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No. 36738-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MARK AARON MOEN,

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

From August to December of 2016, Mark Moen baby-sat his step-grandchildren, A.A., C.A., nine years old, and M.A., six years old. Suffering from pain as a result of back surgeries and a gunshot wound, Mr. Moen often reclined on the bed in the room where M.A.'s toys and belongings were kept. M.A. would play in the room alongside Mr. Moen while A.A. and C.A. played video games down the hall. The family had recently adopted a dog who urinated and defecated in the house, prompting Mr. Moen to shut the door to the room.

When M.A.'s mother came home from work and found the door closed, she began questioning M.A. about why the door needed to be shut. M.A. eventually agreed with her mother that Mr. Moen had been abusing her. M.A.'s mother questioned her several times about the details of the alleged abuse prior to contacting law enforcement.

Law enforcement responded and an appointment was set for M.A. to be interviewed and medically examined at Partners for Families and Children several days later. In the meantime, M.A.'s mother continued to question her.

M.A. participated in a forensic interview at Partners with interviewer Tatiana Williams and made allegations of Mr. Moen sexually abusing her while continuously claiming lack of memory. She was examined by a nurse practitioner with normal results.

The State charged Mr. Moen with two counts of rape of a child in the first degree, two counts of child molestation in the first degree, and one count of unlawful imprisonment with sexual motivation.

At a pretrial child hearsay hearing, the State sought to admit M.A.'s statements to her mother, Ms. Williams, and the nurse practitioner who conducted the medical exam. Defense counsel stipulated to competency despite a lack of record indicating M.A. understood the obligation to tell the truth, and lack of a verified accurate narrative contemporaneous to the alleged abuse indicating M.A. was able to accurately relate past facts. The trial court found M.A. competent and allowed admission of the hearsay statements at trial.

The case proceeded to jury trial. During M.A.'s mother's testimony, she stated she told M.A. she believed her, without objection from defense counsel. Ms. Williams testified that M.A.'s drawings were consistent with someone who had actually

experienced abuse and opined that M.A.'s statements were not being led by an adult. Ms. Williams also opined to factors that could affect a child's memory even though she conceded she was not an expert in child development.

The jury convicted Mr. Moen of two counts of child molestation in the first degree and unlawful imprisonment with sexual motivation. Mr. Moen now appeals, contending trial counsel was ineffective in failing to challenge M.A.'s competency and failing to object to the improper vouching testimony by M.A.'s mother and forensic interviewer Ms. Williams.

#### **B. ASSIGNMENTS OF ERROR**

1. Mr. Moen was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to challenge M.A.'s competency and object to improper opinion and vouching testimony by Ms. Williams.
  - A. M.A. was not competent to testify when the record did not establish she understood the obligation to tell the truth, or that she had a memory sufficient to retain an accurate impression of the facts at issue.
  - B. Both Ms. Nesbitt and Ms. Williams improperly vouched for M.A.'s credibility with testimony that Ms. Nesbitt "believed" M.A., and that Ms. Williams' did not believe M.A. was being led or would be able to make up details if she had not experienced abuse.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Mr. Moen was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to challenge M.A.'s competency and object to improper opinion and vouching testimony by Ms. Williams.

- A. Whether M.A. was competent to testify when the record did not establish she understood the obligation to tell the truth, or that she had a memory sufficient to retain an accurate impression of the facts at issue.
- B. Whether Ms. Nesbitt and Ms. Williams improperly vouched for M.A.'s credibility with testimony that Ms. Nesbitt "believed" M.A., and that Ms. Williams' did not believe M.A. was being led or would be able to make up details if she had not experienced abuse.

### **D. STATEMENT OF THE CASE**

In August of 2016, while recovering from back surgery, Mark Moen began babysitting his three step-grandchildren, A.A. and C.A., both nine years old, and M.A., six years old. (RP 21, 25, 689). He would watch the children at his stepdaughter Danielle Nesbitt's home, meeting them at the bus stop and then staying with them until Ms. Nesbitt returned from work. (RP 25). A.A. and C.A. would spend most of their time playing video games in the living room at one end of the house (RP 480, 488, 697, 701). Mr. Moen, unable to sit or bend his leg, would move from one room in the house to another. (RP 701) He would recline on the couch in the living room watching A.A. and C.A. play video games. (RP 701). He

would lay on the bed in a room at the other end of the hall next the garage door where M.A.'s toys and belongings were located and where she sometimes slept. (RP 458, 701). M.A. would frequently play in that room with Barbies, drawing, and Play-Doh while Mr. Moen reclined on the bed. (RP 702).

In December of 2016, Ms. Nesbitt adopted a young dog that frequently had accidents in the house (RP 27, 461, 473, 697). The children argued over who had to take the dog outside, phoning their mother to decide which child would take the dog out. (RP 697). The dog developed a particular attachment to M.A., following her everywhere. (RP 27). Unfortunately, the dog continued to urinate and defecate freely around the house, including on M.A.'s bed, clothes, and toys in the room where Mr. Moen laid down. (RP 698-700). Eventually, Mr. Moen told M.A. that he did not want the dog in there and she needed to shut the door if she came in. (RP 700).

On December 28, 2016, Ms. Nesbitt came home from work and found the dog waiting outside the door to the room. (RP 27). Ms. Nesbitt asked M.A. why the dog was not in the room with her. (RP 27) M.A. told her that the dog was always outside when she and Mr. Moen were in that room. (RP 27). She told Ms. Nesbitt that Mr. Moen was worried the dog would poop on the floor. (RP 28). Unsatisfied with that answer, Ms.

Nesbitt questioned M.A. further as to why the door needed to be shut. (RP 28). M.A. “got really nervous and ... curled her knees up to her chest.” (RP 28). Ms. Nesbitt “could just tell something was wrong.” (RP 28).

Ms. Nesbitt asked what M.A. and Mr. Moen would do while they were in the room. (RP 40). M.A. responded that they would play Barbies and stuff. (RP 28). Ms. Nesbitt then asked her what Mr. Moen would have the Barbies do, to which M.A. responded, “kiss and have sex.” (RP 40). Ms. Nesbitt then asked M.A. whether Mr. Moen had ever, “done anything like that to her.” (RP 29).

When M.A. responded in the affirmative, Ms. Nesbitt began asking M.A. a series of very detailed questions. (RP 42). She asked if Mr. Moen was touching M.A.'s privates. (RP 42). She asked if Mr. Moen was putting his finger inside her. (RP 42). She asked if Mr. Moen put his penis inside her vagina. (RP 42). She asked if M.A. saw Mr. Moen's penis or had ever touched his penis. (RP 42). M.A. responded “yes” to all of Ms. Nesbitt's questions, except denied that Mr. Moen had ever put his penis inside her. (RP 41).

Ms. Nesbitt phoned her biological father, who told her to record M.A.'s statements and keep the record for law enforcement. (RP 44). Ms. Nesbitt returned to M.A. and had M.A. repeat what she had said, taking notes. (RP 45).

On December 29, 2016, Ms. Nesbitt again questioned M.A and recorded notes. (RP 46-47). Ms. Nesbitt contacted law enforcement that day. (RP 48). Spokane County Sheriff's Deputy Jeff Conway responded and took a statement from Ms. Nesbitt. (RP 492). He left satisfied that Ms. Nesbitt "knew better" than to question M.A. further. (RP 495).

On January 1, 2017, and again on January 4, 2017, Ms. Nesbitt notated more conversations between her and M.A. about the allegations against Mr. Moen. (RP 47). Finally, on January 10, 2017, Ms. Nesbitt brought M.A. to Partners for Families and Children for a forensic interview. (RP 80, 87). A medical examination was also conducted with normal results (RP 63).

The State charged Mr. Moen on January 17, 2017, with two counts of Child Molestation in the First Degree, two counts of Rape of a Child in the First Degree, and one count of Unlawful Imprisonment with Sexual Motivation. (CP 17-18). Beginning January 11, 2019, the court held a hearing to determine the admissibility of M.A.'s statements. to Ms. Nesbitt, forensic interviewer Tatiana Williams, and the ARNP who did the medical examination. (CP 111-112). The court heard testimony from M.A., Ms. Nesbitt, Ms. Dennison, and forensic interviewer Tatiana Williams. (CP 111).

M.A. testified that she was nine years old and in the third grade. (RP 7). She lived with her mother, two brothers, and pets. (RP 7). When asked about telling the truth, she testified:

[The State]: ...Do you have any rules in your house? Does your mom have rules for you guys?

[M.A.]: Uh-huh.

[The State]: Do you have any rules about telling the truth?

[M.A.]: Yes.

[The State]: What rules are – what rule is that?

[M.A.]: I forgot.

[The State]: Is it important to tell the truth when you're at home?

[M.A.]: Yes.

[The State]: So if I said, [M.A.], your hair is blue, is that the truth or a lie?

[M.A.]: Lie.

[The State]: Lie. Is it good or bad to tell the truth?

[M.A.]: Good.

[The State]: Do you promise to tell the truth today?

[M.A.]: Yes.

(RP 7, 8).

She testified that while in kindergarten to first grade, her grandpa Mr. Moen would come watch her after school. (RP 9). She knew what she was in court to talk about that day. (RP 9).

However, she then testified:

[The State]: What are we here to talk about?

[M.A.]: I don't remember.

[The State]: Did – did Mark do some things to you while he was babysitting you?

[M.A.]: Yes.

[The State]: Can you tell us what it – what did he do when he was watching you?

[M.A.]: He put his finger in my lower areas.

...

[The State]: Okay. Now, when you say “lower areas,” is there another word for that?

[M.A.]: (Nods head).

[The State]: What word is that?

[M.A.]: I don’t remember.

(RP 10).

M.A. agreed with the prosecutor that there was a front private and a back private, and that pee came out of the front and poop came out of the back. (RP 10, 11).

The prosecutor then asked:

[The State]: How did it feel when he touched you in your front private?

[M.A.]: I don’t remember.

[The State]: Okay. Do you remember anything ever hurting?

[M.A.]: Yes.

[The State]: What do you remember about that?

[M.A.]: I forgot.

(RP 11).

M.A. testified she was in her room when Mr. Moen would touch her. (RP 12). The prosecutor inquired about the details:

[The State]: When he would touch you in your front private, were your clothes on or off?

[M.A.]: I forgot.

...

[The State]: Where was your underwear when he was touching you in your front private?

[M.A.]: I don't remember.

[The State]: Okay. Did you ever say anything to him while this was happening?

[M.A.]: No.

[The State]: Did Mark ever say anything to you while he was doing that?

[M.A.]: I don't remember.

[The State]: Do you remember if he ever touched your back private?

[M.A.]: No.

(RP 12, 13).

M.A. testified Mr. Moen would not let her leave the bedroom when this was happening. (RP 13). She could not remember how often it happened. (RP 13). She could not remember ever seeing Mr. Moen's private or whether he ever asked her to do anything to them. (RP 14). She could not remember if Mr. Moen ever brought anything with him to the room, but later said he brought candy, although she could not remember what kind. (RP 14).

She identified a piece of paper with her name and purple scribbling on it as having come from her notebook. (State's Ex. 2, RP 15). She said she told her mother what Mr. Moen was doing to her, but she couldn't remember why she told her mother. (RP 17). She couldn't remember what her mother did afterward. (RP 17).

Ms. Nesbitt testified consistently with the facts above and stated the following about the rules in her home:

[The State]: Do you have any rules in your house about lying?

[Ms. Nesbitt]: Yes.

[The State]: What rule is that?

[Ms. Nesbitt]: Tell the truth.

[The State]: Have you taught [M.A.] the difference between telling the truth and telling a lie?

[Ms. Nesbitt]: Yes.

[The State]: Have you ever had any concerns that she's not able to understand the difference between the truth and a lie?

[Ms. Nesbitt]: No.

[The State]: How do you stress the importance of telling the truth at your house?

[Ms. Nesbitt]: It's very important. I tell my kids all the time that they'll be in more trouble for lying to me than whatever the truth is, so.

(RP 22, 23).

Advanced Registered Nurse Practitioner (ARNP) Fiona Dennison testified after Ms. Nesbitt. (RP 58). She testified that during the medical exam, M.A. told her, "grandpa put his finger in my private" and "grandpa put his private halfway in my butt." (RP 63). M.A. told Ms. Dennison that Mr. Moen would tell her to go to her room and would take off her pants and underwear. (RP 64). M.A. told her that when his private was halfway in her private it hurt but did not bleed. (RP 64).

The State called Tatiana Williams as its last witness for the child hearsay hearing. (RP 80). Ms. Williams testified that she worked for Partners for Families and Children as a forensic interviewer. (RP 80). She stated that a forensic interview was a “neutral and objective developmentally sensitive as well as legally sound method of gathering factual information regarding any possible abuse by a child or possible witnessing of abuse.” (RP 80). Ms. Williams had bachelor’s and master’s degrees in social work, and had received training specific to forensic interviewing, including a nationally-recognized protocol for forensic interviewing. (RP 81). She had conducted 1, 243 forensic interviews. (RP 82).

She described how she typically conducted forensic interviews. (RP 83-86). Initially, she reviewed rules with the child, including to tell her if they did not understand something, not to guess at answers, and to promise to tell the truth. (RP 83, 84). She explained that she would go over examples with the child to demonstrate they understood the rules, however, if the child was not demonstrating an understanding, she would “just move on to the next rule.” (RP 84). Ms. Williams testified she used open-

ended questions, and did not introduce words the child had not already used into the interview. (RP 86).

Ms. Williams testified that she interviewed M.A. on Jan. 10, 2017, consistent with this protocol. (RP 87). The court admitted a recording of the interview as State's Exhibit 1, along with drawings made by M.A. during the interview (RP 89, 90, State's Ex. 1-4).

Following the child hearsay hearing, the State moved to admit testimony of M.A.'s statements to Ms. Nesbitt, Ms. Dennison, and Ms. Williams. (RP 99). Defense counsel stipulated to M.A.'s competency but argued that M.A.'s hearsay statements did not have sufficient indicia of reliability to be admitted. (RP 113-116). The court found M.A. competent and that M.A.'s hearsay statements had "sufficient indicia of reliability pursuant to RCW 9A.44.120." (CP 160-161, RP 119-124).

The case proceeded to trial on January 22, 2019. (CP 221). M.A. was the State's first witness. (RP 408). She testified consistently with her testimony during the child hearsay hearing as to her age and living details (RP 408-411). She stated Mr. Moen had put his finger in her lower areas while he was babysitting her. (RP 412). She stated that it was her front private and it hurt. (RP

413). Her clothes were halfway on and halfway off. (RP 414). She testified this had happened more than one time and that Mr. Moen would give her candy. (RP 415). He never said anything but she told him to stop. (RP 415). When she tried to leave the room, he pulled her back by her shirt. (RP 416). M.A. did not remember if Mr. Moen had ever done anything to her back private part, showed her his private, or asked her to do anything with his private. (RP 416).

M.A. identified her notebook but could not remember making the drawings at Partners for Families and Children. (RP 418, 419). She could not remember talking with Ms. Dennison or Ms. Williams. (RP 420).

Ms. Nesbitt's testimony followed M.A. (RP 427). She testified consistently with the testimony provided during the child hearsay hearing. The prosecutor, over defense objection, asked how she felt feeling these allegations from her daughter:

[Ms. Nesbitt]: I mean, it was like a series of emotions you go through because this is somebody you trusted almost your entire life and you trusted your kids with them and you don't want to believe it. So obviously I was shocked.

[State]: How did- how did you respond to her when she was telling you these things?

[Ms. Nesbitt]: I mean, obviously I told her I believed her and I – I let her know it was going to be okay.

(RP 443).

Ms. Nesbitt further stated that M.A. told her Mr. Moen always had candy and napkins. (RP 444). Ms. Nesbitt subsequently searched M.A.'s room and found, "hundreds of, like, Starburst and candy wrappers and napkins." (RP 445). She stated she did not buy candy or paper products at her house. (RP 445). Following the interview at Partners for Families and Children, Ms. Nesbitt again went back to M.A.'s room to look for a notebook at the direction of Detective Brandon Armstrong. (RP 448). She found a notebook with "drawings of like girl characters with ginormous boobs and very descriptive drawings." (RP 449, State's Ex. 5).

A.A. and C.A. testified after Ms. Nesbitt. (RP 478-489). Both stated that during the time Mr. Moen had baby-sat them, they would be playing video games. (RP 480, 488). Both testified that Mr. Moen would be in the room with M.A. with the door shut. (RP 481, 488). A.A. testified that Mr. Moen gave M.A. candy. (RP 481).

Deputy Conway testified to his initial response to the call consistent with his testimony during the child hearsay hearing. (RP 489-496). Deputy Mitchell Othmer testified that he had assisted in

taking Mr. Moen into custody and had found a white napkin in his lower coat pocket on the right-hand side. (RP 497-498).

ARNP Dennison again testified during the trial. (RP 507).

She stated that she was employed at both Partners for Families and Children and Rockwood, where she was a pediatric nurse. (RP 508). She had completed her master's program in pediatric nursing in 2006. (RP 510). In addition to other training as a pediatric nurse, she completed 120 hours of continuing education per five-year period, and had conducted 150 sexual assault exams on children while at Partners. (RP 512-516).

Ms. Dennison testified that she had examined M.A. and she had a normal physical exam. (RP 519). She stated that "most victims of sexual abuse will indeed have a normal exam and a normal exam does not rule out the possibility of sexual abuse." (RP 520). She stated that M.A. disclosed during the exam that, "grandpa put his finger in my private," and "grandpa put his private halfway in my butt." (RP 542). M.A. told Ms. Dennison it was the front and back private. (RP 542). She said only his fingers went in her private in the front, and that he would tell her to go to her room, and would take off her pants and underwear. (RP 543). M.A. further told Ms. Dennison that when Mr. Moen's private was

halfway in her private it hurt but there was no bleeding. (RP 543).

Ms. Dennison testified that it did not surprise her not to find any physical injuries during her exam because most exams were normal. (RP 543).

WSP Crime Lab forensic scientist Kaylene Folks then testified to her examination of a paper napkin submitted for this case. (RP 553, 559). A preliminary acid phosphatase test indicated there was no semen on the napkin, so further DNA testing was not conducted. (RP 561).

The State then called Tatiana Williams. (RP 568). She outlined her training, experience, and methodology of conducting child forensic interviews consistently with her testimony at the child hearsay hearing. (RP 568-579). Additionally, she testified:

[Ms. Williams]: ...I have an understanding of the children I speak to. I do interview children only. So that I have a better understanding of how their brains work a little bit. *I'm not an expert by any means, but I do have some understanding as to how their development would be.*

(RP 571 (emphasis added)).

The State then published the interview of Ms. Williams conducted with M.A. to the jury. (State's Ex. 1).

Ms. Williams began the interview by introducing herself and giving M.A. crayons and markers to draw. (State's Ex. 1 at

00:28-01:47). She asked M.A. to tell her some of the rules she has at school or home. (State's Ex. 1 at 02:37). M.A. initially said, "I don't remember any of them," but then followed up with several school rules. (State's Ex. 1 at 02:41-03:25). Ms. Williams and M.A. discussed telling the truth:

[Ms. Williams]: All right? So tell me, is it good or bad to tell the truth?

[M.A.]: Good.

[Ms. Williams]: Okay. Is it good or bad to tell a lie?

[M.A.]: Bad.

[Ms. Williams]: All right. So do you promise to tell the truth today?

[M.A.]: Yeah.

(State's Ex. 1 at 05:19-05:31).

M.A. answered questions about her home, school, and her activities on the day before the interview. (State's Ex. 1 at 05:49-14:05). M.A. told Ms. Williams that her grandpa was, "doing bad stuff to me like, um, putting his finger in my privates...and putting his privates in my other private." (State's Ex. 1 at 17:17-17:34).

M.A. said she forgot when it started and that she tried to say "stop" to him but he was quiet the whole time. (State's Ex. 1 at 17:47-18:07). She again said she forgot all the rest. (State's Ex. 1 at 18:23). Ms. Williams told her to "tell me everything you

remember,” and M.A. again said, “I told you everything I remembered.” (State’s Ex. 1 at 18:23-18:24).

M.A. then responded to questioning that Mr. Moen was rubbing his finger into her private, “real soft.” (State’s Ex. 1 at 19:27-20:20). M.A. again stated, “that’s all I remember.” (State’s Ex. 1 at 20:43). She said her clothes were halfway on and halfway off and that his clothes were on. (State’s Ex. 1 at 21:47, 21:57). M.A. repeated, “and that’s all that I remember...and he was...I don’t remember it anymore.” (State’s Ex. 1 at 22:00-22:12). M.A. said that it happened more than one time and that the last time, he left and she told her mom. (State’s Ex.1 at 23:46, 23:55).

Ms. Williams again asked M.A. to tell her about the first time Mr. Moen rubbed her private, and M.A. responded, “I can’t really remember then.” (State’s Ex. 1 at 25:07). M.A. said it happened in first grade. (State’s Ex. 1 at 25:23).

Ms. Williams told M.A. to tell her more about Mr. Moen putting his private in her other private. (State’s Ex. 1 at 26:04). M.A. said, “I just can’t explain any...I-I just don’t know.” (State’s Ex. 1 at 26:36, 26:57). With more prodding, M.A. told Ms. Williams that Mr. Moen untied his sweatpants and put it in her butt, but “it’s hard to remember” what happened next. (State’s Ex.

1 at 27:08-27:58). M.A. said it “hurt real bad...that’s all I could remember.” (State’s Ex. 1 at 31:19-31:29). M.A. then asked Ms. Williams, “Okay if I, um, ask you what your name is?” (State’s Ex. 1 at 31:51). Ms. Williams then spent some time questioning M.A. about the physical positions while the alleged contact was occurring. (State’s Ex. 1 at 38:24-41:48). Ms. Williams instructed M.A. to tell her about seeing Mr. Moen’s private. (State’s Ex. 1 at 42:02). M.A. said, “it was just weird...I have nothing else...I didn’t see anything else.” (State’s Ex. 1 at 42:10-42:16). Ms. Williams then encouraged M.A. to draw what Mr. Moen’s private looked like. (State’s Ex. 1 at 42:33-44:55).

Ms. Williams asked M.A. whether “Grandpa Mark did something different to you...like, pictures or videos?” (State’s Ex. 1 at 47:10-47:22). M.A. said he made her draw “inappropriate pictures” with “big breasts.” (State’s Ex. 1 at 47:29-47:46). M.A. said the pictures were in a purple and black notebook. (State’s Ex. 1 at 56:30). Ms. Williams asked her if there was ever a time when Mr. Moen asked her to do anything to his private, and M.A. stated he made her put her hand on his private. (State’s Ex. 1 at 01:00:08-01:00:18). M.A. initially stated that Mr. Moen did not keep her in the room, but then in response to further questioning by Ms.

Williams, said he would yank her arm back by her arm. (State's Ex. 1 at 01:07:32-01:07:46).

Ms. Williams testified the functioning of a child's memory:

[The State]: Based on all of your training and experience in conducting child forensic interviews, can the passage of time impact a child's ability to remember or articulate detail about a traumatic incident?

[Ms. Williams]: Yes, it can.

[The State]: How could it do that?

[Ms. Williams]: Well, because of the passage of time, they can forget details – excuse me – forget details that they might have remembered prior to. They could also either remember new information about an event as time has gone on as well.

[The State]: Can they also block some of that out?

[Ms. Williams]: It's possible I would think.

[Defense counsel]: Object to the leading.

[The Court]: Sustained.

[The State]: Would it be surprising to you that two years later a child can't remember certain details of a traumatic event?

[Ms. Williams]: No.

[The State]: What environmental factors might impact a child's ability to remember?

[Ms. Williams]: Different – so, like, being in a room like that, it was just her and I. She was able to kind of be comfortable and relax and not have to worry about there being, like, a room full of people. Like being in a courtroom setting, it would be nerve-wracking for even an adult. So like to have a child in a setting like that, it might be difficult for them to really feel comfortable enough to talk.

[The State]: What about the courtroom setting makes you say that?

[Ms. Williams]: There's just a lot of eyes, a lot of people. The child could possibly feel intimidated or just be really nervous or scared and not feel comfortable enough to really

talk, when it's just one-on-one having a conversation or, like, hanging out with someone.

[The State]: Would you be surprised if two years later a child couldn't even remember talking to you?

[Ms. Williams]: Oh, no, not at all.

[The State]: Have you seen things like that happen at all?

[Ms. Williams]: Yes. There's been many times I've seen the same kid in passing, they've come for a different reason to our center, and they don't remember who I am.

[The State]: Based on your training and experience, if a child has been subject to frequent incidents of abuse by an individual, how can that affect their ability to remember specific events?

[Ms. Williams]: A lot of times when I talk to children who have had ongoing trauma, they will kind of mesh information together and have a difficult time identifying, like, particular incidents or particular episodes or events that have happened, and they classify it all as, like, "all the time this has happened," and they just generalize it and they don't really provide, like, specific information about, you know, the first time or the last time or something like that. They really just blend things together.

[The State]: Do you have any training as to why that could happen?

[Ms. Williams]: Excuse me. Just my work experience that I've had. I know that it's been very common with the children that I've spoken to that – who have ongoing abuse where it is more of a – like a script memory rather than being able to identify things in an episode. It's just based off of my professional experience.

[The State]: You said that can happen with abuse that has gone on for a long time?

[Ms. Williams]: Correct.

(RP 591-593).

She later testified to how children who were being coached by an adult would testify, and opined that M.A. was not being coached:

[The State]: Based on all of your training and experience, if a child was being led in their answers, what type of answers would you expect to hear?

[Ms. Williams]: They can sound very – just very straightforward, very matter of fact, and then that’s it. They’re not able to provide any additional details or information when asked for follow-up questions. So like, for example, in this interview, when M.A. was talking about the private – or the bladder and describing how it looked, she talked about crinkly and said something about hard or soft or something like that. Like those type of things you wouldn’t find coming from a child if it hadn’t really been experienced --

[Defense counsel]: Objection.

[Ms. Williams]: -- and know about it.

[The Court]: Sustained.

[Defense counsel]: Objection.

[The State]: Based on the responses that she was providing to you, did you have concerns that she was being led through your questions?

[Ms. Williams]: No.

(RP 623).

Mark “Buddy” Moen testified on behalf of his father, Mr. Moen. (RP 666). He suffered from severe separation anxiety and always had to know where his father was located. (RP 670-671). During the time his father baby-sat M.A., Buddy Moen would visit almost daily, walking into the home through the garage door near M.A.’s room. (RP 671-672). He did not see anything inappropriate going on between his father and M.A. (RP 677).

Mr. Moen testified in his own defense. (RP 680). He described a back injury and gunshot wound that he had sustained

while a police officer in Southern California. (RP 683). As a result of those injuries, he had undergone extensive surgeries and had a pain pump installed. (RP 685-688). After having the pump removed on Aug. 19, 2016, he laid awake nights unable to sleep because of the pain. (RP 689). Shortly thereafter, he began babysitting M.A. and her brothers. (RP 690). He acknowledged being in M.A.'s room and closing the door because of the dog. (RP 699, 700). He denied ever inappropriately touching M.A. (RP 702). The defense rested following Mr. Moen's testimony. (RP 712).

Prior to closing arguments, defense counsel highlighted Ms. Williams' improper testimony and acknowledged that he should have moved to strike the testimony:

[Defense counsel]: Judge – also that – I don't envision counsel would do this because she's aware of the objection, but the forensic examiner also – you heard testimony that, oh, the picture that was drawn is only consistent with somebody who would have experienced that, and which was improper testimony. And I suppose I – although I objected twice in rapid succession and the Court sustained that as being improper, I probably should have moved to strike that testimony. But I would ask that counsel be prohibited from indicating that this is consistent with somebody who's been abused.

[The Court]: You weren't planning on doing that?

[The State]: I was not planning on referencing that -- that Ms. Williams said, Your Honor. I was planning to argue that the drawings are consistent with someone who actually experienced this, but not based on that testimony from Ms. Williams or quoting her in any way.

[The Court]: Obviously you can argue what the evidence shows or may not show. That was improper testimony by Ms. Williams. She was commenting on the credibility of another witness. That was excluded in the motions in limine. There was an objection during her response, although I think she may have got a response out in time. If there would have been a motion to strike that testimony, it would have been stricken, as it was improper.

(RP 723-724).

During closing argument, the State argued that Ms. Williams had testified about the type of answers you would expect from a child who was being led. She had testified that those answers would only be a brief explanation, that the child would be unable to answer questions or give additional details, or explain in their own words. (RP 789). The State argued that M.A.'s testimony was not consistent with Ms. Williams testimony about a child who had been led. (RP 789-790).

The jury convicted Mr. Moen of two counts of Child Molestation in the First Degree and one count of Unlawful Imprisonment with Sexual Motivation. (RP 810-811, CP 150-151, 154-155). The Court sentenced him to 114 months to life and 41 months to run concurrently. (RP 835, CP 236-252). Mr. Moen timely appeals (CP 262-263).

## **E. ARGUMENT**

**Issue 1: Mr. Moen was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to challenge M.A.'s competency and object to improper opinion and vouching testimony by Ms. Williams.**

Mr. Moen was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to challenge M.A.'s competency. The record is insufficient to establish that M.A. understood the obligation to tell the truth, or that she had a memory sufficient to retain an accurate impression of the facts at issue. No legitimate tactical reason would have existed for defense counsel not to challenge the competency of the State's central witness.

Mr. Moen was also denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to properly object and/or move to strike multiple instances of improper opinion and vouching testimony on behalf of Ms. Williams. Ms. Williams improperly testified to child memory without objection from defense counsel. Both Ms. Williams and Ms. Nesbitt vouched for M.A.'s credibility. The State then argued, without objection, during closing argument from Ms. Williams' improper memory testimony. Since the State's case rested solely on M.A.'s credibility, the effect of the improper testimony likely affected the jury's

verdict. No tactical reason could have existed for defense counsel to fail to object and/or move to strike such testimony and argument.

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). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must demonstrate (1): [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objection standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel’s deficient performance 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).

In other words, prejudice is established by showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Hicks*, 163 Wn.2d 477, 488, 181P.3d831(2008)(quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). “[S]trategy must be based on reasoned decision-making[.]” *In re Pers. Restraint of Hubert*, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007).

To prove the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[.]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007).

**A: M.A. was not competent to testify when the record did not establish she understood the obligation to tell the truth, or that she had a memory sufficient to retain an accurate impression of the facts at issue.**

Defense counsel was ineffective for failing to challenge M.A.’s competency. The record does not establish that M.A. understood the obligation to tell the truth, nor that her memory was sufficient to retain an accurate impression of the facts at the time of the alleged offenses.

Washington courts presume that all witnesses are competent until proved otherwise by a preponderance of the evidence. *State v. Brousseau*,

172 Wn.2d 331, 341, 259 P.3d 209 (2011). Anyone who is incapable of receiving just impressions of facts or relating them truly is not competent to testify. RCW 5.60.050(2); CrR 6.12(c); *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010). While a child's age is not determinative of her capacity as a witness, five factors must be found before a child can be declared competent to testify: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which [she] is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words [her] memory of the occurrence; and (5) the capacity to understand simple questions about it. *In re Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998)(quoting *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

The Court discussed the issue of child competency in *State v. Espinoza*, No. 35261-7-III, 2019 WL 1125737 at \*1, (Wa. Ct. App. Mar. 12, 2019)<sup>i</sup> and *State v. Severson*, No. 46359-8-II, 2016 WL 1230510 at \*1, (Wa. Ct. App. Mar. 29, 2016).<sup>ii</sup> Both *Espinoza* and *Severson* addressed claims of ineffective assistance of counsel for failing to challenge the competency of child witnesses.

The defendant in *Espinoza* was convicted of three counts of first-degree child molestation after a child hearsay hearing and trial where the children made inconsistent statements as to where events had taken place and who had been present. The children also had inconsistent recollections about who they had made disclosures to and what had been discussed during the disclosures. *Espinoza*, 2019 WL 1125737 at \*1. <sup>iii</sup> The court found that these “common occurrences were insufficient to overcome the strong presumption of competence.” *Espinoza* 2019 WL 1125737 at \*2, (citing *State v. Carlson*, 61 Wn.App. 865, 874, 812 P.2d 536 (1991)). <sup>iv</sup> The Court in *Espinoza* similarly found that inconsistencies in a child’s testimony did not generally call into question the child’s competency. *Espinoza*, 2019 WL 1125737 at 10. <sup>v</sup> If a child can relate contemporaneous events, the court can infer that the child is also competent to testify about abuse incidents. *A.E.P.*, 135 Wn.2d at 225.

Conversely, the record in Mr. Moen’s case does not indicate that M.A. understood her obligation to tell the truth while testifying. Simply parroting that telling the truth was “good” and lying was “bad” is insufficient to show that M.A. understood the obligation to tell the truth in court. She did not discuss the concept of telling the truth with any detail or examples to show that she understood the consequences of being dishonest. The State did not develop the concept during either the child

hearsay hearing or during the trial. Ms. Williams similarly failed to explore the concept during the forensic interview. Defense counsel failed to inquire further during the child hearsay hearing.

The record is also silent regarding whether M.A. was able to accurately relate events contemporaneous to the alleged abuse. M.A.'s interview with Ms. Williams was the closest in time to the alleged abuse, occurring only a few days after the allegation was made and the alleged abuse stopped. While Ms. Williams spent some time talking to M.A. about her school and pets, the only narrative that M.A. gave Ms. Williams about a contemporaneous event was about M.A.'s activities on the day prior to the interview. Nothing in the record indicates that M.A.'s recitation of that day's events even accurately reflects M.A.'s activities the day before. There is no testimony in the record that would corroborate M.A.'s recitation of the events the day prior, such as testimony from M.A.'s mother about those events. Thus, it cannot be inferred that M.A. could accurately relate contemporaneous events.

Defense counsel made no effort to ascertain that M.A. was able to accurately relate events contemporaneous to the alleged abuse by questioning M.A. or her mother Ms. Nesbitt, either during the child hearsay hearing or trial. Failing to even explore the concept that M.A. could not provide an accurate narrative falls below the standard of

professional norms and is ineffective assistance of counsel. While defense counsel may tactically not have wanted to buttress M.A.'s competence in front of a jury, no strategic reason exists for failing to inquire into the issue during the child hearsay hearing when no jury is present.

M.A.'s credibility was essential to the State's case. A successful challenge to her competency would have effectively eviscerated the State's ability to prove the allegations against Mr. Moen. Failing to make such a challenge could not have been a tactical decision and fell significantly below professional norms.

**B: Both Ms. Nesbitt and Ms. Williams improperly vouched for M.A.'s credibility with testimony that Ms. Nesbitt "believed" M.A., and that Ms. Williams' did not believe M.A. was being led or would be able to make up details if she had not experienced abuse.**

Ms. Nesbitt and Ms. Williams both improperly vouched for M.A.'s credibility. Ms. Williams further testified to an opinion she was not qualified to give. Defense counsel's failure to object to this testimony in a case where the central issue was M.A.'s credibility constitutes ineffective assistance of counsel.

No reliable test for truthfulness exists, such that a witness is not qualified to judge the truthfulness of a child's story. *United States v. Azure*, 801 F.2d 336, 341 (8<sup>th</sup> Cir. 1986); *State v. Dunn*, 125 Wn. App.

582, 594, 105 P.3d 1022 (2005). No witness may give an opinion on another witness's credibility. *State v. Neidigh*, 78 Wn. App. 71, 76-77, 895 P.2d 423 (1995); *State v. Wright*, 76 Wn. App. 811, 821-22, 888 P.2d 423 (1995); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). Lay opinion testimony as to the truthfulness of another is not helpful under ER 701 because a jury can assess credibility as well as or better than the lay witness. *Carlson*, 80 Wn. App at 123.

The credibility of the victim and the defendant are crucial in most sexual abuse cases because the two are usually the only percipient witnesses and their testimony directly conflicts. *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Declaring the victim to be telling the truth in essence opines that the defendant is guilty. Opinions on guilt are improper whether made directly or by inference. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.2d 267 (2008). The Court considers five factors when determining whether testimony of a witness concerning the reliability of statements made by another constitutes impermissible vouching: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) other evidence

before the trier of fact. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

In *State v. Flook*, No. 34220-4-III, 2017 WL 2955539 at 1, (Wa. Ct. App. July 11, 2017)<sup>vi</sup>, the Court reversed the defendant's convictions for child rape and child molestation based on a law enforcement officer improperly vouching during his testimony to the credibility of the victim and the lack of credibility of the defendant. All five of the *Kirkman* factors weighed in favor of the defendant: (1)-(2) the testimony came from a law enforcement officer as an "expert" who essentially told the jury the victim was telling the truth and the defendant was lying; (3) in sexual abuse suits credibility is a central issue; (4) the defendant denied the allegations; and (5) the State lacked physical evidence and corroborating eyewitness testimony. *Flook*, 2017 WL 2955539 at \*7-8<sup>vii</sup>. In *State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007), *aff'd on other grounds*, 165 Wn. 2d 870, 204 P.3d 917 (2009), the Court reversed the defendant's convictions for child rape and child molestation, among other charges, after the trial court allowed the victim's mother to testify that her daughter was telling the truth.

Likewise, M.A.'s mother testified that she told M.A. she "believed" her. (RP 443). Defense counsel neither objected nor moved to strike this testimony. Four of the *Kirkman* factors support that this

testimony was improper vouching. 159 Wn.2d at 928. Ms. Nesbitt clearly testified that she believed M.A. Similar to the facts of *Flook*, Mr. Moen was charged with child sexual offenses and denied all of the allegations. *Flook*, 2017 WL 2955539 at \*7-8<sup>viii</sup>. No physical evidence existed to support M.A.'s allegations. Mr. Moen did not deny being in the room with M.A., so the napkin presented by the State was not corroborative of the allegations. Ms. Nesbitt testified she found candy wrappers, however there was no denial that Mr. Moen may have given M.A. candy at some point. It is unclear precisely when the drawings in M.A.'s notebook were created as the notebook was not located until after M.A. had been repeatedly questioned by Ms. Nesbitt and the staff at Partners. Thus, Ms. Nesbitt's testimony that she believed her daughter improperly vouched for M.A.'s credibility in a case that rested solely on credibility.

Ms. Williams' testimony that M.A.'s drawings had to have been done by someone who actually experienced abuse were even more egregious. While defense counsel did object and the Court sustained the objection, the testimony remained in the record for the jury's consideration. "When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration. *State v. Stackhouse*, 90 Wn. App. 344, 361, 957 P.2d 218 (1998); *also see*

*State v. Brooks*, No. 49810-3-II, 2019 WL 325608 at \*1, (Wa. Ct. App. Jan. 23, 2019).<sup>ix</sup> Defense counsel's failure to move to strike the testimony and have the jury instructed to disregard it was ineffective, because the jury was not instructed not to consider testimony of an expert witness who inferred that M.A. was telling the truth. Defense counsel even acknowledged prior to closing argument that he should have moved to strike the testimony, and argued that it was improper, so no argument can be made that he had a strategic reason for not asking the court to strike and the jury to disregard that testimony. The court also acknowledged that the testimony was improper vouching.

In *State v. Dunn*, 125 Wn. App. 582 (2005), the Washington Supreme Court reversed the defendant's conviction for rape of a child on the ground of inadmissible testimony. A physician's assistant testified that despite an absence of any physical evidence of rape, he concluded that sexual abuse occurred because of the detailed story told to him by the victim. *Id.* Similarly in Mr. Moen's case, Ms. Williams testified, without defense objection, to her conclusion that M.A.'s statements had not been led or coached by an adult because of the detail M.A. had given. Defense counsel could not have had a strategic reason for failing to object to this testimony.

Ms. Williams also gave extensive testimony about reasons a child might not be able to remember incidents of abuse, most of which was not objected to. She acknowledged she was not an expert in child development or the functioning of a child's brain. Thus, her conclusions about reasons a child might forget details of abuse or blend it together really were lay testimony in expert clothing. Most of the testimony she gave about reasons a child might not be able to testify to abuse in court – intimidating courtroom, lack of comfort, etc. – were well within the lay experience of the jurors. However, the State presented her as an expert in her field and the jury likely gave significant weight to her testimony. There was again no reason for defense counsel not to object and/or move to strike the testimony.

Ms. Nesbitt and Ms. Williams improperly vouched for M.A.'s credibility. Defense counsel failed to object and/or strike that testimony from the record, and it all remained in the record for the jury to consider. Mr. Moen's case pitted his credibility against that of M.A. Defense counsel had no legitimate strategic reason for allowing M.A.'s credibility to be bolstered by other witnesses. Defense counsel was ineffective for not challenging the improper testimony.

Because the State's case hinged on M.A.'s credibility, the trial result would have been different had defense counsel challenged M.A.'s competency and properly objected and stricken the improper testimony.

#### **F. CONCLUSION**

Defense counsel failed to provide Mr. Moen with effective assistance of counsel by failing to challenge M.A.'s credibility when no evidence showed she knew the difference between the truth and a lie, or that she had memory sufficient to retain an accurate impression of the facts at issue. Defense counsel further failed to provide Mr. Moen effective assistance of counsel when he failed to properly object and/or strike improper vouching testimony by Ms. Nesbitt and Ms. Williams. Because the State's case hinged on M.A.'s credibility, the trial result would have been different had defense counsel challenged M.A.'s competency and properly objected and stricken the improper testimony.

Since he was deprived of ineffective assistance of counsel, Mr. Moen's convictions for first degree child molestation and unlawful imprisonment with sexual motivation should be reversed and the case remanded for a new trial.

Respectfully submitted this 18<sup>th</sup> day of October, 2019.

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<sup>i</sup> Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

<sup>ii</sup> See footnote i.

<sup>iii</sup> Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

<sup>iv</sup> See footnote iii.

<sup>v</sup> Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

<sup>vi</sup> See footnote v.

<sup>vii</sup> Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

<sup>viii</sup> See footnote vii.

<sup>ix</sup> Unpublished opinions have no precedential value and are not binding on any court but may be cited if identified and accorded persuasive value as the Court deems appropriate. GR 14.1(a).

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33738-0-III  
vs. )  
MARK A. MOEN ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Brooke D. Hagara, counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 18, 2019, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's Opening Brief to:

Mark A. Moen DOC #41360  
Airway Heights Corrections Center  
P.O. Box 2049  
Airway Heights, WA 99001-2049

Having obtained prior permission from the Respondent, I also served the same at on the Respondent at [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org) using the Washington State Appellate Courts' Portal.

Dated this 18th day of October, 2019.

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