

84204-3
NO. 37508-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BEADLE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Richard Brosley, Judge
The Honorable Nelson Hunt, Judge

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STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ISSUES

1. Is the Washington Supreme Court's decision in State v. Smith¹ applicable to the issue of whether the State met its burden of proving the child witness in this case was unavailable to testify?

2. Is it the State's burden to show there are no reasonable alternatives to live testimony before a trial court can find a child witness is unavailable for the purpose of admitting the witness' hearsay statements thereby denying a defendant the right to cross examination?

B. SUPPLEMENTAL PROCEDURAL FACTS

On September 8, 2009, following oral argument, this Court requested supplemental briefing discussing State v. Smith and its possible application to this case. The court also requested as part of the briefing a discussion on which party has the burden to raise and demand fuller exploration of closed-circuit television pursuant to RCW 9.44.150.

¹ 148 Wn.2d 122, 59 P.3d 74 (2002).

C. SUPPLEMENTAL ARGUMENT

THE DECISION IN STATE V. SMITH, HOLDING THE STATE HAS THE BURDEN OF PROVING THE UNAVAILABILITY OF THE CHILD WITNESS AND THAT BURDEN IS NOT SATISFIED UNLESS THE STATE EXPLORES ALTERNATIVES TO IN COURT TESTIMONY, LIKE CLOSED CIRCUIT TELEVISION, PROVIDES A LEGAL ANALYSIS APPLICABLE TO THE SAME ISSUE IN THIS CASE AND ALONG WITH OTHER AUTHORITY SUPPORTS THE PROPOSITION THE STATE HAS THE BURDEN TO EXPLORE ALTERNATIVES TO IN COURT TESTIMONY TO SATISFY ITS BURDEN TO PROVE THE CHILD'S UNAVAILABILITY TO TESTIFY.

This and the Smith case share a common issue: whether the child witness was properly found unavailable for the purpose of admitting her hearsay statements without the opportunity for cross examination. Although the two cases share the same issue, not surprisingly the facts are different. The Smith Court's legal analysis of the issue is instructive, however, and the propositions of law it adopts or reaffirms provide an analytical framework for resolving the same issue in this case.

Further, those legal propositions and the holding in Smith along with other authority show the State and not the defendant has the burden to explore alternatives to in court testimony, like closed-circuit television, where there is a remote possibility the child can testify. A trial court's finding of unavailability without a record showing the State explored those alternatives is unsupported.

Smith was charged with one count of first degree rape of a child. The trial court held a hearing to determine the child victim's competency and the admissibility of her hearsay statements. When the child saw Smith in the courtroom, however, she appeared traumatized. She began to cry and refused to talk. Smith, 148 Wn.2d at 126. The child's therapist testified she did not believe the child would be able to testify in court with Smith present and that use of a video would probably not work either because when the pressure was on, the child would get "overwhelmed and will just retreat and go into silence." Id. at 128.

The child's caseworker also testified she did not think the child would be able to testify in court. She opined the child might be able to testify if there were a different physical arrangement and she suggested such an arrangement could include the Judge in closed Chambers with one or two people the child trusted. Smith, 148 Wn.2d at 127.

Smith argued that he was entitled to confront the child witness and that if she could not testify in court, he should be allowed to listen to her testimony through some other alternative. One possible alternative he suggested was taking the child's testimony via closed-circuit television. Smith, 148 Wn.2d at 126-127.

Based on the child's behavior when brought into court to testify² and efforts by the child therapist to familiarize the child with the courtroom, the trial court ruled the child was "unavailable" for the purposes of RCW 9A.44.120. Smith, 148 Wn.2d at 128-129. The trial court also ruled exploring whether the child could testify via closed-circuit television was not feasible because the courtroom lacked the means to accommodate video testimony and it was likewise not required by statute. Id.

On appeal Smith argued the child was not unavailable to testify for purposes of the confrontation clause and RCW 9A.44.120 because the State failed to make a good faith effort to procure the child's testimony through use of a closed-circuit television or similar alternative. The Smith Court agreed.

The Smith Court reaffirmed the long-standing legal principle that the confrontation clause prefers the State elicit the damaging testimony from a witness while under oath in a face-to-face confrontation. Smith, 148 Wn.2d at 132 (citing State v. Rohrich, 132 Wash.2d 472, 477-78, 939 P.2d 697 (1997)). The Smith Court also reaffirmed the constitutional right to confrontation and RCW 9A.44.120 require the State to prove the child is unavailable to testify and that a child may not be found unavailable

² When she saw Smith in the courtroom the child became scared, began to cry and immediately refused to talk. Smith, 148 Wn.2d at 126.

unless the State has makes a “good faith effort to obtain the witness’ presence at trial.” Id. at 132 (citing State v. Ryan, 103 Wash.2d at 170, 691 P.2d 197 (1984)).

The Court, citing State v. Goddard, 38 Wn. App. 509, 513, 685 P.2d 674 (1984), likewise reaffirmed the legal proposition that under the good faith standard, the State is required to avail itself of whatever procedures exist to bring a witness to trial. Id. at 133. The Court explained:

The State is not required to perform a “futile act,” but “‘if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.’ Ryan, 103 Wash.2d at 172, 691 P.2d 197 (quoting [Ohio v. Roberts, 448 U.S. [56] at 74, 100 S.Ct. 2531 [(1980)]]. See also ER 804(a)(5) (declarant is absent from hearing and “proponent of the statement has been unable to procure the declarant’s attendance ... by process or other reasonable means”). Finally, the lengths to which the prosecution must go to produce the witness is “ ‘a question of reasonableness.’” Roberts, 448 U.S. at 74, 100 S.Ct. 2531 (quoting California v. Green, 399 U.S. 149, 189 n. 22, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)) (emphasis added).

Smith, 149 Wn.2d at 132-133.

The Smith Court found in determining a child witness’ availability to testify, these legal principles necessitate a trial court consider what options are available to the State in securing the testimony, including the option of closed circuit television, where there is some evidence the child

may be able to testify. Smith, 148 Wn.2d at 137-138. The Court held, "... before a court can find a child victim unavailable for the purpose of admitting his or her hearsay statements under RCW 9A.44.120, it must consider the use of closed-circuit television pursuant to RCW 9A.44.150 if there is evidence that the child victim may be able to testify in an alternative setting." Id. at 139 (emphasis added).

The admission of hearsay forecloses face-to-face confrontation and cross examination, which is why it is properly the State's burden to make a good faith effort to procure the testimony before it can be found the child witness is unavailable. Smith, 148 Wn.2d at 132, 136. To satisfy its burden of proof the State and not the defendant is required to present sufficient evidence. See, Federal Signal Corp. v. Safety Factors, Inc. 125 Wn.2d 413, 432, 886 P.2d 172 (1994)

(burden of proof may refer to the burden of pleading, the burden of producing evidence, and the burden of persuasion).

Any suggestion the defendant has the burden to demand or even raise exploration of alternatives for procuring the testimony of his accuser, such as via closed-circuit television, is an anathema to the holding in Smith, the constitution and the child hearsay statute.

In Smith, for example, the State argued that was not required to explore the use of closed-circuit television. Smith, 148 Wn.2d at 137.

The Smith Court conceded that if it was too costly it would likely be unreasonable to use that alternative to in court testimony. It did not agree, however, the State had no obligation to explore the alternative. The Court held that despite evidence the county did not have a closed-circuit television installed in the courtroom, the State failed to make a record that it explored that alternative so it was not possible to find the alternative unreasonable because of cost. Because the State failed to show it explored the alternative, it failed to satisfy its burden to show its good faith efforts to procure the child's testimony, which showing was necessary to support the court's finding the child witness was unavailability to testify. Id. at 137-138.

In addition, the State is constitutionally required to elicit damaging evidence from the child witness/accuser so the defendant may cross examine if he chooses.

The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses.... The State's failure to adequately draw out testimony from the child witness before admitting the child's hearsay puts the defendant in "a constitutionally impermissible Catch-22" of calling the child for direct or waiving his confrontation rights. Rohrich, 132 Wash.2d at 478, 939 P.2d 697 (quoting Lowery v. Collins, 996 F.2d 770, 771-72 (5th Cir.1993)).

State v. Williams, 137 Wn. App. 736, 745, 154 P.3d 322 (2007).

If the defendant had the burden to demand exploration of alternatives to in court testimony, like closed-circuit television, it would not only impermissibly relieve the State of its constitutional and statutory burden to show unavailability, it would put the defendant in a similar kind of “Catch-22” position characterized in Rohrich. It would require the defendant to take affirmative steps to call the child for direct examination or waive his right to cross examination.

Furthermore, the Washington Supreme Court recognizes that RCW 9A.44.120 and RCW 9A.44.150 both address the same issue. The statutes are directed at helping the State convict a child abuser by alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse by permitting the admission of testimony that would not otherwise be admissible. See, State v. Foster, 135 Wn.2d 441, 464, 957 P.2d 712 (1998) (State’s interests in permitting child hearsay is similar to State’s interest in allowing testimony via closed circuit television). It would be a curious, legally unsupported and unprincipled rule to require the defendant to demand the use of a statutory procedure designed to benefit the State by allowing the admission of otherwise inadmissible testimony in order to protect his constitutional right to cross examination.

In Smith it was far from certain the child would be able to testify at all, including through the use of closed-circuit television. The child's therapist testified she did not believe the child could testify in court in Smith's presence and would probably not be able to testify via closed-circuit television either because when pressured the child retreated and became silent. The child's caseworker agreed but equivocated by holding out the remote possibility the child might be able to testify in a different physical arrangement. Although the child displayed obvious trauma when brought into the courtroom---based on the remote possibility testified to by the caseworker ---the Smith Court ruled the State failed to meet its burden to show unavailability because it failed to make a record showing it explored that alternative of procuring her testimony via closed-circuit television.

In sum, the State's good faith effort obligation requires it explore all reasonable alternatives to procure the child's live testimony, including the use of a closed-circuit television, for example, if there is the remotest possibility the child can testify. It is the State's burden to explore alternatives to in court testimony, including the use of closed-circuit television. It is not the defendant's burden to demand the State explore those alternatives or lose the right to face-to-face confrontation and cross examination. If there is no such showing on the record the State fails to

satisfy its burden of proving the child's unavailability to testify and the court's finding of unavailability is unsupported.

Here, there is even less support for the court's unavailability finding than in Smith. The court's finding of unavailability was based on B.A.'s initial refusal to come into the court and her accompanying behavior at the beginning of the first November hearing, weeks before the trial. However, near the end of the hearing, it is uncontroverted that B.A. was willing to testify. 1RP 47. In the time between that hearing and the trial, which occurred weeks later, there were additional hearings on the issue of B.A.'s hearsay statements but the State presented no evidence B.A. was brought to those hearings or was not still willing to come to court. The State presented no evidence or opinion by B.A.'s caseworker, therapist or anyone else about why B.A. behaved the way she did and initially refused to come in the court at the first November hearing. The State presented no evidence it explored any alternatives to in court testimony despite its knowledge that at one time B.A. was willing to come to court to testify.

The court speculated B.A. exhibited the strange behavior at the first November hearing because she was too traumatized to testify at all. While that may have been a reason it is nothing more than unfounded speculation and there are a number of other equally logical reasons. She

may have been intimidated or traumatized because Beadle was in the courtroom or traumatized by the idea of telling her story to a room of strangers or she could have been just plain scared. Any of those reasons could have been dealt with by alternative means of procuring her live testimony, such as closed circuit television, if such means had been explored.

Moreover, given her change of heart near the end of that hearing, the only hearing where the record shows B.A. had been brought to court to testify or even asked to testify, belies the court's finding she was too traumatized to testify. Without any showing by the State that something changed between the end of the first November hearing and the beginning of trial that indicated B.A. could not now testify despite her earlier apparent willingness, there is no evidentiary basis for the court's ruling. Furthermore, her willingness to come into court shows any trauma B.A. suffered was apparently alleviated by the end of the first November hearing and there is no evidence it would not still have been alleviated by the time the trial began weeks later.³

³ If the court had conducted adequate hearings on the issue where it required the State to fulfill its burden to produce evidence to show unavailability there would have likely been evidence similar to the therapist and caseworker testimony in Smith regarding B.A.'s state of mind and ability or lack of ability to testify. Brief of Appellant at 19-20; Reply Brief of Appellant at 2-3.

On these facts, this Court should find the evidence simply does not show B.A. was unavailable to testify and not reach the issue of whether the State should have explored closed circuit television as an alternative to in court testimony. Brief of Appellant at 17-20. But, if this Court disagrees, the facts at least show the “possibility, albeit remote, that affirmative measures might produce the declarant.” Smith, 148 Wn.2d at 132. And, based on that possibility the State had the obligation to explore alternatives to in court testimony, like closed circuit television, to procure the child’s testimony. On this record the State failed to do so thereby failing to meet its burden to show B.A. was unavailable to testify.

D. CONCLUSION

It is the State’s burden to prove a child witness alleged to be the victim of abuse is unavailable to testify before her hearsay statements are properly admitted. That burden is not satisfied unless the State shows it made a good faith effort to procure the testimony. To show it made that good faith effort, the State is required to explore all reasonable alternatives to in court testimony, including closed circuit television, where there is even the remotest possibility the child can testify. Because the State has the constitutional obligation to present the damaging testimony from the witness and the defendant has the constitutional right to confront and cross

examine the witness, it is not the defendant's burden to demand the State explore alternatives to in court testimony.

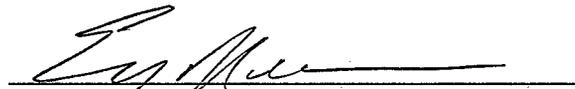
Here, the record does not show B.A. was unavailable to testify. Alternatively, the record shows there was more than a remote possibility B.A. could testify but the State failed to fulfill its good faith obligation to explore alternatives to in court testimony, like closed circuit television.

This Court should hold the trial court's finding that B.A. was unavailable to testify is unsupported and reverse Beadle's convictions.

DATED this 7 day of October, 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 37508-7-II
)	
STEVEN BEADLE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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STATE OF WASHINGTON
BY 
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SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*