

63506-9

63506-9

No. 63506-9-1

IN THE COURT OF APPEALS - DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 DEC 14 PM 2:14

STATE OF WASHINGTON, Respondent

v.

JESSE SHANE ALDERMAN, Appellant

APPELLANT'S REPLY

MAZZONE AND MARKWELL, LAWYERS by
Peter M. Mazzone, WSBA 25262
Attorney for Appellant
2910 Colby Avenue, Suite 200
Everett, Washington 98201-4011
(425) 259-4989 -phone
(425)259-5994 - fax

ORIGINAL

Table of Contents

I. Introduction 1

II. It was Error Not to Hold the Child Hearsay Hearing 2

III. Alderman’s Trial Counsel Was Ineffective Resulting in
Prejudice 2

 A. Alderman’s Trial Counsel was Ineffective 2

 B. Alderman was Prejudiced as a Result of Trial Counsel’s
Ineffective Performance 7

 C. Haner’s Forensic Examination 11

IV. Conclusion 12

Table of Authorities

Washington State Supreme Court Cases

State v. Leavitt, 111 Wn.2d 66, 758 P.2d 982 (1988) 2,7

State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007) 10

Other Washington Cases

State v. Kilgore, 107 Wn.App. 160 , 182-83, 26 P.3d 308(2001)
..... 10

State v. Leavitt, 49 Wn.App. 348, 743 P.2d 270 (1987) 2-3

State v. Lopez, 95 Wn.App. 842, 980 P.2d 224 (1999) 11

State v. Mason, 127 Wn.App. 554, 565-66, 126 P.3d 34 (2005)
..... 10

State v. Warren, 55 Wn.App. 645, 653, 657, 779 P.2d 1159 (1989)
..... 7

State v. Warren, 134 Wn.App. 44, 61-63, 138 P.3d 1081 (2006) ... 9

I. Introduction

Alderman's assignments of error on appeal are clear. The diary entry was child hearsay. The child hearsay hearing should have been held. The child hearsay hearing was not held. It was not held because both the State and defense counsel incorrectly "independently" determined that it was not child hearsay and therefore failed to notify the trial court of the issue.

At trial, the State introduced the child hearsay statement from the beginning of the trial, in its opening statement, and later repeatedly discussed it, and finally admitted it into evidence against Alderman. Alderman's trial counsel was ineffective by failing to recognize the child hearsay issue, failing to request a child hearsay hearing, failing to object to the introduction of the child hearsay, and failing to object to the admittance into evidence of the child hearsay. Trial counsel's ineffective representation allowed the State to bring its case unimpeded, and also waived Alderman's right to appeal the lack of a child hearsay hearing at trial. Trial counsel's failures prejudiced Alderman by affecting the outcome of the trial.

II. It was Error in this Case Not to Hold the Child Hearsay Hearing.

Failing to hold a child hearsay hearing is error. *State v. Leavitt*, 111 Wn.2d 66, 71, 758 P.2d 982 (1988).

The diary entry is child hearsay. It was an out of court statement made by a child under the age of ten. The statement should not have been introduced or admitted at trial without a child hearsay hearing to determine the reliability of the statement. A hearing would have determined the statement to be unreliable. That hearing was not held because neither trial counsel nor the trial court recognized that the diary entry was child hearsay. Contrary to the State's arguments in its Response, it is clear from the record, that the child hearsay statement, and the circumstances surrounding that statement, were central to the State's case against Alderman at trial.

III. Alderman's Trial Counsel was Ineffective Resulting in Prejudice.

A. Alderman's Trial Counsel was Ineffective.

Alderman's trial counsel's performance fell below an objective standard of reasonableness required of trial lawyers.

Failure to request the child hearsay hearing, by itself, is sufficient

indicia of deficient performance to meet the first prong of the ineffective assistance of counsel test. *State v. Leavitt*, 49 Wn.App. 348, 359, 743 P.2d 270 (1987).

The State attempts, as it must, to bolster trial counsel's performance by showing that it was part of a legitimate trial strategy. Resp.B.p. 21-23. However, the State's theory on defense's strategy, fails upon examination.

While it is true that a legitimate trial strategy in such a case would attempt to discredit A.Z., there is simply no evidence, contrary to the State's argument, that trial counsel wanted or "needed" the hearsay. Resp.B.p.22. The State asserts that it was trial counsel's strategy to allow the State to introduce all the hearsay against his client unchecked "to highlight the evolution of A.Z.'s statements from vague, short, and nonspecific comments to high detailed recitations." Resp.B.p. 21.

To prop up its theory, the State cites trial counsel's own testimony for this fact. Resp.B.p. 21. However, a short review of the exchange between the State and trial counsel at the motion for a new trial, shows nothing except that the State was seeking to elicit from trial counsel an agreement with its version of his trial strategy. RP 320. However, those are

the State's words not those of trial counsel.

Also, not unexpectedly, the State takes issue with Alderman's assertion that the State "surprised" defense counsel with its intention to use the diary entry. Resp.B.p. 15. As a premise of its argument that it was trial counsel's strategy all along to allow all the evidence against Alderman in at trial to show the evolution of A.Z.'s statements, the State must necessarily show that trial counsel was not surprised by the State's use of the diary entry at trial.

However, the State's arguments fail to show that defense counsel was not "surprised" by the State's decision to use the Child Hearsay statement.

First, the State points to trial counsel's "independently" arriving at the conclusion that the statement was not child hearsay. Resp.B. p. 15. This fact does not support the State's argument. Trial counsel could logically consider that, if the statement was not subject to the child hearsay, barring some unforeseen event at trial, it should not come in at all.

Second, the State cites the prosecutor's decision to contact Alderman's trial counsel and inform him that it would not be holding a

Child Hearsay hearing for “A.Z.’s statements to her mom and to Nurse Haner” because A.Z. was over the age of ten at that time. Resp.B.p. 15. The State is notably silent on any discussion in that exchange of the only pertinent Child Hearsay issue, the statement that A.Z. wrote when she was under age ten, her diary entry.

That the diary entry was not broached when Child Hearsay and trial issues were covered is particularly interesting because it was clearly something the State had considered. CP 56, 99. In fact, the State’s discussion with defense counsel regarding potential evidentiary issues concerning evidence it intended to present at trial, without discussing the diary entry, supports Alderman’s surprise assertion, as a reasonable attorney could conclude that when opposing counsel contacts them to discuss specific procedural issues regarding evidence that opposing counsel intends to use against that attorney’s client at trial, that the discussed evidence would presumably encompass the potential evidence being brought by the opposing counsel at trial.

Finally, in the motion for a new trial, when the State attempted to claim that trial counsel’s own testimony confirmed that he was not surprised by the State’s use of the child hearsay statement, the trial court,

who had also listened to the testimony, quickly intervened, “he said he wasn’t surprised that it was offered when it was offered, which was after it had been discussed.” RP 332. Trial counsel was surprised.

Of course, once presented with the State’s case, including the hearsay, at trial, trial counsel used what became available to discredit A.Z., but that does stand for the theory proposed by the State. It was not a legitimate trial strategy, but a misunderstanding of the rules of evidence, that led to trial counsel’s acquiescence to the State’s introduction of the hearsay evidence. Trial counsel did not believe that the diary entry was a child hearsay issue. RP 318. Trial counsel did not object to the State’s introduction of the child hearsay in its opening statement. RP 43. Trial counsel did not object to A.Z.’s reading the hearsay statement to the jury. RP 62. Trial counsel did not object to the admittance of the hearsay, because, “it’s been talked about so much.” RP 159.

From these known facts, the only reasonable conclusion is that trial counsel’s further failure to object to the other hearsay admitted, that of A.Z.’s statements to her mother, and Nurse Haner’s testimony, occurred because he did not recognize it as inadmissible hearsay. The State has failed to show that defense counsel’s substandard performance was a

legitimate trial strategy.

B. Alderman was Prejudiced as a Result of Trial Counsel's Ineffective Representation.

To show prejudice sufficient to satisfy the second prong of the ineffective assistance of counsel test, defendant need only show that there was a reasonable probability that but for counsel's deficient performance, the outcome would have been different. *Leavitt*, 111 Wn.2d at 71.

The State claims that even without the hearsay statements, the outcome would have been the same based on A.Z.'s "compelling" trial testimony. Resp.B.p. 23. For example, the State cites such "graphic" details as "defendant's movements back and forth" and "sometimes the bed would creak" to represent "revealing details that she could not have gleaned other than by having endured what she described." Resp.B.p. 23. Contrary to the State's argument, A.Z.'s testimony was vague and contradictory, and remarkable only for the lack of detail provided.

The State then cites *State v. Warren* for the proposition that a reviewing court will not find deficient performance "where the child testified and gave explicit account mirroring allegedly inadmissible hearsay statements". 55 Wn.App. 645, 653, 657, 779 P.2d 1159 (1989). Resp.B.p. 23. In this case, A.Z.'s in court testimony would not have

“mirrored” the child hearsay statement if it did not come in. The hearsay statement was a very damaging, separate and distinct piece of evidence, a missing link, used to bolster the State’s case against Alderman.

The State next takes issue with Alderman’s assertion that the State made the child hearsay the foundation of its case against him. Resp.B.p. 16-17. However, the record, including the State’s presentation of the case, speaks for itself. The State introduced the child hearsay in its opening statement. RP 43. The State began the heart of its direct examination of its first witness, A.Z., with the child hearsay. RP 54-58. The State had A.Z. read the statement aloud to the jury. RP 62. The State discussed the veracity of the child hearsay with A.Z.’s mother. RP 135. The State considered the child hearsay statement critical enough that it sought to admit it into evidence. RP 159. Finally, the State focused on it in closing arguments to bolster A.Z.’s trial testimony. RP 279.

The State then incorrectly asserts that, if there was error, it was harmless because the evidence would have come in anyway. Resp.B.p. 24.

The State claims that some of the statements, the diary entry and the A.Z.’s statement to her mother, were not hearsay as they were not offered for the truth of the matter asserted. Resp.B.p. 24. This is not

accurate. The record reflects that the statements were offered for the truth of the matter asserted. In both instances, the State followed up its question prompting the hearsay with, “is that true?” or “Did you ask her if that really happened?”. RP 62, RP 135. The State claims these statements would have come in under ER 404(b) bad acts as “res gestae” and circumstances of disclosure. Resp.B.p. 24. However, admissibility as res gestae or circumstances of disclosure under 404(b) is limited to “the immediate context for events close in time and place to the charged crime.” *State v. Warren*, 134 Wn.App. 44, 61-63, 138 P.3d 1081 (2006). The hearsay statement in this case was written four years after the alleged crime.

If Alderman’s trial counsel did recognize the hearsay for what it was and did object to its introduction, there is no evidence that the State would have countered the hearsay objection as it now proposes. In fact, when presented with this issue at the motion for a new hearing, after having months to consider it, the State initially argued that it could have tried to get the child statement in under “recorded recollection”, which, the trial court correctly pointed out, would not have succeeded. RP 331. The State then put forth the “circumstances of disclosure” argument and the

trial court correctly noted that it doesn't "necessarily mean that the content of the diary is admissible." RP 334.

Next, the State cites *State v. Mason* for the proposition that A.Z.'s mother's testimony regarding A.Z.'s affirmative nod, was "admissible to explain why Jacqueline persisted in seeking police and CPS involvement." 127 Wn.App. 554, 565-66, 126 P.3d 34 (2005). Resp.B.p. 24. However, the Supreme Court, on review, rejected this blanket proposition. *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007).

Finally, the State asserts that the diary entry and the hearsay elicited from A.Z.'s mother regarding whether or not the diary entry were true would come in as a prior consistent statement. Resp.B.p. 25, 27.

This also is incorrect, as the hearsay statements were discussed by the State in its opening statement, well before Alderman's trial counsel uttered a word. RP 43.

Even if the State did successfully rebut a hearsay objection to these statements, the State's conclusion that the evidence would have been allowed in at trial in the same form which these statements came in, unimpeded, is unsupported.

C. Haner's Forensic Examination

The State cites *State v. Kilgore* for proposition that when a 10 year old is involved in an examination, "we can assume a treatment motive". 107 Wn.App. 160, 182-83, 26 P.3d 308 (2001). Resp.B.p. 29, 30. However, the *Kilgore* Court's conclusion is devoid of any analysis and is at odds with *State v. Lopez*, which stands for the proposition that in order for a statement to come in under the medical diagnosis hearsay exception, there must be a legitimate treatment motive. 95 Wn.App. 842, 849, 980 P.2d 224 (1999).

The State appears to assert that a forensic examination becomes a medical examination if: 1) a few medical related questions are posed to A.Z.; and that 2) A.Z. was flown to Snohomish County for an STD examination. Resp.B.p. 32-33.

The present case involved a forensic examination. A.Z. had no treatment motive. She was at the examination at the behest of law enforcement. She was flown from Kansas to Snohomish County for the very purpose of developing evidence for use in prosecution. Accordingly, Alderman's trial counsel should have objected to the State's introduction of hearsay in this instance.

Next, the State's assertion that Alderman's trial counsel "opened the door" to Haner's entire colloquy with A.Z. by questioning A.Z. whether or not she had told Haner that "it hurt", when she had not mentioned that previously, is also without merit. Resp.B.p. 32-33.

A.Z. did tell Haner it hurt and had not said that to anyone else before. There was nothing untoward, out of context, or requiring "explanation, clarification, or contradiction" about trial counsel's question to A.Z. The question was accurate and did not open the door to allow the State to elicit A.Z.'s statements, *carte blanche*, from Haner.

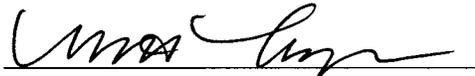
IV. Conclusion

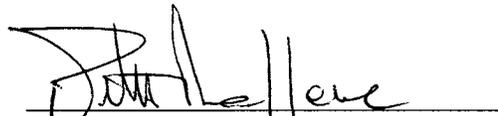
Ultimately, the hearsay evidence admitted without objection at trial was very harmful to Alderman and did affect the outcome of the trial. The State knew this and that is why the State introduced the evidence at trial. It is one thing to be faced with one accuser, it is an entirely different case when facing three other unexpected and improper accusers: the diary statement, the hearsay admitted through the mother, and the hearsay admitted through Nurse Haner, which Alderman would not have faced had his trial counsel been effective.

For the foregoing reasons, defendant respectfully requests that this Court reverse the convictions and remand for a new trial.

Respectfully submitted this 14th day of December, 2009.

MAZZONE AND MARKWELL, LAWYERS


Michael Torgesen, WSBA# 34337


Peter Mazzone, WSBA# 25262

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,)	No. 63506-9-1
)	
Respondent,)	DECLARATION OF SERVICE
)	
)	
ALDERMAN, JESSE)	
Appellant.)	
_____)	

I, Michael Torgesen, hereby certify that a copy of Appellant's Brief was hand delivered to: Court of Appeals Division One, 600 University Street, Seattle, WA 98101; and Snohomish County Prosecuting Attorneys Office at 3000 Rockefeller Ave., Everett, WA 98201.

I certify under penalty of perjury and laws of the State of Washington that the above is true and correct.

Dated this December 14, 2009, in Everett, Washington.


Michael Torgesen