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NO. 36999-4-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA J. MOBLEY,

Appellant.

REPLY BRIEF OF APPELLANT,
JOSHUA J. MOBLEY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY
THE HONORABLE JULIE M. MCKAY, JUDGE

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I. ARGUMENT IN REPLY

The prosecution's case against Joshua Mobley rested on speculation and supposition. His conviction resulted from the accumulation of grievous errors both before and during trial. This Court must reverse because these errors violated Mr. Mobley's constitutional rights.

In its response brief, the state defends the decisions by the trial court and the actions of trial counsel. These arguments are not persuasive, for the reasons stated in Mr. Mobley's opening brief and for three specific reasons. First, the trial court violated Mr. Mobley's constitutional right to present a defense by excluding other suspect evidence. Mr. Mobley was not required to place the alternative suspect at the scene in order to present this evidence. Second, the trial court erred by allowing Mr. Mobley's young daughter, C.M., to testify. The court improperly conflated child competency with reliability. Third, the prosecutor committed misconduct and burdened Mr. Mobley's constitutional right to remain silent by arguing that his reluctance to speak with police was evidence of his guilt.

A. **Mr. Mobley was Not Required to Place Ms. Bell at the Scene Before Presenting Alternative Suspect Evidence.**

Before trial, Mr. Mobley presented evidence about another suspect, Jeanynes Bell. Ms. Bell had the "motive," "means," and "prior history" to commit this crime. *See State v. Franklin*, 180 Wn.2d 371, 372, 325 P.3d

159 (2014). In the months before C.H.’s death, she had been stalking C.H. and his mother, Ms. Henry, and threatened C.H. with death. CP 1216-18. Ms. Henry believed that Ms. Bell knew where she lived and wanted to kill C.H. CP 1217.

The trial court applied the incorrect legal standard and erroneously excluded evidence about Ms. Bell. Effectively, the court required Mr. Mobley to place Ms. Bell at the scene in order to present evidence connecting her to the crime. RP 1665 (finding that “[t]here was no evidence to indicate that Ms. Bell was present at or near Crystal Henry’s apartment on either February 26th or 27th 2017”).

This standard was unreasonably high, conflicted with case law, and violated Mr. Mobley’s constitutional right to present a defense. Mr. Mobley was only required to present evidence “tending to connect” Ms. Bell with the crime; he did not need to place her at the scene. *Franklin*, 180 Wn.2d at 379; *see also State v. Clark*, 78 Wn. App. 471, 480, 898 P.2d 854 (1995) (trial court erred by excluding other suspect evidence even though other suspect had an alibi, his truck was seen at the house “within two weeks prior to the fire”—not the night in question, and there was “no evidence directly link[ing]” him “to the fire”).

In its response, the state perpetuates the trial court’s error. The state argues that Mr. Mobley cannot “put Ms. Bell at the scene,” and thus Ms.

Bell “did not have the opportunity” to kill C.H. Response at 24. The state’s argument fails because to present other suspect evidence, Mr. Mobley was not required to prove that Ms. Bell committed this crime. *See Franklin*, 180 Wn.2d at 379 (Trial court erred by “require[ing] specific facts to show that another person actually committed the crime”). He was not required to place Ms. Bell at Ms. Henry’s residence. *Clark*, 78 Wn. App. at 480. He only needed to raise reasonable doubt as to his own guilt. *Franklin*, 180 Wn.2d at 381.

In addition to applying the wrong legal standard, the state relies on an inapposite case to defend the trial court’s ruling. In its response, the state analogizes to *State v. Wade*, 186 Wn. App. 749, 346 P.3d 838 (2015) to argue that Mr. Mobley must place Ms. Bell at the scene. Response at 23-24. However, this case is distinguishable because there the evidence affirmatively showed that the other suspect did not have the opportunity to commit the crime. *Wade*, 186 Wn. App. at 768.

In *Wade*, the victim lived in an apartment in a secure building with a “high end” video security system. *Id.* at 754. People could only access the building if they had a key or were “buzzed in” by a resident through a keypad. *Id.* The other suspect did not appear on any of footage from the four video surveillance cameras. *Id.* at 758. The defense presented no evidence that the other suspect was capable of committing the crime. *Id.* at

765. Moreover, the evidence against the defendant was overwhelming. The defendant's DNA was found under the victim's fingernails, and he admitted to carrying the victim's body and placing her in the closet, where she was later found deceased. *Id.* at 759.

Under these circumstances, the *Wade* Court properly held that the other suspect evidence was speculative and inadmissible. *Id.* at 767-68. Unlike in *Clark*, it was not possible for the other suspect to commit the crime given the surveillance footage and the defendant's own description of what happened. *Id.* *Wade* merely reiterates the requirement that an alternative suspect must have a nonspeculative link to the crime, including the opportunity to commit it. *Id.*; *see also Franklin*, 180 Wn.2d at 381. Contrary to the state's argument, this case does not create the novel and unconstitutional requirement of placing the other suspect at the scene.

Here, unlike in *Wade*, the connection between Ms. Bell and this crime was not speculative. Ms. Bell threatened C.H. with death; stalked his mother, Ms. Henry, and C.H. for months; knew where Ms. Henry worked; and potentially stalked C.H. at his daycare. CP 1216-18, 1502-03. Ms. Bell also had no alibi and was in the Spokane area on the night of the crime. CP 1218. She could likely access Ms. Henry's apartment because it was unlocked, there was no evidence of security cameras or an alarm system,

and Ms. Henry was under the influence of medication that made her drowsy and “out of it.” RP 885, 1288.

Unlike in *Wade*, the evidence about Ms. Bell was at least as strong as the case against Mr. Mobley. Ms. Bell had the motive, means, prior history, opportunity, and ability to commit this crime. *See Franklin*, 180 Wn.2d at 372; *Clark*, 78 Wn. App. at 479. This evidence thus raised reasonable doubt about Mr. Mobley’s guilt. *Id.* The trial court erred and violated Mr. Mobley’s constitutional right to present a defense by excluding this evidence.

B. The Trial Court Improperly Conflated Incompetent Child Testimony with Merely Unreliable Child Testimony.

The trial court also erred by allowing Mr. Mobley’s daughter, C.M., to testify at trial. Young children often do not have the capacity to form independent recollections of events. *See State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (the third factor for child competency is whether the child has “a memory sufficient to retain an independent recollection of the occurrence”). They are easily influenced by outside sources. RP 342-43. Children will take information from outside sources, assemble it into a coherent story, and then repeat it as a memory that they witnessed firsthand. RP 342. This process, called source confusion, is not the same as lying. RP 342, 369. When children are confused about the source of

information, they do not intentionally relay falsehoods; they truly believe that they experienced events that they only heard about from others. *Id.*

In this case, C.M. was five when C.H. was killed, six when she was interviewed by a child forensic interviewer, and seven when she testified at trial. RP 1805, 1807, 2017. When C.M. was five, police exposed her to detailed information about this case and the allegations against her father. On February 27, 2017, police interviewed C.M.'s mother, Jenifer Mobley, for about 90 minutes. RP 1201. The interview occurred just after police arrested Mr. Mobley. *Id.* According to police, C.M. paid attention during the interview and interjected at points. RP 347. Detectives described the bruises all over C.H.'s face and body. RP 348. Detectives said that something happened the day before that caused these bruises. *Id.* Detectives also said that they believed Mr. Mobley injured C.H. and caused his death. *Id.*

Eleven months later, C.M. was interviewed by a social worker. RP 1805, 1807. C.M. said that she saw her father step on C.H. CP 1256. Her statements were evaluated by Dr. Daniel Reisberg, a professor of cognitive psychology with over four decades of experience studying the formation of

memory in children and adults.¹ RP 333, 336. Dr. Reisberg did not—and could not—offer an opinion about the accuracy of C.M.’s specific statements. RP 350. He could, however, provide an opinion as to the risk of error. *Id.*

Dr. Reisberg “absolutely” did not consider C.M.’s memory reliable. *Id.* He reiterated that “the risk of error here is high enough so that I, as a scientist, would never want to rely on it, and, therefore, could not possibly count it as reliable.” *Id.* This high risk of error resulted from C.M.’s age, the length of time until she was interviewed, and her exposure to outside information, particularly the police interview. RP 346-47. In particular, the statements by police that C.M. overheard during the interview were “exactly the sorts of things that could quite easily have planted ideas in [her] head.” RP 348.

The trial court concluded that Dr. Reisberg’s assessment went to the “weight of CM’s testimony not the admissibility of it.” CP 1256. In its response, the state argues that the trial court properly considered and rejected Dr. Reisberg’s testimony. Response at 38. This argument fails because both the trial court and the state confuse competency with

¹ Dr. Reisberg did not interview C.M. RP 336. He reviewed body camera footage from the police interview, video and transcripts of C.M.’s interviews, and affidavits from Mobley family members. *Id.*

credibility. The trial court did not, as the state argues, “reject part or all of the defense expert’s opinions.” Response at 38. Instead, the court found that these opinions undermined C.M.’s credibility, not her competency. CP 1256. This reflects an erroneous understanding of how outside influences impact memory in children. *See, e.g., In re Dependency of A.E.P.*, 135 Wn.2d 208, 232-33, 956 P.2d 297 (1998) (babysitter’s lengthy and detailed interviews of child potentially “planted false ideas in A.E.P.’s memory”).

Courts must act as gatekeepers to exclude incompetent testimony. *See* RCW 5.60.050. Juries can evaluate whether testimony is reliable but cannot evaluate incompetent testimony. *See Commonwealth v. Delbridge*, 578 Pa. 641, 663, 855 A.2d 27 (2003) (discussing competency versus credibility of child witnesses). When children lack “a memory sufficient to retain an independent recollection of the occurrence,” their testimony is incompetent—not merely unreliable—and must be excluded. *See Swan*, 114 Wn.2d at 645.

This is particularly true when the state’s own actions may have influenced the child in question. *See, e.g., Commonwealth v. Davis*, 939 A.2d 905, 910, 2007 Pa. Super. Ct. 382 (2007) (concluding that a child’s “recollections were tainted” and “not of his own memory” due to suggestive police interviews). The state should not be allowed to plant ideas in a

child's mind and then use those false memories as substantive evidence at trial.

Here, police knew that Mr. Mobley babysat C.H. and his own children on the day in question. RP 2047, 2057-58. They knew that C.M. was a potential witness. *Id.* Despite this, police chose to interview Jenifer Mobley for 90 minutes, with C.M. present and engaged in the interview. RP 347-48, 1201, 1876. Police chose to describe in graphic detail the bruises and injuries sustained by C.H. RP 348. Police chose to disclose that they believed these injuries were inflicted the day before by C.M.'s father, Mr. Mobley. *Id.* The trial court should have excluded C.M.'s testimony as incompetent because her memory was undermined largely due to the state's own actions.

C. The Prosecutor Committed Misconduct by Arguing that Mr. Mobley's Expressed Desire Not to Speak to Police was Substantive Evidence of his Guilt.

During closing arguments in this case, the prosecutor relied on Mr. Mobley's statement that he did not want to speak with police as substantive evidence of his guilt. RP 2197. In its response, the state attempts to distinguish between the right to remain silent and a verbal expression of this right. Response at 52-53. This argument fails because the constitutional right to remain silent extends to the invocation of this right: "when the State invites the jury to infer guilt from the *invocation of the right of silence*, the

Fifth Amendment and article I, section 9 of the Washington Constitution are violated.” *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) (emphasis added).

Police first spoke to Mr. Mobley early in the morning on February 27, 2017. RP 1198. Mr. Mobley was getting his children ready for the day and asked if he could talk to police later. RP 149, 1021, 1200. In closings, the prosecutor argued that this statement showed that Mr. Mobley was guilty:

Now, the other clue is from Mr. Mobley himself when contacted by law enforcement. First, he says – remember, they introduced themselves, hi, we’re with the police department. Oh, can we do this later, I’m too busy. What, if anything, strikes you about the first words that come out of this man’s mouth? They hadn’t even told him why they were there yet, and he’s already saying he’s too busy.

RP 2197. This contradicted the trial court’s ruling that the state was “**PROHIBITED** from commenting upon Mr. Mobley’s invocation of his right to remain silent and right to counsel.” CP 1180 (emphasis in original).

In its response, the state accurately points out that the trial court ruled that Mr. Mobley’s statements “were voluntary, and therefore admissible pursuant to CrR 3.5.” Response at 51 (citing CP 1179). However, the state leaves out the very next finding, where the court limited the scope of testimony and argument about these statements:

Although Mr. Mobley's statements are admissible under CrR 3.5, the State may not comment upon, or otherwise elicit evidence of, Mr. Mobley's invocation of his right to remain silent and right to counsel. As such, the Court will disallow any such questions or argument at the time of trial.

CP 1179 (emphasis added). The trial court thus distinguished between using Mr. Mobley's statements in order to present the facts in a coherent manner and using his reluctance to speak to police as substantive evidence of his guilt. CP 1179-80; *see also Burke*, 163 Wn.2d at 221-22 (discussing comments on silence versus mere reference to silence).

In its response, the state also argues that the prosecutor "did not comment on the defendant's 'silence' during its closing argument, but rather highlighted the defendant's prearrest, voluntary statement to the police." Response at 52. The state accurately defines silence as refraining from speech. Response at 53. "Rather than remaining 'silent,' the defendant willingly chose to make a statement regarding his availability when he first greeted the police." Response at 53.

Essentially, the state argues that prosecutors are only prohibited from commenting on a defendant's silence or refusal to speak with police. Response at 52. This is false, and contradicts the Washington Supreme Court's decision in *Burke*, 163 Wn.2d 204. In that case, the defendant was accused of third-degree rape of a child for having sex with a 15-year-old girl at a party when he was 22. *Burke*, 163 Wn.2d at 206. During the

investigation, police spoke with the defendant at his home. *Id.* at 207. The defendant told police that he had consensual sex with a girl at a party. *Id.* His father then interjected and asked if his son was being charged. *Id.* The defendant essentially agreed and said he wanted to talk to an attorney. *Id.* The police then left, but as they were leaving, the defendant commented that the allegations were baseless.²

At trial, the prosecutor argued that Burke was guilty because he did not tell police that he believed the victim was overage. *Id.* at 208. The Court of Appeals ruled that Burke did not truly invoke his right to silence because of his subsequent statement to police about the allegations. *Id.* at 220. The Washington Supreme Court disagreed, noting that “the issue before us is not the admissibility of Burke’s subsequent statements....” *Id.* The Court held that the state “violated Burke’s right to silence” by implying

² The exact sequence of this conversation is unclear. The Court in *Burke* summarized this portion of the conversation as follows:

At about this point, Burke’s father intervened to ask the police if his son would be charged. When told that it was “very possible,” the father advised Burke not to talk to the police until counsel had been consulted. Burke asked the police if this was possible and was told “yes, [you can] speak to an attorney.” As the police were leaving, Burke said, “he thought that this was a bunch of shit, that girls at Edmonds Woodway [high school] were always trying to get guys in trouble.”

Burke, 163 Wn.2d at 207 (internal citations to the record omitted).

“that suspects who invoke their right to silence do so because they know they have done something wrong.” *Id.* at 222.

Commenting on a defendant’s silence burdens his constitutional rights. *Id.* at 219. Likewise, commenting on a defendant’s statement invoking the right to silence (“I don’t want to talk to you” or similar statements) commits the same constitutional error. *See, e.g., id.* (police interpreted defendant’s “question if it was possible to speak with an attorney as an assertion of his right to silence”). The error persists even when the accused makes an admissible, subsequent statement to police. *Id.* at 220-21. As noted in *Burke*, “It would be incongruous for the State to tell the jury that Burke exercised his right to silence, to suggest he did so because of guilt, and then for the State to argue that the inference from guilt by silence was proper because Burke did not invoke his right to remain silent unequivocally.” *Id.* at 221.

Here, Mr. Mobley initially told police that he did not want to speak with them and asked if they could talk another time. RP 149, 1021, 1200. This was an invocation of his right to remain silent. *See State v. Easter*, 130 Wn.2d 228, 239, 922 P.2d 1285 (1996) (citing *Quinn v. United States*, 349 U.S. 155, 162, 75 S.Ct. 668, 673, 99 L.Ed. 964 (1955)) (“No special set of words is necessary to invoke the right [to remain silent].”). He subsequently allowed police into his home and spoke with them briefly, before again

invoking his right to silence as well as his right to counsel. RP 139, 1022, 1024.

In closing, the prosecutor argued that Mr. Mobley's initial reluctance to speak with police was substantive evidence of his guilt. RP 2197. The implication is that innocent people want to speak with police right away and guilty people want to keep quiet. *See Burke*, 163 Wn.2d at 222 ("The implication is that suspects who invoke their right to silence do so because they know they have done something wrong."). This is an improper inference that burdened Mr. Mobley's right the right to remain silent. *Id.*

The error also was not harmless. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Burke*, 163 Wn.2d at 222 (citing *Easter*, 130 Wn.2d 228 at 242). This case depended on the jury's assessment of Mr. Mobley's credibility. The prosecution's argument "had the effect of undermining his credibility as a witness, as well as improperly presenting substantive evidence of guilt for the jury's consideration," and thus was not harmless. *Id.* at 222-23. This Court must reverse.

II. CONCLUSION

Mr. Mobley respectfully requests that this Court reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 10th day of August, 2020.



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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On August 10, 2020, I electronically filed a true and correct copy of the Reply Brief of Appellant, Joshua J. Mobley via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

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Joshua J. Mobley DOC # 418254 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326	(X) via U.S. mail
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SIGNED in Tacoma, Washington, this 10th day of August, 2020.



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