NO. 32779-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

SEAN JOSEPH BATES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00730-8

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Brittnie E. Roehm, Deputy
Prosecuting Attorney
Bar No. 49588
Office ID 91004

Megan A. Whitmire, Deputy
Prosecuting Attorney
Bar No. 29933
Office ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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C. The State agrees that the trial court erred in imposing a sentencing condition prohibiting the defendant from using a computer or electronic device capable of accessing the internet without authorization from defendant's Community Corrections Officer and/or therapist.

D. The State agrees that the trial court abused its discretion in imposing discretionary legal financial obligations without first considering the defendant's present or likely future ability to pay.

II. STATEMENT OF FACTS

On July 9, 2013, the Kennewick Police Department was dispatched to a report of a child sexual assault. Report of Proceedings ("RP")[1] at 64. The reporting party, Tiffany Jackson, advised that her niece, 7-year-old S.J. (DOB: 04/11/2006), disclosed that S.J.'s "boyfriend" Sean had licked S.J.'s private area and put his finger in her bottom. RP at 54-55, 118. S.J. explained to Tiffany that it was a secret "because [Sean] was her boyfriend" and no one was supposed to know. RP at 56. The defendant, 44-year-old Sean Bates, was a coworker of S.J.'s grandmother, Tammi

[1] "RP" refers to the Verbatim Report of Proceedings of the jury trial, prepared by Court Reporter John McLaughlin, dated 06/23/2014-06/30/2014, consisting of four volumes.

Makeeff. RP at 118-21. Ms. Makeeff had known the defendant for about eight years, and at the time S.J. made the allegations, the defendant had been renting a room in Ms. Makeeff's basement for about 18 months. RP at 118-20.

Upon hearing this information, Ms. Jackson contacted S.J.'s father, Brandon Jackson, and he arrived at the residence to speak to his daughter about the incident. RP at 57. S.J. provided her father with further explanation of the events. RP at 243. S.J. explained to him that Sean pulled down her pants, held her upside-down, licked her private area, and put a finger in her butt. RP at 243.

At trial, S.J.'s grandmother, Ms. Makeeff, testified that the evening of July 6, 2013, she could not find S.J., so she began searching the basement. RP at 125, 128. Ms. Makeeff noticed that the basement was dark, so she didn't think anyone was down there. RP at 128. Upon walking by the downstairs bathroom and calling S.J.'s name, she heard the defendant respond "in here," from the bathroom. RP at 128. The bathroom door was closed, so she assumed he was using the bathroom. *Id.* Then, she also heard S.J.'s voice from the bathroom say, "in here." *Id.* Ms. Makeeff tried to process in her mind why they would both be inside the bathroom with the door closed, but assumed they were both coming in from the

outside, because there was a door from that bathroom to the outside. RP at 128-29.

S.J. was interviewed by Mari Murstig, a child interviewer employed by the Benton County Prosecuting Attorney's Office, on July 10, 2013. RP at 181. That interview was audio and video recorded. *Id.* The trial court held a hearing prior to trial on June 9, 2014, and ruled that the recorded interview was admissible at trial pursuant to RCW 9A.44.120. CP 123-30. S.J. told Ms. Marstig that on Saturday [July 6, 2014], the defendant took her into the downstairs bathroom, pulled down her pants, turned her upside down, and licked her private part and butt. RP at 183. She also told Ms. Murstig that the defendant put his finger in her private parts on multiple occasions. RP at 183-84. Following Ms. Murstig's testimony, the court allowed the State to play Ms. Murstig's recorded interview of S.J. without objection from the defense. RP at 184.

S.J. took the witness stand at trial and told the jury that the defendant touched her front private and back private with his hand while in the defendant's downstairs bedroom on his couch. RP at 292. She testified that the touching happened under her clothes and both outside and inside her privates. RP at 293. She also testified on cross-examination that the touching on the couch downstairs occurred while she was between the ages of six and a half and seven years, and occurred about thirty (30)

times. RP at 308. She further testified that the defendant had touched the inside and outside of her privates while she and the defendant were together in her grandma's swimming pool. RP at 293. S.J. testified about the incident in her grandma's bathroom, when the defendant had turned her upside down and licked her front and back privates, and specifically that when he licked the back private, he did so on the inside of her private. RP at 296. She testified that when he did this, it felt "uncomfortable." RP at 294, 296. She explained that her grandma knocked on the bathroom door and said, "are you there[?]" and that's when S.J. put her clothes back on and went out. RP at 294.

S.J. testified both on direct and cross-examination that she remembered speaking to Ms. Murstig. RP at 296, 307. S.J. was not asked by the prosecutor to tell the jury what she told Ms. Murstig. RP at 296. But when questioned during cross-examination, defense counsel asked S.J. whether there had been an incident on the tennis court or on the couch upstairs. RP at 307. S.J. denied any incidents in those locations, but repeated that there had been incidents on the couch downstairs and in her grandma's bathroom. RP at 308.

When the defendant was interviewed by detectives, he explained that he is a "black-out" drinker, and that when he drinks, he does not remember what has occurred. RP at 360. On direct examination, the

defendant testified that he never played with the kids in his bedroom, and always made sure that the door was open whenever the kids were in the basement. RP at 357. However, on cross-examination, the defendant admitted that on July 6, 2013, he was alone in the basement bathroom with S.J., and that the door was closed. RP at 390.

The defendant was convicted of two counts of Rape of a Child in the First Degree, and sentenced to 144 months to life. CP 96-110.

III. ARGUMENT

A. Admission of the forensic interview did not violate the defendant's right to confront witnesses.

The trial court's admission of S.J.'s video recorded forensic interview did not violate the defendant's right to confront witnesses because S.J. testified about the sexual assault at trial, and was fully available for cross-examination.

When admitting hearsay statements under RCW 9A.44.120 under circumstances where the child witness is available to testify at trial, the confrontation clause is satisfied when the child either: (1) testifies about the abuse, or (2) if the child recants or testifies that he or she does not remember the events described in the hearsay statement, the State must ask the child about the events and hearsay statements and the defendant must have an opportunity to cross-examine the child about the statements.

State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999), *cited in State v. Kilgore*, 107 Wn. App. 160, 26 P.3d 308 (2001). As used in RCW 9A.44.120(2)(a), the term "testifies" means that the child takes the stand and describes the acts of sexual contact alleged in the hearsay. *State v. Rohrich*, 132 Wn.2d 472, 475, 939 P.2d 697 (1997).

In the present case, the child *did* testify about the abuse and defense counsel *did* cross-examine the witness regarding her statements to Ms. Murstig. RP at 307-09. The State was not required to ask S.J. what she said to Ms. Murstig because the child did not recant or testify that she did not remember the events.

The defendant argues that because S.J. was not asked to adopt her statements to Ms. Murstig, she was not fully subject to cross-examination. However, this argument is not persuasive, particularly since defense counsel did in fact cross-examine S.J. regarding the statements she made to Ms. Murstig. RP at 307. Consequently, because S.J. was available at trial and subject to cross-examination, and *was* in fact fully cross-examined by defense counsel, the defendant's right to confrontation was not violated.

However, if the Court concludes instead that the trial court erred in admitting the statements made by S.J. to Ms. Murstig, the error was harmless. The admission of a hearsay statement in violation of the

confrontation clause is a classic trial error. *State v. Watt*, 160 Wn.2d 626, 633, 160 P.3d 640 (2007). It is well-established under federal and state law that a violation of the confrontation clause is subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

An error is harmless if "'it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Here, the jury's verdict was strongly supported by S.J.'s testimony at trial that the defendant touched the inside of her privates while swimming in her grandma's pool, about thirty times on the defendant's couch in the basement, and then again in her grandmother's bathroom on July 6, 2013. Moreover, S.J.'s statements during trial were consistent with the statements she made to her father, Brandon Jackson; her mother, Savannah Moore; her grandmother, Ms. Makeeff; and her cousins, Aaliyah Valdez and Luciana Valdez. Absent S.J.'s statements to Ms.

Murstig, it is evident beyond a reasonable doubt that any reasonable jury would have reached the verdicts arrived at in this case.

B. Counsel provided effective assistance.

To establish ineffective assistance of counsel, a defendant must prove that defense counsel's representation: (1) fell below an objective standard of reasonableness; and (2) defense counsel's deficient representation prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)), *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Contrary to the defendant's argument, defense counsel's representation was not deficient for failing to move for a mistrial because defense counsel conducted a full cross-examination of S.J., including questions regarding her statements to Ms. Murstig. Hence, defense counsel's representation was in no way deficient, and did not fall below an objective standard of reasonableness.

C. The conditions relating to the use of any device to access the internet should be stricken.

In light of the defendant's argument, the State agrees that the record lacks any support for an inference of any nexus between the offenses of which Mr. Bates was convicted and use of a computer or other

device to access the internet; therefore, the conditions relating to the use of any device to access the internet should be stricken.

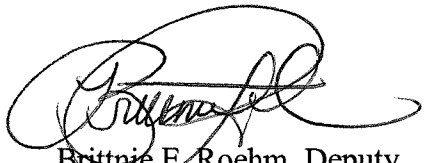
D. Remand is appropriate to enable inquiry into and consideration of the defendant's ability pay legal financial obligations.

In light of the defendant's argument, the State agrees that the matter should be remanded for a hearing to inquire into the defendant's ability to pay his legal financial obligations.

IV. CONCLUSION

This Court should affirm the defendant's convictions because the admission of the forensic interview statements did not violate the defendant's right to confront witnesses under the Sixth Amendment and because defense counsel provided effective assistance of counsel. The conditions relating to the use of any device to access the internet should be stricken. Additionally, remand is appropriate to enable inquiry into and consideration of the defendant's ability to pay his legal financial obligations.

RESPECTFULLY SUBMITTED this 24th day of November, 2015.



Brittnie E. Roehm, Deputy
Prosecuting Attorney
Bar No. 49588
Office ID 91004

ANDY MILLER
Prosecutor

Megan A. Whitmire, Deputy
Prosecuting Attorney
Bar No. 29933
Office ID 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Janet Gemberling, PS
P.O. Box 9166
Spokane, WA 99209

☒ E-mail service by agreement was made to the following parties:
admin@gemberlaw.com

Signed at Kennewick, Washington on November 24, 2015.

Courtney Alsbury
Appellate Secretary