

NO. 46688-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JUAN MADRAZO-MUNOZ,

Appellant.

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

The Honorable David Gregerson, Judge

OPENING BRIEF OF APPELLANT

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A. ISSUES PRESENTED ON APPEAL

1. The trial court denied the appellant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow the defense to elicit relevant evidence favorable to the defense.

2. The trial court abused its discretion in suppressing relevant evidence that the complaining witness J.N.S. was potentially exposed to precocious sexual knowledge.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The appellant was convicted of two counts of child molestation in the first degree. Did the trial court error by suppressing evidence that the complaining witness J.N.S. possessed a cell phone depicting sexual acts, depriving appellant Juan Carlos Madrazo-Munoz of his due process right to present evidence to the jury that would rebut the assumption that J.N.S. had precocious sexual knowledge obtained from the appellant during the alleged acts? Assignments of Error No. 1 and 2.

C. STATEMENT OF THE CASE

In December, 2010 police responded to a report of suspected

molestation of J.N.S.¹ by the appellant Juan Carlos Madrazo-Munoz. 2Report of Proceedings (RP) at 138-40.² The allegation originated when J.N.S.'s mother—Jenny Thomas—was making Christmas cookies in her kitchen and asked J.N.S. if anyone had touched her inappropriately. J.N.S. alleged that Mr. Madrazo-Munoz had put his hand down her underpants and touched her vagina on two occasions, and that this had occurred at his house in Vancouver, Washington in July, 2010. 2RP at 142, 3RP at 326. Mr. Madrazo-Munoz and his wife Katrina were family friends of Ms. Thomas and J.N.S. frequently stayed overnight at the Madrazo-Munoz house on weekends to visit with their children. 2RP at 140-42, 151, 199. J.N.S. referred to Mr. Madrazo-Munoz as “Uncle Carlos.” 2RP at 200.

After J.N.S. accused Mr. Madrazo-Munoz of touching her, Ms. Thomas went to the Madrazo-Munoz house after midnight and told Katrina about J.N.S.'s accusation, and then called the police. 2RP at 143, 191, 200, 215, 216, 217.

¹DOB: October 6, 2000.

²The record of proceedings consists of four volumes:

1RP—November 20, 2013, December 4, 2013, December 13, 2013, December 16, 2013, March 18, 2014, May 8, 2014, July 31, 2014, hearings, and August 4, 2014, jury trial;

2RP—August 5, 2014, jury trial;

3RP—August 6, 2014, jury trial; and

4RP—August 7, 2014, jury trial, and September 17, 2014, sentencing.

J.N.S. was interviewed by a responding officer early in the morning after making the allegation. 2RP at 175.

Approximately two months after the allegation, Sgt. Barbara Kipp of the Vancouver Police Department interviewed J.N.S. in February, 2011. J.N.S. told the officer that Mr. Madrazo-Munoz put his hand inside her underpants and placed it on her vagina on two occasions. She stated that once he put his hand in her underpants while she was sleeping on a couch, and that he did the same thing a second time when she was sleeping in the bed of one of Mr. Madrazo-Munoz' children. 3RP at 251-54, 256-58, 305, 314. J.N.S. testified at trial that he had touched her vagina on two occasions. 3RP at 251-54, 256-58.

On October 4, 2013, almost three years after the allegation, Mr. Madrazo-Munoz was charged by information in Clark County Superior Court with two counts of first degree child molestation against J.N.S. RCW 9A.44.083. Clerk's Papers (CP) 1.

Prior to trial, the State sought to suppress testimony regarding pornography found by Katrina Madrazo-Munoz on a cell phone belonging to Jenny Thomas that was in the possession of J.N.S. 1RP at 69. The photos contained on the phone depicted Jenny Thomas performing oral sex on an unidentified male and were found by Ms. Madrazo-Munoz on a cell phone in

J.N.S.'s backpack in July or August, 2010. 1RP at 69. Ms. Madrazo-Munoz took the cell phone and did not return it to J.N.S. 1RP at 69. The defense argued that the photos were relevant because they showed precocious knowledge by J.N.S. and because it refuted the State's argument that J.N.S.'s visits stopped or were reduced because she no longer wanted to stay overnight at the Madrazo-Munoz' house. 1RP at 70. The trial court "provisionally" granted the motion to exclude this evidence from trial. 1RP at 76.

Trial commenced on August 4, 2013, the Honorable David Gregerson presiding. 1RP at 28-107, 2RP at 113-240, 3RP at 246-420.

During trial defense counsel renewed his request to introduce testimony regarding the cell phone containing sexually explicit "selfies" taken by Ms. Thomas. 2RP at 223. Outside the presence of the jury, Katrina Madrazo-Munoz stated that in 2010 she and her husband had found a cell phone belonging to Jenny Thomas in items brought to their house by J.N.S. 2RP at 224. On the phone Mr. Madrazo-Munoz found images of Ms. Thomas performing oral sex on the phone and showed the images to Ms. Madrazo-Munoz. 2RP at 229. The images appeared to be "selfies" taken by Ms. Thomas. She looked at pictures on the phone and found images of Ms. Thomas performing oral sex. 2RP at 225. She talked with her husband

about the images and they decided to keep the phone in a cupboard away from the children and did not return it to Ms. Thomas. 2RP at 226. She stated that Ms. Thomas did not ask about the missing phone. 2RP at 226. Defense counsel argued that the phone showed precocious knowledge of the child and was relevant because it showed a possible source of J.N.S.'s knowledge regarding sex. 2RP at 231-32. The court reiterated its pre-trial ruling that the proffered testimony regarding the phone and images contained in the phone is irrelevant and any probative value is outweighed by unfair prejudice. 2RP at 234.

Other than the testimony of J.N.S., the only evidence offered was the testimony of two officers who interviewed J.N.S., Jenny Thomas, her grandmother, her mother's friend, and Ms. Madrazo-Munoz. There was no physical evidence introduced at trial.

The jury found Mr. Madrazo-Munoz guilty of child molestation in the first degree as alleged in Counts I and II. CP 174, 176. In special verdict forms, the jury found that both counts were committed using an abuse of trust. CP 175, 177.

At sentencing the State requested an exceptional sentence of 120 months based on the special verdict finding that Mr. Madrazo-Munoz used a

position of trust to commit the offenses. 4RP at 432. Following consideration of a pre-sentence investigation report by Department of Corrections and after hearing argument from counsel, the court imposed sentence at the top end of the standard range of range on each count, and ordered the sentences to run concurrently for a total of 96 months. CP 210.

Timely notice of appeal was filed September 17, 2014. CP 226. This appeal follows.

D. ARGUMENT

1. **THE TRIAL COURT ERRED BY SUPPRESSING EVIDENCE THAT J.N.S. HAD POSSESSION OF A CELL PHONE CONTAINING IMAGES DEPICTING ACTS OF ORAL SEX, DEPRIVING THE APPELLANT OF HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE TO THE JURY THAT WOULD REBUT THE INFERENCE THAT J.N.S. HAD SEXUAL KNOWLEDGE DUE TO THE ALLEGED OFFENSES.**

Juan Madrazo-Munoz was convicted of two counts of child molestation in the first degree. Under RCW 9A.44.083:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1).

The Sixth and Fourteenth Amendments to the United States

Constitution, and article 1, § 21 of the Washington Constitution, guarantee a defendant the right to defend against the State's allegations and present a defense. These are fundamental elements of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); see also *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (exclusion of evidence material to defense violates due process).

Defense counsel is traditionally allowed to mount a general challenge to the credibility of the witness or, more specifically, to reveal biases, prejudices, or ulterior motives of the witness. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, L.Ed.2d 347 (1974). Moreover, the defendant has the right to the admission of relevant evidence. ER 401, 403. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. A party is entitled to admit relevant evidence, except as limited by constitutional requirements or as otherwise provided by statute, by the evidence rules. *See* ER 402. It is error to exclude relevant evidence absent a legitimate basis for doing so. *See, e.g., State v.*

Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007) (appellate court reviews a trial court's decision to exclude evidence for an abuse of discretion).

Washington courts have often recognized that a child's precocious knowledge of sexual activity is corroborative evidence of abuse. *See, e.g., State v. Swan*, 114 Wn.2d 613, 633, 790 P.2d 610 (1990). Evidence of alternative sources of precocious knowledge on the part of a child witness is admissible, not to impeach the witness's character, but to explain an abnormally high level of sexual knowledge and to rebut the inference that the only way the child witness would have knowledge of sexual matters was because the defendant had sexually abused the child as charged. *State v. Horton*, 116 Wn.App. 909, 918-20, 68 P.3d 1145 (2003); *State v. Carver*, 37 Wn.App. 122, 125-26, 678 P.2d 842, *rev. denied* 101 Wn.2d 1019 (1984); *State v. Bailey*, 52 Wn.App. 42, 50, 757 P.2d 541, (1988).

Our courts have found that evidence that a child had another source of sexual knowledge is relevant to disproving the inference that the defendant is the source of the sexually precocious knowledge. *See State v. Kilgore*, 107 Wn.App. 160, 180, 26 P.3d 308 (2001); *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984) (evidence of prior abuse of the alleged victim was probative "to rebut the inference [the child] would not

know about such sexual acts unless [he or she] had experienced them with defendant.").

In this case, the defense's proposed evidence—the testimony of Katrina Madrazo-Munoz that J.N.S. had her mother's phone in her possession, and that when Mr. Madrazo-Munoz looked at pictures contained on the cell phone, it contained "selfies" taken by Ms. Thomas depicting the act of oral sex—was offered as evidence relevant to the central issue of the child's credibility and also to document that the reason visits by J.N.S. were reduced was not due to the alleged molestation, but that the Madrazo-Munoz family was troubled about the pictures found on J.N.S.'s mother's cell phone and wanted to limit their contact with J.N.S. and her mother. 2RP at 233. The trial court erroneously excluded this evidence, ruling that mere possession of the phone by J.N.S. did not show that she had accessed the photos and that the proffered evidence was not relevant to the trial and even if relevant, its probative value is outweighed by its prejudicial nature under ER 403. 2RP at 234.

The trial court erred in excluding the relevant evidence of the possession of the cell phone and the images contained on the phone because this proposed evidence was relevant to rebut an assumption by the jury that J.N.S. acquired her precocious knowledge of the alleged acts through the

defendant. Evidence that the child had knowledge regarding sex before she ever met the defendant shows she knew of this act from another source. *See State v. Kilgore*, 107 Wn.App. 160, 180, 26 P.3d 308 (2001); *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). This evidence was therefore relevant and essential to the defense.

The only evidence of the alleged molestation entered in this case came from the child's statements; therefore her credibility was the critical issue. In the absence of evidence that the child learned about inappropriate touching from another source, her testimony to that act could serve to bolster her credibility with the jury.

Without some constitutional reason to exclude the evidence or any counter-balancing prejudice, it was error for the trial court to exclude the evidence. Moreover, the images on the phone serve to refute the State's theory that J.N.S.'s visits at Mr. Madrazo-Munoz's house were dramatically reduced because she was reluctant to go there after the alleged molestation.

The trial court's error below is reversible where it is one that has presumptively affected the final result of the trial. *See State v. Edwards*, 93 Wn.2d 162, 606 P.2d 1224 (1980). An error of constitutional proportions will not be held harmless unless the appellate court is able to declare a belief that it

was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976); *State v. Vargas*, 25 Wn. App. 809, 610 P.2d 1 (1980). An error of non-constitutional magnitude is also cause for reversal where, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980); *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

This case turned on J.N.S.' credibility. Mr. Madrazo-Munoz was denied his right to challenge her credibility with critical evidence capable of creating reasonable doubt in the minds of some or all jurors. The trial court's error likely compromised the verdict itself because this was a case with no physical evidence, vague allegations, and of particular note—a four year delay between the time of the alleged acts and the decision to charge Mr. Madrazo-Munoz. The central issue in the case was therefore the credibility of the child's allegation against Mr. Madrazo-Munoz. The evidence that J.N.S. could have been exposed to the images on her mother's cell phone and that she had prior knowledge of sexual activities was directly relevant to her credibility because it rebuts the implication that the child could only know about such a

thing if what she alleged was true. Without this evidence, the defense had a compromised ability to directly rebut the vague, four year old allegations made by the child. The trial court's error in excluding relevant evidence essential to the defense's case therefore requires the reversal of the convictions.

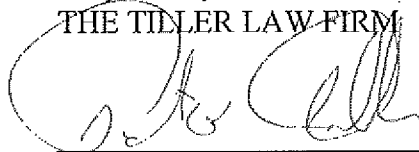
E. CONCLUSION

For the foregoing reasons, Mr. Madrazo-Munoz respectfully requests this Court reverse and dismiss his convictions.

DATED: March 6, 2015.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

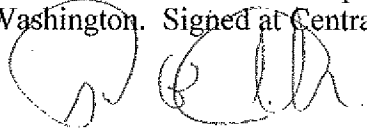
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 6, 2015, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid Ms. Anne Cruser, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000, and was mailed by U.S. mail, postage prepaid, to the appellant, Mr. Juan Madrazo-Munoz, DOC No. 896028, Coyote Ridge

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PETER B. TILLER

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