

NO. 37508-7-II

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

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2009 JAN 21 PM 4:53

STATE OF WASHINGTON,

Respondent

v.

STEVEN BEADLE,

Appellant.

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

The Honorable Richard Brosley, Judge
The Honorable Nelson Hunt, Judge

09 JAN 23 AM 11:39
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COURT OF APPEALS
DIVISION II
BY STATE OF WASHINGTON
DEPUTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE STATE FAILS TO SHOW THE RECORD SUPPORTS THE TRIAL COURT'S CONCLUSION THAT B.A. WAS UNAVAILABLE TO TESTIFY AT TRIAL.

The record is clear and the State agrees that at the November 16, 2007 hearing, despite B.A.'s initial tantrum and refusal to come into the courtroom, B.A. changed her mind and was "willing to come into the courtroom." 1RP 47 Brief of Respondent (BOR) at 6-7. Moreover, the State does not dispute that in the over 2 months from the date of that hearing until the trial started the record does not show any further attempt by the prosecutor to procure B.A.'s testimony.

The prosecution must at a minimum make a good faith effort to obtain a witnesses presence at trial before the court properly finds a witness unavailable. See, Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968) ("witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial"). The State claims the "prosecutor did everything he could to get B.A. to come into the courtroom. . . ." BOR at 6. That statement appears to be true for the November 16, 2007 hearing and it appears the prosecutor was successful. Unfortunately, the judge did not want to put B.A. on the stand then because he had other matters to take of. Under that circumstance

the prosecutor had the obligation to make a good-faith effort to procure B.A.'s presence at any of the other pretrial hearings or trial. The record does not show the prosecutor made any efforts to do so, much less good-faith efforts.

Additionally, the State contends the court had no obligation to hold a hearing to attempt to determine why B.A. refused to initially testify at the November 16, 2007 hearing because to make that determination would require the ability to read the child's mind. BOR at 7. The State's rhetoric does not mask the real issue --- whether based on this record the court properly found B.A. unavailable.

At the November 16, 2007 hearing the court was told B.A. was refusing to come into the courtroom and it could hear her cries and screams. Later, during that same hearing, the court was told by the prosecutor B.A. changed her mind and was now willing to testify. Because of the court's calendar it refused to take her testimony. Based on these facts the court had the obligation to hold a meaningful hearing to determine if B.A. was able to testify at trial. The flaw in the State's contention is the flaw in the court's findings, without such a hearing there is no way of knowing if B.A. could have testified or the reasons underlying her initial refusal. B.A.'s willingness to testify after her initial unwillingness cried out for an

explanation. A meaningful hearing, like the one envisioned by this Court in State v. Hopkins, 137 Wn. App. 441, 154 P.3d 250 (2007), would have provided it. In any event, it would have allowed the court to make a reasoned decision on B.A.'s availability instead of a decision based on conflicting information.

Moreover, the State's arguments rest on the assumption B.A. was traumatized by the courtroom setting and therefore would have been unable verbalize what happened making her unavailable as a witness. See, BOR at 4 and 7 (citing State v. Justiniano, 48 Wn. App. 572, 577, 740 P.2d 872 (1987)). Ironically, in Justiniano, which the State relies on almost exclusively to support its arguments, the child testified at the pretrial hearing and it was based on that testimony that the court found her incompetent and therefore unavailable. Unlike in this case, where B.A. did not testify at any pretrial hearing and there was no evidence taken from any witnesses about the reasons or even possible reasons for her initial refusal to testify, it is an unsupported leap of logic to suggest she was so traumatized by the courtroom setting she could not verbalize what happened.

The State further contends the court's conclusion, that the evidence does not suggest that B.A. may be able to testify by the use of closed-circuit

television, is supported based on B.A.'s initial refusal to testify at the November 16, 2007 hearing. BOR at 7. In State v. Smith, 148 Wn.2d 122, 59 P.3d 74 (2002), the Court ruled that before determining whether a child witness is unavailable because testifying in a courtroom setting is too traumatic, good faith requires the court consider what options are available to secure the testimony, including the option of testimony by closed-circuit television. Id. at 137.

Assuming the evidence supports the State's contention that B.A. was too traumatized to testify in court given her initial refusal and accompanying behavior, it does not support the conclusion she could not have testified by closed-circuit television or some other alternative way. The reason the court's conclusion is unsupported is because there was never any attempt to determine why B.A. initially refused to testify and without that determination it is impossible to make that conclusion.

For example, it is just as likely as not that B.A. initially refused to testify not because of the "courtroom setting" but because facing the man she accused (whether falsely or not) of molesting her was too traumatic. That trauma, however, may have been alleviated if she knew she could testify outside his presence via television. And, if this example is subject

to the charge it is based on nothing more than speculation, then so too is the court's conclusion.

On these facts the court erroneously determined B.A. was unavailable. This Court should hold the trial court erred in finding B.A. unavailable and reverse Beadle's conviction.

2. UNDER THIS COURT'S DECISION IN HOPKINS, THE WASHINGTON SUPREME COURT'S DECISION IN SHAFER AND THE UNITED STATES SUPREME COURT'S DECISION IN CRAWFORD, B.A.'S STATEMENTS TO JENSEN AND BUSTER WERE TESTIMONIAL AND THE ADMISSION OF THOSE STATEMENTS VIOLATED BEADLE'S RIGHT TO CONFRONTATION AND WERE NOT HARMLESS.

Beadle argues his constitutional right to confrontation was violated by the admission of B.A. statements to Jensen and Detective Buster. The State responds that under the holding in State v. Shafer, 156 Wn.2d 381, 128 P.2d 87 (2006), whether a statement is testimonial is determined based on the "declarant's intentions." BOR at 15. The State recognizes its argument and reading of Shafer is inconsistent with this Court's holding in Hopkins, supra, and implies this Court should reverse its Hopkins decision. See, BOR at 15 (the Hopkins court "departed from this objective standard [the declarant's intentions] and employed reasoning that does not square with Shafer."); see also BOR at 17 ("Indeed the decisions in Hopkins

and Shafer cannot be reconciled.”).¹ The State's arguments are contrary to recent confrontation clause jurisprudence, which supports this Court's holding in Hopkins, and on a misreading of Shafer.

As pointed out in the opening brief, the child's statements in Shafer were made to her mother and a family friend. Brief of Appellant at 25-26. Because statements made to family, friends or nongovernmental agents are generally *not* testimonial unless the person making the statement reasonable believes the statement will be later used in court, the issue in Shafer was whether a reasonable person in the child's situation would have expected her statements to be used at trial. Shafer, 156 Wn.2d at 389.

However, the Supreme Court has determined statements in response to questions by police or government agents investigating an alleged crime are testimonial by their nature. "Whatever else the term covers" (referring to the term testimonial) "it applies at a minimum to prior testimony . . . and to police interrogations." Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This Court noted in Hopkins that the Shafer Court cited Crawford for the proposition that "Of the testimonial statements identified as such in Crawford, the common thread binding them together was some degree of involvement by a government

¹ Although the State claims whether a statement is testimonial depends on the declarant's intent, it inexplicably terms it as an "objective standard."

official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court." Hopkins, 137 Wn. 445 (citing Shafer, 156 Wn.2d at 389). The State's argument that this Court's decision in Hopkins has somehow been overruled or rendered inapplicable by Shafer is based on a misreading of the law and is simply not persuasive.

B.A.'s statements to Jensen and Detective Buster were as testimonial as the child's statements to the social worker in Hopkins. Here, Jensen too was acting in a government capacity. She was asked to assist Buster when he interviewed B.A. and Jensen testified the interview was conducted *solely* for law enforcement purposes, which the State does not dispute. Thus, like the statements made to the social worker in Hopkins, the statements made simultaneously to Jensen and Buster were also testimonial and inadmissible.

The State argues that even if the admission of the statements to Jensen and Buster violated Beadle's right to confrontation, the error was harmless. BOR at 22. The State's argument, however, rests on its mistaken belief that Beadle bears the burden to show harm. BOR at 22 ("Here, Beadle has failed to show the even if the trial court had denied admission of B.A.'s statements to the CPS worker and Detective Buster, the outcome of the trial would have been different."). A constitutional error is presumed prejudicial and it is the State's burden to prove beyond

a reasonable doubt the 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).

The State contends the error was not harmless because B.A. repeated her story to others, made drawings depicting a man's penis and was traumatized at the November 16, 2007 pretrial hearing. BOR at 22. Those facts do not meet the State's burden to show the error was harmless. B.A.'s hearsay statements were vague, her drawings do not lead to the logical conclusion Beadle forced her to touch his penis and the evidence does not show B.A. was "traumatized" at the pretrial hearing because she was molested by Beadle.

This case came down to credibility. Beadle, however, could not use the most effective tool in his legal arsenal to test B.A.'s credibility --- the crucible of cross-examination. Crawford, 541 U.S. at 61. The jury likely decided the credibility contest in favor of B.A. because she repeated her accusations to a police officer and Jensen, persons of official authority, unlike family members and her counselor. Thus, their testimony could have contributed to the verdict. For this reason as well as the reasons in the opening brief, the State has failed to prove the admission of the testimony was not harmless.

3. THE TESTIMONY DESCRIBING B.A.'S BEHAVIOR AT THE PRETRIAL HEARING WAS IRRELEVANT, UNFAIRLY PREJUDICIAL AND NOT HARMLESS.

The State does not argue that testimony about B.A.'s initial refusal to testify at the November 16, 2007 hearing was relevant. The State does not make that argument because there is no legal or factual theory that would render the testimony relevant. Instead, the State justifies the court's ruling by arguing the court limited the scope the testimony by excluding any opinion testimony that B.A.'s behavior was the result of trauma. BOR at 23-24. The State contends, therefore, the testimony was not unfairly prejudicial and supports that contention by pointing out it could not find any Washington cases addressing the "precise issue" and by chiding appellant's counsel for citing a Florida case. BOR at 24.

First, ER 402 prohibits the admission of irrelevant evidence. "Evidence which is not relevant is not admissible." ER 402. It is only when the evidence has some relevancy that the court has the discretion to exclude the evidence if the relevancy is outweighed by its unfair prejudice. ER 403. The State makes no argument whatsoever the evidence had any relevancy. At trial the State argued it was relevant to explain why B.A. was not testifying, but as pointed in the opening brief, without any accompanying reason to explain her absence, her absence was not relevant

to any issue at trial. Because the evidence was not relevant, it should have been excluded.

Second, even if the evidence had some relevancy it was unfairly prejudicial, despite the trial court's ruling the State could not offer an opinion B.A. was too traumatized to testify. It is not surprising there are no Washington cases on point. It is doubtful any courts have admitted this type of evidence because of its unfair prejudicial nature thus the issue has likely never been litigated.

When the issue was litigated in a similar circumstance in Florida, the court held the evidence was unfairly prejudicial because it allowed the jury to improperly infer from the testimony the child's unavailability was the result of being required to testify about events that were traumatic in her life in front of a person whom she is still extremely fearful and who was responsible for the trauma. Cunningham v. State, 801 So.2d 244, 247 (Fla.App. 2001). Cunningham is not precedent but the court's reasoning is sound and persuasive. Indeed, in its earlier argument that any violation of Beadle's right to confrontation was harmless, the State claims B.A.'s "traumatized behavior at the child hearsay hearing" is a factor. BOR at 22. The State makes the same impermissible inference in support of its harmless error argument condemned by the Cunningham court and that the

jury made here. It is the only logical inference that can be made, regardless of whether accompanied by any opinion B.A.'s behavior was the result of the trauma of facing the person who molested her, which is why the State fought to admit the evidence

The real question is whether the admission of the evidence was harmless. The State repeats the argument in made that the right to confrontation error was harmless. BOR at 24. That argument, however, does not address the critical issue in this case ---credibility. It is likely the jurors decided B.A. was the more credible because they inferred she could not testify in front of Beadle because he traumatized her and she was afraid of him. Once the jury made that inference it would have concluded there was not choice but to convict.

The error also improperly inflamed the passions and sympathy of the jury. Jurors likely sympathized with B.A. because she exhibited an strong emotional reaction when asked to testify against Beadle and based their decision on that sympathy instead of a reasoned analysis of the facts. The error improperly inflamed the passions and sympathy of the jury and those reactions informed its decision.

This case rested on the jury's credibility determination. Because the irrelevant evidence allowed the jury to improperly infer B.A. was

traumatized and afraid of Beadle and had the effect of inflaming juror's sympathy and passions, the error was not harmless.

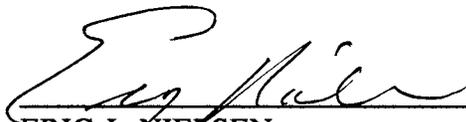
B. CONCLUSION

For the above reasons and the reasons in the opening brief, Beadle's conviction should be reversed.

DATED this 21 day of January, 2009.

Respectfully submitted,

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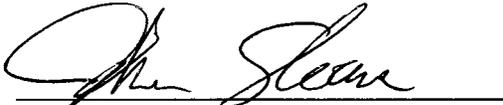
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Containing a copy of the reply brief of appellant, re Steven Beadle
Cause No. 37508-7-II, in the Court of Appeals, Division II, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



John Sloane
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