

No. 67595-8-I

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

STATE OF WASHINGTON, Respondent

v.

EDUARDO CAZADORES-VALDEZ
AKA MARIO RUVALCABA, Appellant

APPELLANT'S REPLY BRIEF

MAZZONE AND CANTOR, LLP
Jesse Cantor, WSBA 26736
Attorney for Appellant
1604 Hewitt Avenue, Suite 515
Everett, Washington 98201-4011
(425) 259-4989 -phone
(425)259-5994 - fax

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 APR 24 AM 10:33

ORIGINAL

Table of Contents

I. THE WITNESS RECANTATION WERE MATERIAL, RELIABLE AND CREDIBLE. BECAUSE THERE EXISTED NO INDEPENDENT CORROBORATION TO THE CLAIMS OF ABUSE, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL 1

II. THE NEW TRIAL COURT RECORD ESTABLISHED THAT D.R. HAD A MOTION TO LIE AND ACCORDINGLY CHILD HEARSAY STATEMENTS WOULD BE INADMISSIBLE UNDER RCW 9A.44.120. 4

III. THERE WAS NO LEGAL JUSTIFICATION FOR DR. SUGAR TO TESTIFY ABOUT THE IDENTITY OF THE ALLEGED ABUSER IN THE COURSE OF DESCRIBING THE SEXUAL ASSAULT EVALUATIONS 6

IV. THE DEFENSE MADE A TIMELY OBJECTION TO THE ADMISSION OF THE DVD RECORDED INTERVIEWS OF D.R. AND M.R. THEREFORE THE OBJECTION TO IMPROPER FOUNDATION PRESERVES THE CHALLENGE TO THE PROCEDURE IN ADMITTING THE RECORDINGS INTO EVIDENCE. 8

V. CONCLUSION 10

Table of Authorities

Washington State Supreme Court Cases

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

Other Washington State Cases

State v. Eder, 78 Wn. App. 352, 361-362 (1995) 2

State v. Ieng, 87 Wn. App., 873, 878 (1997) 2

State v. Butler, 53 Wn. App. 214 (1989) 6-7

Washington State Statutes

RCW 9A.44.120 4, 6

Rules of Evidence

ER 803(a)(5) 3, 8-9

ER 403 6

I. THE WITNESS RECANTATIONS WERE MATERIAL, RELIABLE AND CREDIBLE. BECAUSE THERE EXISTED NO INDEPENDENT CORROBORATION TO THE CLAIMS OF ABUSE, THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL.

In its response, the State asserts that the recantations did not constitute newly discovered evidence "because these witnesses had already recanted their original statements at trial." RB at 13.¹ To the contrary, the testimony from the complaining witnesses was that they each had no recollection of abuse. Both D.R. and M.R. testified at trial that they had no recollection of abuse. The post-trial recantations amounted to newly discovered statements that these complaining witnesses would testify under oath that there was never any abuse from the defendant as they had originally alleged.

Furthermore, Roberto Ruiz testified at trial that he had seen the defendant with D.R. when D.R. had her pants down around her ankles. RP 49-50, May 24, 2011. Roberto Ruiz also testified at trial that he might have imagined the entire event. *Id.* at 68. After trial, Roberto Ruiz provided newly discovered statements to the defense stating that he lied at trial and that he now would be prepared to testify that he never saw this alleged event. In fact, Roberto Ruiz gave new reasons why he lied about the event when testifying at

¹ RB is the State's Response Brief.

trial. Specifically Roberto Ruiz stated that he lied at trial because he was angry at the defendant for physically abusing his mother. Mr. Ruiz then confirmed that he gave false testimony at trial. CP 135 p.2.

With absolutely no independent corroborating evidence in the record to support the initial allegations of abuse, the trial judge erred in dismissing the newly discovered recantations without conducting a careful reliability and credibility assessment. The trial judge in This Case failed to adequately assess the credibility and reliability of the recantations.

When there is newly discovered recantation evidence, the trial judge must assess the credibility of the recantations. This is necessary because if the recantation testimony is credible, and no independent corroborating evidence supports the conviction, then the trial judge must grant a new trial. State v. Eder, 78 Wn. App. 352, 361-362 (1995).

Similarly, the trial judge must assess whether the recantation evidence is reliable. State v. Ieng, 87 Wn. App. 873, 878 (1997). The court must consider the totality of the circumstances before determining by a preponderance of the evidence that the recantation evidence is credible. Id. In other words, to simply rubber stamp a finding of unreliability without a proper analysis of the totality of the circumstances will constitute an abuse of discretion. Id., at 879.

In the instant case, both D.R. and M.R. testified at trial that they never recalled any abuse. Their testimony prompted the trial judge to allow into evidence, under ER 803(a)(5), recordings of their pre-trial interviews where each made accusations that the defendant sexually assaulted both D.R. and M.R. Post trial, both complaining witnesses recanted their initial accusations of sexual abuse. As such, there can be no finding that the recantations were discoverable at the time of trial (or before trial) since the trial testimony was not a full change in position, but instead reflected a lack of recollection.

The fact that the complaining witnesses both came forward after trial and consistently told the court that there was no sexual abuse demands that the trial judge identify precisely why the two cannot be believed before dismissing the recantations. Their recantations were corroborated not only by both witnesses agreeing with one another that there was no abuse, but further were corroborated by the new statements of Roberto Ruiz also claiming that there was never any abuse.

To say that the medical diagnosis hearsay testimony of Dr. Sugar adequately corroborates the credibility of the initial accusations is insufficient. The complaining witnesses asserted post trial that they lied about the sexual assault accusations. These recantations necessarily encompassed their initial claims to law enforcement, to their school counselor, and to Dr. Sugar all

made during the beginning phases of the investigation. The three main witnesses each came forward and were consistent in claiming that there was never any abuse.

Furthermore, there was absolutely no evidence of coercion or pressure to recant. All that was before the court was that there were family members who learned of the recantations and brought the new evidence to the attention of the defense. Bringing the witnesses into the defense attorney's office in order "to come clean" with the truth is not sufficient evidence establishing coercion. With no physical evidence of abuse, no admissions of guilt by the defendant, and no other evidence suggesting sexual abuse, there can be no rational basis to find the recantations un-reliable or non-credible. Reversal of the convictions is therefore required.

II. THE TRIAL COURT RECORD ESTABLISHED THAT D.R. HAD A MOTIVE TO LIE AND ACCORDINGLY CHILD HEARSAY STATEMENTS WOULD BE INADMISSIBLE UNDER RCW 9A.44.120.

The State argues that the trial court properly weighed the *Ryan* factors in finding that D.R.'s child hearsay statements were supported by a sufficient indicia of reliability. The State points to D.R.'s demeanor when school counselor Bonnie Paasch explained that she would be calling the police. RB

at 25. The State emphasizes that D.R.'s demeanor and response is not what we would expect "from a girl who was allegedly trying to get the defendant out of her house." Furthermore, the State pointed to the Court's generic finding that D.R. is "of good general character." RB at 25-26.

The trial Court makes no reference to how it made its finding of "good general character." Furthermore, the trial court failed to adequately explain how the witness's demeanor in response to the police being called is consistent with not having a motive to lie. In fact, one would reasonably assume that a child witness who has a motive to lie would be very concerned about law enforcement getting involved out of fear that an investigation likely would disclose the falsities. Moreover, the real proof of the existence of a motive to lie becomes apparent when three material witnesses affirm that the initial accusations were untrue. Although these admissions were made after trial, the trial judge had clear evidence during trial that D.R.'s initial accusations were suspect, especially when D.R. testified that she could not recall any abuse.

The first two factors cited in State v. Ryan that the trial court must consider are 1) whether there is a motive to lie; and 2) the general character of the child. The trial court essentially rubber stamped the "good character" prong without any explanation as to the bases of this finding. And more

important, the Court was made aware of the likely recantations and changes in the story before trial started and at the time of the Child Hearsay hearing. In other words, the trial judge was on notice before trial began that the initial claims from D.R. were suspect, yet the trial court admitted D.R.'s hearsay accusations into evidence without sufficient articulation as to why and how the out of court statements would be admissible under RCW 9A.44.120 and without conducting an ER 403 balancing test. Reversal of the defendant's convictions is accordingly required.

III. THERE WAS NO LEGAL JUSTIFICATION FOR DR. SUGAR TO TESTIFY ABOUT THE IDENTITY OF THE ALLEGED ABUSER IN THE COURSE OF DESCRIBING THE SEXUAL ASSAULT EVALUATIONS.

Over the defense's objection, the trial court permitted Dr. Sugar to testify about the identity of the alleged abuser as part of her medical diagnosis testimony. Although we concede that in child assault cases This Division has carved out an exception to the general rule prohibiting statements of fault during medical diagnosis testimony, the trial judge must still conduct a two part test before admitting such testimony about the identity of the abuser. *State v. Butler*, 53 Wn. App. 214 (1989). The trial judge neglected to conduct this two part test.

Before admitting hearsay statements under Evidence Rule 803(a)(4), Statements for Purposes of Medical Diagnosis or Treatment, the trial judge must apply a two part admissibility test. First, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment. Second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. *State v. Butler*, 53 Wn. App. 214, 220 (1989).

In this case, the declarant's motive in making the statement about the alleged abuser was suspect given the subsequent changes in the story about what happened and who was responsible. That is, before trial commenced the judge was on notice that the complaining witnesses were changing their story and would likely testify at trial that the defendant did not cause any abuse. As such, before Dr. Sugar testified, the trial judge had ample evidence that the initial statements to Dr. Sugar were in fact not motivated to promote medical treatment. Instead, given the change in position before Dr. Sugar's trial testimony, the court had clear evidence that the witnesses would not confirm that Mr. Cazadores caused any sort of abuse at all.

Dr. Sugar's testimony should have been limited exclusively to testifying about the scope of the alleged assaults (i.e., that the complaining witnesses claimed they were touched on or in their "private parts" and that

there was a concern of actual penetration). However, Dr. Sugar should not have been permitted to testify before the jury that “Mario” was sexually abusing D.R. and M.R. especially when the declarants’ motivation in making the statements to Dr. Sugar during the sexual assault examination was suspect.

Accordingly, at the time of the defense’s objection to Dr. Sugar’s testimony, and based on the record before the court, there was insufficient evidence that the motives of both D.R. and M.R. in making the statements were consistent with the purposes of promoting treatment. Mr. Cazadores is therefore entitled to a new trial.

IV. THE DEFENSE MADE A TIMELY OBJECTION TO THE ADMISSION OF THE DVD RECORDED INTERVIEWS OF D.R. AND M.R. THEREFORE, THE OBJECTION TO IMPROPER FOUNDATION PRESERVES THE CHALLENGE TO THE PROCEDURE IN ADMITTING THE RECORDINGS INTO EVIDENCE.

At trial, the defense objected to the admission of the DVD recordings based on the alternative grounds that the State failed to satisfy the foundational requirements of ER 803(a)(5), “Recorded Recollection.” The State argues in its response brief that this assignment of error was not preserved for review. RB at 35. Specifically, the State asserts that the defense never challenged the actual playing of the DVD recordings and

therefore the procedure utilized in publishing the statements were not properly preserved for appellate review. RB at 35.

To the contrary, the defense made a timely objection to the admission of the recordings arguing that the foundational requirements necessary under ER 803(a)(5) had not been satisfied. The objection to the foundation necessarily preserves any challenge to the procedure utilized in admitting the statements. In this case, our challenge has to do specifically with the jury receiving the exhibit in evidence. This challenge was properly preserved with the overall objection to the lack of foundational requirements needed to admit statements under the past recorded recollection hearsay exception.

The objection from Cazadores preserved the challenge to the admission of the recordings into evidence. The objection further preserves the issue of whether it was appropriate for the jury to actually receive the recordings into evidence notwithstanding the fact that the adverse party (the defense) did not offer the exhibit. In other words, according to the evidence rule, if the foundational requirements set forth in ER 803(a)(5) are not met, then the recordings “may not itself be received as an exhibit.” The defense made a timely objection based on lack of foundation. Accordingly, the challenge to the DVD recordings being received into evidence have been properly preserved for Appellate Review.

V. CONCLUSION

For the reasons stated in this Reply Brief, and as further supported by the arguments and authority set for in our opening brief, and as may further appear in the record, the Appellant respectfully requests that his judgment and conviction be vacated and that a new trial be ordered.

DATED: This 23rd day of April, 2012



Jesse Cantor, WSBA # 26736
Mazzone and Cantor, LLP
1604 Hewitt Ave., Suite 515
Everett, WA 98201

(425) 259-4989 (Tel)
(425) 259-5994 (Fax)

jessec@mazzoneandcantor.com

CERTIFICATE OF SERVICE

I, Jesse Cantor, attorney for the Appellant, hereby certify that on This 23rd Day of April, 2012, I served a true and correct copy of the foregoing opening brief by U.S. First Class Mail, correct postage paid, on the following parties:

King County Prosecutor's Office
Appellate Division
King County Courthouse
516 Third Ave, Suite W554
Seattle, WA 98104



Jesse Cantor