841204-3

No. 37508-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN BEADLE

Appellant.

FILED
COURT OF APPEALS
DIVISION II
09 JAN 14 PM 12: 04
STATE OF WASHINGTON
BY
DEPUTY

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR
345 W. MAIN STREET, 2ND FLOOR
CHEHALIS, WA 98532
360-740-1240

by: Lori Smith
Lori Smith, Deputy Prosecutor

TABLE OF AUTHORITIES

STATEMENT OF THE CASE.....1

ARGUMENT.....1

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE FOUR-YEAR-OLD VICTIM WAS UNAVAILABLE TO TESTIFY AT TRIAL.....1

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE HEARSAY STATEMENTS OF THE FOUR-YEAR-OLD VICTIM BECAUSE THE STATEMENTS WERE *NON*-TESTIMONIAL.....11

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED LIMITED TESTIMONY ABOUT THE VICTIM'S DEMEANOR OCCURRING AT THE CHILD HEARSAY HEARING.....23

CONCLUSION.....25

TABLE OF AUTHORITIES

Federal Cases

Crawford v. Washington, 541 U.S. 36, 24 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....12,13,16

Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006).....14,15

Washington Cases

State v. C.J. , 148 Wn.2d 672, 63 P.3d 765 (2008).....3,4

State v. Castellanos, 132 Wn.2d 94, 935 P.2d 1353 (1997).....2

State v. Cooley , 48 Wn.App. 286, 738 P.2d 705, *rev.den.* 109 Wn.2d 1002 (1987) 2

State v. Davis, 154 Wn.2d 291,111 P.3d 844 (2005), aff'd, 126 S.Ct. 2266 (2006).....21

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020 (1986).....21,22,24

State v. Hendrickson, 138 Wn.App. 827,158 P.3d 1257 (2007).....12

State v. Hopkins, 137 Wn.App. 441, 154 P.3d 250 (2007) 4,5,15,16,17

State v. Justiniano, 48 Wn.App. 572, 740 P.2d 872 (1987).....4,7,8

State v. Lawrence, 108 Wn. App. 226, 31 P.3d 1198 (2001), review denied, 145 Wn.2d 1037 (2002).....12

State v. Mavkle, 118 Wn.2d 424, 823 P.2d 1101 (1992).....12

State v. Montgomery, 95 Wn.App. 192, 974 P.2d 904 (1999).....2

State v. Pham, 75 Wn. App. 626, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002,891 P.2d 37 (1995).....12

State v. Powell, 126 Wn. 2d 244, 893 P.2d 615 (1995).....3

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).....1,3,4,5

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980).....21

State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001).....23

State v. Williams, 136 Wn. App. 486, 150 P.3d 111(2007).....14

State v. Williams, 137 Wn.App. 736, 154 P.3d 322 (2007).....2,24

State v. Woods, 154 Wn.2d 613,114 P.3d 1174 (2005).....5

State v. Young, 62 Wn.App. 895, 817 P.2d 412 (1991).....2

Statutes

RCW 9A.44.120.....2,3,10

Court Rules

ER 804(a).....3,8

Cases from Other Jurisdictions

Anderson v. State, 163 P.3d 1000 (Alaska App. 2007).....14

STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal. However, on page 20 of his brief the Appellant makes a factual misstatement about a finding made by the trial court in the Findings of Fact and Conclusions of Law Regarding Child Hearsay Hearing. Appellant states that the trial court concluded "[t]he evidence does suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." This is not correct. This finding by the trial court correctly reads as follows: [t]he evidence does not suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 42.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE FOUR-YEAR-OLD VICTIM WAS UNAVAILABLE TO TESTIFY AT TRIAL.

Beadle claims that the trial court erred when it found that the victim, B.A., was unavailable to testify at trial and that the State failed to meet its burden to prove that B.A. was unavailable to testify. Beadle's argument is without merit.

"The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced." State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984)(citation omitted).

Washington has a "child hearsay" statute. RCW 9A.44.120. The determination of admissibility of a child's hearsay statements under RCW 9A.44.120 is within the sound discretion of the trial court, and its ruling will not be overturned unless there is a manifest abuse of discretion. State v. Cooley , 48 Wn.App. 286, 293, 738 P.2d 705, *rev.den.* 109 Wn.2d 1002 (1987). A court abuses its discretion when its evidentiary ruling is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" State v. Williams, 137 Wn.App. 736, 743, 154 P.3d 322 (2007), citing State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)(quoting State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Great deference is given to the trial court's determination regarding such evidentiary matters. State v. Young, 62 Wn.App. 895, 902-03, 817 P.2d 412 (1991); State v. Montgomery, 95 Wn.App. 192, 198, 974 P.2d 904 (1999). Thus, the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). The "burden is on the appellant to prove an abuse of discretion." Williams, 137 Wn.App. at 743. And the reviewing Court may "uphold a trial court's evidentiary ruling on the grounds the trial

court used or on other proper grounds the record supports." Id., citing State v. Powell, 126 Wn. 2d 244, 259, 893 P.2d 615 (1995).

As previously mentioned, under the Sixth Amendment, a demonstration of unavailability is necessary when the declarant witness does not testify. State v. Ryan, 103 Wn.2d 165, 169, 691 P.2d 197(1984). The prosecution must make a good faith effort to obtain witnesses presence at trial before the court may deem that person unavailable. Ryan at 170. Although unavailability is usually based upon the physical absence of a witness, it may also arise when the witness refuses to testify, asserts a privilege, or claims a lack of memory. Id. at 171; see ER 804(a). Under RCW 9A.44.120--the child hearsay statute-- statements of sexual abuse made by a child under the age of ten are admissible if the trial court finds that the child's statements are reliable and either the child testifies at trial or is unavailable as a witness. RCW 9A.44.120(2)(b). This statute is meant to help overcome the natural difficulty of prosecuting child sexual abuse cases. State v. C.J., 148 Wn.2d 672, 681, 63 P.3d 765 (2008). Because there are generally no witnesses other than the child and the abuser, and children are often ineffective witnesses, the legislature has created a method for allowing the out-of-court statements of child victims. C.J., 148 Wn.2d at 680-681. And, through RCW 9A.44.120, the legislature

has granted greater discretion to the trial court in determining the trustworthiness of a child's out-of-court statements. Id. at 681. Pursuant to the child hearsay statute, "our Legislature has clearly established prerequisites for allowing child hearsay in a criminal trial at which the child does not testify herself. A primary prerequisite is that the trial court must conduct a hearing, and find that a child witness is unavailable to testify." State v. Hopkins, 137 Wn.App. 441, 451, 154 P.3d 250 (2007). That was done in the present case. See11/16/07 RP; 12/19/07 RP; CP 41-44. It should be further noted that, as in this case, a young child can be competent as a witness yet still be unable to testify in the courtroom, thus making her unavailable. See, e.g., State v. Justiniano, 48 Wn.App. 572, 577, 740 P.2d 872 (1987) ("the trauma of a courtroom setting imposed on a child of such tender years being questioned about such disagreeable events deprived [the victim] of the ability to verbalize in the courtroom what had happened, thus making her unavailable as a witness"). When a child witness is unavailable, the trial court must also make separate determinations of reliability and corroboration based on the factors set out in State v. Ryan, 103 Wn.2d 165, 175-176, 691 P.2d 194 (1984); C.J., 148 Wn.2d at 681. Not every Ryan factor needs to be satisfied; it is enough that the factors are substantially met. State v.

Woods, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (2005)(citing State v. Ryan, supra).

In the present case, the trial court's finding that B.A. was unavailable to testify was not an abuse of discretion. Here, the trial court clearly did "conduct a hearing, and find that a child witness is unavailable to testify." State v. Hopkins , 137 Wn.App. at 451. In the present case there was testimony that the child victim, B.A., was diagnosed as suffering from Post Traumatic Stress Disorder, and Sexual Abuse of a Child. 11/16/07 RP 16. And, we have the testimony of the CPS worker, Ms. Jensen, who described B.A.'s demeanor on the day of the child hearsay hearing when B.A. would not come into the courtroom:

> When I got here, she had resigned herself to a corner and was down on her knees and hunched over, kind of in a fetal position. An advocate from Human Response was trying to engage her, and she wasn't having it. Her mom was trying to engage her. I went over and talked with her, got down and we played a little bit, and eventually she came out of it. . . but she said that she --she didn't want to --she didn't want to talk. She was scared. . . .

11/16/07 RP 32. Then, at the December 19, 2007, continuation of the child hearsay hearing, in finding B.A. unavailable, the trial court explained its decision thusly:

> The Court observed that the child was not brought into the courtroom. The Court observed that when the child was here for the purpose of testifying, there

> was a substantial amount of crying and screaming coming from the public portion of the hallway outside the courtroom door, and Mr. Hayes [prosecutor] at that time related to the court --and it was not disputed by Mr. Brown [defense counsel] or Mr. Beadle --that t his yelling and screaming that was coming in was coming from the child, and she was doing it in resisting her --any and all attempts to bring her into the courtroom. That was not remedied at any one of the three hearings that we've had with respect to the admissibility of this evidence. Consequently, as far as the Court's concerned, she's unavailable as a witness.

12/19/07 RP 24. And, in its written findings and conclusions, the trial court made the following finding regarding B.A.'s unavailability via B.A.'s refusal to come into the courtroom at the November 16, 2007, child hearsay hearing:

> On November 16, 2007, at the time of the Child Hearsay Hearing, the State attempted to bring B.R.A. into the courtroom to testify; B.R.A. then began crying loudly, crawled into a corner of the hallway wall on the floor outside the courtroom, and hid her face from view; Lisa Burgess, Roni Jensen, Carl Buster, and Margaret Heriot all attempted to reassure and coax B.R.A. to come out of the corner; B.R.A. did not leave her spot in the corner for over an hour;

CP 42. All of these facts and findings by the trial court amply support the trial court's finding that four-year-old B.R.A. was unavailable to testify. The prosecutor did everything he could to get B.A. to come into the courtroom--and four other witnesses tried to get B.R.A. to come into the courtroom. CP 42. Then, at the last minute, B.A. was apparently ready to come into the courtroom, but

by that time the court had to move on to other matters. 11/16/07 RP 47. The trial court also found that "[t]he evidence does not suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 42. Thus the trial court did properly consider the possibility of using closed-circuit television, but determined that it was unlikely that B.A. would be able to testify using that method either.

Beadle finds fault with the trial court's ruling because it did not determine "why" B.A. was refusing to testify. The State does not know how a court would ever determine exactly why a four-year-old child would be unable to testify, short of being able to read the child's mind. The State suggests that here, as in the Justiniano case, "[t]he trauma of a courtroom setting imposed on a child of such tender years being questioned about such disagreeable events deprived [the victim] of the ability to verbalize in the courtroom what had happened, thus making her unavailable as a witness." Justiniano , 48 Wn.App. at 577. Indeed, in the present case, the fact of the matter is that B.A. was obviously incapacitated by the prospect of testifying in court: she was crying and screaming and folding herself up into a fetal position in a corner of the hallway at the child hearsay hearing. CP 42; 11/16/07 RP 32. If this does not qualify as "unavailable" via "infirmity" then the State

does not know what would. ER 804(a)(4). The facts here show that B.A., "because of her tender age and the ominous setting of the courtroom, was unable to express in words the memory of the of the occurrence," making her unavailable to testify. State v. Justiniano, 48 Wn.App. at 577-579. Accordingly, the trial court did not abuse its discretion when it found that B.A. was unavailable to testify.

After finding B.A. unavailable, the trial court in the present case then correctly made additional findings about the reliability and corroboration of B.A.'s statements. The trial court found that there was no motive for B.A. to lie. 12/19/07 RP 25. The trial court also noted, "I find that the time, content, circumstances of the statements made by the child to the various parties do provide sufficient indicia of reliability to admit them in evidence at the trial of Mr. Beadle. 12/19/07 RP 29. Significantly, the trial court also observed:

> I should also add that with respect to the issue of reliability of the statements, some of the statements are much more graphic than others. . . . what really stands out, for example, that her hands were sticky and that the defendant Steve helped her wash her hands because of the substance that was on her hands as a result of what came out of his tail. That is --had a very profound effect on the Court as I was listening to the statements that were attributed to her. There simply is no way that a child who's four years old would make something like that up unless, in fact,

> there was something sticky on their hands, and it was something that someone in the position of Mr. Beadle did, in fact, help her clean off her hands. It's extremely telling testimony.

12/19/07 RP 29, 30. Indeed, the statements made by B.A. in this case quite simply had the ring of truth about them in the graphic yet child-like way B.A. discussed the incidences, and when she drew a picture of "Steve's tail" and when she took all of the clothes off of the male doll and the baby doll and placed the baby doll's legs around the waist of the boy doll and said that Steve's "tail was between" them. 1/30/08 RP 44, 48, 68, 69, 80. A child of this age is simply not going know about a "tail" that stuff came out of which made her hands slippery and sticky--unless she actually witnessed the events. It simply stretches credulity to think B.A. was making all of this up given how consistent her stories to every one were. The trial court noted this too when it discussed "corroboration, given the fact that the child is not available." 12/19/07. The trial court explained

> with respect to corroboration, we've got the fact that the child told as many people what I'll refer to as consistent stories as to what ha happened to her. No. 2, we've got the fact that the mother made it abundantly clear that the defendant did in fact have access to the child, and thus would be in a position or was in a position to have committed the acts complained of. . . . [and] we've got the verbal acts--when I say verbal acts, I'm talking about the actions taken by the child when she was examined by

> Margaret Heriot, . . . when she said that she gave her dolls, and the first thing that she did was she took all of the dolls' clothes off and pointed to the part of the doll where . . . the tail that she's described would be located. And that goes, I think, directly to the issue of corroborating her verbal statement by what I'll refer to as a nonverbal act, in that she's pointing out on the doll exactly what it was that she's referring to.
>
> * * *
>
> As far as I'm concerned I'm satisfied that the actions taken by the child, as I've already gone through with respect to the people who heard the statements, do provide sufficient evidence and indicia of corroboration of the acts that the child complained of. So, as far as I'm concerned, the second prong of 9A.44.120 is satisfied by the evidence that has been produced by the State.

12/19/07 RP 30-32. In making these extensive findings, the trial court properly found that B.A. was unavailable; furthermore, because B.A. was unavailable the trial court knew it had to address reliability and corroboration of B.A.'s statements--and it did so.

In sum, because there was ample evidence that the child could not testify because her demeanor and actions during the child hearsay hearing show that she was truly "unavailable" and furthermore that B.A.'s statements were all nonetheless reliable and sufficiently corroborated, the trial court did not abuse its discretion when it found B.A. unavailable. Accordingly, this Court should affirm Beadle's convictions.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE HEARSAY STATEMENTS OF THE FOUR-YEAR-OLD VICTIM BECAUSE THE STATEMENTS WERE *NON*-TESTIMONIAL.

Beadle argues that it was error for the trial court to admit the hearsay statements of four-year-old B.A. because, according to Beadle, the statements made by B.A. to CPS worker Jensen and Officer Buster were testimonial, and thus not admissible because the victim did not testify. Beadle's argument is without merit because, according to the Washington Supreme Court, the inquiry to determine whether hearsay statements are "testimonial" must focus on whether the declarant would reasonably expect her statements to be used in litigation--not on the intent of the questioner. State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006). Indeed, resolution of this issue in the present case depends upon whether we must focus on the intent of the declarant, or on the intent of the questioner in determining whether the hearsay statements are testimonial. The State submits that pursuant to Shafer , the proper focus for determining whether any given hearsay statements are "testimonial" is on the intent of the declarant. Id., As such, Beadle misreads the ruling in State v. Shafer, supra.

Evidentiary rulings and the admissibility of child hearsay lies within the trial court's sound discretion, and will not be reversed absent manifest abuse of discretion. State v. Mavkle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992); State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002,891 P.2d 37 (1 995). Judicial discretion is abused if exercised on untenable grounds or for untenable reasons. State v. Lawrence, 108 Wn. App. 226, 233, 31 P.3d 1198 (2001), review denied, 145 Wn.2d 1037 (2002).

The State may present prior testimonial statements of an absent witness only if the witness is truly unavailable and the defendant has had prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); see also State v. Shafer, 156 Wn.2d 381, 388, 128 P.3d 87, cert. denied, --- U.S. ----, 127 S.Ct. 553 (2006). A statement is testimonial if a reasonable person in the declarant's position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime. Shafer, 156 Wn.2d at 389; see also State v. Hendrickson, 138 Wn.App. 827, 833, 158 P.3d 1257 (2007).

In State v. Shafer, the Washington State Supreme Court provided specific guidelines for determining whether a statement is

testimonial and held that the state of mind of the declarant controls the issue. Id., 156 Wn.2d 381, 389-90, 390 n8, 128 P.3d 87 (2006). The Shafer court held that a three-year-old victim's statements to her mother were nontestimonial:

> These statements were not solicited by T.C.'s mother. Without prompting, T.C. told her mother about her encounter with Shafer, and she did so upon awaking from sleep. T.C.'s mother then responded in a manner that one would expect of a concerned parent under the circumstances -- she inquired further. While T.C.'s statements in response to her mother's questioning were not entirely spontaneous, they were not the result of leading questions or a structured interrogation. Furthermore, the police were not involved, and T.C. had no reason to expect that her statements would be used at a trial. For these reasons, we conclude that T.C.'s statements to her mother were nontestimonial and, thus, do not run afoul of *Crawford.*

156 Wn.2d at 389-90 (footnote omitted)(emphasis added). The Shafer court then evaluated statements of that same victim to a family friend who had a history of acting as a confidential informant for law enforcement agencies, and who had knowledge of Shafer's arrest for the sexual assault:

> On the one hand, Doroshenko had prior experience as an informant for law enforcement agencies, and her contact with T.C. occurred approximately a week after Shafer was arrested. On the other hand, Doroshenko was not acting for any law enforcement agency at the time she talked to T.C, and, again, T.C. had no reason to expect that her statements would later be used in court. ... On balance, we are of the view that T.C.'s nonvideotaped statements to Doroshenko were not testimonial.

Shafer, 156 Wn.2d at 384-5, 390-1(emphasis added).

The Shafer court thus set forth an objective standard for courts to apply when determining whether a statement is testimonial:

> The proper test to be applied in determining whether the declarant intended to bear testimony against the accused is whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. The inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement was made. Applying this standard, it defies logic to think that T.C., as a three-year-old child, or any reasonable three-year-old child, would have an expectation that her statements about alleged sexual abuse could be used for prosecutorial purposes. Thus, whether one looks to T.C.'s subjective appreciation of the legal ramifications of her statements, as the dissent incorrectly asserts we do, or whether one objectively looks to what a reasonable, competent person in T.C.'s position would understand to be the import of the statements, which is the proper determination, the outcome of this case would not change. A three-year-old child, whether T.C. or a fictional reasonable one, who tells her mother and a family friend in a private setting about sexual abuse is not making the statements in anticipation that the statements will later be used to prosecute the alleged sexual abuse perpetrator.

State v. Shafer, 156 Wn.2d at 389-90 (citation omitted)(emphasis added); see also State v. Williams, 136 Wn. App. 486, 502-4, 150 P.3d 111, 119-20 (2007) and See e.g., Anderson v. State, 163 P.3d 1000 (Alaska App. 2007) where that court stated, "We acknowledge that, even though most of the Supreme Court's discussion in Davis focuses on the primary purpose of the police interrogation, the Supreme Court also stated that 'in the final

analysis' it is 'the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate'" (quoting Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006)(emphasis added). Thus, the focus should be on the declarant's intentions--not on the questioner's intentions.

However, in State v. Hopkins, 137 Wn.App. 441, 154 P.3d 250 (2007), Division II of the Court of Appeals departed from this objective standard and employed reasoning that does not square with Shafer. 137 Wn. App. 441, 453-7, 154 P.3d 250, 255-8 (2007). The court first determined that a two-and-one-half-year-old victim's statements to mother and grandmother were nontestimonial and admissible:

> Like the child in Shafer, M.H. made disclosures to her family members, who were concerned for her physical safety. Hannah and Blake sought answers to their questions precipitated by M.H.'s disclosures, not in contemplation of prosecuting a criminal case against Hopkins, but rather to assess M.H.'s physical well-being and her future safety. Moreover, neither Hannah nor Blake asked leading questions; nor did they engage in a structured interrogation of M.H. ... [W]e similarly hold here that Hannah's and Blake's testimonies about M.H.'s disclosures to them did not violate Hopkins' Sixth Amendment right to confront the witness against him.

Id. at 454. Although the court found these statements to be nontestimonial, the court focused almost entirely on the state of mind of the family members.

The Hopkins court also held that the child's statements to a CPS worker were partly testimonial. *Id.* at 455-7. The court held that statements to the CPS worker during the first interview were primarily nontestimonial because the CPS worker was not working with law enforcement, the CPS worker was performing a check to ensure the child's safety, the check was unrelated to potential prosecution, and the CPS worker used non-leading questions. *Id.* But, the court held that the statements to the same CPS worker during a second interview were testimonial:

> But Mahaulu-Stephens visited M.H. a second time for a CPS investigation because of new disclosures. Although the purpose of this visit, too, can be characterized as protecting M.H., it also had the potential to lead to criminal prosecution of Hopkins, which is what actually happened. That Mahaulu-Stephens was also conducting a CPS investigation moves her second meeting with M.H. closer, though not conclusively, on the continuum toward criminal investigation and information that is "testimonial" under *Crawford.*
>
> ...
>
> The following evidence suggests that M.H.'s statements to Mahaulu-Stephens were testimonial. Mahaulu-Stephens testified that (1) her job was "to investigate whether or not those allegations [of abuse and neglect] are accurate, if there is any truth to the referral," (2) it was her practice to record information gained during the investigation and then to "[a]sk them more questions if there's something they're talking about that's a little more concerning," and (3) she records her notes for the explicit purpose of "[d]ocument[ing] that [the victim] made a spontaneous disclose and be able to give that information to law enforcement."
>
> ...
>
> The second meeting between Mahaulu-Stephens and M.H., however, did produce incriminating statements, which the State used against Hopkins at trial. This second meeting

> was even more removed from any ongoing emergency than their first meeting. Moreover, at this second meeting, Mahaulu-Stephens was also acting in a government capacity for CPS and, in that capacity, she obtained statements from M.H. that the State used to prosecute Hopkins. We hold, therefore, that M.H.'s hearsay disclosures to Mahaulu-Stephens during the second interview were "testimonial" under *Crawford* and, therefore, their admission at trial violated Hopkins' Sixth Amendment protections because M.H. did not testify at trial.

Id. at 456-7. Throughout its analysis, the Hopkins court talks almost exclusively about the state of mind of the CPS worker and scarcely mentions the state of mind of the declarant – whether the child would have reasonably expected that her statements during the second interview would be used as evidence. The State respectfully suggests that in so doing the Hopkins Court veered away from the Washington Supreme Court's analysis in Shafer, supra.

Indeed, the decisions in Hopkins and Shafer cannot be reconciled. But, because a Supreme Court decision controls over all lower courts, the State respectfully suggests that the ruling in Shafer must control this Court's analysis in cases such as this where the declarant is a child of tender years. Here, applying the standard outlined in Shafer, this Court should agree with the trial court and rule that four-year-old B.A.'s statements to family members, mental health counselors, the CPS witness, and law

enforcement are all nontestimonial. This is because the Shafer standard focuses solely on the objective intent of the declarant; this standard does not take into account the intent, motivation, or mindset of the person eliciting or listening to the hearsay statements.

In the present case, at the time B.A. made statements about the sexual abuse, she was four years of age. When one objectively looks to what a reasonable, person in B.A.'s position would understand to be the import of her statements, it simply defies logic to think that four-year-old B.A.-- or any reasonable four-year-old child-- would have an expectation that her statements to anyone about sexual abuse could be used for prosecutorial purposes. See e.g., State v. Shafer, 156 Wn.2d at 389-90. As correctly stated by the trial court in the present case:

> With respect to the statements made to Detective Buster and to Ronnie Jensen, for the record, I find that they were not made by the four-year-old child with the expectation that there would be any prosecution made of Mr. Beadle. . . . there's no doubt in my mind that this child had no idea whether any statements made by her would in fact be used for prosecution or not. . . . The standard is --the objective standard is what is the intent of the person who made the statement? And under the objective standard of looking at it as to the intent of the child, I don't think you can attribute any intent to a four-year-old child. . . . So the standard is the inquiry focuses on the declarant's intent by evaluating the specific circumstances in which the out-of-court statement

> was made. From that perspective, they're not testimonial.
>
> * * *
>
> What I'm saying is that from the perspective of the Court in making this decision with respect to State vs. Shaefer [sic], our Supreme Court has held that the -- what you have to look at is the intent of the declarant. The intent of the declarant here, as far as I'm concerned, is to describe what happened to her. It was not for the purpose of giving testimony against Mr. Beadle. . . . my ruling would be that under Schaefer, those statements are not testimonial and Crawford does not apply. that's what Schaefer says, if you look at objectively what her intent is and not theirs. Her intent is to describe what happened to her. It's not testimonial.

12/19/07 RP 35, 36, 37 (emphasis added). That was the oral ruling of the trial court by the judge who heard the child hearsay matter. See also CP 41-44 (written findings). And even though a different judge presided over the trial in this case, the trial judge also agreed with the previous judge's analysis and noted that the focus should be on the intent of the declarant when he explained:

> [It would be] awfully hard for me to think a four-year-old would be able to think through . . . . a four-year-old is not going to recognize, even if she is talking to a CPS worker or police officer, that this is going to have consequences in a criminal case, that what she says will be taken before a jury and result in the criminal prosecution.

1/30/08 RP 18. The State believes that both judges got it right in this case when they focused on the intent of the four-year-old

declarant, B.A. Each judge in this case made a ruling that the child hearsay statements made to both the CPS worker (Jensen) and Detective Buster were non-testimonial because the focus is correctly placed on the intent of the declarant in making the statements. Schafer, supra . Although the first judge in this case *did* analyze this issue both ways--from the intent of the victim and from the perspective of the officer--the trial court's ultimate and correct ruling was that B.A.'s statements to the CPS worker (Jensen) and Detective Buster were non-testimonial. 12/19/07 RP 36. Under Shafer this was not an abuse of discretion. There is simply nothing that shows this four-year-old child gave the statements to Jensen and Buster in anticipation that her statements would be used against Beadle in a State prosecution. Accordingly, this Court should under these facts follow Shafer, and this time should agree that the correct focus when determining whether statements are testimonial is on the declarant, not on the listener or the questioner. In so doing, this Court should find that the trial court's analysis in the present case-- which followed Shafer's directive to focus on the intentions of the declarant-- was correct, and should affirm the rulings of the trial judge.

But even if this Court determines that B.A.'s statements to the CPS worker and to Detective Buster were testimonial and

improperly admitted, this Court should nonetheless find that admission of the statements was harmless error. "It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020 (1986). " 'A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.' " Guloy, 104 Wn.2d at 425. Constitutional error is presumed to be prejudicial and the State bears the burden of providing that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980); Guloy, 104 Wn.2d at 425. An appellate court uses the "overwhelming untainted evidence" test in its harmless error analysis. Guloy, 104 Wn.2d at 426. Under that test, we look only to the untainted evidence to determine whether the untainted evidence is so overwhelming that it "necessarily leads to a finding of guilt." Guloy, 104 Wn.2d at 426 (citing Parker v. Randolph, 442 U.S. 62, 70-71, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979)); see also State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), aff'd, 126 S.Ct. 2266 (2006).

Here, Beadle has failed to show that even if the trial court had denied admission of B.A.'s statements to the CPS worker and to Detective Buster, the outcome of the trial would have been different. Indeed, even without the hearsay statements that B.A. made to the CPS worker and to Detective Buster, there is ample evidence to convict Beadle through B.A.'s drawing of "Steve's tail", through her traumatized behavior at the child hearsay hearing and through her other consistent, and graphic statements made by B.A. to her mother Lisa Burgess, to Damon Burgess, to Margaret Heriot, and to Cary McAdams. CP 43. B.A.'s statements were consistent throughout. B.A. made the same statements to four other people besides the CPS worker and the detective. And the facts contained in B.A.'s statements reveal startlingly graphic details about the workings of Beadle's private parts that surely no four-year-old child would know about an adult man-- unless she had experienced them. Thus, even without the testimony of the CPS worker and Detective Beadle, there was "overwhelming untainted evidence" to convict Beadle beyond a reasonable doubt. Guloy, supra. Accordingly, any error in admitting the testimony of the CPS worker and the detective was harmless.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED LIMITED TESTIMONY ABOUT THE VICTIM'S DEMEANOR WHICH OCCURRED AT THE CHILD HEARSAY HEARING.

Beadle also argues that the trial court erred when it allowed testimony at trial about the victim's demeanor at the child hearsay hearing. The trial court did not abuse its discretion when it allowed this evidence to be elicited.

A trial court reviews a trial court's decision to admit evidence for an abuse of discretion. State v. Vreen, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). In the present case, what Beadle is complaining about is "demeanor" evidence of the child at the child hearsay hearing. However, admission of this evidence was not "unfairly" prejudicial.

The trial court here was careful to limit what was said about B.A.'s demeanor and resultant refusal to come into the courtroom at the child hearsay hearing. The trial court said,

> I don't want extended presentation on exactly what was required that she refused to come in and she -- when you say appeared to be traumatized, that's not what should come in, it's just that she resisted coming into the courtroom. I don't know if it was trauma or fear or what, to that point I think Mr. Brown's [defense counsel's] point is well taken. But I think the state has the right to put on its evidence and that's part of it. . . . So the ruling will be . . . . that the fact she resisted coming into the courtroom at a prior hearing. . . . And you can go into some, you know, that she went off to a corner and for an hour couldn't be coaxed out . . .

> but I don't want any opinions on why it might have been or that she appeared to be traumatized.

1/30/08 RP 15, 16. Thus, the trial court did limit the scope of this testimony while at the same time allowing the State to present a brief reason that its witness was not there. The State has not yet been able to find any cases that have addressed this precise issue, and apparently Beadle could not find many cases to support his argument that this evidence was improper either, since he cites a Florida case.

Nonetheless, even if it was error to allow testimony about the child's demeanor at the child hearsay hearing in this case, any error should be deemed harmless. "[R]eversal is required only 'where there is any reasonable possibility that the use of the inadmissible evidence was necessary to reach a guilty verdict.'" Williams, 137 Wn.App. at 747, *quoting* State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Reversal is not required here because other evidence supported the jury's verdict--even without the testimony about B.A.'s demeanor. As explained above, B.A. told six people the same, consistent details about the incidences of abuse. B.A. also made a drawing of "Steve's tail." Because there is no "reasonable possibility that the use of the" demeanor

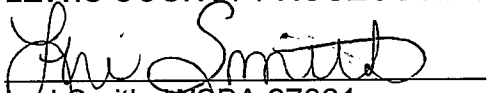
evidence contributed to the jury's verdict, any error in admitting the evidence was harmless.

CONCLUSION

The trial court did not abuse its discretion when it found that four-year-old B.A. was unavailable to testify in this case. Her actions, demeanor and refusal to come into the courtroom at the child hearsay hearing showed that she was unavailable. Furthermore, the trial court did not abuse its discretion when it admitted the statements of four-year-old B.A. because the statements were non-testimonial. Finally, the trial court did not abuse its discretion when it allowed limited testimony at trial about the unavailable B.A.'s demeanor at the child hearsay hearing. Accordingly, Beadle's convictions should be affirmed in all respects.

Respectfully submitted this 12th day of January, 2009.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by: 

Lori Smith, WSBA 27961
Deputy Prosecuting Attorney
Attorney for Respondent.

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. STEVEN BEADLE, Appellant.	NO. 37508-1-II DECLARATION OF MAILING

FILED
COURT OF APPEALS
DIVISION II
09 JAN 13 P 12: 04
STATE OF WASHINGTON
BY
DEPUTY

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On 1/12/09, I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

Eric J. Nielsen
Nielsen Broman & Koch PLLC
1908 E. Madison St.
Seattle, WA 98122-2842

Dated this 12 day of January, 2009, at Chehalis, Washington.

Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Lewis County Prosecuting Attorney's Office