

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 v. )  
 )  
 STEVEN BEADLE, )  
 )  
 Appellant. )

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84204-3  
 No. 37508-7-II

STATE'S  
 SUPPLEMENTAL  
 BRIEFING

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 STATE OF WASHINGTON  
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 COURT OF APPEALS  
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MICHAEL GOLDEN, Lewis County Prosecuting Attorney, by and through his deputy prosecuting attorney Lori Smith, as attorney for Respondent State of Washington, files this supplemental brief as requested by this Court.

This Court asked the parties to file supplemental briefing discussing State v. Smith, 148 Wn.2d 122, 59 P.3d 74 (2002) and its possible application to this case, including addressing which party has the burden to raise and to demand fuller exploration of the alternative of having the victim testify via closed circuit television, as set out in RCW 9A.44.150.

As to whose burden it is to demand or explore whether a child witness can testify by some alternative means, Respondent has not found a Washington case that expressly addresses that

exact issue (framed the way this Court framed it). However, at least one court in another jurisdiction discussed a similar "closed-circuit-television" statute in terms that indicate the burden is on the State in such cases. Gaitan v. State, 257 S.W.3rd. 1,5(Tex.App.--Fort Worth 2008). Additionally, since it was the State who was the "proponent" of the child hearsay statements in this case, it appears that it is thus the State's burden to show that the child is "unavailable" under the child hearsay statute--which is also how the Smith Court apparently sees it. Smith, 148 Wn.2d at 132; RCW 9A.44.120. Moreover, as to RCW 9A.44.150, providing for "testimony of child by closed-circuit television," that statute expressly states that "on motion of the prosecuting attorney in a criminal proceeding. . . a child under the age of ten may testify in a room outside the presence of the defendant . . ." Because the statute expressly says that only the prosecutor may move to take testimony by closed circuit television, it can probably be inferred that it is also the State's burden to address the alternative of closed-circuit television.

As to the applicability of the ruling in the Smith case, because the circumstances there are different from what occurred in this case, Smith's ruling should not apply here. First off, the

Smith Court expressly limited the reach of its ruling by stating, "our holding is limited to situations in which evidence is presented that the child victim may be able to testify through alternative means. In addition, what the State must do to produce a witness is still governed by the overall reasonableness standard." Smith, 148 Wn.2d at 137(emphasis added). Here, unlike in Smith, there was no evidence presented that the four-year-old child victim would be able to testify via closed circuit television, or by any other means for that matter. Furthermore, the prosecutor's actions in trying to get the child to come into the courtroom were reasonable and showed good faith efforts.

Respondent acknowledges that a demonstration of unavailability is necessary when a declarant witness does not testify. RCW 9A.44.120(2)(b); State v. Ryan, 103 Wn.2d 165, 169, 691 P.2d 197(1984). And Respondent further agrees that the State must make a good faith effort to obtain the witness' presence at trial before the court may deem that person unavailable. Ryan at 170. It is also true that although unavailability is usually based upon the physical absence of a witness, it may also arise when the witness refuses to testify--as happened in this case. Id. at 171. It is this thorny issue of "unavailability" as it applies to a child of tender

years that is the sticking point in the present case--as well as in Smith. But again: Smith is distinguishable.

In Smith --unlike here--there was testimony from a social worker that the victim might be able to testify via some other means in which she would not physically be in the same room as the defendant. Smith, 148 Wn.2d at 127. Because of that evidence, the Smith Court held that the trial court erred when it found the victim "unavailable," explaining that,

before a court can find a child victim unavailable for the purpose of admitting his or her hearsay statements under RCW 9A.44.120, it must consider the use of closed-circuit television pursuant to RCW 9A.44.150 if there is evidence that the child victim may be able to testify in an alternative setting. In addition, if closed-circuit television equipment is not readily available in the courtroom, the court may consider whether the cost of bringing in outside equipment is unreasonable. Because testimony was offered in this case that J.S. might be able to testify in an alternative setting, the trial court erred in admitting her hearsay statements without first determining that she would not be able to testify via closed-circuit television or that bringing in outside equipment would be financially unreasonable.

Smith, 148 Wn.2d at 139, 140 (emphasis added). But, there was no such evidence presented in this case.

Here, there was no testimony or any other evidence presented to show that the four-year-old child victim could have

testified via closed-circuit television. In fact, here--unlike in Smith-- the trial court made a specific finding that "[t]he evidence does not suggest that B.R.A. may be able to testify by the use of closed-circuit television pursuant to RCW 9A.44.150." CP 42 (emphasis added). This finding by the trial court was undoubtedly made because it had witnessed the screaming and crying of the child coming from the hallway outside the courtroom as she refused to come into the courtroom. 11/16/07 RP 32. There were several State's witnesses (including a witness advocate) who tried to talk the child into coming into the courtroom, but their efforts proved futile. Id. This is important to note because even the Smith Court conceded that, "[t]he State is not required to perform a 'futile act.'" while also noting that 'if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation.'" Smith at 132, 133(emphasis added), citing State v. Ryan, 103 Wn.2d at 172(quoting Ohio v. Roberts, 448 U.S. at 74). Furthermore, "the lengths to which the prosecution must go to produce the witness is 'a *question of reasonableness*.'" Smith at 133, quoting Roberts, 448 U.S. at 74 (quoting California v. Green, 399 U.S. 149, 189 n. 22, 90 90.Ct. 1930, 26 L.Ed.2d 489 (1970)(emphasis added)).

So, the question is, were the prosecutor's efforts to bring the four-year-old child into the courtroom in this case done in "good faith" and were his efforts "reasonable"? The answer to these questions is "yes," and the record here supports those answers. Here, there was testimony at the child hearsay hearing that the child victim, B.A., was diagnosed as suffering from Post Traumatic Stress Disorder, and Sexual Abuse of a Child. 11/16/07 RP 16. There was also testimony by the CPS worker, Ms. Jensen, who described B.A.'s demeanor on the day of the hearing when B.A. would not come into the courtroom:

When I got here, she had resigned herself to a corner and was down on her knees and hunched over, kind of in a fetal position. An advocate from Human Response was trying to engage her, and she wasn't having it. Her mom was trying to engage her. I went over and talked with her, got down and we played a little bit, and eventually she came out of it. . . but she said that she --she didn't want to --she didn't want to talk. She was scared. . . .

11/16/07 RP 32. Then, at the December 19, 2007, continuation of the child hearsay hearing, the trial court found B.A. unavailable and explained:

The Court observed that the child was not brought into the courtroom. The Court observed that when the child was here for the purpose of testifying, there was a substantial amount of crying and screaming

coming from the public portion of the hallway outside the courtroom door, and . . . [the prosecutor] at that time related to the court --and it was not disputed by Mr. Brown [defense counsel] or Mr. Beadle --that this yelling and screaming that was coming in was coming from the child, and she was doing it in resisting her -- any and all attempts to bring her into the courtroom. That was not remedied at any one of the three hearings that we've had with respect to the admissibility of this evidence. Consequently, as far as the Court's concerned, she's unavailable as a witness.

12/19/07 RP 24(emphasis added). The trial court also made written findings regarding the issue of B.A.'s unavailability:

On November 16, 2007, at the time of the Child Hearsay Hearing, the State attempted to bring B.R.A. into the courtroom to testify; B.R.A. then began crying loudly, crawled into a corner of the hallway wall on the floor outside the courtroom, and hid her face from view; Lisa Burgess, Roni Jensen, Carl Buster, and Margaret Heriot all attempted to reassure and coax B.R.A. to come out of the corner; B.R.A. did not leave her spot in the corner for over an hour.

CP 42. All of these observations and findings by the trial court amply support the trial court's ruling that four-year-old B.R.A. was "unavailable".

Still, much has been made here about the prosecutor coming back into court at the end of the hearsay hearing and telling the court that the child was apparently ready to come into the

courtroom at that point. But it is important to note what the prosecutor did not say: he did not say that the child was ready to "testify." 11/16/07 RP 47. There is a difference. No one had any idea whether the child would be able to "testify" even if she was brought into the courtroom given her earlier and lengthy hysterical reactions when asked to into the courtroom. Nor did the prosecutor's statement to the court constitute "testimony" inferring that the child may have been able to testify via some other method--such as that given in Smith. Here, even if they had succeeded in getting the child to come inside the courtroom--there is no indication whatsoever that the child would have actually been able to "testify."

Indeed, given the child's hysteria at that hearing, Respondent wonders what else should the prosecutor have done? Should the prosecutor have picked up the child and forcefully brought her into the courtroom and put her on the witness stand? Would the prosecutor likewise be expected to carry the hysterical child victim into the courtroom at the jury trial? Such an action by the State in a jury trial would likely be reversible error. Surely the State cannot be expected to go to such lengths when dealing with a child of such tender years?

Finally, given the existence of such statutes as RCW 9A.44.120 and 9A.44.150, aren't we allowed to consider that the Legislature has clearly shown by enacting such statutes that an exception is to be made when very young children are the victims in these cases? It has been said that RCW 9A.44.120 is meant to help overcome the natural difficulty of prosecuting child sexual abuse cases. State v. C.J., 148 Wn.2d 672, 681, 63 P.3d 765 (2008). These cases are difficult because there are generally no witnesses other than the child and the abuser, and children are often ineffective witnesses, therefore the legislature has created a method for allowing the out-of-court statements of child victims. C.J., 148 Wn.2d at 680-681. Thus it is said that pursuant to the child hearsay statute, "our Legislature has clearly established prerequisites for allowing child hearsay in a criminal trial at which the child does not testify herself. A primary prerequisite is that the trial court must conduct a hearing, and find that a child witness is unavailable to testify." State v. Hopkins., 137 Wn.App. 441, 451, 154 P.3d 250 (2007). That was done in the present case--yet the State is being told that it did not do enough, despite an obviously traumatized four-year-old child witness. See 11/16/07 RP; 12/19/07 RP; CP 41-44. See also State v. Justiniano, 48 Wn.App. 572, 577,

740 P.2d 872 (1987) ("the trauma of a courtroom setting imposed on a child of such tender years being questioned about such disagreeable events deprived [the victim] of the ability to verbalize in the courtroom what had happened, thus making her unavailable as a witness").

Similarly, our Legislature made its intent clear when it enacted RCW 9A.44.150 in 1990:

'The legislature declares that protection of child witnesses in sexual assault and physical abuse cases is a substantial and compelling interest of the state. Sexual and physical abuse cases are some of the most difficult cases to prosecute, in part because frequently no witnesses exist except the child victim. When abuse is prosecuted, a child victim may suffer serious emotional and mental trauma from exposure to the abuser or from testifying in open court. In rare cases, the child is so traumatized that the child is unable to testify at trial and is unavailable as a witness or the child's ability to communicate in front of the jury or defendant is so reduced that the truth-seeking function of trial is impaired. In other rare cases, the child is able to proceed to trial but suffers long-lasting trauma as a result of testifying in court or in front of the defendant. The creation of procedural devices designed to enhance the truth-seeking process and to shield child victims from the trauma of exposure to the abuser and the courtroom is a compelling state interest. 1990 c. 150 § 1.'

RCW 9A.44.150 (emphasis added). The concerns set out by the Legislature above, were most certainly present in the instant case. But what is the State to do, then, when the child witness is suffering obvious emotional and mental trauma to the degree that she will

not be able to testify even by closed-circuit television--as was correctly found by the trial court in the case at bar? The answer is that the State has shown that the child is therefore unavailable, because alternative to her "live" testimony outside the presence of the defendant were considered and rejected as required. That was not done in the Smith case--which is another distinguishing factor.

In short, the four-year-old child's hysterical demeanor and refusal to come into the courtroom in this case, coupled with the State's efforts to get her to come into the courtroom show that she was truly "unavailable." 11/16/07 RP 47. Because in Smith there was testimony indicating that the child there might be able to testify via some alternative method, its reasoning should not be applied here. As such, the trial court in the present case did not err when it found the four-year-old child unavailable, and when it further found that it was not likely that the child would be able to testify via closed-circuit television. This was a difficult situation, but is one that has been addressed by at least one other court when it noted in a similar-sounding case,

[h]ere the judge properly found that the child would be too fearful to provide accurate testimony if she were forced to testify in open court; indeed, the child even refused to testify in open court. . . . The trial judge correctly observed that we should not expect a

juvenile to sit in court and explicitly state she is under 'severe emotional distress,' nor should we expect her to understand those terms. A judge should listen to a child's statements, observe her reactions and draw inferences from physical manifestations to determine whether there is a substantial likelihood of 'severe emotional and mental distress.' . . . We agree the child's reactions indicated a 'substantial likelihood of severe emotional and mental distress' and affirm the trial court's findings on this matter.

State v. Delgado, 742 A.2d 990, 993-995 (N.J. Super. A.D. 2000).

As in that case, the child's "physical manifestations" in the present case also showed that she was under "severe emotional and mental distress" when she was faced with the prospect of testifying in the courtroom at the child hearsay hearing in this case. This rendered her unavailable as found by the trial court.

There is one more issue that Respondent needs to address. Respondent is not aware of any statute or binding precedent that requires the State to hold additional child hearsay hearings several times before trial--as inferred at oral argument--in order to see if the child is not longer afraid to testify. Again, such a procedure is not required and furthermore, given this child's young age and hysteria at the prior hearing--it seems extremely unlikely that a four-year-old victim's reactions would be any different at another hearing held a month or so after the original hearing.

CONCLUSION

This Court should find that the Smith case is distinguishable because there was no evidence presented here--as there was in Smith--that the four-year-old child might be able to testify by some alternative means. In fact, the trial court here expressly found that closed-circuit television would not likely be a suitable option either. Accordingly, this Court should affirm the trial court's ruling that the four-year-old child in this case was unavailable as exhibited by her hysterical, sobbing, reactions and her refusal to come into the courtroom, and should further uphold the trial court's finding that the child's severely traumatized behavior at the hearing showed that the child would not likely be able to testify via closed-circuit television. Consequently, Beadle's convictions should stand.

RESPECTFULLY SUBMITTED this 8th day of October, 2009.

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by:

  
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