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Court of Appeals
Division II
State of Washington
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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER J. McVEY

Petitioner.

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
Cause No. 15-1-00783-5

PERSONAL RESTRAINT PETITION

BRETT A. PURTZER
WSB #17283

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I. STATEMENT OF THE CASE

A. Procedural History

On June 11, 2015, the State charged Tyler McVey with one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree for an incident that occurred on or between March 1, 2015 and April 17, 2015. CP 6. On August 26, 2016, the State filed a First Amended Information to correct a clerical mistake in Count I related to the initials of the minor child. CP 42.

On December 28, 2015, a child hearsay hearing was held to determine the admissibility of statements made by the minor child, E.S., to her father, Jason Seevers, a forensic interviewer, Sue Villa (Batson), and a medical doctor, Joyce Gilbert, M.D. At the conclusion of the hearing, the court determined that the child hearsay statements were admissible. CP 16-20.

On August 29, 2016, trial was held before the Honorable Carol Murphy and on September 1, 2016, the jury returned guilty verdicts on both counts. CP 126-127. On October 13, 2016, the Court sentenced Mr. McVey to an indeterminate sentence of 160 months to life as well as other conditions of sentence. CP 149-162. On October 25, 2016, Mr. McVey filed his notice of appeal with the Court of Appeals.

On January 30, 2018, the Court of Appeals affirmed the conviction and the Supreme Court denied a Petition for Review on June 6, 2018. The Mandate issued on June 14, 2018.

On January 14-15, 2019, a hearing was held in Thurston County Superior Court before the Honorable Judge Lenese to address defendant's motion for a new trial based on ineffective assistance of counsel as trial counsel for Mr. McVey failed to interview and produce an alibi witness at trial. Said motion was denied on January 16, 2019, and Findings of Fact, Conclusions of Law and Order were entered on March 13, 2019. An appeal was filed on March 13, 2019 and the transcript of said hearing is pending.

B. Facts

Kecia Johnson and Jason Seevers are the parents of E.S., a minor child born October 21, 2010. RP 39:13-40:18. In 2012, when E.S. turned two, her parents separated. RP 41:3-9. After their separation, Ms. Johnson and Mr. Seevers had split custody of E.S., and then Mr. Seevers obtained full custody. RP 41:14-21.

In approximately 2014, Ms. Johnson was in a romantic relationship with the defendant, Tyler McVey, who she met while working at the Manor Care long term care facility. RP 41:25-42:21. During the period of Ms. Johnson's relationship with Mr. McVey, Jason Seevers obtained full custody of E.S., but Ms. Johnson had visitation with her daughter two to three times per week, which would occur at her house. RP 44:4-45:12. During the 2014-2015 period, Ms. Johnson's nanny, Peggy Cluck, and her step-father, Mark Schmidt, lived in her home. RP 45:8-18. At times when E.S. came for visits, Mr. McVey was present. RP 47:10-18.

After Ms. Johnson's nanny moved out of the home, Mr. McVey watched E.S. on three or four occasions. RP 48:6-13. This would occur when Ms. Johnson had to leave for work. *Id.* Mr. Schmidt, who was also living at the house during this time, was not able to watch E.S. by himself because he suffered a stroke that prevented him from being able to care for E.S. RP 49:13-50:14.

After one of E.S.'s visits with Ms. Johnson, Mr. Seevers picked her up and E.S. disclosed that something had happened to her by Mr. McVey. RP 51:8-56:12; RP 100:19-103:14. Mr. Seevers called Ms. Johnson and asked E.S. to tell her what she had just told him. RP 103:16-19. E.S. did not explain anything about the touches, even though Mr. Seevers asked her to describe the touches. RP 103:20-104:14. Even though Mr. Seevers attempted to talk to E.S. more during the drive, she would not speak with him. RP 105:19-21.

When Ms. Johnson confronted Mr. McVey about what she had learned, he stated that the allegation was false and fabricated because neither Mr. Seevers nor E.S. liked him. RP 56:10-15.

In March, 2015, Mr. Seevers complained to the child custody court that E.S. was living in unsanitary conditions when she visited her mother. RP 119:10-17. Mr. Seevers made this complaint approximately two and one-half weeks before E.S.'s April 7, 2015 allegations. *Id.* at 18-20. When Ms. Johnson was questioned by law enforcement regarding the allegations, she believed that E.S.'s allegations were the result of the custody battle she was having with Mr. Seevers. RP 66-21-23.

When E.S. testified, she said that she told her dad that Mr. McVey touched her privates. RP 125:2-3. E.S. also stated that she told her mother and her babysitter about what occurred, but never saw a doctor. RP 125:20-21. E.S. said that the event only happened one time, RP 126:9-10, and occurred the same day she told her dad. RP 126:22-23. E.S. also testified that no one else was at the house at the time. RP 126:15-16.

During cross examination, E.S. stated that she told her mother first and then told her father later in the day about what had occurred. RP 127:8-23. E.S. acknowledged that when this event occurred, her grandfather was home. RP 128:18-20. Later, during cross examination, E.S. stated that the only persons present were Mr. McVey and her babysitter, Peggy. RP 129:11-20; RP 130:5-9.

On April 30, 2015, Sue Villa (Batson) conducted a recorded forensic child interview of E.S. at the Monarch Children's Justice and Advocacy Center in Lacey. RP 172:12-21. At the time, E.S. was 4 ½ years old. RP 173:22-23. During the interview, E.S. said that she was there to talk about Tyler. RP 176:12-23. She reported that Mr. McVey touched her with his hands, that she didn't like it, and that he "screwed" her and it hurt. RP 177:7-14. E.S. stated that his hand went inside her body. RP 177:15-16. E. S. said the event happened more than one time in the dining room. RP 177:20-178:8. E.S. also stated that her grandfather was present in the house when the touching occurred. RP 179:7-12.

E.S.'s physical examination conducted by Joyce Gilbert, M.D. was normal. RP 241:1-4. The abuse allegations reportedly occurred on April 7, 2015

and the physical examination occurred April 10, 2015. RP 248:18-21. The doctor acknowledged that there was no physical evidence of recent physical trauma as it would take 7-10 days for scar tissue to form and there was no scarring. RP 250:2-251:3; 255:10-14. One of the explanations for a normal examination is because no physical contact occurred. RP 255:19-21.

After the State rested, the defense also rested. Mr. McVey did not testify. RP 258:19-261:23.

II. ARGUMENT

A. **MR. McVEY'S COUNSEL WAS INEFFECTIVE FOR FAILING TO EFFECTIVELY CROSS-EXAMINE E.S. AND TO ALLOW DEFENDANT TO TESTIFY.**

1. *Ineffective Assistance of Counsel*

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint of Lui*, No. 92816-9 WL 2691802, at *3 (Wash. June 22, 2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1992) (“Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest.” (citing *State v. Visitacion*, 55 Wn.App. 166, 173-74, 776 P.2d 986 (1989))).

2. *Trial Counsel’s Failure to Review all Discovery with Mr. McVey and Failure to Allow Mr. McVey to Testify Prejudiced Mr. McVey’s Right to Effective Assistance of Counsel.*

As set forth above, the right to effective assistance of counsel includes the requirement that “trial counsel ... investigate the case”. See *State v. Jones*, 183 Wn.2d 327, 352 P.2d 776 (2015). Further, the United States Supreme Court has recognized that a criminal defendant has a constitutional right to testify on his or her own behalf. *Rock v. Arkansas*, 483 US 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). On the federal level, the defendant’s right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments. *Id.* at 51-52, 107 S.Ct.

2703. In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. This right is fundamental, and cannot be abrogated by defense counsel or by the court. *State v. Thomas*, 128 Wash.2d 553, 558, 910 P.2d 475 (1996). Only the defendant has the authority to decide whether or not to testify. *Id.* The waiver of the right to testify must be made knowingly, voluntarily, and intelligently, but the trial court need not obtain an on the record waiver by the defendant. *Id.* at 558-59, 910 P.2d 475.

Here, trial counsel's failure to review and share all discovery with Mr. McVey establishes counsel's ineffectiveness. Per Mr. McVey's declaration, he was not aware of the video of E.S.'s forensic examination, as he never received it. McVey Declaration at 2 (Exhibit A) E.S.'s statements in her forensic examination differ from both her statements at the child hearsay hearing and her trial testimony, (Exhibit B) yet her differing statements were never challenged by trial counsel. No trial tactic can include the failure to obtain and review evidence before trial. "Failure to investigate ... is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). *See also, State v. Tinkham*, 74 Wash.App. 102, 109, 871 P.2d 1127 (1994) (to discharge duty of effective assistance of counsel, counsel must investigate the case.)

Also, as set forth by Mr. McVey, he relied on his trial counsel on his decision not to testify. But, had his trial counsel received and reviewed E.S.'s recorded forensic examination with Mr. McVey, and illustrated the inconsistencies in her various statements, and properly advised Mr. McVey, Mr.

McVey would have testified as he had nothing to hide and no impeachment evidence existed as a reasonable explanation for why Mr. McVey did not take the stand and testify on his behalf.

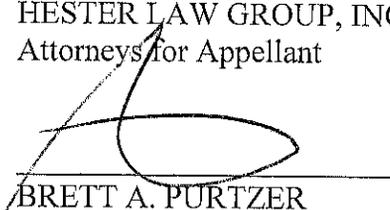
As such, trial counsel's performance was deficient and prejudicial as a reasonable likelihood exists that the outcome of the trial would have been different but for counsel's deficient performance in failing to cross-examine E.S. about her different statements and failing to call Mr. McVey to testify at trial.

III. CONCLUSION

Based upon the aforementioned, Mr. McVey received ineffective assistance of counsel, which prejudiced his right to have a fair trial. As such, Mr. McVey respectfully requests that this Court reverse the trial court and grant him a new trial, or, in the alternative, remand this matter to the trial court for a reference hearing.

RESPECTFULLY submitted this 6th day of June, 2019.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant



BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

Counsel for Respondent

Joseph Jackson
Deputy Prosecuting
Attorney
2000 Lakeridge Dr. SW
Olympia, WA

U.S. Mail
 Hand Delivery
 ABC-Legal
Messengers
 Email

Defendant

Tyler McVey
DOC #393584
Airway Heights
Corrections Center
P. O. Box 2049
Airway Heights, WA
99001-1899

U.S. Mail
 Hand Delivery
 ABC-Legal
Messengers
 Email

Signed at Tacoma, Washington this 6th day of June, 2019.



LEE ANN MATHEWS

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,)	
)	NO. 15-1-00783-5
Plaintiff,)	
)	
vs.)	
)	DECLARATION OF
TYLER J. MCVEY,)	TYLER McVEY
)	
Defendant.)	

I, Tyler McVey, hereby declare as follows:

That I am the defendant in State v. McVey in the *aforementioned* cause number.

That I am currently incarcerated in the Department of Corrections at Airway Heights and make this declaration in support of my motion for *new trial* based upon ineffective assistance of counsel.

That at the beginning of this case, Mr. Brungardt represented me and I believed that he was doing so in my best interest. Since my trial, and after reviewing additional information, including information that was withheld from me, I believe that his representation fell below an acceptable level for any felony attorney with his level of skill and expertise.

Declaration of Tyler McVey - 1



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(253) 272-2157

1 Initially, I did not know an audio/video recorded forensic interview of E.S.
2 existed until after I became represented by Mr. Purtzer. I reviewed the trial and pre-
3 trial hearing transcript and read where Mr. Brungardt was going to obtain this video,
4 but he never did. As such, I never viewed the video before trial. Due to DOC
5 restrictions for my confinement, I cannot view the video, but understand that E.S.
6 makes statements during this forensic interview that are inconsistent to what she
7 testified to at the child hearsay hearing and that are inconsistent with her trial
8 testimony. As the court will recall, she did not testify much during trial.
9

10 Additionally, and even more concerning, is that an individual who was present
11 at the time the allegations arose, Mark Schmidt, was never interviewed by Mr.
12 Brungardt and was never called at trial. Mr. Schmidt was referenced in the police
13 reports, but no investigation was conducted by law enforcement of what information
14 he might have about my case. Throughout Mr. Brungardt's representation of me, he
15 continually told me that Mr. Schmidt's testimony was the key to my case, but he
16 completely failed me by not interviewing Mr. Schmidt and by not calling him as a
17 witness at my trial. During Mr. Brungardt's representation of me, I would journal my
18 thoughts. See Exhibit A is part of my journal that I prepared on June 26, 2015,
19 where I reference Mr. Brungardt's opinion as to Mr. Schmidt's testimony. Mr.
20 Schmidt is Kecia's step-father.
21

22 I have reviewed the declaration Mr. Schmidt signed at his residence in
23 Daytona Beach, Florida. His statements in the declaration are consistent with my
24 recollection of the events that occurred on the date of the allegation and are
25 consistent with what I told Mr. Brungardt. I do not know why Mr. Brungardt never

1 called him as a witness on my behalf when he possessed crucial testimony and
2 evidence about my innocence.
3 That I am currently incarcerated for crimes I did not commit. Had I known
4 about the forensic video of E.S., had an opportunity to view it, and had Mr. Schmidt
5 been called as a witness to testify on my behalf, I would also have testified. Based
6 upon my discussions with Mr. Brungardt, he told me that I should not testify because
7 everything was locked up and favorable to me. That my testifying would be of no
8 advantage to me and that the jurors would question why E.S. would make
9 statements that are not true. There was no reason for me not to testify as I had
10 nothing to hide.
11

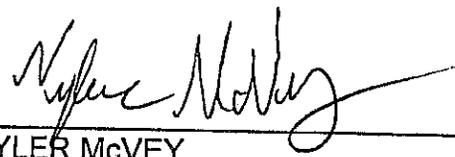
12 Mr. Brungardt never discussed with me what he would argue on my behalf
13 during his closing argument. Not until I heard Mr. Brungardt's closing argument
14 whereupon he conceded that I committed child molestation did I realize that what
15 Mr. Brungardt told me was false regarding his defense of me in my case. I believe
16 that his representation of me truly fell below any acceptable level of competence for
17 a lawyer who has been practicing as long as he has. His failure to properly
18 represent me prejudiced my right to have a fair trial.
19

20 As such, I ask that the court grant my motion for a new trial based upon the
21 ineffective assistance of my trial counsel.
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I, Tyler McVey, hereby declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 10th day of August, 2018 at Airway Heights, Washington.



TYLER McVEY



6/26/15 0630

Another night up too late, another night I couldn't sleep. I feel better for now at least. I haven't had much consistent happiness since this ordeal unfolded.

Regarding my

current situation - my lawyer states that my ex's step father's testimony is the key.



1 **STATEMENT OF:** E.S. [REDACTED]
2
3 **CASE NUMBER:** 2015-1904
4
5 **DATE/TIME:** April 30, 2015 0922
6
7 **TAKEN BY:** Sue Battson

9 Q: This is Sue Battson with the Monarch Children’s Justice and Advocacy Center. Uh it is
10 9:22 on April the 30th and right now I’m with E.S. [REDACTED] Is that right E.S. [REDACTED] Okay.
11 And this is uh Lacey Police department case number 2015-01904. Uh and E.S. [REDACTED] I’m just
12 going to put this down right here so that it can record us while we’re talking. And um and
13 then we’ll just go from there. Okay?
14

15 A: Okay.

17 Q: So look at you play with the puzzle, that’s awesome. Um I got a couple....do you know
18 what rules are? Yeah? What’s a rule? What’s an example of a rule?
19

20 A: No kicking. No hitting. No fighting.

22 Q: That...perfect. That’s a great...those are great rules. Um we got a couple rules while
23 we’re in here that I need to go over with you okay?
24

25 A: Okay.

27 Q: Okay. So I just need for you to promise that while you and I are talking today we only
28 talk about the truth okay?
29

30 A: Okay.

32 Q: If we’re not talking about the truth, what is it? If it’s not the truth it’s a....
33

34 A: Rule.

36 Q: It’s a rule. It’s a lie. Do you know what a lie is? If somethings not true? So like...
37

38 A: Get in trouble.

40 Q: Oh you get in trouble in when you tell a lie, that’s right. So if I said that there was uh a
41 pink elephant in this room, would that be the truth or would that be a lie?
42

43 A: A lie.
44



1 Q: That would be a lie. Right. And so and you get in trouble when you lie so there...I need
2 to say there is not a pink elephant in this room. So um you'll agree to that? You'll to only
3 tell me about what true and real? Can you use your words?
4
5 A: Yes.
6
7 Q: Oh thank you. Um then the next rule is if I ask you a question and you don't know the
8 answer to it, I do not want you to guess. Okay?
9
10 A: Okay.
11
12 Q: So if I said what is my dog's name what would you say?
13
14 A: I don't know.
15
16 Q: Yeah cos you don't know my dog do you? Her name's Chata. I don't think you'd ever
17 have guessed that would you? So that's perfect if you don't know the answer to
18 something, I just want you to say I don't know. The next one is, if... I may repeat things
19 to make sure that I understood you right and if I say something wrong, I really want you
20 to tell me I made a mistake. Okay? So if I call you George, what are you going to do?
21
22 A: _____
23
24 Q: You're going to say it's a mistake? What is....what is your real name?
25
26 A: E.S.
27
28 Q: You're not George. You're going to say hey I'm E.S. Okay. So if I say the
29 wrong thing, you tell me what the right thing is.
30
31 A: Okay.
32
33 Q: Okay. Alright. And then sometimes I'm confusing. Sometimes people don't understand
34 what I'm talking about.
35
36 A: You know how I could these?
37
38 Q: How? Do you know how to do that? You can sit down that's a good girl. Do you know
39 how to do those? Awesome. So if I um if I say something that doesn't....that you don't
40 understand, I need you to tell me you don't understand. Will you do that?
41
42 A: Yeah.
43
44 Q: Okay. So if say how is your cabeza what are you going to say? How's your cabeza?
45
46 A: Mm good.

1
2 Q: Oh. What is your cabeza?
3
4 A: Uh huh.
5
6 Q: I don't want you to guess. If you don't know what it is, I want you to say I don't know
7 what a cabeza is. Okay? So how's your cabeza?
8
9 A: I don't know.
10
11 Q: I don't know. I don't know what a cabeza is. It's your head. It's another word for head in
12 Spanish. It's another language. Do you speak Spanish? No. So I shouldn't use Spanish
13 words with you should I? No. Okay. Um alright. So um will you... can you promise to me
14 that you're only going to tell me the truth today? I see you're nodding your head. What's
15 the word that goes with that? Yes. Very good. Very good so E.S. I told you at...oh
16 look at that. You drew that? You did a very nice job. Do you know how to erase it? You
17 do... you know what I do sometimes I turn it upside down. It erases fast too. Oh but hey
18 that worked didn't it? I just learned a new way to do it.
19
20 A: From me?
21
22 Q: Yes. I always had to turn it upside down and then shake it. You do it right side up and it
23 works. I'm impressed.
24
25 A: You can do the red one.
26
27 Q: I can do the red one.
28
29 A: Mm mm.
30
31 Q: Oh okay. Does it work too? Oh it does. I see it. Okay I want to try it your way.
32
33 A: Well I know how to do this puzzle.
34
35 Q: You got another puzzle don't you?
36
37 A: It's a hard one for you.
38
39 Q: It...yes it would be a hard one for me. It's got some beautiful flowers on it. So E.S.
40 do...who...um who's in your family?
41
42 A: J.
43
44 Q:
45
46 A: Mm mm.

1
2 Q: Okay. How olds J. do you know?
3
4 A: 10 months old.
5
6 Q: Oohh he's a baby. Wow. Who else is in your family?
7
8 A: My sister that's K.
9
10 Q:
11
12 A: Mm mm.
13
14 Q: How old is K.
15
16 A: Seven.
17
18 Q: She's seven. She must be really big.
19
20 A: And she's my sister.
21
22 Q: She's your sister.
23
24 A: Just one.
25
26 Q: Just one sister? Who else is in your house?
27
28 A: At my mom's house?
29
30 Q: I don't know. Tell me...where do you live most of the time?
31
32 A: At my dad's house.
33
34 Q: At your dad's house. Where does J. live at?
35
36 A: At my dad's house.
37
38 Q: Okay so he's atthese guys are at dad's house? Okay who'swho else is at dad's
39 house?
40
41 A: Um my two sister.
42
43 Q: Okay what are their names?
44
45 A: K.
46

1 Q: K. [REDACTED]
2
3 A: A. [REDACTED]
4
5 Q: [REDACTED]
6
7 A: And _____
8
9 Q: And K. [REDACTED] what?
10
11 A: And brother F. [REDACTED] (?)
12
13 Q: Oh okay. I'm not sure I understood is it F. [REDACTED] Oh. Okay. F. [REDACTED] How old is A. [REDACTED]
14
15 A: I don't know.
16
17 Q: Is she bigger than you or littler than you?
18
19 A: Bigger.
20
21 Q: Bigger. Is she older than K. [REDACTED] or younger than K. [REDACTED]
22
23 A: Older.
24
25 Q: Okay. Okay. How old is F. [REDACTED]
26
27 A: Uh huh.
28
29 Q: Is he bigger than K. [REDACTED] or littler than K. [REDACTED]
30
31 A: Bigger.
32
33 Q: Bigger. Okay. Alright. Anybody else? And you! You live there. Who else...uh what's
34 your daddy's name do you know?
35
36 A: His name?
37
38 Q: Mm mm.
39
40 A: Jason.
41
42 Q: Jason is daddy. Okay. Does he have a wife? No? Is there anybody else that lives there
43 with Jason and you guys? No? No other adults in the house?
44
45 A: _____
46

1 Q: Who's the other adult in the house?
2
3 A: Tina.
4
5 Q: Tina. Okay. Who's Tina?
6
7 A: K. mom.
8
9 Q: K. mom. Okay.
10
11 A: Does it look hard for you dig a flower?
12
13 Q: It looks really hard. Look at what a good job you're doing. I like the way you do that.
14 Wow. You just make it look really easy.
15
16 A: You try doing it now.
17
18 Q: You think I can?
19
20 A: Yes.
21
22 Q: Okay. I'm going to mess them up. Okay. So let's see. This one's bees.
23
24 A: Yeah.
25
26 Q: I'm going to put the bees in there. Is that okay?
27
28 A: Wherever you see two right then that is a _____
29
30 Q: Oohhh it's a two and there's two bees. Oh that's good. Okay. That's a good thing to look
31 for. So there's four butterflies so I should put it by the four with the butterflies. Okay. Oh
32 here's a leaf and part of the flowers so this goes by the flower.
33
34 A: Yep right there.
35
36 Q: Okay I almost got it wrong. Alright. Um uh oh. Oh here we go. I wanted the ladybugs. I
37 got to get it turned right. There they go. Those are three ladybugs. M'kay. We just have
38 one flower. Oh. I don't think I was as fast as you. You did a really good job. Very nice.
39 Thank you. This says its crocodile creek. So you just said something about your mom's
40 house. Does your mom live in another house?
41
42 A: Yeah.
43
44 Q: Who lives at your mom's house?
45
46 A: Grandpa Mark.

1
2 Q: Grandpa Mark. Okay. Who else?
3
4 A: A dog.
5
6 Q: Okay.
7
8 A: And me and nobody else.
9
10 Q: Okay. Mark and a dog. Did I hear that you came here before? What did you...um wait
11 before we do that, will you tell me about...do you remember your last birthday? No? Do
12 you remember Christmas? No. Um let's oh wow you did a really, really good picture
13 didn't you.
14
15 A: Mm mm.
16
17 Q: That's nice. That's really good. So how about do you remember getting up this morning?
18
19 A: Why does it say that right there?
20
21 Q: Oh I think that tells the company that made it. So you remember getting up this morning?
22 You're busy shaking.
23
24 A: There.
25
26 Q: Okay. That's beautiful. I want you to tell me all about your day from the time you woke
27 up.
28
29 A: Good.
30
31 Q: Good.
32
33 A: Yes I get to play the piano.
34
35 Q: You got to play the piano when you woke up? Okay. What'd you do the first thing you
36 woke up?
37
38 A: I don't remember.
39
40 Q: You don't remember. Okay. Do you remember whattell me about what you had for
41 breakfast.
42
43 A: Baby....baby scramble eggs and bread.
44
45 Q: Scrambled eggs and bread. Okay. Uh did you play the piano before or after you had
46 breakfast?

1
2 A: After.
3
4 Q: After.
5
6 A: I mean before.
7
8 Q: Oh. Okay.
9
10 A: Actually after.
11
12 Q: Okay. I want you to think about it for a second and decide which one it was.
13
14 A: Mm after.
15
16 Q: After. Okay. What'd you do after you played the piano?
17
18 A: _____ jacket.
19
20 Q: You got your shoes and jacket on.
21
22 A: Mm mm. 12.51
23
24 Q: Okay.
25
26 A: We were late.
27
28 Q: I was late?
29
30 A: No me and my dad were late.
31
32 Q: You and your dad were late. Well you weren't very late. What'd you do after you got
33 your shoes and jacket on?
34
35 A: Dad bring me out of the house get him and his truck really quick.
36
37 Q: Okay. And then what?
38
39 A: And then this _____ trunk....truck.
40
41 Q: In his truck. Okay.
42
43 A: You know what this is for?
44
45 Q: No what?
46

1 A: You...you _____ it and you see some blue and then that's how you see the rest of
2 your family.
3
4 Q: Oh wow, they're on the other side of that huh? Okay. It also actually I kinda...I didn't
5 tell the truth. I should tell the truth. It's....protects that door right there so it doesn't slam
6 the wall if the door opens up all the way.
7
8 A: And for that.
9
10 Q: And for that. So it...it does a couple of things. Okay so you got in the truck and then
11 what?
12
13 A: We left.
14
15 Q: You left. And then what'd you do?
16
17 A: This looks like a heart (?)
18
19 Q: Is it pretty hard? You want to work on it all by yourself or do you want some help?
20
21 A: I want some help.
22
23 Q: Okay.
24
25 A: _____
26
27 Q: Okay.
28
29 A: Hey you know where these....
30
31 Q: I'm going to _____ this.
32
33 A: You know where these go huh?
34
35 Q: I think so. So um we were just talking about that you've been here before, Oh I'm going
36 to bring the recorder over here so it can hear us really good. Okay.
37
38 A: Whaa....why is _____
39
40 Q: I don't know. I think they're kinda cute looking though don't you?
41
42 A: Mm mm.
43
44 Q: Okay. So I'm going to look at the picture and I'm gonna try to put it where it matches so
45 this one goes there on top of the house. This one goes there. Oh good one.
46

1 A: Oops.
2
3 Q: Oops. Oh maybe I got it a little bit wrong. Did I...I don't know.
4
5 A: This...
6
7 Q: There it is. Um ...
8
9 A: It...
10
11 Q: What did you...you said you came here before. I think this one goes a little...there! I like
12 that. What did you come here before for?
13
14 A: A long, long time ago.
15
16 Q: Yeah. How come you came? You don't know?
17
18 A: Taler (?)
19
20 Q: Taler?
21
22 A: Tyler!
23
24 Q: Oh Tyler. Well who's Tyler?
25
26 A: My mom's boyfriend but he made me feel uncomfortable now my mom has a different
27 boyfriend.
28
29 Q: Oh she's...he's not her boyfriend anymore?
30
31 A: Uh huh.
32
33 Q: Okay.
34
35 A: He touched right here and he...and he did that and it really hurted. He made me
36 uncomfortable.
37
38 Q: He touched uh where he touch? You were trying to show me.
39
40 A: I did.
41
42 Q: Yeah. Uh can you show me again? Can you back up? Oh you...okay. He touched...did
43 he touch inside your underpants? Is that what I saw? M'kay. Where were you when he
44 did that?
45
46 A: Dining room.

1
2 Q: In the dining room. Did he do that one time or more than one time?
3
4 A: More.
5
6 Q: More than one time. Okay. What did he say when he did that?
7
8 A: Nothing.
9
10 Q: No? Okay. Okay.
11
12 A: _____
13
14 Q: Yes you are. Look at that you're doing really good.
15
16 A: Little (?)
17
18 Q: Yeah. Hey I'm going to put this one here. I'm doing the easy ones it's not really fair to
19 just do the easy ones but I did it okay. There we go. So he touched you there. What he
20 touch you with?
21
22 A: His hands.
23
24 Q: His hands. Okay. Did his um hands go inside your underpants? Okay. Did his hands go
25 inside....what do you call that part of your body?
26
27 A: What do you think?
28
29 Q: I don't know. Everybody has different words for it. I want to know what your word is.
30
31 A: Private area.
32
33 Q: Your private area. What do you use that private area for?
34
35 A: Potty.
36
37 Q: Potty. Okay.
38
39 A: Oops. _____.
40
41 Q: Okay and did you say it hurt?
42
43 A: _____
44

1 Q: It could be the other way too. Those could be the opposite to ours, Yeah like that. I don't
2 know, I'm guessing. I think it might be _____. So did you say it hurt? It did hurt.
3 What made it hurt do you know?
4
5 A: When he screwed it made it hurt.
6
7 Q: When he screwed?
8
9 A: Mm mm.
10
11 Q: What did he do that was screwed? What does that mean? Oh his hand moved in a ...in a
12 motion that was like a screw. M'kay. Did it go inside your body? It did? You nodded
13 your head yes. It...I want to make sure I got that right.
14
15 A: You did.
16
17 Q: He did. Okay. What did he go inside your body with?
18
19 A: Uh his hand.
20
21 Q: His hand. Okay.
22
23 A: This looks like a hard one for real.
24
25 Q: It...it is a hard one but look at what a good job you're doing.
26
27 A: Mm.
28
29 Q: I think you're doing excellent although see look this one might be switched too. Right?
30 Try that. Yeah see how it matches. Okay. Um okay.
31
32 A: Mm. There. Did it.
33
34 Q: Okay. What were you doing right before he started doing that do you remember? No? He
35 did it more than one time. Where was mommy?
36
37 A: At work.
38
39 Q: Mommy was at work.
40
41 A: Where does this ...
42
43 Q: Oh...oh hey you got it. That was a hard one. That was really hard. Okay. What else do
44 you have? Uh...hey there's part of the tire. Is that the tire? Maybe? Yeah maybe it...I
45 don't know does it go up higher like that? M'kay.
46

1 A: Oops. It goes up there.
2
3 Q: Oh there you go, you did it! That was good.
4
5 A: Not all that way.
6
7 Q: Well okay we're getting close though. Oh look at you do that. Um I'm going to put this
8 one down there. You got to put it the right direction though. That's it.
9
10 A: Why's it like that?
11
12 Q: Why is it tipped?
13
14 A: Mm mm.
15
16 Q: I...oops...I don't know. Maybe it's kinda warped. It might be _____. There.
17
18 A: Oops that wrong way.
19
20 Q: Yeah you got it turn it there okay. So um when he touched you was anybody else in the
21 house?
22
23 A: Grandpa Mark.
24
25 Q: Grandpa Mark. Where was Grandpa Mark?
26
27 A: In his bedroom.
28
29 Q: Okay.
30
31 A: Another hard one for you.
32
33 Q: Oh good I like these hard ones.
34
35 A: Why do you like them?
36
37 Q: It's a challenge. I like to have to think about things.
38
39 A: The elephant is really hard.
40
41 Q: Yes. What's that one called?
42
43 A: A zebra.
44
45 Q: That's a zebra. What's this one called?
46

1 A: A lion.
2
3 Q: A lion. And what's this one called?
4
5 A: A monkey.
6
7 Q: A monkey. That's right. Okay.
8
9 A: Okay the elephant is so hard.
10
11 Q: Yeah.
12
13 A: You're going to do the elephant.
14
15 Q: Oh I am? Okay. So when Tyler touched you more than one time, was umdid he ever
16were his clothes on or off?
17
18 A: On.
19
20 Q: His clothes were on. Were your clothes on or off?
21
22 A: On.
23
24 Q: Your clothes were on. Okay. Um ...
25
26 A: Okay this is a hard one.
27
28 Q: Alright. Let's see.
29
30 A: I'll tell you.
31
32 Q: Okay. Oh good. That's the nose. There. Good.
33
34 A: Now you have to do the body.
35
36 Q: Now I have to do the body. Okay. Um well I think this it ends here so I think it's the end.
37 Do you think that's right? You think I got it? Okay good. Thank you. Here do you want
38 to do this one or one of the others?
39
40 A: One of the others.
41
42 Q: Okay. Okay. When he touched you, did he...oh I should do another one. I like this one
43 cos I like horses. Um did he take pictures?
44
45 A: It's a zebra.
46

1 Q: It's a zebra. It's kinda like a horse. Did he ever take any pictures? You're shaking your
2 head. What does that mean?
3
4 A: No.
5
6 Q: No.
7
8 A: Here.
9
10 Q: Oh okay. One more. So those are some more legs right? Maybe I should put them this
11 way. That would be funny wouldn't it if his legs came out of the top? He wouldn't walk
12 very well would he? Okay there you go. Um ...
13
14 A: Done.
15
16 Q: Did he...did he touch anywhere else besides your private...your privates? Oh you're very
17 careful with that. I like that. Thank you. So I...I'm not sure I saw what you said. Did he
18 touch you anyplace besides your privates?
19
20 A: Now this is a really, really hard one.
21
22 Q: Oh see I think that one has a horse. I like horses.
23
24 A: Does (?) ?
25
26 Q: Yeah. I actually have a horse. That's why I like them so much.
27
28 A: This is...this is supposed to be opening up right here.
29
30 Q: Oh yeah. Okay. For the door. Oh here's a rooster. I have a rooster too. That's a happy
31 horse. Did you see the smile on his face? Isn't that nice?
32
33 A: Okay you do this and I do all of these.
34
35 Q: Okay. You want me to...yeah you start.
36
37 A: Now you go.
38
39 Q: Now I can put my horse in?
40
41 A: You gotta do it fast.
42
43 Q: Oh.
44
45 A: Whoever wins...
46

1 Q: Oh.
2
3 A: I won.
4
5 Q: Oh you're really good. Let's get this one in. I'm not very fast. You're very fast. Good
6 girl.
7
8 A: Okay.
9
10 Q: Okay. Here. Uh you're very careful with that. I _____ that. Are you a careful person? Did
11 um Tyler say anything to you after he touched you?
12
13 A: Mm no.
14
15 Q: Well...no? No. Okay. Did he ever...you said that he touched you more than one time and
16 you were in the living room were you ever any place other than the living room?
17
18 A: No...dining room!
19
20 Q: Dining room. Very good. See you corrected me when I got something wrong. That's
21 exactly what I wanted. Okay.
22
23 A: Hard one for you.
24
25 Q: Yes. In the dining room.
26
27 A: This is a hard one for you.
28
29 Q: Okay.
30
31 A: You got all those and I got all of these.
32
33 Q: Do you think I can do it by colors? Okay. Are you...oooh....you'reyou're making
34 ...okay there we go. We both have how many?
35
36 A: One....we both have four.
37
38 Q: We both have four. Okay. Are you ready?
39
40 A: You start first.
41
42 Q: Me start first. Okay. So this is blue. That's blue. Oh that's not the right one. Okay I'll put
43 it there then.
44
45 A: I have a lot of blue.
46

1 Q: Yes you do.
2
3 A: Actually you have to have that on I have to put this one on.
4
5 Q: Okay.
6
7 A: Actually I have _____.
8
9 Q: Okay. There we go. Okay so now you gotta put one in. There! Nice. Okay. So now I
10 have...I have two green ones.
11
12 A: Yeah.
13
14 Q: _____ I'm gonna try to do the square. That's a square. Okay.
15
16 A: This one's a hard one.
17
18 Q: Oh yeah you gotta turn it just right. Okay that was good. Alright. Oh it's my turn. Um
19 okay I...this is a diamond. I'm going to put it like that.
20
21 A: I did mine.
22
23 Q: Oh good. Okay. Nice.
24
25 A: Now I gotta do mine.
26
27 Q: Okay.
28
29 A: Actually you do yours.
30
31 Q: Want me to do mine? Okay. Well it doesn't fit there cos that's yellow. This one's green.
32
33 A: You won.
34
35 Q: Yeah but it...I won cos I started first not cos I'm just the best. Thank you.
36
37 A: Now this time we gotta do this puzzle at the same amount and we start at the same and
38 _____ start at the same time _____
39
40 Q: Oh okay we're gonna...we're gonna go together?
41
42 A: Yeah.
43
44 Q: So you said you were in the dining room where....were you standing or sitting or laying
45 down or something else?
46

1 A: Standing.
2
3 Q: Standing. Okay. Was he standing or sitting or laying down or something else?
4
5 A: Um....sitting.
6
7 Q: He was sitting. What was he sitting on?
8
9 A: The dining room chair.
10
11 Q: Okay.
12
13 A: Okay.
14
15 Q: Okay.
16
17 A: One...
18
19 Q: Was it the same every time or was there a time that was different?
20
21 A: Actually you get the big giraffe, I get this.
22
23 Q: Oh nice. Okay.
24
25 A: Okay we got...you start now and I start.
26
27 Q: Okay. We're starting. Okay. Let me try that one. And like this...uuhh..
28
29 A: I won.
30
31 Q: You won. That was good. You're very fast. Okay. So was there ever a time that was
32 different from you standing and him sitting?
33
34 A: Uh huh.
35
36 Q: No it was always the same that way? Okay. And so where were...if I'm him sitting in the
37 chair, where were you standing? You were standing right there. Okay. How did he get
38 you come close to him? Oh so you took a step closer. Okay. Did he tell you what he was
39 doing?
40
41 A: No.
42
43 Q: No. He just did it? Okay. Oh ...alright. Do you know what any of these are?
44
45 A: Firetruck.
46

1 Q: That's a firetruck yeah.
2
3 A: _____ whoever wins gets this one.
4
5 Q: Oh okay.
6
7 A: Put in.
8
9 Q: Okay I like that. Okay. Do you know what this is?
10
11 A: You get three I get... actually we both get two.
12
13 Q: Oh good. Oh that makes perfect sense. Okay. Do you know what this is?
14
15 A: I don't.
16
17 Q: It's a...it's a truck. It's... I think it's a tow truck. In case somebodys car broke down. Do
18 you know what this is?
19
20 A: A police car.
21
22 Q: That's a police car. Yeah. Nice. What's this?
23
24 A: Motorcycle.
25
26 Q: Yeah a motorcycle, that's a police motorcycle. What's that?
27
28 A: _____
29
30 Q: It's an ambulance. What do people go on an ambulance for? Oh. You touched your arm.
31
32 A: Nope.
33
34 Q: Oh.
35
36 A: Broke your arm _____
37
38 Q: Oh if you hurt yourself, broke your arm, broke your leg.
39
40 A: Broke your foot or broke your hand off or broke ...
41
42 Q: Or hit your head really hard.
43
44 A: Or break your neck off.
45

1 Q: Oh that'd be...yeah you definitely need an ambulance if you broke your neck off. Yeah.
2 You might need more than an ambulance is possible. Okay. Is there...I want you to know
3 what else you can tell me about
4
5 A: You get three, I get two.
6
7 Q: Okay.
8
9 A: Makes perfect...makes perfect.
10
11 Q: It's perfect. Okay. Are we going to do this now?
12
13 A: Yeah.
14
15 Q: Okay.
16
17 A: So if I win I get the win more.
18
19 Q: Okay. Okay are you ready? Set.
20
21 A: Go.
22
23 Q: Go. Okay. I may...I going to use the Kleenex cos I have a cold I don't want to make
24 everybody sick.
25
26 A: I won.
27
28 Q: Oh. I wasn't fast enough was I?
29
30 A: I have the big firetruck.
31
32 Q: There you go. Nice job. Nice job. What else can you tell me about what happened that
33 day?
34
35 A: Nothing more.
36
37 Q: There's nothing more? Do you remember...
38
39 A: Oh!
40
41 Q: Oops! Do you remember what you were wearing?
42
43 A: This is going to be a hard one. We'll have to win.
44
45 Q: Oh how do we do that?
46

1 A: You got...you gotta be that. And I gotta be the two dinosaurs.
2
3 Q: Okay.
4
5 A: And we each get a truck.
6
7 Q: Oh.
8
9 A: You get the firetruck, I get the firetruck.
10
11 Q: Okay. This is the hulk. Ahhhh. Look how strong he is. You've got dinosaurs though. He
12 bit me. I'm dead. Here comes the...I need an ambulance I've been bitten by a dinosaur.
13 Okay. Oh there's the...very nice. There's the ambulance. He's going to take me to the
14 hospital. Where's the hospital? Maybe this should be the hospital. Okay. Nice. Good job.
15 Okay. Well E.S. I think you did such a great job. You told me all about Tyler. Is there
16 anything else that you want to tell me about?
17
18 A: Mm mmm.
19
20 Q: You're shrugging your shoulders. Has anybody else ever touched you in a way that made
21 you feel uncomfortable? You're shaking your head, what does that mean?
22
23 A: No.
24
25 Q: No. Okay.
26
27 A: I already told you.
28
29 Q: Yes okay. That's right. I just want to make sure. Um did anybody tell you what to say to
30 me today? You're shaking your head. What does that mean?
31
32 A: No.
33
34 Q: No. did your daddy tell you why you were coming here today? You're shaking your
35 head, what does that mean?
36
37 A: No.
38
39 Q: No. Okay. Um so nobody...did anybody tell you what to say?
40
41 A: No.
42
43 Q: No. Okay. Well I think we should be done. I'm going to use the Kleenex again and I'm
44 going to put these guys inside here. Okay.
45
46 A: Okay.

1
2 Q: Can you help me pick the ...put the puzzles away?
3
4 A: _____.
5
6 Q: Yeah.
7
8 A: _____ one. _____ really good.
9
10 Q: The car one was really good. Okay.
11
12 A: We get to do this coloring (?)
13
14 Q: Well if...oh my goodness. That's beautiful isn't it?
15
16 A: You got to do that color.
17
18 Q: Okay well right now I have to put everything away because I have to get ready to go.
19 What are you going to do with the rest of your day? Oops. Do you know?
20
21 A: No.
22
23 Q: No.
24
25 A: You and me got to do....
26
27 Q: Oh we don't get to color. I have to go do some things but you know what, if you want
28 you can take this coloring book with you.
29
30 A: _____ . I want to take this coloring book.
31
32 Q: Well those are...those are big ones. We don't get to take the big ones. We get to take the
33 little ones. Okay. Big ones are for lots of kids to play with. Okay. So if you want you can
34 choose anyone of these. There's ...there's some different ones. This one has uh clowns.
35 That one has shark. This one might be different. What's that one...no that's a shark.
36
37 A: I want the shark. I...
38
39 Q: Oh there's a cow.
40
41 A: I want the cow.
42
43 Q: You want the cow. Okay.
44
45 A: _____ two cows.
46

1 Q: Good. Okay. Well E.S. thank you so much for coming to oh we should put the ...the
2 etch a sketches back in there shouldn't we.
3
4 A: But I want to play one of them.
5
6 Q: Well okay but we got to go. We're getting packed up so that we can leave.
7
8 A: Now done.
9
10 Q: What a good girl. You're an excellent helper. So this is Sue Battson and it is now ten
11 o'clock and I'm going to end my interview with E.S. Okay thank you for talking with
12 me today E.S. Do you want to turn it off?
13
14 A: How?
15
16 Q: You push that button right there it says....

HESTER LAW GROUP, INC., P.S.

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Filing Personal Restraint Petition

Transmittal Information

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Appellate Court Case Number: Case Initiation
Trial Court Case Title: State of Washington Vs Mcvey, Tyler Justin
Trial Court Case Number: 15-1-00783-5
Trial Court County: Thurston Superior Court
Signing Judge: CJ Fairhurst
Judgment Date: 06/06/2018

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