

34623-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL T. BARNES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. Admission into evidence of alleged victim's pre-trial video-recorded statements violated Mr. Barnes's rights under the Confrontation Clause.
2. Failure to object to admission into evidence of alleged victim's pre-trial video-recorded statements violated Mr. Barnes's Sixth Amendment right to effective assistance of counsel.

B. ISSUES

1. A forensic interview with the child was conducted during the police investigation of allegations of child molestation. The child testified at the beginning of trial and was not asked about any of the statements made during the interview. Were the defendant's rights under the Confrontation Clause violated when a recording of the interview was subsequently shown to the jury during the interviewer's testimony?
2. Defense counsel failed to object when the State introduced into evidence a recording of the alleged victim's pretrial statements after the alleged victim's testimony ended

without any questions about the statements made in the recorded interview. Did counsel's failure to object violate the defendant's right to the effective assistance of counsel?

3. The child's testimony consisted of ambiguous statements suggesting the accused may have touched him inappropriately. Absent the evidence presented in the recorded pre-trial interview, the evidence was insufficient to prove the essential elements of the charged crime beyond a reasonable doubt. Was counsel's failure to object to the recorded evidence harmless error?

C. FACTS

Amanda B. called the Pasco police from her home in Dayton, Ohio in the spring of 2014. (RP 41-42) Her son Z.B. spoke with Officer Nathan Carlisle. (RP 43, 191) A few days later Detective Jesus "Jessie" Romero called Ms. B. (RP 43) As a result of the call, Ms. B. returned to the tri-cities with her children. (RP 44) She took Z.B. to SARC for an interview with Mari Murstig. (RP 44)

In April 2015 the State charged Michael Barnes with first degree child molestation involving Z.B. (CP 1) The charge was tried to a jury.

Z.B. testified that Michael touched him in a way that made him feel weird or uncomfortable. (RP 67-68) He remembered that he had gone downstairs to change his clothes. (RP 73) He said his clothes “got took off” and Michael “touched stuff,” specifically “the back side and the front side,” which Z.B. called the “bad parts.” (RP 69) Z.B. said Michael touched them with his hand. (RP 69) He said he was asked to touch Michael but he didn’t. (RP 69) Z.B. testified he never saw Michael take his clothes off. (RP 70) He recalled that the touching went on “for a very long time” but he did not know how often it happened. (RP 72)

Z.B. told the jury he remembered that he had talked with Ms. Murstig and had told her “he touched me.” (RP 71) He remembered that he talked with “Jessie,” but he didn’t remember what he told him. (RP 72)

Ms. Murstig told the jury she interviewed Z.B. in August 2014. (RP 99) Z.B. told her he was uncomfortable talking with her so she offered to bring Detective Romero in, and at Z.B.’s request she let him talk with the detective alone. (RP 99) She made a video recording of the entire interview, which was shown to the jury. (RP 100) Ms. Murstig testified that Z.B. told her Mr. Barnes had touched his penis and made him touch Mr. Barnes’s penis. (RP 186-87)

Mical Quevas identified herself as the mother of a child whose father was Ms. B’s brother. (RP 152-53) She described an incident in

which she found her son and Z.B. engaged in what resembled adult sexual activity. (RP 155) She testified that “I asked him why he - - he was doing that to my son and he just said ‘I don’t know. Michael did it to me.’ ” (RP 156) The State presented expert testimony that the behavior described by Ms. Quevas was likely caused by exposure to sexual activity. (RP 167)

Officer Carlisle told the jury that when he spoke with Ms. B on the phone in 2014, she gave him a summary of what her son Z.B. had reported to her. (RP 182-83) He then spoke with Z.B. (RP 180) After some preliminary questions, he told Z.B. that “his mom had already told me about how Michael had touched him.”¹ (RP 184)

D. ARGUMENT

1. ADMISSION OF THE FORENSIC INTERVIEW VIOLATED THE CONFRONTATION CLAUSE.

The Confrontation Clause of the Sixth Amendment provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

¹ During cross-examination Ms. B. testified that when she spoke with Officer Carlisle on the phone she told him that an unidentified person told her that Z.B. had said that “Michael made me pull on his penis, and he pulled on my penis,” and said “If you tell anyone what we did together then I am going to hurt your mom, brother, grandma and grandpa.” (RP 57)

During cross-examination Officer Carlisle explained that it had been his understanding that Ms. B had been relating to him what her son had told her. (RP 187) He recalled that he then asked Z.B. “about the inappropriate touching” and Z.B. told him Michael touched his penis and that Michael made him touch his penis. (RP 197)

confronted with the witnesses against him” U.S. Const. amend VI. Confrontation Clause violations are reviewed *de novo*. *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007) (citing *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

Under the Confrontation Clause, testimonial hearsay is inadmissible unless either (1) the declarant testifies at trial or (2) the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004).

Testimonial statements include those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *State v. Fisher*, 130 Wn. App. 1, 13, 108 P. 3d 1262 (2005) (quoting *Horton v. Allen*, 370 F.3d 75, 84 (1st. Cir. 2004)). A child’s statements in the course of a forensic interview are testimonial. *State v. Beadle*, 173 Wn.2d 97, 110, 265 P.3d 863 (2011).

If a hearsay declarant testifies as a witness and is subject to full and effective cross-examination, hearsay is admissible under the Confrontation Clause. *California v. Green*, 399 U.S. 149, 158, 164, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) . So long as the declarant is asked about the prior hearsay statement, the availability requirement of the

Confrontation Clause is satisfied, even if the declarant denies or fails to remember making the statement:

Indeed, if there is any difference in persuasive impact between the statement “I believe this to be the man who assaulted me, but can’t remember why” and the statement “I don’t know whether this is the man who assaulted me, but I told the police I believed so earlier,” the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-examination.

United States v. Owens, 484 U.S. 554, 559-60, 108 S. Ct. 838, 842-43, 98 L. Ed. 2d 951 (1988).

“Under *Owens* and *Green* the admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is asked about the event *and the hearsay statement*, and the defendant is provided an opportunity for full cross-examination.” *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (emphasis added); see *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 15-16, 84 P.3d 859 (2004).

In *State v. Price*, our Supreme Court held that a declarant is not unavailable if he or she testifies and “concedes making the statements” about which the witness testifies:

The purposes of the confrontation clause are to ensure that the witness’s statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness’s demeanor. (*citation omitted*) The *Green* Court held that “the Confrontation Clause does not require excluding from evidence the prior statements of

a witness *who concedes making the statements*, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.” (*citation omitted*)

State v. Price, 158 Wn.2d 630, 639-40, 146 P.3d 1183 (2006) (quoting *California v. Green*, 399 U.S. 149, 158, 164, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)) (emphasis added).

Here, the State presented a video recording containing numerous out-of-court statements Z.B. made to the forensic investigator, Ms. Murstig, and the investigating officer, Detective Romero. The recorded interviews were an essential component of the investigation, obviously obtained for use at a later trial.

Although the child testified, and acknowledged that he had been interviewed by Ms. Murstig, the prosecutor did not ask him whether he told Ms. Murstig about the alleged incident, nor did he ask about any of the statements made during the interview with either Ms. Murstig or Detective Romero. The recorded statements were not made under oath. Thus Z.B. did not concede making the statements, and was not open to full cross-examination about those statements at trial. *Price*, 158 Wn.2d at 640.

Introduction of the recording of the interviews violated Mr. Barnes’s right to confront the primary witness against him.

2. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO EVIDENCE OF THE VICTIM'S RECORDED PRE-TRIAL STATEMENTS.

a. Counsel's Performance Was Deficient.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The State's case against Mr. Barnes rested on Z.B.'s hearsay statements to Ms. Murstig, primarily presented to the jury in the video recording of the forensic interview. While the video recording would have enabled the jury to observe Z.B.'s demeanor while making the statements, they were not made under oath. He did not adopt them as his statements

while testifying at trial and was not subject to cross-examination as to their content.

Because the State's case did not provide defense counsel with any opportunity to question Z.B. about those statements, their introduction into evidence violated Mr. Barnes's right to confront the primary witness against him. Accordingly, in failing to object to admission of the video recording, considering the State's failure to make S.J. available for cross-examination, defense counsel provided deficient representation.

b. The Deficient Representation Was Not Harmless.

The defendant alleging ineffective assistance of counsel bears the burden of establishing that “ ‘there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.’ ” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). An error is harmless if “ ‘it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). There is great judicial deference to counsel's performance, and the court's analysis begins with a strong presumption that counsel was effective. *Strickland v.*

Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). But “a criminal defendant can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s performance.’ ” *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

The child’s statements during the recorded interviews were highly prejudicial. Absent the recording, the evidence is wholly insufficient to prove the essential elements of the offense of which Mr. Barnes has been convicted.

“A person is guilty of child molestation in the first degree when the person has . . . sexual contact with another” RCW 9A.44.083(1) “ ‘Sexual contact’ means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” Whether sexual contact has been proved is determined in light of “the totality of the facts and circumstances presented.” *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

Z.B. testified that Michael touched his “bad parts,” namely “the back side and the front side” with his hand and asked Z.B. to touch him, but Z.B. didn’t do that. (RP 69) Beyond stating that his clothes were taken off, Z.B. did not elaborate on the context or circumstances in which

the alleged touching occurred. He did not testify to any other occurrences relevant to the molestation charge.

Z.B.'s testimony was not sufficient to support the inference that Mr. Barnes touched any sexual or intimate parts of Z.B.'s body, or that any touching was done so for the purpose of gratifying anyone's sexual desire. This testimony falls far short of the evidence necessary to support a conviction for first degree child molestation.

The forensic interview provided the State with an opportunity to present statements of the alleged victim that were in addition to, or inconsistent with, his testimony at trial. Thus the jury was presented with significant evidence from which the requisite sexual contact might be inferred, but about which Z.B. could not be cross-examined. If that evidence had been excluded, the result of this trial would probably have been different.

No reasonable attorney would acquiesce in the State's use of such prejudicial evidence in the absence of any opportunity to cross-examine the declarant. Trial counsel's failure to object to the introduction into evidence of the video recording violated Mr. Barnes's right to effective assistance of counsel.

E. CONCLUSION

Mr. Barnes's conviction should be reversed and the case remanded for a new trial consistent with the constitutional requirement of effective assistance of counsel.

Dated this 19th day of July, 2017.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 34623-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MICHAEL T. BARNES,)	
)	
Appellant.)	

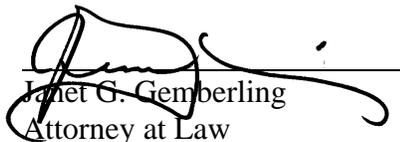
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I certify under penalty of perjury under the laws of the State of Washington that on July 19, 2017, I mailed a copy of the Appellant's Brief in this matter to:

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