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STATE OF WASHINGTON
BY REBECCA WOLD BOUCHEY

NO. 41517-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT L. CREWS, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in suppressing relevant evidence that the child had precocious sexual knowledge of the act she described from a source other than the defendant.
2. The trial court erred by finding that evidence showing the child had prior knowledge of oral sex from a source other than the defendant was not relevant.
3. Within a reasonable probability, the trial court's error affected the jury's verdict.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WHETHER THE TRIAL COURT ERRED BY SUPPRESSING EVIDENCE THAT M.P.W. HAD CREATED A DRAWING DEPICTING KNOWLEDGE OF ORAL SEX PRIOR TO MEETING CREWS, DEPRIVING CREWS OF HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE TO THE JURY THAT WOULD REBUT THE ASSUMPTION THAT 9 YEAR OLD M.P.W. MUST HAVE LEARNED ABOUT IT FROM HIM DURING THE ALLEGED ACT.

III. STATEMENT OF THE CASE

On September 14, 2009, CPS was called to the elementary school of M.P.W., to investigate suspected physical abuse by her mother. RP 144. M.P.W. was then nine years old. RP 112. During the interview by

the social worker, M.P.W. confirmed that her mother had hit her and also accused her mother's ex-boyfriend, Robert Crews, of licking her privates. RP 147, 107, P Exh. 2 (Supp. Desig.). After prompting in the second interview, M.P.W. repeated the allegation. RP 160, P Exh. 5 (Supp. Desig.). Crews was charged with first degree rape of a child. CP 2.

Prior to trial, the defense sought to admit a drawing and journal entries from school that were made by the child, which depicted and referred to the act of oral sex. RP 65-70, 10/6/10 D Exh. 1 (Supp. Desig.). The school had specifically noted the sexual nature of the child's work. 10/6/10 D Exh. 1 (Supp. Desig.). The drawing and entries were made before the child met Crews.¹ RP 68, 118. The trial court excluded this evidence from trial, ruling that the child's prior knowledge of oral sex was not particularly "precocious" and was not relevant to the trial. RP 70.

After denials and promptings, M.P.W., testified that Crews had touched her "private" with his tongue in her bedroom in the nighttime. RP 88. She said she told her mother the next day and did not see Crews again. RP 90-91. M.P.W. said it happened only once, then she said she was sure it happened twice. RP 92, 96. She denied that Crews had lived with them, but admitted that she had been jealous of Crews and the attention her

¹ The earliest entry being January 26, 2009. RP 68. The mother testified that she met Crews in March, 2009, and he moved in in April. RP 118.

mother paid to him and that she wanted him to be kicked out. RP 99-100. She testified that she did not like Crews and wanted him to get into trouble. RP 102-103. Her mother made Crews leave after her allegation. RP 91.

Roxanne W., the mother, testified that Crews had been her boyfriend and moved in with her and her daughter in April of 2009. RP 118. According to Ms. W., her daughter told her on the last day of school in June 2009 that Crews put his mouth on her privates. RP 120-21. M.P.W. was not specific about when it happened, only saying it was “a while before.” RP 121. Ms. W said that upon being told this by her daughter, she immediately asked Crews to move out of the house, but did not report anything to the authorities. RP 122.

Other than the testimony of the child and her mother, the only other evidence offered were the video recordings of the child’s two interviews. There was no physical evidence.

Crews was convicted of Rape of a Child in the first degree. CP 22.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY SUPPRESSING EVIDENCE THAT M.P.W. HAD CREATED A DRAWING DEPICTING KNOWLEDGE OF ORAL SEX PRIOR TO MEETING CREWS, DEPRIVING CREWS OF HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE TO THE JURY THAT WOULD REBUT THE

ASSUMPTION THAT 9 YEAR OLD M.P.W. MUST HAVE LEARNED ABOUT IT FROM HIM DURING THE ALLEGED ACT.

Criminal defendants are guaranteed the right to confront and cross-examine adverse witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22. The cross-examiner has traditionally been allowed to mount a general attack on 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).

In addition, 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). Washington courts have also recognized that evidence that the child had another source of that 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 child’s drawings and journal entries from school depicting the act of oral sex—were offered as evidence relevant to the central issue of the child’s credibility. RP 65-70, 10/6/10 D Ex. 1 (Supp. Desig.). The trial court erroneously excluded this evidence, ruling that the child’s prior knowledge of oral sex was not particularly “precocious” and was not relevant to the trial. RP 70.

The trial court erred in excluding the relevant evidence of the child’s prior knowledge of oral sex because this proposed evidence was relevant to rebut an assumption by the jury that M.P.W. came by her precocious knowledge of this act through the defendant. Evidence that the child had knowledge of oral 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.

Because the only evidence of the act in this case came from the child's statements, her credibility was the central issue. In the absence of evidence that the child learned about oral sex 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.

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 nonconstitutional 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).

In this case, the trial court's error likely compromised the verdict itself because this was a case with no physical evidence, conflicting statements from the child, and only vague allegations. The central issue in the case was therefore the credibility of the child's allegation against Crews. The evidence that the child had prior knowledge of the sexual act she described 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 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 Crews' conviction.

V. CONCLUSION

The trial court erred by excluding evidence that the child's precocious sexual knowledge of oral sex came from a source other than the defendant. This evidence was relevant to the jury's determination of the credibility of the child's allegations against the defendant. Therefore, Crews' conviction must be reversed.

DATED: July 5, 2011

Rebecca W. Bouche

Rebecca Wold Bouchey #26081
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on July 5, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Appellant:
Robert L. Crews
DOC# 716505
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

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Rebecca W. Bouchey

Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant