

No. 48181-2-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Latrina Deshell McNair,

Appellant.

Corrected Brief of Appellant

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1. Introduction

Latrina McNair was convicted of Assault of a Child in the Third Degree, on the basis of out-of-court statements by the victim, who was never subject to cross-examination, and an alleged confession that was not corroborated by any other evidence. Additionally, the State failed to prove the absence of lawful parental discipline. This Court should reverse the conviction and dismiss the charge with prejudice.

2. Assignments of Error

Assignments of Error

1. The trial court erred in admitting hearsay statements of Z.M. when Z.M. was unable to testify and was never subject to cross-examination.
2. The trial court erred in denying McNair's motion for a directed verdict at the close of the State's evidence.

Issues Pertaining to Assignments of Error

1. Whether McNair's constitutional right to confront the witnesses against her was violated by the admission of hearsay statements by Z.M. when Z.M. was unable to testify and was never subject to cross-examination (assignment of error #1).
2. Whether there was insufficient evidence to establish that McNair struck Z.M. with a belt or other instrument (assignments of error #1 and 2).
3. Whether there was insufficient evidence to establish that McNair caused bodily harm to Z.M. (assignments of error #1 and 2).

4. Whether there was insufficient evidence to establish the absence of lawful parental discipline under RCW 9A.16.100 (assignments of error #1 and 2).

3. Statement of the Case

Latrina McNair is the only mother that her niece, Z.M., and nephew, O.M., have ever known. RP 81, 280-81. The children were abandoned at birth by McNair's sister. *Id.* The children's grandmother has formal custody, but McNair stands in the role of mother. RP 226, 318. At the time of the incident, Z.M. was seven years old and O.M. was nine.

On or about July 28, 2014, a neighbor observed bruises on Z.M.'s arms and called Child Protective Services one or two days later. RP 41. McNair allegedly told the CPS social worker who came to the apartment that she had "whoop[ed] [Z.M.'s] ass" for getting in trouble. RP 94. However, McNair told the officers who arrived on the scene, consistent with her later testimony at trial, that during the course of normal discipline, McNair was going to spank Z.M. on the buttocks with a belt, but Z.M. ran away from the wall where she had "assume[d] the position" for a spanking and hurt herself while running around the apartment, screaming and crashing into walls and furniture. RP 112, 137, 304-08.

At trial, multiple State witnesses testified that Z.M. had told them during the course of formal interviews that McNair caused Z.M.'s injuries. RP 97, 111, 162, 194. Z.M. was called as a witness, but was overcome with emotion on the stand and was unable to identify McNair or provide

any other substantive testimony. RP 47-57. Z.M. was dismissed without cross-examination. RP 57.

O.M. testified that Z.M. had gotten in trouble for mistreating her sisters two days before the police came. RP 147-48. According to O.M., who was in one of the bedrooms at the time, McNair called Z.M. into the living room for a spanking. RP 148. He believed that McNair spanked Z.M. with a belt because he heard Z.M. screaming and crying. RP 149. O.M. saw Z.M. running around the apartment to avoid being spanked. RP 149-50. After the incident, O.M. noticed the bruises on Z.M. RP 149. O.M. never saw McNair strike Z.M. with a belt. RP 154.

McNair explained the method of parental discipline in her family. RP 290-92. The children's grandmother agreed with and participated in this discipline. RP 235. The children received rewards for good behavior and timeouts or lost privileges for bad behavior. RP 289-91. For extreme situations, such as stealing, hurting another, or lying to hurt another, the child would receive two warnings and after the third would be subject to spanking. RP 291-93.

On the occasion described by O.M., Z.M. had reached her third strike. RP 299-302. When the time came for the spanking, Z.M. stood against the bedroom wall with both hands on the wall. RP 305. Before the first swat, Z.M. moved off the wall. *Id.* When McNair told Z.M. to get back on the wall, Z.M. had some kind of breakdown and started running and screaming through the apartment, throwing herself into things. RP

305-08. Z.M. eventually calmed down. RP 309. McNair never spanked or hit Z.M. RP 310.

The trial court instructed the jury, “A person commits the crime of assault in the third degree when he or she, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” CP 48. The court also instructed,

It is a defense to a charge of assault of a child in the third degree that the force used was lawful as defined in this instruction.

The physical discipline of a child is lawful when it is reasonable and moderate, and is inflicted by a person authorized in advance by the child’s parent or guardian to use such force for purposes of restraining or correcting the child.

You must determine whether the force used, when viewed objectively, was reasonable and moderate.

You may, but are not required to, infer that it is unreasonable to do the following acts to correct or restrain a child: throwing, kicking, burning, or cutting a child, striking a child with a closed fist, shaking a child under age three, interfering with a child’s breathing, threatening a child with a deadly weapon, doing any act that is likely to cause, and that does cause, bodily harm greater than transient pain or minor temporary marks. You shall consider the age, size, and condition of the child, and the location of the injury, when determining whether the bodily harm is reasonable or moderate. This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.

The State bears the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the

absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 53. The jury returned a guilty verdict. CP 56. McNair appealed. CP 82.

4. Argument

4.1 Admission of hearsay statements by Z.M. violated the Confrontation Clause when Z.M. was unable to testify and was not subject to cross-examination.

The Sixth Amendment affirmatively grants and strictly protects certain procedural rights accorded a person accused of a crime, including the right to an attorney, the right to trial by jury, and the right to confront one's accusers. *Crawford v. Washington*, 541 U.S. 36, 60-61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 68.

The Confrontation Clause applies to out-of-court statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* at 51-52. Where the declarant is unavailable for cross-examination at trial, there must have been a prior opportunity for cross-examination. *Id.* at 54-56. Satisfying the hearsay exceptions in the evidence rules is not enough to render the statement admissible; the defendant must have the opportunity to cross-examine any witness who bears testimony against her, whether in court or out. *See Id.* at 68. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy

constitutional demands is the one the Constitution actually prescribes: confrontation.” *Id.* at 68-69.

Multiple State witnesses testified that Z.M. said that McNair had caused her injuries. RP 97 (CPS social worker), 111 (police officer), 162 (child forensic investigator with prosecutor’s office (CP 156-57)), 194 (pediatric nurse-practitioner hired by CPS (193)). These were testimonial statements triggering McNair’s rights under the Confrontation Clause. Z.M. was called as a witness by the State, but was too emotional to offer any substantive testimony. RP 47-57. Due to her inability to testify, Z.M. was dismissed. RP 57. McNair never had an opportunity to cross-examine Z.M. regarding these out-of-court statements. *See* RP 47-57.

Because the Confrontation Clause absolutely requires the opportunity for cross-examination, Z.M.’s out-of-court statements were inadmissible. This Court should reverse the conviction obtained on the basis of this inadmissible testimony.

4.2 Without Z.M.’s hearsay statements, there is no evidence to corroborate McNair’s alleged confession to the *corpus delicti* of striking Z.M. with a belt.

In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Aten*, 130 Wn.2d 640, 666-67, 927 P.2d 210 (1996). If the evidence is insufficient, the

conviction must be reversed and the case dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Washington follows the *corpus delicti* rule: confessions or admissions of a person charged with a crime are not sufficient, standing alone, to prove the fact of a criminal act; it must be corroborated by other evidence. *Aten*, 130 Wn.2d at 655-56. “The rule arose from a judicial distrust of confessions, coupled with the view that a confession admitted at trial would probably be accepted uncritically by a jury, thus making it extremely difficult for a defendant to challenge.” *Id.* at 656-57. Corroborating evidence “must be consistent with guilt and inconsistent with an hypothesis of innocence.” *Id.* at 660.

In assessing whether there is sufficient evidence of the *corpus delicti*, independent of a defendant’s statements, this Court assumes the truth of the State’s evidence and all reasonable inferences from it in a light most favorable to the State. *Id.* at 658. “The final test is whether the facts found and the reasonable inferences from them have proved the nonexistence of any reasonable hypothesis of innocence.” *Id.* at 660.

Once Z.M.’s out-of-court statements are excluded, the State’s evidence that McNair ever struck Z.M. causing bodily injury disappears. The centerpiece of the State’s case is McNair’s alleged statement to the CPS social worker that she had “whoop[ed] [Z.M.’s] ass” for getting in trouble. RP 94. However, this alleged admission is insufficient as a matter of law to establish the elements of the crime, without other corroborating evidence that would rule out any reasonable hypothesis of innocence.

The State’s “corroborating evidence” does not demonstrate that McNair ever struck Z.M. with a belt or other instrument (a required element of third degree assault) and does not rule out McNair’s version of events, in which she is innocent of striking Z.M. or causing bodily harm. McNair testified that she was following a course of family discipline—which on its face was objectively reasonable¹—but before she could spank Z.M. on the buttocks, Z.M. had a breakdown and ran around uncontrollably, screaming and throwing herself into walls and furniture. RP 304-08. At least some of the bruises were caused directly by Z.M.’s outburst, and other injuries were playground injuries or caused by Z.M.’s friend. RP 246-49, 327-29. This is the same story McNair told to the police officers who investigated the incident. RP 112-13, 137, 328.

O.M.’s testimony, rather than corroborating the alleged admission, is consistent with McNair’s version of events. O.M. testified that he heard Z.M. screaming and running at the time of the alleged “whooping,” but

¹ Through RCW 9A.16.100, the legislature has specifically exempted from the crime of assault of a child the use of reasonable and moderate physical discipline by a parent for the purpose of correcting a child. *See In re Dependency of H.S.*, 188 Wn. App. 654, 664, 356 P.3d 202 (2015).

A parent has a right to use reasonable and timely punishment to discipline a minor child within the bounds of moderation and for the best interest of the child. The parent may decide what is required and the means to impose appropriate control. For this purpose, a parent may inflict reasonable corporal punishment. *State v. Singleton*, 41 Wn. App. 721, 723, 705 P.2d 825 (1985). The course of discipline described in McNair’s testimony was objectively reasonable under this standard.

O.M. did not see McNair strike Z.M. with a belt or any other instrument. He heard Z.M.'s screaming, but did not testify that he heard any sounds of striking. O.M.'s testimony does not corroborate the alleged confession and does not rule out McNair's version of events. In fact, it is entirely consistent with McNair's story.

The State has no other evidence to corroborate the allegation that McNair struck Z.M. with a belt or other instrument. The State did not produce the belt or other instrument that is alleged to have been used. Not a single witness has personal knowledge of McNair striking Z.M. with a belt or anything else. The State's nurse practitioner stated that the bruises were consistent with a whooping, but she could not rule out other causes. Her testimony does not rule out McNair's innocence because she cannot identify the assailant. The State cannot rule out McNair's version of events, in which she is innocent of striking Z.M. or causing bodily harm. Without corroborating evidence, McNair's alleged admission is insufficient as a matter of law to prove the elements of the crime. This Court should reverse.

5. Conclusion

Admission of Z.M.'s out-of-court statements that McNair caused her injuries violated McNair's right to confront the witnesses against her because McNair had no opportunity to cross-examine Z.M. This alone requires reversal of the conviction. Without Z.M.'s statements, there is

insufficient evidence of the elements of the crime. This Court should reverse the conviction and dismiss the case with prejudice.

Respectfully submitted this 11th day of April, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on April 11, 2016, I caused the original of the foregoing document, and a copy thereof, to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 11th day of April, 2016.

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