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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34806-7-III

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STATE OF WASHINGTON, Respondent,

v.

PHILIP NOLAN LESTER, Appellant.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

- A. The State's reliance on *Ohio v. Clark* is misplaced because A.B.'s statements were made to police and CPS investigators for the purpose of gathering evidence, not to a school teacher.

The State's argument that A.B.'s forensic interview was not a "testimonial" statement within the meaning of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) relies entirely upon analogy to *Ohio v. Clark*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2173, 192 L. Ed. 2d 4484 (2015). Because *Clark* is factually distinguishable in critical respects, the analogy fails.

In *Clark*, L.P., a three-year-old boy, returned to school a day after being left in Clark's care with a bloodshot eye and red marks on his body. A teacher asked, "Who did this? What happened to you?" and L.P. said, "Dee Dee." "Dee" was Clark's nickname. The teacher and her supervisor called the child abuse hotline to report the incident and the following day, a CPS worker took L.P. and his sister A.T. to the hospital, where a doctor discovered injuries suggestive of physical abuse on both of them. A court found L.P. incompetent to testify at trial but allowed his statements to the teachers to be admitted, holding they were not testimonial. *Clark*, 135 S. Ct. at 2177-78.

In affirming the admission of L.P.'s statements, the U.S. Supreme Court clarified that whether a statement is "testimonial" for Confrontation Clause purposes is whether the primary purpose of the interrogation is to respond to an ongoing emergency, or to create a record for trial. *Clark*, 135 S. Ct. at 2179-80. When statements are made to police, courts consider all of the circumstances of the statement, such as the formality of the interrogation and whether the statements were intended to prove past facts, rather than to quell an ongoing emergency. *Id.* at 2180. But the *Clark* Court recognized, nearly categorically, that statements made to people who are not police officers are unlikely to be testimonial. *Id.* at 2181. In the case of L.P.'s statements to his teacher, the statements were made in the context of an ongoing emergency in which the school needed to know who caused the injuries to determine if it was safe to release him to his guardian. *Id.*

Because the statements in *Clark* were made to a schoolteacher in a classroom rather than to police and CPS investigators in a formal, station-house interrogation, the circumstances there evidenced a non-testimonial purpose. I RP 121. Moreover, because the teacher in *Clark* did not know who had harmed the child and was seeking to find out in order to evaluate what to do to protect the child from further abuse, the circumstances are not the same as here, where A.B. was in a safe environment, had already

named “Uncle Junior” as the perpetrator to her mother, and the questioning served only to elicit details and gather evidence about what had already happened. I RP 182, 192. Factually, the present case does not fall within the *Clark* Court’s evaluation of statements to non-law enforcement witnesses, nor within the exception for statements to law enforcement whose purpose is to respond to an ongoing emergency recognized in *Michigan v. Bryant*, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) and *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Instead, A.B.’s recorded station-house interview is the type of statement that qualifies as testimonial “under any definition,” as a statement taken by police in the course of an interrogation whose primary purpose is “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822 (*quoting Crawford*, 541 U.S. at 52-53).

Notably, the State does not address or even acknowledge *State v. Hopkins*, 137 Wn. App. 441, 457, 154 P.3d 250 (2007), which was discussed at length in Lester’s Appellant’s Brief. *See Appellant’s Brief*, at 10-13. Yet unlike *Clark*, *Hopkins* is squarely on point factually. As here, *Hopkins* involved a child’s initial disclosure to family members, followed by subsequent interviews by a CPS investigator. 137 Wn. App. at 454-57. As here (and unlike *Clark*), the CPS investigator conducting the

questioning was a government official whose “investigatory role overlapped with and aided law enforcement.” 137 Wn. App. at 457. Because the *Hopkins* court concluded that statements made to a CPS investigator under similar circumstances as in the present case were testimonial and inadmissible under the Sixth Amendment, the State’s failure to explain and distinguish *Hopkins* should be understood as an effort to ignore it entirely in hopes of avoiding its application here.

Moreover, the State fails to meet its burden to prove beyond a reasonable doubt that admitting A.B.’s extensive, detailed, recorded police interview was “so insignificant as to be harmless” in light of the circumstances of the trial. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1185 (1985), *cert. denied*, 475 U.S. 1020 (1986). The State attempts to analogize the evidence in this case to the evidence in *State v. Beadle*, 173 Wn.2d 97, 265 P.3d 863 (2011), where the admission of testimonial child hearsay statements to a police detective and CPS investigator was found to be harmless error. But in *Beadle*, the child made multiple voluntary disclosures to her mother, stepfather, and mental health counselor over the course of more than a year, drew Beadle’s “tail” several times, demonstrated how and where the touching occurred, and was diagnosed with post-traumatic stress disorder based upon symptoms identified by a

mental health professional as consistent with sex abuse. 173 Wn.2d at 101-03.

Here, by contrast, A.B. made a single statement to her mother, who had recently fallen out with Lester, about “Uncle Junior’s pee-pee.” She did not describe the alleged abuse to any other non-law enforcement personnel, nor were the generalized behavioral disruptions described by her mother during the time A.B. was babysat by Lamote ever identified as symptomatic of sex abuse trauma by a psychological expert. Thus, unlike in *Beadle* where, absent the improperly admitted testimonial statements, the jury would still have heard the child’s multiple, repeated and consistent disclosures to non-law enforcement witnesses, seen the child’s drawings, and considered the child’s psychological diagnosis and symptomology as potentially corroborative of her statements, here, absent A.B.’s statements in her interview, the jury would only have heard the single, uncorroborated disclosure to her mother, occurring shortly after the mother’s own falling out with Lester. Neither the quality nor the quantum of the remaining evidence would have inevitably resulted in a guilty verdict here, where the overwhelming bulk of the State’s case arose from the testimonial statements that should not have been introduced.

B. Under the law of the case doctrine, the State undertook to prove the dates of the alleged offenses as essential elements when it included the dates as elements in the “to convict” instructions.

The State contends that the date of the crime is not an essential element, and therefore it was not required to prove the date beyond a reasonable doubt. *Respondent’s Brief*, at 15-16. It thereafter devotes a substantial portion of its briefing to the proposition that Lester had notice of the charged conduct and did not argue that the Information was defective. *Respondent’s Brief*, at 16-20. In so doing, the State overlooks that under the law of the case doctrine, it undertook to prove beyond a reasonable doubt that the offense occurred on or between December 1, 2014, and January 1, 2015 when it included the date of the offense as an element in its “to convict” instructions. *Appellant’s Brief*, at 15, 17.

Under the law of the case doctrine, the State’s observation that the date of the offense is not an essential element of the crime is irrelevant. In *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998), cited at page 15 in Lester’s *Appellant’s Brief*, the Washington Supreme Court described the law of the case doctrine at length. Under the doctrine, “jury instructions not objected to become the law of the case.” *Id.* (citing *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)). This means that “the

State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.” *Id.* (citing *State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995), *State v. Rivas*, 49 Wn. App. 677, 683, 746 P.2d 312 (1987)). The defendant may thereafter assign error to the State’s failure to present sufficient evidence to prove the additional element. *Id.* (citing *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988)).

This is precisely the challenge that Lester raised. Regardless of whether the law *would* have required the State to prove the date of the offense, the “to convict” instructions asked the jury to find beyond a reasonable doubt that the charged acts occurred between December 1, 2014 and January 1, 2015. CP 65, 67. Thus, under the law of the case doctrine, the State was required to prove beyond a reasonable doubt that the alleged incidents occurred within that time frame.

In its brief, the State makes no serious effort to argue that it met its burden of proof, pointing only to testimony from Lester that during some days in December, he did not work and would have had access to A.B. while Lamote babysat. *Respondent’s Brief*, at 19. But the State’s argument fails to reconcile Lester’s work schedule with Bishop’s testimony that A.B.’s behavioral changes (allegedly associated with the

abuse) started in September, and that Lamote did not babysit A.B. anymore after about December 15. I RP 130, 137. The testimony identified by the State showed only that Lester did not work on December 1 or December 3, during the time frame when Lamote was babysitting. II RP 271-72. But Lester also testified that A.B. was not there on days he didn't work, and he did not dispute that there were occasions when A.B. was at the house in the morning before he left for work or in the afternoon after he came home, contending only that he was never alone with her. II RP 264-65. Absent some reason to believe the charged incidents could *only* have occurred on December 1 or December 3, it would be speculative to conclude the incidents occurred then rather than on other occasions when A.B. was at the home between August and mid-December, and it would be contrary to the State's theory that A.B.'s behavioral changes in September were the result of abuse she suffered from Lester.

The State appears to concede the paucity of its evidence when it states, "If the defendant could show some prejudice the date might be sufficient for reversal." *Respondent's Brief*, at 19. The prejudice to the defense is the failure to present sufficient evidence to prove each element – including elements the State undertook to prove under the law of the case doctrine – beyond a reasonable doubt. Because no additional showing of prejudice to the defense is required, the evidentiary

insufficiency requires reversal of the convictions and dismissal of the charges.

- C. The State fails to show that conditions prohibiting purchasing or possessing alcohol, or entering premises where the primary business is the sale of alcohol, or having no contact with minors without exception for his minor son, are crime-related or authorized by the Legislature.

The State points out, correctly, that RCW 9.94A.703(3) permits the sentencing court to prohibit a defendant from consuming alcohol<sup>1</sup> regardless of whether alcohol use contributed to the offense. But the State does not address the fact that the restrictions imposed by the court are broader than merely prohibiting alcohol consumption; instead, they go further and prohibit Lester from possessing it, from possessing or consuming any non-alcoholic “mind or mood altering substances” including marijuana regardless of whether they are controlled substances, and from being in bars or other areas where the primary business is the

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<sup>1</sup> After the crimes for which Lester was charged, the Legislature amended RCW 9.94A.703(3)(e) to add “possessing” alcohol as a discretionary condition the court may impose. 2015 Laws of Washington Ch. 81, § 3 (effective July 24, 2015). Because the sentencing court must apply the law that was in effect at the time the crime was committed to avoid *ex post facto* punishments, the sentencing court here was limited to imposing the conditions authorized under the version of the Sentencing Reform Act in effect before the 2015 amendment. See *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

sale of liquor. These restrictions are not authorized by the Sentencing Reform Act and therefore, to the extent they are overbroad, should be stricken.

The State further contends that prohibiting Lester from having unsupervised contact with his own minor son after he was convicted of abusing an unrelated minor girl was reasonable, but it points to no evidence or authority that Lester presents a risk of harm to his own son or that the restriction on contact was reasonably crime-related. Its argument rests upon *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), *abrogated on other grounds by State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). In *Berg*, the defendant was convicted of raping and molesting his 14-year-old stepdaughter, who lived in his home, and the court upheld a condition limiting contact with his own minor female children still in the home. 147 Wn. App. at 929-30, 941-42. Notably, in *Berg*, the victim was “living in that same arrangement” as the defendant’s children, and the prohibition did not extend to male children. *Id.* at 942. Moreover, the *Berg* court pointed to the defendant’s conduct in “exploiting a child’s trust in him as a parental figure” to commit the crime. *Id.* at 944.

By contrast, in this case, A.B. did not reside in Lester’s home; she went there occasionally to be babysat by Lester’s girlfriend while Lester

was usually gone at work. I RP 126-28. The circumstances reflect neither the exploitation of a close paternal relationship with the victim nor the willingness to disregard incest taboos that were present in *Berg* and suggested that a similar crime could be committed against the defendant's own minor daughter. Moreover, unlike the order in *Berg* which was limited to minor female children, the order here prohibits contact with *all* minor children, including Lester's own son, in the absence of any evidence that Lester poses any risk of offending sexually against a male child.

In *State v. Letourneau*, 100 Wn. App. 424, 439, 442, 997 P.2d 436 (2000), the court considered a restriction on contact between the defendant and her four daughters and two sons and concluded the restriction was impermissible, where the defendant's own biological children were not of similar age or circumstances as the previous victim. Instead, to support such a restriction, "[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention." *Id.* at 442. No such showing was made here; the State has simply sought to argue that because Lester was convicted of molesting one child, all children are therefore at risk. But the record reflects no history of abuse of Lester's son, no propensity toward sexual abuse of

male children, and no willingness to commit incest. As in *Letourneau*, there is insufficient evidence here to substantiate any claim that prohibiting Lester from unsupervised contact with his minor son is reasonably necessary to protect the son from sexual molestation by Lester – the State has simply failed to show that such a risk exists.

## VI. CONCLUSION

For the foregoing reasons, Lester respectfully requests that the court REVERSE his convictions and DISMISS the charges against him with prejudice; or, in the alternative, STRIKE the community custody conditions prohibiting contact with any minors under age 18, possession or purchase of alcohol, or entry into premises that primarily sell alcohol, and REMAND for modification of the terms; and DENY appellate costs.

RESPECTFULLY SUBMITTED this 1 day of December,  
2017.



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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 1 day of December, 2017 in Walla Walla,  
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Andrea Burkhart

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