Mr. French's total lack of criminal history.
CP 83; RP 237. Mr. French filed a timely notice of appeal. CP 100.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED B.I.'S STATEMENTS TO HER MOTHER AS EXCITED UTTERANCES WHEN B.I. WAS NO LONGER UNDER THE INFLUENCE OF A TRAUMATIC EVENT

Hearsay evidence is generally inadmissible at trial. ER 802. A hearsay statement is admissible if it qualifies as an "excited utterance." ER 803(a)(2). "A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event." *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008) (citing *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001)). Appellate courts review a trial court's decision to admit hearsay statements for an abuse of discretion. *State v. Kennealy*, 151 Wn. App. 861, 879, 214 P.3d 200 (2009). "A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons." *Kennealy*, 151 Wn. App. at 879.

The primary determination in an excited utterance analysis is “whether the statement was made while the declarant was still under influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *State v. Williams*, 137 Wn. App. 736, 748, 154 P.3d 322 (2007) (citing *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).

The key to determining whether the statement was made under the influence of the startling event is spontaneity. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). In *Chapin*, our State Supreme Court elaborated on the requirement of spontaneity:

Ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it. *E.g.*, *State v. Palomo*, 113 Wash.2d 789, 791, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826, 111 S.Ct. 80, 112 L.Ed.2d 53 (1990) (statement of victim of attempted rape made immediately after a policeman pulled the defendant off of her); *see generally* E. Cleary, *McCormick on Evidence* § 297, at 706 (2d ed. 1972). This is because as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.

Chapin, 118 Wn.2d at 688. “The fact that a statement is made in

response to a question will not by itself require the statement be excluded, but it is a factor that raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.” *Chapin*, 118 Wn.2d at 690 (citing *State v. Ryan*, 103 Wn.2d 165, 176, 691 P.2d 197 (1984)).

B.I.’s disclosure to her mother on April 19, 2016 was not spontaneous and was not made while she was under the stress or excitement of a startling event. Testimony at trial revealed that B.I. had gone to the French’s house after school on April 19, 2016. RP 129. When B.I.’s mother picked her up, she did not initially claim anything out of the ordinary had happened that day. RP 130. Although the record is unclear as to the exact amount of time that elapsed between B.I. being at the French’s house and her making her disclosure, it does reveal that there was an opportunity for reflective thought as B.I. did not make any statements regarding Mr. French until later that night when she was going to bed. RP 130.

Furthermore, the record does not contain any testimony regarding B.I.’s demeanor at the time she made her initial disclosure and there is no evidence showing her to be under stress

or excitement at the time she made the statements. B.I.'s mother did testify that B.I. appeared upset when she was picked up from the French's but did not testify that B.I. was still upset later that night when she made the allegations against Mr. French. RP 129-130.

“Evidence that a declarant has calmed down before making a statement tends to negate a finding of spontaneity.” *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002) (citing *State v. Doe*, 105 Wn.2d 889, 893-94, 719 P.2d 554 (1986)). This aspect of the law is crucial because cases where an excited utterance has been upheld as admissible typically require the declarant to exhibit some sort of visible indicators of stress at the exact time they make the statements at issue. See, e.g., *Magers*, 164 Wn.2d at 179 (declarant “scared,” “uneasy,” and “obviously traumatized” when making statements), *Williams* 137 Wn. App. at 739 (declarant “crying, hysterical, and shaking badly” when making statements).

In this case, we do not have any evidence suggesting B.I. was under stress or excitement at the time she made her initial disclosure to her mother. There was an intervening time period of what appears to be at least a couple of hours between the alleged

startling event and the statements related to it. Under *Chapin*, this intervening time raises the danger of fabrication and requires a greater showing from the State that B.I. “did not engage in reflective thought” before making the statements. *Chapin*, 118 Wn.2d at 688. The State fails to make this showing because they cannot point to any testimony establishing that B.I. was exhibiting symptoms of stress or excitement when she made the statements. B.I.’s initial statements to her mother accusing Mr. French of touching her inappropriately do not qualify as excited utterances and the trial court abused its discretion by admitting them into evidence.

A trial court’s erroneous decision to admit hearsay at trial is subject to a harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). An error is not harmless if there is a reasonable probability that it affected the outcome of the trial. *State v. Goggin*, 185 Wn. App. 59, 69, 339 P.3d 983 (2014).

B.I.’s hearsay statements to her mother on April 19, 2016 represent the first time B.I. made any allegation against Mr. French. She specifically identified Mr. French as the perpetrator in her statements and described the alleged molestation in detail. RP 130-31. During her testimony regarding B.I.’s statements, B.I.’s mother

also reenacted B.I.'s demonstration of what she claimed Mr. French had done to her. RP 131-32. B.I.'s hearsay statements include both a verbal description and visual demonstration of the allegations forming the basis for the molestation charge. The admission of these statements was highly prejudicial to Mr. French and there is a reasonable probability they affected the jury's verdict. The trial court's erroneous admission of these statements requires the reversal of Mr. French's conviction and a new trial.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED B.I.'S HEARSAY STATEMENTS MADE DURING A FORENSIC INTERVIEW AS STATEMENTS MADE FOR MEDICAL DIAGNOSIS OR TREATMENT

Another category of statements that are admissible despite being hearsay are statements made for the purpose of a medical diagnosis or treatment. ER 803(a)(4). "The medical treatment exception applies to statements only insofar as they were "reasonably pertinent to diagnosis or treatment." *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004) (citing *Woods*, 143 Wn.2d at 602). To establish reasonable pertinence, the party offering the statement must demonstrate that

“(1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment.” *Grasso*, 151 Wn.2d at 20.

Statements identifying the perpetrator of a crime are generally not admissible under ER 803(a)(4). *State v. Perez*, 137 Wn. App. 97, 106, 151 P.3d 249 (2007) (citing *State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993)). An exception to this rule exists and a court may admit such statements where the declarant is a child victim and treatment required removing the child from the abuser's home. *Ashcraft*, 71 Wn. App. at 456-57 (citing *State v. Butler*, 53 Wn. App. 214, 222-23, 766 P.2d 505 (1989)).

At the start of B.I.'s forensic interview, the interviewer asked her the identity of the person she said had touched her. RP 153. The interviewer testified that B.I. responded by saying “Larry French.” RP 153. This question and B.I.'s response has nothing to do with B.I.'s physical condition or treatment for any injury she had suffered. Many of the questions posed to B.I. during her forensic interview were investigative in nature and asked for information unrelated to her medical treatment. The identity of the accused is

not relevant to the stated purpose of the examination. The interviewer testified that the purpose of the interview is to ensure “that she was not physically injured by this person . . . which she identified as Larry French . . .”. RP 154.

B.I.’s statements from her forensic interview fall outside of the hearsay exception contained in ER 803(a)(4). The medical treatment and diagnosis exception exists because such statements are considered inherently trustworthy as the declarant has a strong motive to be truthful in seeking their own medical care. *Butler*, 53 Wn. App. at 220. This motive does not exist when speaking about issues unrelated to the declarant’s medical care, such as identity of the perpetrator when the declarant does not live with them. Without this guarantee of trustworthiness, the admission of B.I.’s statements without any cross-examination raises the same legal problems as the admission of any other hearsay statement.

B.I. did not live at the French household. RP 128. Thus, the concerns described in *Butler* and *Ashcraft* about removing her from the home as part of her medical treatment do not apply in this case. Current Washington case law has consistently held that in the absence of concern for removing the child from the home,

statements concerning the identity of defendant are not sufficiently related to medical diagnoses or treatment to fall into the hearsay exception contained in ER 803(a)(4). *Perez*, 137 Wn. App. at 106 (citing *Ashcraft*, 71 Wn. App. at 456). B.I.'s response to the interviewer asking her who had touched her was hearsay and was admitted despite not being related to medical diagnosis or treatment. There is no hearsay exception in the rules of evidence allowing for the admission of B.I.'s statement and the trial court abused its discretion by admitting it.

There is a reasonable probability that the admission of B.I.'s statement influenced the outcome of the trial when viewed in tandem with the statements to her mother that were erroneously admitted as excited utterances. The jury was able to hear testimony regarding the alleged molestation from three witnesses. Two of the witnesses, B.I.'s mother and the forensic interviewer, provided hearsay evidence of Mr. French molesting B.I. as it had been described to them. RP 130-132, 153-155. B.I. also testified at trial regarding the allegations against Mr. French. RP 105. Her testimony provided a general overview of the accusations, but lacked detail as to exactly what had occurred and failed to provide

specificity as to the acts that occurred during any one incident. B.I. generally described the alleged touching and testified that it occurred several times but could not recall the first or second time it happened. RP 108-109. B.I. also testified that Mr. French took nude photographs of her and that she told her mom about them but could not remember when she did. RP 114.

If the hearsay evidence against Mr. French had been excluded, the jury would have only been left with B.I.'s testimony to describe the allegations against Mr. French. This testimony lacks the detail and probative force of the hearsay that was admitted along with it. B.I.'s testimony exhibits memory deficits related to details of the alleged incidents. In the absence of the hearsay evidence that was erroneously admitted, the jury would at the very least have insufficient evidence to conclude beyond a reasonable doubt that there was an ongoing pattern of sexual abuse as alleged in the State's sentencing enhancement. Furthermore, there is a reasonable probability that the jury would have found the State's evidence insufficient to convict Mr. French. The hearsay statements not only provided additional evidence of Mr. French's guilt, but also corroborated B.I.'s testimony, thereby enhancing its probative

value.

The State's case was strengthened significantly by the erroneous admission of hearsay statements as substantive evidence against Mr. French. There is a reasonable probability that the outcome of Mr. French's trial would have been different had these statements not been admitted. The admission of the statements constitutes reversible error and the error had an effect on the outcome of the trial. Mr. French's conviction must be reversed, and the case remanded for a new trial. *Goggin*, 185 Wn. App. at 69.

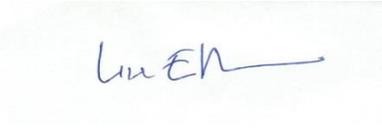
D. CONCLUSION

The trial court abused its discretion when it admitted multiple hearsay statements over Mr. French's objection. The trial court admitted B.I.'s initial disclosure to her mother as an excited utterance even though the evidence shows B.I. was not under the influence of any startling event at the time she made the statements. The court admitted B.I.'s identification of Mr. French as a statement for medical diagnosis or treatment even though the question and response was entirely unrelated to her medical treatment. The admission of these statements was error and it

affected the outcome of Mr. French's trial. This court should reverse his conviction and remand the case for a new trial where the hearsay evidence will be excluded.

DATED this 19th day of September 2018.

Respectfully submitted,

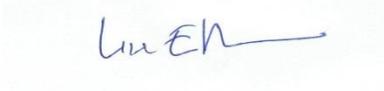


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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office appeals@co.grays-harbor.wa.us and Larry French/DOC#404878, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on September 19, 2018. Service was made by electronically to the prosecutor and Larry French by depositing in the mails of the United States of America, properly stamped and addressed.



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