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NO.65332-6-1

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

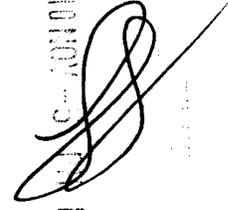
STATE OF WASHINGTON,

Respondent,

v.

M.G.H.,

Appellant.

2010 NOV 11 1:59


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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding the complaining witness M.P. competent to testify.

2. The court violated Appellant's Sixth Amendment right to confrontation by admitting the child hearsay of the juvenile complaining witness M.P. who was unavailable because she was not competent to testify.

3. The court violated Washington State's child hearsay statute by admitting uncorroborated hearsay by an unavailable juvenile.

4. If the juvenile complaining witness M.P. was competent to testify, the court erred in admitting her child hearsay because it was unreliable.

5. The court erred in admitting the verbal and written statements of M.G.H., made without Miranda warnings, and finding his interrogation to be noncustodial.

6. The court erred in placing the burden on M.G.H. to corroborate his custodial statements to law enforcement about where and with whom M.G.H. and M.P. were playing.

7. The court erred in determining there was sufficient evidence to convict M.G.H.

Issues Pertaining to Assignments of Error

1. Was the juvenile complaining witness M.P. incompetent to testify because she could not accurately remember or describe the events about which she testified?

2. If M.P. was not a competent witnesses and thus unavailable, did admitting her out-of-court statements violate M.G.H.'s rights under the Sixth Amendment Confrontation Clause?

3. If M.P. was not a competent witness and thus unavailable, did admitting her out-of-court statements violate the child hearsay statute when there was no admissible independent corroborating evidence as required by that statute?

4. If M.P. was a competent witness, was her child hearsay too unreliable to be admitted?

5. Was M.G.H. in custody when he was interrogated in the office of his middle school by Detective Hatch without rights advice, and were his statements therefore inadmissible?

6. Did the court impermissibly put the burden on M.G.H. to corroborate his statements to Det. Hatch about where and with whom he was playing?

7. After viewing the evidence in the light most favorable to the State, could any rational trier of fact have found M.G.H. guilty beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor charged Appellant M.G.H. (dob 12/29/1993) with Child Molestation in the First Degree, prescribed by RCW 9A.44.083. Information, CP 1. The single count information alleged that M.G.H. had sexual contact with M.P. (dob 9/12/01) in October of 2008. CP 1.

M.G.H. was tried as a juvenile in adjudicative hearing before the Honorable Judge George N. Bowden, on March 30 and 31, 2010. RP Cover Page.¹ On the day of trial, the defense moved for an in limine decision on child witness competency and admissibility of hearsay. CP 34, 35, 36, 37. Over objection, the Judge found M.P. competent to testify. RP 31-35. Over objection, the Judge admitted statements of child hearsay from M.P.'s mother, father, Officer Sahlstrom, Officer Whalen, and Nurse Caryn Young. CP 55. RP 187-200. Over objection, and after CrR 3.5 testimony, the Judge found questioning of M.G.H. by Detective Hatch to

¹ The verbatim report of proceedings is referenced as follows: RP - x. Clerk's papers are referenced as CP-x. Trial exhibits are referenced as Trial Ex.- x.

be noncustodial, and admitted his verbal and written statements. CP 53, RP 177, Trial Ex. 4. Defense counsel moved for directed verdict based on insufficient evidence, and that motion was denied. RP 201.

M.G.H. was convicted of the Charge. RP 224, CP 40, 44, 54. M.G.H. was sentenced to 15 to 26 weeks commitment. CP 44. This appeal follows. CP 47.

2. Substantive Facts

a. *Alleged Offense, Reporting and Investigation*

At the time of the alleged offenses, M.P. was seven years old. The girl's parents are Heidi and Eric Pratley. RP 35, 65. In October 2008, M.G.H. would have been fourteen years old. RP 37, 168.

The Pratleys were acquainted with M.G.H.'s family because Heidi Pratley and M.G.H.'s mother Shannon Craig, are sisters, making M.P. and M.G.H. first cousins. RP 37. Although M.G.H. and his family lived in Eastern Washington, they would sometimes visit M.P. and her family in Snohomish County. RP 37-38. Such a visit occurred the weekend of October 4-5th, 2008. RP 38-39.

i. *M.P.'s Parents and Officer Sahlstrom.*

A few hours after M.G.H. and his family left on Sunday evening, M.P. told her mother, Heidi, that M.G.H. had touched her "potty." RP 41-43. Heidi testified that M.P. said M.G.H. touched her [potty] with his hand

and his penis. RP 44, 57, RP 63. Heidi Pratley testified that M.P. also told her that he touched her breasts or chest area with his hand. RP 45. Both of M.P.'s parents questioned her for about 15 minutes that evening. RP 145.

On October 7, 2008, the Pratleys brought M.P. to the Monroe Police Department. RP 46-48; RP 99-103. Officer Kenneth Sahlstrom made contact with the Pratleys. Id. Heidi Pratley and Eric Pratley made verbal and written statements reporting that their daughter M.P. had made allegations of sexual abuse against her cousin M.G.H. Id; Trial Ex. 1 and 2. More specifically, Heidi's hearsay account provided that M.G.H. and M.P. "played doctor" in a bedroom closet during the recent visit; M.G.H. told her to lift her shirt, and then kissed her chest and rubbed her "potty." RP 44-45, 48. She reported the allegations were initially made while M.P. was helping her cook dinner. Trial Ex. 2. She also reported that M.G.H. told M.P. "It was their secret and if she told anybody she would get in trouble." Trial Ex. 2. Heidi was cross examined at trial and admitted that her written statement did not include any allegation that M.G.H. touched M.P. with his penis, or that their "potties" touched. RP 57-63.

During her testimony, Heidi testified that the allegation was first made by M.P. when she was in the kitchen, finishing dishes from dinner; M.P. had just come down from a shower and was getting ready for bed

and school the next day. RP41. She told M.P. she did not do anything wrong, and would not get in trouble. RP 43. After discussing the issue, Heidi called her sister, Shannan, the mother of M.G.H. to tell her of the accusations. RP 45.

The Judge permitted Heidi to testify as to M.P.'s character, for limited purpose of child hearsay admissibility. RP 52. She testified M.P. was truthful; however on cross she also testified that M.P. had previously gotten in trouble for lying. RP 52-56.

M.P.'s father testified that he prepared "his" statement by writing down what M.P. said as she said it in the police station. RP70-71. Eric Pratley's statement provided that the closet was in M.P.'s brother's closet; they used her pretend doctor's kit to give each other pretend shots, and then he rubbed her "potty." He further relayed that M.P. said she didn't remember who lifted her shirt, but he kissed her "booby," the closet door was closed, and he stopped when he heard people coming up the stairs. Trial Ex. 1. Eric testified and was cross examined at trial. He testified that M.P. said M.G.H. touched her potty and kissed her stomach. RP 69. When asked in direct what part of M.G.H.'s body touched her potty, he testified that MP said the penis and hand were used to rub her potty. RP 69. He further stated that M.P.'s statements to him in the home were that M.P. was touched on the chest with the hand (not kissed), and that M.G.H.

kissed her stomach. RP 69. On other occasions she claimed M.G.H. touched her butt. RP 75. On cross, he admitted that the written statement he prepared for M.P. didn't say M.G.H. kissed her stomach, didn't say M.G.H. rubbed his penis on her, didn't say M.G.H. touched her chest with his hand, and didn't say he touched her butt. RP 74-75. He also testified that the initial allegation was made Sunday evening while M.P. was helping her mother unload the dishwasher, and he was sitting in the living room. RP 67.

The Pratleys brought M.P. back to Monroe Police Department for a law enforcement interview on October 9, 2008. RP 108. The interview was conducted by LaDonna Whalen of the Monroe P.D. RP 107-108. The interview was audio-recorded, but not video recorded, and was later transcribed. RP 110. The CD recording was admitted and published. RP 112-114; Trial Ex. 3. Ms. Whalen described the interview as being done in accordance with her training received from CornerHouse using the RATAC method. RP 108. It included what she described as rapport building phase, use of anatomical drawings, and use of anatomically correct dolls. RP 108-110. Officer Whalen testified she anticipated the interview being used for evidentiary and trial purposes and that was why she recorded it. RP 130.

ii. ARNP Caryn Young.

On November 24, 2008 M.P. was taken to Providence Hospital in Everett, where ARNP Caryn Young conducted a sexual assault examination. RP 117. Medically, the examination was non-specific for sexual abuse. RP 126. Caryn Young reported that during the child history, M.P. stated that M.G.H. touched her potty with his hand. RP 119. When asked how many times this happened, M.P. responded that she didn't remember. RP 120. When asked where her clothes were when this happened, she said, "On." RP 120. When asked if this happened over or under her clothes, she shrugged her shoulders, indicating she didn't know or remember. RP 120. Nurse Young asked M.P. if M.G.H. said anything, to which M.P. responded that "he kept saying, don't tell anybody." RP 120.

iii. Detective Hatch and M.G.H.

On October 28, 2008, Detective Barry Hatch, Monroe P.D. traveled to Spokane, Washington to M.G.H.'s middle school. RP 148. He arrived at 11:40 a.m., and met with a secretary in the office. Id. It was lunchtime at the school, but Det. Hatch had school personnel locate M.G.H. and bring him to the office. Id. Per Det. Hatch, M.G.H. arrived at 11:52 a.m. Id. Det. Hatch testified that he told M.G.H. that he was a

police detective with the City of Monroe, and told him he was not under arrest. RP 150. Det. Hatch was in plain clothes, carrying a gun and badge. RP 149. Det. Hatch testified that at no point did he advise M.G.H. of his Miranda rights, verbally or in writing, including right to counsel or right to remain silent. RP 150, 158. When asked if he believed he had probable cause to arrest M.G.H. for child molestation prior to meeting with him, he answered, “Well, there may have been probable cause, but—I guess there probably could have been.” RP 157. Det. Hatch never explained to M.G.H. that he was suspected of molesting M.P. or that he could face felony charges. RP 164. Det. Hatch placed undue significance to M.G.H.’s suspicion that he was there because of his last visit to Monroe, as the detective was unaware that M.P.’s mother had called to confront M.G.H. and his mother about the allegations. RP 150, 160. During the CrR 3.5 hearing, M.G.H. testified that he did not believe he was free to leave, that he was told to talk to the detective by school administrators, and that he had no choice but to answer questions. RP 169-173. During verbal questioning, M.G.H. admitted to playing “doctor” with M.P. during his last visit, but denied any inappropriate touching. RP 161. He signed a written statement at the request of Det. Hatch. RP 152; Trial Ex. 4. M.G.H.’s written statement admitted playing doctor upstairs with M.P., his other two cousins, and his little sister. *Id.* The statement denied any

inappropriate touching of M.P., and further stated “I was never in any closet.” Id.

iv. Defense Interview of M.P.

On January 28, 2010 M.P. was interviewed by Defense Counsel. CP 34. The interview took place at Snohomish County Prosecuting attorney’s offices in the Denny Juvenile Justice Center in Everett, WA. Id. The interview was attended by counsel, the witness, a victim advocate, and also Stillman the prosecutor’s victim advocate dog. Id. The interview was recorded, and transcribed, with the transcription filed on March 25, 2010, along with defense motion in limine and brief on child witness testimonial capacity and child hearsay. CP 34, 35, 36. During the interview M.P. repeatedly stated she did not remember what had happened between her and M.G.H. CP 34, pp. 20-21.

b. In Court Testimony and Hearsay.

i. Testimony of Whalen.

Per Officer Whalen’s testimony, prior to use of the dolls, M.P. made statements to her that M.G.H. had touched her “potty” over the clothes, and had her take her pants down; she stated M.G.H. had kissed her “boobie” and kissed her on the mouth, and “tongue kissed;” she described M.G.H. “scratching” her “potty.” RP 131-133. The scratching gesture was made with fingers apart in a claw-like squeezing/scratching

gesture. Id. Officer Whalen testified that this was not the same gesture, demonstrated by counsel, that M.P. made during her testimony in court (fingers together, palm out, with an up and down movement of the hand). RP 132.

After the dolls were introduced, Whalen testified that M.P. did not make the same gesture with the dolls, and although “anatomically correct” the dolls did not have spreadable fingers. RP 133. She acknowledged that the interview was not videotaped, but stated she tried to narrate M.P.’s actions during the interview. RP 131.

Officer Whalen testified that M.P. used the term “potty” generically for both male and female genitalia, and did not distinguish between the penis and scrotum in her definition. RP 139-140.

Officer Whalen said M.P. demonstrated the booby-kissing and potty touching with the dolls. She said M.P. then took off the underwear of the male doll, and stated and demonstrated that M.G.H. “had her” rub with the hand, the area beneath the scrotum, describing the perineum. RP 139. She testified that M.P. then said “all he rubbed is my potty. I didn’t touch his potty at all.” She later testified that M.P. told her she only touched that area with the shots using a toy syringe. RP 140-141.

Officer Whalen testified that M.P. told her the potty touching happened three times with pants up, and once with pants down. RP 135-

136. She testified that she asked M.P. whether or not their potties touched each other, and there was no response that had happened, and when asked again it was specifically denied. RP 136, 137.

Officer Whalen testified that M.P. said that M.G.H. told her many times to not tell anybody. RP 133.

Officer Whalen's testimony acknowledged M.P.'s detailed and fanciful description of a "kiss lick". RP 138. She acknowledged that M.P. told her, "first we keep our mouths closed, and then we put our mouths together, and then we kissed each other with our tongues licking each other, and then we closed our mouths, and we did, but we didn't do that at all." RP 138. When Officer Whalen asked her if that had really happened, M.P. replied, no. RP 138.

Officer Whalen testified that M.P. never said that M.G.H. kissed her stomach. RP 141.

Officer Whalen testified that M.P. never said that M.G.H. touched her "boobie" or chest with his hand. RP 141.

Officer Whalen testified that M.P. never said that M.G.H. touched her "butt." RP 141.

ii. Testimony of M.P.

M.P. testified for initial purposes of determining competency and again on the merits. See RP 12-29, and RP 78-99.

During her initial testimony, M.P. testified that she had just turned eight years old. RP 12. When asked by the prosecutor, she claimed to know the difference between the truth and a lie. RP 14. When asked if she had ever told a lie, she answered no. Id. When asked if anyone in her family had ever gotten in trouble for lying, she also answered no. Id. The prosecutor asked her a series of questions about her birthday and Halloween last year and the year before (2009 and 2008). She was able to describe where she went for dinner, and what costumes she wore. RP 15-17.

On cross examination, she admitted she had previously discussed these things with the prosecutor, and had looked at pictures to help her remember. RP 18. When asked what she had gotten for her birthday the year before (September 2008) she could not remember. RP 19. She agreed it was hard for her to remember from that long ago. RP 19. She stated she gets grounded for lying, but denied telling a lie. RP 20. When asked about her interview by defense counsel, she affirmed that she did not remember at that time (two months prior) anything about what had happened with M.G.H. RP 20-21. She stated she told the truth at the time, and that she did not remember. RP 21.

When asked, "If you said you remember now, you would be lying; isn't that right?" she replied, "Yes." RP 21.

The prosecutor attempted to rehabilitate M.P., asking her if she was scared during the defense interview; she replied “No.” RP 23-24. When he asked her why she told defense counsel she didn’t remember, she answered, “Because I didn’t really remember a lot.” RP 23.

On re-cross, M.P. stated she remembered more about M.G.H. after talking to the prosecutor, and her mom and dad. RP 25. She admitted that they had “helped her to remember” and to “remember what to say” when she talked to the judge. RP 26. The questioning continued:

Q. And so that’s how you’re able to remember, right, because your mommy and daddy helped you?

A. Yes.

Q. So it’s—you remember from talking to them, not because you remember what really happened or didn’t happen; is that right?

A. Yes.

RP. 26.

The judge then found M.P. competent, denying the defense motion. M.P. testified again after she was found “competent.”

When asked on direct how long the weekend visit in October 2008 was, she testified she didn’t remember. RP 79. When asked if it was one day or longer than one day, she answered “one day.” RP 80. She testified that M.G.H. touched her potty in her brother’s closet. RP 81. She testified that he touched her with the middle of her hand, while pointing to her palm and moving it up and down. RP 82, 88. She testified that this

happened under her clothes, but her pants were off. RP 82-83. She said M.G.H. touched her boobies over her clothes with his hand, and demonstrated by again pointing to the middle of her palm. RP 84, 88. When asked did M.G.H. say anything, she said he told her not to tell anybody. RP 84. When asked how many times, she said once. Id.

Still on direct, she was asked if at any time, M.G.H.'s clothes were off, and she answered "No.". RP 84-85. She was asked did she ever touch M.G.H., and again she answered "No." RP 86.

When asked who she had spoken to about this incident, she answered with her mom and dad, and recalled speaking to LaDonna Whalen at the police station, although she stated that happened two or three days after the incident. RP 89. She recalled only that one trip to the Monroe P.D., and denied that there was a time that she told her dad what happened and he wrote it down. RP 90. She stated she had been to the doctor, but denied being asked or saying anything about what happened. RP 90.

On Cross examination, M.P. denied having a doctor's kit, contrary to her statement in Trial Exhibit 1. RP 92. She affirmed her direct testimony that M.G.H. had only said not to tell one time. RP 94. She affirmed her direct testimony that the touching had occurred with the center of the palm of the hand. RP 94.

M.P. reaffirmed that she had no memory of the events when she was interviewed by defense counsel in January. RP 94-95. She affirmed that she remembered because her mom and dad helped her, and if they hadn't, that she would not remember today on the stand. RP 95. She testified that M.G.H. did not touch her butt. RP 95. She claimed MGH did not take his clothes off, then said she didn't remember. RP 95-66. She testified she never touched M.G.H. on the potty, and he never touched her with his potty. RP 96. His potty never touched her potty. RP 97-98. She testified that he did not kiss her boobies. RP 97. She testified that the touching was for a "short time." RP 97. When asked if it could have been accidental, she said she didn't know. RP 97.

MP was unable to correctly identify a truth or a lie. When asked questions about truths and lies:

Q. If somebody says that something happened when it never really happened, is that a truth or is that a lie?

A. The truth.

Q. I just want to make sure we understand each other. Okay. So if somebody says something happened and it didn't really happen, is that a truth or a lie?

A. A truth.

RP 98-99.

D. ARGUMENT

1. M.P. WAS NOT COMPETENT TO TESTIFY.

It is within the discretion of the trial court to allow children under age 10 to testify. Jenkins v. Snohomish County Public Utility Dist. No. 1, 105 Wn.2d 99, 101, 713 P.2d 79 (1986). However, a child who is incapable of receiving just impressions of the material facts or of relating them truly is not competent to testify. Id.; RCW 5.60.050(2).

To be competent to testify, a child must be able to: (1) understand the obligation to speak the truth at trial; (2) receive an accurate impression of the events when they occurred; (3) retain an independent recollection of the events; (4) express her recollection in words; and (5) understand simple questions about the occurrence. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); Jenkins, 105 Wn.2d at 101. If the child does not meet every one of these criteria, she is not competent to testify. RCW 5.60.050(2).

The Legislature and the courts have recognized that child witnesses present special problems. Consequently, each element of the Allen test is critical to a determination of competency. The absence of one of the elements gives rise to legitimate questions about the child's mental ability to grasp or recall the incident or the child's recognition of the importance of a legal proceeding, factors taken for granted with adult witnesses."

Jenkins, 105 Wn.2d at 102-03.

This Court reviews a trial court's competency evaluation for abuse of discretion. Jenkins, 105 Wn.2d at 101. This Court examines the entire record in reviewing the pretrial competency determination. State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). If a child's testimony is inconsistent, she may not have the requisite memory to retain an independent recollection of the occurrence. Jenkins, 105 Wn.2d at 103. Internal contradictions in the child's testimony defeat one or more of the Allen elements. They are "fatal to a finding of competence." Id.

Here, as shown above, M.P. made one inconsistent statement after another. Her testimony repeatedly contradicted itself, her prior statements, and hearsay statements attributed to her by testifying adults.

It was difficult for the court or counsel to track the inconsistencies of M.P.'s testimony and hearsay statements. Upon viewing the entire record, however, the inconsistencies are stunning. In summary fashion, inconsistencies include but are not limited to: whether or not she could remember what happened, whether or not she was kissed on her boobie, whether or not she was kissed on her stomach, whether or not she was touched on the butt, whether or not MGH touched her with his potty, whether or not she touched M.G.H. or his potty, whether or not their potty's touched, whether or not he had clothes on or off; whether or not she had a doctor's kit, how many times he told her to not say anything,

whether her potty was touched over or under the clothes, whether it was touched with scratching fingers or the center palm of the hand. Supra.

These material contradictions are fatal to a finding of competency pursuant to the Allen factors, both under prong three, and the prong two issue of whether or not she received an accurate impression when the events occurred.

Further her inability to discern a truth from a lie and her casual recital of detailed allegations to Officer Whalen regarding a” kiss-lick” and her immediate retraction are evidence that she did not understand or have the ability to speak the truth at trial. RP 98-99 and RP 138.

Additionally, M.P. testified repeatedly that she did not remember the October 2008 incident when she was interviewed by the defense in January 2010, and was only able to remember due to conversations and help from her parents and the prosecutor. Supra, RP 26, 94-96. Under these circumstances she did not retain an independent memory under prong three of the Allen test.

Because M.G.H. was convicted on incompetent testimony, reversal is required.

2. IF M.P. WAS NOT A COMPETENT WITNESS, SHE WAS UNAVAILABLE FOR CROSS EXAMINATION AND HER CHILD HEARSAY WAS INADMISSIBLE UNDER THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

The Confrontation Clause permits an unavailable witness's testimonial statements to be introduced at trial only if the witness has been subject to the rigors of cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Specifically, where a child's testimonial hearsay is at issue, the Sixth Amendment bars its admission without cross-examination, even if the trial court finds the hearsay is reliable. Bockting v. Bayer, 399 F.3d 1010, 1021 (9th Cir.2005), amended, 408 F.3d 1127 (9th Cir.2005), reversed on other grounds sub nom., Whorton v. Bockting, 549 U.S.496, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

a. M.P. Was Unavailable.

A witness who is incompetent to testify is unavailable. State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). Specifically, a child who is demonstrably incompetent to testify is an unavailable witness. State v. Ryan, 103 Wn.2d 165, 182, 691 P.2d 197 (1984).

b. M.P.'s hearsay was testimonial.

Statements to investigating police officers are always testimonial. Crawford, 541 U.S. at 53; State v. Saunders, 132 Wn. App. 592, 602, 132

P.3d 743 (2006). Also, an interviewer who is merely gathering evidence – as opposed to a child sexual abuse therapist – is regarded as an investigator for hearsay purposes. State v. Perez, 137 Wn. App. 97, 106, 151 P.3d 249 (2007) (hearsay by child therapists, but not investigators, admissible under medical treatment exception.)

Officers Whalen and Sahlstrom were clearly investigating the case as law enforcement officers. The written statements of M.P.'s mom and dad were clearly taken in the context of investigation and contemplation of litigation. Trial Ex. 1 and 2. In particular, Trial Exhibit 1 was essentially a statement taken from M.P. by officer Sahlstrom, merely using Eric Pratley to transcribe the statement. The purpose of these interviews of M.P. was solely to gather evidence; Officer Whalen admitted as much with regards to her interview and Trial Exhibit 3. ARNP Young was acting as an investigator, and not a medical provider when she questioned M.P. nearly two months after M.G.H.'s visit. Her investigative role is borne out by the fact that M.P. had already been taken to her own physician, her "medical" findings were nonspecific, and there was no medical treatment or care provided. This was solely an attempt to gather forensic evidence by a person with a nursing degree, and intellectual honesty demands the ruse be recognized as such.

c. There was no meaningful cross examination.

Cross examination implies sworn testimony. The court rules require an oath or affirmation to “awaken the witness’s conscience” and impress the witness’s mind with the duty to tell the truth. ER 603. See also RCW 34.05.452(3); WAC 10-08-160(1) (administrative proceedings).

Defense counsel spoke to M.P. informally before trial, but not before a magistrate or under oath. CP 34. M.P. claimed no memory of the event at the time. That was not cross examination. M.P. took the stand at trial, but since M.P. was incompetent, she could not testify at the trial, either on direct examination or on cross examination. Since she claimed her current “memory” came only from help from her Mom and Dad, she could not be meaningfully impeached with prior inconsistencies. None was given under oath, so did not qualify as a prior inconsistent statement as defined by the hearsay rule, i.e. a statement “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.” ER 801(d)(1)(i)(b); State v. Horton, 116 Wn. App. 909, 919 n. 33, 68 P.3d 1145 (2003).

Her hearsay statements were not, therefore, subjected to the “crucible” of cross examination Crawford requires. 541 U.S. at 61.

d. The hearsay is inherently unreliable.

A trial court cannot remedy the lack of cross examination by declaring that an unavailable child witness's hearsay is reliable. Bockting 127 S. Ct. at 1179. In Bockting, the child rape victim was unavailable at trial but her testimonial statements were admitted under Nevada's child hearsay statute without cross examination.² Bockting sought to overturn the conviction on Sixth Amendment grounds after Crawford was decided. The United States Supreme Court maintained the conviction, holding that Crawford was not retroactive. However, the Court agreed with the Nevada court that a judge's determination of reliability is insufficient under Crawford:

Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to ... amorphous notions of 'reliability.' ... Admitting statements deemed reliable by a judge is fundamentally at odds with the right to confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.

Bockting, 127 S. Ct. at 1179 quoting Crawford, 541 U.S. at 61.

² Nevada's statute is essentially identical to Washington's. Nev. Rev. Stat. § 51.385(1)(a); Whorton v. Bockting, 127 S. Ct. at 1177 -1178 (2007).

If M.P. was not competent to testify, admission of her hearsay statements violated Crawford. Additionally, given the inconsistencies between in M.P.'s statements and hearsay statements, and even between the various hearsay statements, the hearsay could not be deemed reliable in any event.

3. IF M.P. WAS UNAVAILABLE, HER HEARSAY WAS NOT CORROBORATED AS REQUIRED BY THE CHILD HEARSAY STATUTE.

Washington's child hearsay statute excludes an unavailable child's statements as unreliable per se, unless the statements are supported by admissible independent corroborating evidence. RCW 9A.44.120 (2)(b); Ryan, 103 Wn.2d 165,174, 691 P.2d 197 (1984).

Here, there was no admissible, independent, corroborating evidence. M.G.H. denied any inappropriate touching of M.P. There was no physical evidence, and no third party witnesses. ARNP Young's examination was non-specific. There was no DNA or other evidence.

Therefore, if M.P. was incompetent, admission of her uncorroborated hearsay violated the child hearsay statute.

4. EVEN IF M.P. WAS COMPETENT TO TESTIFY, HER HEARSAY WAS INADMISSIBLE BECAUSE IT WAS UNRELIABLE.

The child hearsay statute provides that out-of-court statements by a child under the age of ten who testifies at trial may be admitted if the

court finds sufficient indicia of reliability. RCW 9A.44.120(1), (2)(a). Ryan, 103 Wn.2d at 172; In re Dependency of A.E.P., 135 Wn.2d 208, 226-27, 956 P.2d 857 (1998). A child need not be testimonially competent when the out-of-court statements were made, but the circumstances surrounding the making of the statements must render them inherently trustworthy. State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765, 771 (2003); Ryan, 103 Wn.2d at 173. Child hearsay must manifest “particularized guarantees of trustworthiness” because it is not a “firmly-rooted” hearsay exception. Id. at 170. The statements must be characterized by such a degree of inherent trustworthiness as will serve as a substitute for cross-examination. Ryan, 103 Wn.2d at 175. In assessing trustworthiness, the court considers the factors set forth in Ryan.

Several key Ryan factors were not met here. (1) The record discloses an apparent motive to lie; (2) the declarant’s general character did not suggest trustworthiness because she had previously lied to her mother; (3) other than the first generic statement, all subsequent statements were not spontaneous but rather the result of questioning by adults; (4) the likelihood of faulty recollection was far from remote. Ryan, Id. at 175-76.

In State v. Ryan, the Washington Supreme Court held that the children’s statements to their mothers lacked the trustworthiness in part

because their mothers might be predisposed to believe that the defendant had committed indecent liberties on the children, and that the parent-child relationship makes objectivity difficult. In re Dependency of S.S 61 Wn.App. 488, 497, 814 P.2d 204, abrogated on other grounds by State v. Karpenski 94 Wash.App. 80, 971 P.2d 553, 558 (Div. 2,1999). In this case, the allegations first arise with M.P.'s conversations with her parents, and particularly her mother, and those statements should have been excluded.

The record suggests a strong motive to lie. M.G.H.'s statement to Detective Hatch that his aunt "hates me and is always making me out to be the bad guy" reveals bias on the part of Heidi Pratley, the first adult to whom M.P. speaks. M.P.'s mother testified M.P. got in trouble for lying previously. M.P. then lied and testified she had never lied, and never got in trouble for lying. Both M.P and Heidi testified that grounding or other punishments would happen to M.P. if she got caught lying. Once she made the allegation, M.P. could not retract it for fear of getting in trouble. At the police station, both parents were in the room, and she was trapped, forced to inconsistently repeat her allegation of wrongdoing against M.G.H.

As previously set forth in the factual recitals above, M.P.'s various statements were inconsistent with each other; in the face of those

inconsistencies the possibility of faulty recollection was not remote. Those inconsistencies when coupled with M.P.'s more recent claims of lack of memory make the possibility of faulty recollection a near certainty.

The out-of-court statements of M.P. lacked the indicia of reliability required for statutory admission as child hearsay pursuant to Ryan.

5. M.G.H.'S STATEMENT WAS INADMISSIBLE BECAUSE DETECTIVE HATCH'S INTERROGATION OF M.G.H. WAS CUSTODIAL, AND CONDUCTED WITHOUT RIGHTS ADVICE.

The right against self incrimination is protected under the Fifth Amendment to the U.S. Constitution and Article 1, Sections 9 and 22 of the Washington State Constitution.

Custodial statements must have been made after the rights warning was given, or they are inadmissible. The burden of proving the timing is on the State. Absent such a showing, there is a conclusive presumption that all confessions or admissions made during a period of custodial interrogation are compelled in violation of the Fifth Amendment privilege. Further, the state must prove that there was an effective waiver of these rights in order for Matthew's statements to be admissible. Effective waiver requires that the waiver be made voluntarily, knowingly, and intelligently. Miranda v. Arizona, 384 U.S. 436, 444 86 S.Ct 1602 (1966).

In this case, the lack of any warnings at all makes the only issue one of custody; if M.G.H. was in custody when questioned by Det. Hatch, the statements he made, both verbal and written, must be suppressed. Both M.G.H. and Detective Hatch testified that when he met with M.G.H. at the office in his school, he never advised M.G.H. of his Miranda rights. RP 157-158, 172-173. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602 (1966).

Miranda requires that the defendant be advised of his right to remain silent and of the right to counsel, and applies to custodial interrogations. *Miranda*, supra. “The safeguards required by *Miranda* become applicable as soon as a suspect’s freedom of action is curtailed to a degree associated with formal arrest.” Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3128, 3151, 82 L.Ed.2d 317 (1984). Interrogation occurs whenever the police knew or should have known that their words or actions, such as confronting the suspect with evidence of the crime, were reasonably likely to elicit an incriminating response. Rhode Island v Innis, 446 U.S. 291, 64 L.Ed.2d 297, 100 S. Ct. 1682 (1980). A person not actually placed under arrest is deemed “in custody” where the police questioning takes place under circumstances which are likely to substantially affect the individual’s will to resist and which compel him to speak where he would

not otherwise do freely. State v. Pejsa, 75 Wn.App. 139, 876 P.2d 963 (1994)

In Washington, the interrogation of a fourteen year old in a school's office is a custodial interrogation. State v. D.R., 84 Wash.App. 832, 930 P.2d 350 (1997). In that decision, the court found the reasoning of an Oregon case to be compelling:

Given that the school setting is more constraining than other environments, it is especially important that police interviews with children, when carried out in that setting, are conducted with due appreciation of the age and sophistication of the particular child. An interview that might not be 'compelling' for an adult might nonetheless frighten a child into believing that he or she was required to answer an officer's questions. Accordingly, special precautions should be taken to ensure that children understand that they are not required to stay or answer questions asked of them by a police officer.

State v. D.R., *supra* at 837, quoting State ex. Rel. Juvenile Dep't of Lored, 125 Or.App. 390, 865 P.2d 1312 (1993). M.G.H.'s interrogation was clearly "custodial"—he was retrieved by school staff, escorted to the office, and told to talk to the officer; he did not believe he had a choice whether or not to talk to the officer, and did not believe he could get up and leave. R.P. 169-170. In this case, the setting of the school's office, with its mantle of authority, was a significant and material factor in creation of a custodial situation. State v. D.R., *supra* at 353.

Additionally, Hatch requested the school secretary leave the room. See *Archer v. U.S.*, 393 F.2d 124 (5th Cir. 1968) (The presence or absence of other persons is an indicator of custodial status). Although Det. Hatch testified that he told M.G.H. he was free to leave, M.G.H. testified for purposes of the CrR 3.5 hearing that he did not believe that he could leave, and that Det. Hatch never said that he could. RP 171-172. On her way out of the office, the school staff member shut the window and the door. RP 171. Likewise, detective Hatch's course of conduct was clearly an interrogation--there can be no credible dispute that his questions were designed to elicit an incriminating response, particularly where he testified that he believed he already had probable cause to arrest, and had marked M.G.H.'s statement as "suspect" and not "witness" on the line above M.G.H.'s name. Trial Ex. 4.

The Court erred when it admitted against him the verbal and written custodial statements of M.G.H. to detective Hatch. As detailed in the next section, the contents of those statements would prove prejudicial.

6. THE COURT IMPERMISSIBLY PUT THE BURDEN ON M.G.H. TO CORROBORATE HIS STATEMENTS TO DETECTIVE HATCH.

A defendant in a criminal case has no duty to present evidence. In re Winship, 397 U.S. 358, 361-362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), State v. McKenzie, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006). The State

bears the entire burden of proving each element of its case beyond a reasonable doubt. Id. Due to that significant burden on the state and the lack of a duty of production on the part of a defendant, it is improper for a prosecutor to state or imply that the defense has a duty to present evidence. State v. McKenzie, 157 Wash.2d 44, 58-59, 134 P.3d 221 (2006). That requirement is intended to not influence to finder of fact to improperly base its decision on the absence of production by a criminal defendant.

In State v. Toth, the court found that the prosecutor's statement that the defendant should have should have provided witnesses to corroborate his exculpatory testimony was improper. 152 Wash.App. 610, 615, 217 P.3d 377, 379 (Wash.App. Div. 2, 2009). The court found that that statement prejudiced the defendant beyond a reasonable doubt because the finder of fact could infer that the defendant had the burden to prove that he was not guilty. Id.

Here, the finder of fact improperly shifted the burden to the defendant to produce evidence of his innocence. Specifically, the court, in its oral decision stated that the defendant, in his statement to the police indicated that "he and McKenna were playing doctor with Brent and Megan and his sister Sidney. Three witnesses who could have corroborated him, who could have been called to testify [weren't]. And I

think that statement is significant, because it not only is clearly at variance with all the other evidence in the case that I've heard and that's been presented, but if that had been corroborated...would certainly make the likelihood of sexual misconduct far less likely in my view than if it is simply he and McKenna playing together in a closet.” RP 223. As in State v. Toth, this statement demonstrates the court's improper imposition of the burden of production on the defendant. The defendant has no duty to produce corroborating witnesses and the statement of the court to the contrary prejudices the defendant beyond a reasonable doubt. Also, since counsel moved for directed verdict based on insufficient evidence, calling these witnesses that the prosecution failed to call would have waived a claim on appeal. RP 201.

Upon finding that the finder of fact has committed error in improperly shifting the burden to the defendant to prove his innocence the remedy is to reverse and remand. Toth, 152 Wash. App. 610, 615, citing State v. Dixon, 150 Wash.App. 46, 58-59, 207 P.3d 459 (2009).

7. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, IF M.P. WAS INCOMPETENT TO TESTIFY, AND IF HER HEARSAY STATEMENTS WERE INADMISSIBLE, NO RATIONAL TRIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).

When the sufficiency of evidence is challenged in a criminal case, the court draws all reasonable inferences from the evidence in favor of the State and interprets them most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). “Circumstantial evidence and direct evidence are equally reliable.” State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004). The court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.* at 874-75, 83 P.3d 970. See also, State v. Gatlin 2010 WL 4137562, 2 (Wash.App. Div. 3, October 21, 2010) (only the Westlaw citation is currently available).

Here, even taking all of the evidence in the light most favorable to the state, if M.P. was not competent to testify, and if her hearsay statements were not admissible, no reasonable fact finder could have found that defendant M.G.H. was guilty of Child Molestation First Degree in violation of RCW 9A.44.083. In the absence of M.P.’s testimony and hearsay, there is no evidence that M.G.H. had sexual contact with M.P.

Accordingly, the conviction should be reversed.

D. CONCLUSION

For the foregoing reasons M.G.H. asks this court to reverse his conviction and vacate his sentence.

DATED this 5th day of November, 2010.

Respectfully submitted,

COGDILL NICHOLS REIN
WARTELLE ANDREWS

A handwritten signature in black ink, appearing to read 'm j a', is written over a horizontal line.

MICHAEL J. ANDREWS
WSBA No. 26176

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

v.

HARGROVE, MATTHEW

Appellant,
DOB 12/29/1993

NO. 653326

CERTIFICATE OF
SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date given below, I caused the original **Brief of Appellant** to be filed with the clerk of the above captioned court and copies served via legal messenger upon the following:

SETH FINE
SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

DATED this 5th day of November, 2010.


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Cogdill Nichols Rein Wartelle Andrews
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ORIGINAL

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HARGROVE, MATTHEW

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CERTIFICATE &
ACCEPTANCE OF
SERVICE

The undersigned, MATTHEW HARGRAVE, hereby acknowledges that he is the Appellant herein and hereby acknowledges that he accepted service of the **Appellant's Brief** on the ____ day of November, 2010.

See Attached

Matthew Hargrave
Appellant

2010 NOV -5 PM 1:59

653326

ORIGINAL

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
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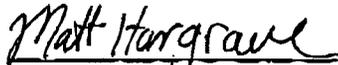
HARGROVE, MATTHEW

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CERTIFICATE &
ACCEPTANCE OF
SERVICE

The undersigned, MATTHEW HARGRAVE, hereby acknowledges that he is the Appellant herein and hereby acknowledges that he accepted service of the Appellant's Brief on the 05 day of November, 2010.



Matthew Hargrave
Appellant