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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COUNTY OF KING
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STATE OF WASHINGTON, Respondent,

v.

STEVEY A. DUNLAP, Appellant.

APPELLANT'S BRIEF

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STATUTES

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding that F.S. had no apparent motive to lie.
2. The trial court erred by finding that the statements were consistent.
3. The trial court erred in finding that the possibility that F.S.'s recollection was faulty was remote.
4. The trial court erred in finding that there was no reason to believe F.S. misrepresented Stevey's involvement.
5. The trial court erred by finding that F.S.'s out of court statements to Cherie Carter-Stuart were admissible under the child hearsay statute.
6. The trial court erred by finding that F.S.'s out of court statements to Kim Brune were admissible under the child hearsay statute.
7. The trial court erred by finding that F.S.'s out of court statements to Lynn Jorgenson were admissible under the child hearsay statute.
8. Without the improperly admitted evidence, which was outside the scope of the child hearsay exception, there was insufficient evidence to establish that the crimes occurred.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting evidence under the child hearsay exception where there was evidence that the mother had tainted the child's memory and statements, where the allegations were reported only after a significant delay, where only the mother heard the initial disclosures, and where there was reason to believe that the child might either have a faulty memory or might have misrepresented Stevey's actions?

III. STATEMENT OF THE CASE

Stevy Dunlap was 13 years old at the time of this trial. RP5 389. He was charged with sexual conduct with his 8 year old cousin F.S., a.k.a. "Alex." CP 8-9.

Stevy and Alex first met in the Summer of 2005. RP5 396. At the time, Stevey was 11 years old and Alex was 6 years old. RP5 389, RP2 41. Their families were close and, when Stevey moved to the area with his mother in November of 2005, Stevey and Alex saw a lot of each

other, especially at the home of Barbara Hudson,¹ who sometimes watched both boys. RP3 28, RP3 22.

Stevey and Alex had a lot in common. Both boys had just moved to the area, both were living with their grandmothers, and both were away from their fathers. They enjoyed playing cards together and both shared a love of professional wrestling and video games. RP5 397. Despite their age difference, they enjoyed each other's company and became friends.

An adult always supervised Stevey and Alex when they were together. Although the adult was not always in the room, they were never alone behind closed doors or out of hearing. The last time Stevey and Alex saw each other was during a family visit after Labor Day in 2006. RP5 415, 447.

On September 17, 2006, Alex's mom, Cherie Carter-Stuart, called the police and reported that Alex told her he had been "sodomized" by Stevey at Alex's father's house on his birthday. RP5 385-86. She also told the officer that Stevey used lotion and "numbing stuff" to put his finger in Alex's anus. RP5 384-85. Finally, Carter-Stuart said her "psychic powers" were telling her that Alex may have performed oral sex on Dunlap. RP5 386.

¹ Hudson, or "Gigi" as the family called her, is Alex's great-grandmother. RP2 86. She was also essentially Stevey's great-grandmother—his

According to Carter-Stuart's trial testimony, the actual exchange with Alex was that Alex came in and told her that "what happened to Carter" had also happened to him. RP3 150. When she said "Did Stevey kiss you?" Alex said "Yes, . . . He also put his dinky in my butt." RP3 150. Carter-Stuart did not remember telling the officer about the lotion or her "psychic powers." RP3 179-80. She testified that Alex never said any of that. RP3 179. She admitted that she was taking prescription drugs that affected her memory. RP4 218.

Alex testified at trial to three incidents. In the first allegation, Stevey "stuck his private in my butt hole" at Hudson's house in his bedroom when he was in kindergarten (2004)². RP2 139. Alex said the door to the room was open the whole time and Hudson was in the next room with her door open. RP2 171.

In the second allegation, at the end of his kindergarten year (2006), Stevey "stuck his pee pee in my butt hole" at Hudson's house. RP2 144. Again the door was open and Hudson was home. RP2 171, 147.

In the third allegation, around Christmas of his first-grade year (2006), he went over to Carol Taylor's house for a playdate with Stevey. RP2 149. Sometime during this visit, he was in Stevey's room when

grandmother was living with Hudson's son. RP3 6, 8.

² Alex's kindergarten year was 2004-5. RP2 193.

Stevey “stuck his pee pee in my butt hole.” RP2 152. Then Alex said he reciprocated, at Stevey’s request. RP2 154. According to Alex, there may also have been an incident where Stevey licked Alex on the bottom. RP2 158. The door to the room was open and Stevey’s grandfather, Kevin Carter, was next door. RP2 182.

All of the adults responsible for supervising Alex and Stevey testified at trial.³ None had seen anything unusual between the boys and, until his disclosure in September of 2006, Alex had said nothing about any abuse. RP3 186.

Stevey testified in his own defense. He categorically denied that any sexual interaction between him and Alex had ever occurred. RP5 398, 411, 439. Although Stevey did not know for sure why Alex would make up stories about him, he did know that Alex had been unhappy with what he perceived as special treatment Stevey got from Gigi, feeling that Stevey was not punished as much as he, Alex, was. RP5 413.

The court permitted the State to introduce evidence of three out-of-court interviews of Alex under the child hearsay rule: Alex’s statements to his mother, Alex’s statements to Lynn Jorgeson (Mary Bridge Victim

³ Jerry Stuart (Alex’s Dad), RP2, Latoya Taylor (Stevey’s Mom), RP3, Carol Taylor (Stevey’s Grandmother), RP3, Barbara Hudson (Gigi, Alex’s & Stevey’s Great-Grandmother), RP3, Cherie Stuart (Alex’s Mom), RP3, Kevin Carter (Stevey’s Grandfather, Alex’s Uncle), RP5.

Advocate), and Alex's interview with Kim Brune (Prosecutor's Child Interviewer). RP5 322-26, CP 12-14. The interview with Brune was recorded on DVD and the DVD was played for the court (but not transcribed). RP4. The Statements made to Jorgeson were also ruled admissible under the medical treatment or diagnosis exception to the hearsay rule, ER 803(a)(4). CP 13.

The case was heard in juvenile court by bench trial. Stevey was convicted on four counts of rape of a child in the first degree. CP 21-22. He was sentenced to 45 to 108 weeks. CP 23. The court subsequently entered findings and conclusions in support of the verdicts. Supp. CP. This appeal timely followed.

IV. ARGUMENT

ISSUE 1: DID THE TRIAL COURT ERR IN ADMITTING EVIDENCE UNDER THE CHILD HEARSAY EXCEPTION WHERE THERE WAS EVIDENCE THAT THE MOTHER HAD TAINTED THE CHILD'S MEMORY AND STATEMENTS, WHERE THE ALLEGATIONS WERE MADE ONLY AFTER A SIGNIFICANT DELAY, WHERE ONLY THE MOTHER HEARD THE INITIAL DISCLOSURES, AND WHERE THERE WAS REASON TO BELIEVE THAT THE CHILD MIGHT EITHER HAVE A FAULTY MEMORY OR MIGHT HAVE MISREPRESENTED STEVEY'S ACTIONS?

The trial court abused its discretion in admitting Alex's out-of-court statements under the child hearsay exception. RP5 322-26. Under this exception, the court permitted the mother, Lynn Jorgeson (Mary

Bridge Child Advocate),⁴ and Kim Brune (Prosecutor's Child Interviewer) to testify to Alex's out-of-court statements. Further, the court permitted the State to play a DVD recording of Brune's interview of Alex. The time, content, and circumstances of the statements did not establish sufficient indicia of their reliability and should not have been admissible. 9A.44.120(1). The court's findings and conclusions reflect that the judge relied on the impermissible hearsay evidence, and the DVD in particular in support of the verdicts. Supp. CP, pp. 4-5.

The relevant factors for the court to consider in determining the reliability of child hearsay statements under RCW 9A.44.120 were first set out in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), and reestablished by subsequent cases:

(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing and relationship between the declarant and the witness . . . (citations omitted)

and

(1) whether the statement contained assertions about past fact—if not, it carries on its face a warning to the jury not to give the statement undue weight;

⁴ The statements made to Lynn Jorgeson were ruled admissible under the medical purposes exception. RP5 328.

(2) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement;

(3) how likely it is that the statement was founded on faulty recollection;

(4) are the circumstances surrounding the making of the statement such that there is no reason to suppose that the declarant misrepresented the defendant's involvement, for example, was the statement spontaneous or against the declarant's penal interest? (citations omitted)

State v. Leavitt, 111 Wn.2d 66, 73-74, 758 P.2d 982 (1988).

In this case, there are many indications that Alex was coached and that he had fabricated or exaggerated what had happened to him. Alex made the first allegation to his mother. Alex's mother showed her faulty memory and tendency to exaggerate on the stand and in her statements to police. There is no way to know what Carter-Stuart said to Alex, but it is clear from Alex's use of adult terminology and his association of his allegations with what he had been told about allegations made by his best friend, that Alex's statements were tainted and therefore did not have sufficient indicia of reliability. Therefore, in view of the evidence brought forth, it was "likely that the statement[s] [were] founded on faulty recollection," and there was "reason to suppose that the declarant misrepresented the defendant's involvement."

Alex was going through a very stressful and turbulent time in his life at the time of the disclosure. His parents were going through a very

contentious divorce and custody battle. RP2 192. He had changed school and home three times in the two years prior. RP3 139-40. And his father was deployed to Iraq twice in the two years before. RP2 194-95.

To compound the stress in Alex's live, Alex's mother, Cherie Carter-Stuart, was also troubled by mental problems. Carter-Stuart testified that she was on several medications, which affected her mood and memory. RP3 184-85, RP4 218. The officer who interviewed Carter-Stuart directly after the initial disclosure reported that she seemed "unstable." RP5 382.

Carter-Stuart showed herself inclined to self-aggrandize and embellish in her statements to police. Carter-Stuart told the officer that Stevey "used lotion and numbing stuff to put his finger in Alex's anus." RP3 179, RP5 384-85. She said the second incident of "rape" took place at Alex's father's house. RP3 179, RP5 385. She also said that her "psychic powers" told her that Alex performed oral sex on Stevey. RP5 386, RP5 386. At trial, Carter-Stuart did not remember making any of these statements and she confirmed that Alex had never said any of that. RP3 179-80. Carter-Stuart admitted that she was taking medication at the time that has affected her memory. RP4 218. Carter-Stuart's report to the officer of what Alex told her did not conform to Alex's own statements,

nor did it even conform to Carter-Stuart's testimony about the truth of what she heard.

Alex's terminology in explaining what had happened to him indicated that he had been discussing it with an adult. Alex's description of what happened was that he was "raped". RP4 242-43. According to Lynn Jorgeson, the Mary Bridge Child Advocate, when the child uses "lingo" such as the word "raped," it indicates discussions with adults. RP4 267-68. Alex testified that his mom told him what "rape" means. RP2 173.

Further, Alex was concerned he might be "gay" or have a "disease." RP4 246. Again, these are concepts not normally in the grasp of an 8-year-old and indicate that someone was putting these ideas into Alex's head.

In addition, his mother had told Alex that Stevey had molested his best friend, Carter. RP3 159. After telling Jorgeson that he was "raped", Alex said, "He did it to my friend Carter at the birthday party." RP4 245. It was only after Alex's mother told him about Carter that Alex made any allegations against Stevey. RP3 159, 149. In making that first allegation, Carter-Stuart reported that Alex's statement was that what she had told him happened to his friend Carter had also happened to him. RP3 150.

In Alex's disclosures to Jorgeson and Carter-Stuart, he did not disclose any incidents of oral sex. It was only after Carter-Stuart's reports that her "psychic powers" told her Alex had performed oral sex on Stevey, that Alex made any allegations of that kind. Alex's only statement that he had performed oral sex on Stevey and visa versa was made during the interview at the prosecutor's office. See DVD Exhibit, and Supp. CP p. 5. Alex denied these incidents in his testimony on the stand. RP2 148, 155.

In this context, with coaching by someone, probably his mother, evident, all of Alex's statements become tainted. Where "there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 827, 111 L.Ed.2d 638, 110 S.Ct. 3139 (1990). Other courts have also held that child hearsay statements made after other adults had questioned the child had a low level of reliability. See *Webb v. Lewis*, 44 F.3d 1387 (9th Cir. 1994); *Swan v. Peterson*, 6 F.3d 1373 (9th Cir. 1993).

In short, it is very clear that Carter-Stuart's discussions with Alex tainted his memory and ability to accurately report what happened to him. As such, the trial court erred in finding that Alex's hearsay statements were reliable and admissible. Further, since the trial court relied on the

DVD of the prosecution's interview,⁵ which should not have been admitted, the convictions must be reversed. In the alternative, if the court finds that the other evidence supports counts I through III, count IV must still be reversed because the only evidence of oral sex was introduced through the DVD. See Supp. CP p. 5.

V. CONCLUSION

For the reasons stated above, the appellant asks that this court find that the trial court erred in admitting the child hearsay evidence and reverse his convictions.

DATED: January 25, 2008

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CERTIFICATE OF SERVICE

I certify that on January 25, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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⁵ See Supp. CP pp. 4-5.

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