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DEC 31 2013

King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2013 DEC 31 PM 4:21

NO. 69918-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NEGATU FENTAHUN,

Appellant.

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

The Honorable Douglass North, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATEMENT MADE BY W.F.'S BROTHER TO THE HOSPITAL SOCIAL WORKER IS NOT ANALOGOUS TO A STATEMENT MADE BY A PARENT SEEKING TREATMENT FOR A CHILD AND WAS INADMISSIBLE UNDER ER 803(a)(4).

The State cites State v. Grant, 776 N.W. 2d 209 (N. .D. 2009) for the proposition that statements made to health care providers by third persons are admissible under ER 803(a)(4) if that person has a sufficiently close relationship to the person seeking treatment. Brief of Respondent (BOR) at 11. Grant does not support the trial court's ruling in this case that Amanuel's statement to Drummond, the hospital social worker, was admissible under ER 803(a)(4).

In Grant, the court ruled statements made the child victim's grandmother to a nurse were admissible under North Dakota's evidentiary rule, which is the same as Washington's ER 803(a)(4), reasoning that "Health care providers often rely upon the information provided by adults to properly diagnose and treat children." Grant, 776 N.W. 2d at 215. The Grant court's holding and reasoning is similar to the holding and rationale in State v. Justiniano, 48 Wn. App. 572, 740 P.2d 872 (1987). In Justiniano the court ruled statements by a child victim's mother to a doctor are the equivalent of statements made by the child to the doctor and admissible under ER 803(a)(4) "because children of tender years are

incapable of expressing their medical concerns to physicians.” Justiniano, 48 Wn. App. at 572; See, State v. Alvarez-Abrego Court, 154 Wn.App. 351, 405, 225 P.3d 396 (2010) (where Division Two restated its reasoning in Justiniano “was apparently grounded on the premise that an injured child may rely on a parent to seek medical aid when the child cannot do so.”).¹

The State argues W.F. “was in a position similar to that of the child in Justiniano” because her loose teeth rendered her unable to express her medical concerns. BOR at 13. The State further contends Amanuel’s statements to Drummond have the indicia of reliability because his only concern was to assist his sister so she would get the necessary treatment. Id. The record does not support either contention.

The State admits W.F. was alert and conscious when Amanuel spoke with Drummond. BOR at 13. And, despite her loose teeth, W.F. spoke to first responders before she was taken to the hospital where Amanuel spoke with Drummond. 1RP 82, 3RP 27-34. Moreover, Drummond merely assumed that W.F. was in too much pain because of her loose teeth to carry on a conversation. 4RP 40, 46. Amanuel’s statement to Drummond was

¹ The State also cites United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) for the same proposition that statements by a parent to medical providers are admissible under ER 803 (a)(4). The Yazzie court ruled, however, because the declarant is not the person seeking treatment “inquiry into the declarant’s purpose must be exacting.” Id. at 813. The trial court here did not engage in that “exacting” inquiry.

merely his rendition of the alleged assault by Negatu and his attempt to stop the assault. 4RP 41-43. It had little bearing on any diagnosis or treatment related to W.F.

The record belies the State's analogy to Justiniano. It does not show W.F. was incapable of expressing her own medical concerns to Drummond. It does not show the purpose of Amanuel's statement to Drummond was to facilitate W.F.'s diagnosis or treatment.

Under these facts if this Court were to hold Amanuel's statement to Drummond was admissible under ER 803(a)(4) it would constitute an expansion of this exception to the hearsay rule to include statements to medical providers by third persons regardless of the patient's ability to express her own medical or psychological concerns, and regardless of whether the statements pertain to the patient's diagnosis or treatment. Even if it is assumed a family member, like a parent or spouse, may in certain circumstances share the same motive, where the patient herself is capable of speaking to the medical provider the statement of a third party on behalf of the patient is not one of those circumstances. Expanding the medical diagnosis and treatment exception to the hearsay rule to encompass these facts would undermine the rationale for admitting statements under that rule, which is based on the presumption a patient has a strong motive to be truthful and accurate. State v. Butler, 53 Wn. App.

214, 220, 766 P.2d 505 (1989). There is no logical basis to extend the presumption that there is a strong motive to be truthful and accurate to third party statements where the patient herself is an adult and capable of speaking with medical providers.

The State also claim`s there was “no reason to believe” Amanuel`s statement “was not reliable.” BOR at 12. The State cites nothing in the record to support its claim. Its claim is no more than an assumption just as it would be an assumption to assert there was “no reason to believe Amanuel`s statement was reliable.”

Furthermore, the medical diagnosis exception applies only to statements of causation. It does not apply to statements of fault. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). “For example, the statement ‘the victim said she was hit on the legs with a bat.’ would be admissible, but “the victim said her husband hit her in the face” would not be admissible.” Id. at 496-497. Amanuel`s statement that it was his brother who assaulted W.F. was a statement of fault. 4RP 41.

The State failed to meet its burden ER 803(a)(4) applies to these facts. The court erroneously admitted Amanuel`s hearsay statement to Drummond, which was nothing more than his rendition of the incident claiming his brother assaulted W.F. and that he tried to stop him.

2. AMANUEL'S STATEMENT TO DRUMMOND WAS TESTIMONIAL.

The State claims this case is similar to State v. Moses, 129 Wn. App. 718, 119 P.3d 906, rev. denied, 157 Wash.2d 1006, 136 P.3d 759 (2006), State v. Saunders, 132 Wn. App. 592, 132 P.2d 743, rev. denied, 159 Wn. 2d 1017(2007), and State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271 (2007). The State contends those cases are like this case because in those cases the courts found statements by domestic assault victims to medical providers that the defendants in those cases assaulted them were nontestimonial. BOR at 16-18. The issue, however, is whether Amanuel's statement was testimonial.

In Moses, the court ruled statements to a medical doctor are not testimonial (1) where they are made for diagnosis and treatment purposes, (2) where there is no indication that the witness expected the statements to be used at trial, and (3) where the doctor is not employed by or working with the State. Moses, 129 Wn. App. at 729-30. The State agrees these factors are determinative. BOR at 16 (citing State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838 (2013)).

The State fails to analyze the factors identified in Moses and Hurtado. An analysis of the first two factors shows Amanuel's statement was testimonial. First, the statement was not made for the purpose of

Amanuel's diagnosis or treatment because he was not the person seeking medical treatment. Nor was it made for the purpose of the diagnosing and treating W.F. because Amanuel's statement merely related what allegedly happened, that his brother was the assailant, and his role in the incident.

Second, Amanuel expected his statement would be used against Negatu at a trial. Drummond testified she "also assisted Amanuel in calling SPD (Seattle Police Department) from the hospital room." 4RP 41. A reasonable person in Amanuel's position would anticipate that telling a hospital social worker that his brother Negatu assaulted his sister, that he (Amanuel) tried to stop the assault and having the social worker assist him in calling police, that his statement would be used to prosecute Negatu for the alleged assault.

In Moses, Saunders and Sandoval it was the victim of the domestic assault who identified the assailant to medical providers for the purpose of treatment. Unlike in those case is was not W.F., who was the alleged victim of the assault, but her brother Amanuel that told Drummond that Negatu assaulted W.F. Drummond also "assisted" Amanuel in calling the police. The statement was not made for the purpose of Amanuel or W.F.'s treatment but to identify Negatu as the assailant. Amanuel's statement to Drummond was testimonial. Because Amanuel did not testify at trial, admission of the statement violated Negatu's right to confrontation.

3. AMANUEL'S STATEMENTS TO THE 911 DISPATCHER WERE TESTIMONIAL.

The State does not attempt to analyze the 911 call under the factors identified in State v. Reed, 168 Wn. App. 553, 563-64, 278 P.3d 203, review denied, 290 P.3d 995 (2012). See, Brief of Appellant at 14. The State merely asserts Amanuel's request during the call that his sister needed medical attention supports its contention that Amanuel made the 911 call for the "sole purpose of procuring aid for his sister" and therefore his statements were not testimonial. BOR at 22.

The issue is not whether Amanuel called 911 to procure medical aid for W.F. but whether the primary purpose of the 911 dispatcher's interrogation was to establish or prove the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. Davis v. Washington, 547 U.S. 813, 826, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)), cert. denied, 553 U.S. 1035 (2008). A conversation that begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements. Davis, 547 U.S. at 827.

Negatu will not repeat the argument made in his opening brief. He has shown under the Reed factors the conversation with the 911 dispatcher conversation might have begun to determine the need for emergency assistance but quickly evolved into testimonial statements divorced from

getting medical help for W.F. At that point the circumstances objectively indicate the primary purpose was is to establish or prove the facts of a past crime, in order to identify the perpetrator. Brief of Appellant at 14-16. Admission of the 911 call violated Negatu's right to confrontation.

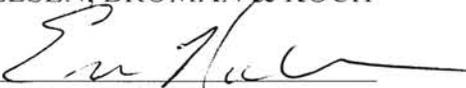
B. CONCLUSION

W.F. did not testify and although a number of statements she made to first responders and Dr. Haung were admitted, in none of those statements does she identify Negatu as her assailant. Negatu's conviction rests on Amanuel's hearsay statements to the 911 dispatcher and Drummond. Negatu was unable to cross examine Amanuel because Amanuel also did not testify at trial. Because Amanuel's statements were inadmissible under recognized exceptions to the hearsay rule and violated Negatu's right to confrontation, his conviction should be reversed.

DATED this 31 day of December, 2014.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69918-1-I
)	
NEGATU FENTAHUN,)	
)	
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 31ST DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NEGATU FENTAHUN
P.O. BOX 18392
SEATTLE, WA 98118

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF DECEMBER 2013.

x *Patrick Mayovsky*