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SUPREME COURT NO. _____
NO. 37508-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
FEB 12 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BEADLE,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
10 FEB - 9 PM 12: 57
STATE OF WASHINGTON
BY *[Signature]* DEPUTY

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

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Steven Beadle, the appellant below, asks this Court to review the Court of Appeals decisions referred to in Section B.

B. COURT OF APPEALS DECISION

Beadle requests review of the Court of Appeals decision in State v. Beadle, (Court of Appeals No. 37508-7-II, filed January 26, 2010). Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. A child hearsay proceeding was conducted over the course of a month and consisted of three separate hearings. At the first hearing, the child was brought to court to testify but for some inexplicable reason became upset, cried, and refused to go into the courtroom. Later, at that same hearing, the State told the court the child changed her mind about coming into the courtroom to testify. The court, however, continued the hearing without taking the child's testimony. There is no evidence the child was brought to court at any of the two subsequent hearings or asked to testify at any of those hearings or at trial. The court never held a hearing to determine the reasons for the child's initial behavior at the first hearing or whether the child could testify at the trial. There was no evidence the child would not have testified at the trial in person, via closed-circuit television or by any other alternative means. The court

nonetheless concluded the child was unavailable to testify at trial under RCW 9.44.120 and unable to testify via closed-circuit television and a majority of the Court of Appeals agreed.

a. Where there was no evidence of the reasons for the child's behavior and initial refusal to testify at the first hearing and no evidence the child could not have testified at any of the subsequent hearings or at the trial, did the court erroneously conclude the child was unavailable to testify at the trial, which was held over two months after the first hearing?

b. Where there was no evidence the child would not have testified at trial via closed-circuit television did the court erroneously conclude the child was likely unable to testify via closed circuit television or by other means?

2. The child complainant was taken to the police station and interviewed by a detective and a Child Protective Services (CPS) investigator whose assistance the detective requested. The interview was conducted solely for law enforcement purposes. The child did not testify at trial, however, the court found her hearsay statements to the detective and investigator were not testimonial and admitted the statements. Did the court erroneously conclude the hearsay statements were not testimonial?

3. Over petitioner's objection the court improperly admitted testimony at the trial describing the child's initial behavior at the first

pretrial hearing. The Court of Appeals found the testimony was irrelevant and prejudicial but harmless. Under the correct harmless error standard, was admission of the testimony harmless error?

D. STATEMENT OF THE CASE¹

Steven Beadle was convicted of two counts of first degree child molestation. CP 69-70. B.A. was the named victim in both counts. Id.

In October 2004, Lisa Burgess began living with Beadle. 4RP 24. Burgess also met her husband, Damon Burgess, in October 2004. 4RP 23. When Burgess and Beadle ended their relationship and Beadle moved out, Burgess was pregnant with Beadle's child. 4RP 24-25. The day after their child was born, Burgess and Beadle started living with each other again. 4RP 26. They lived together until January 2006 when Beadle was sent to prison for an unrelated matter. Id.

Two months later, Lisa Burgess married Damon Burgess. 4RP 27. The following October, Burgess left Damon Burgess for a few weeks and resumed a sexual relationship with Beadle, who was no longer incarcerated. Beadle told Damon Burgess he slept with Lisa Burgess and Damon Burgess told Beadle to stay away from his family. 4RP 73-74.

A little over a year later the Burgess's were driving to Anacortes and during the trip, B.A. drew a picture of a "tail" and showed it to Damon

Burgess. 4RP 68. Damon Burgess asked B.A. whose “tail” it was and she said it was Beadle’s “tail.” 4RP 69. He then asked B.A. if she had ever seen the “tail” and she said yes and Beadle helped her wash her hands because they became sticky. Id.

Damon Burgess told Lisa Burgess what B.A. had said. Lisa Burgess asked B.A. about it and B.A. told Burgess that she came into the bedroom once when Burgess and Beadle were sleeping, got into the bed, and Beadle had her touch his “tail” and then helped her wash her hands because they became sticky. 4RP 44.

Lisa Burgess then asked B.A. if she would talk to police and B.A. agreed. The following day Burgess spoke to Lewis County Detective Carl Buster and arranged for him to interview B.A. 4RP 46.

Burgess brought B.A. to the police station for the interview. 5RP 8. Detective Buster contacted Ronnie Jensen, an investigator with CPS, to assist him with the interview. 4RP 103-104. The two interviewed B.A. During the interview B.A. pointed to the genital area of a bear doll and said that is where the “tail” is and that she was told to touch it and it got wet. 4RP 108; 5RP 15. She said after she touched it she had to wash her hands because they were slippery. 5RP 16. Buster did not refer B.A. to the sexual assault clinic for an examination. 5RP 22.

¹ See, Opening Brief of Appellant at 1 for an index to the citations to the record.

Carrie McAdams, a clinician with Cascade Mental Health, evaluated B.A. in April 2007, about two months after B.A.'s interview with Detective Buster and Jensen. 4RP 75, 79. When McAdams asked B.A. why she was there, B.A. told her it was because "Steve did things to me." 4RP 80. She told McAdams that he helped her wash her hands, which had become sticky from his "tail." Id. B.A. said that sometimes Beadle sat with her with a towel on his lap and his "tail" between them and he made her touch it. Id.

Margaret Heriot, a Cascade Mental Health therapist, was assigned to counsel B.A. 4RP 90, 93. During their third session, B.A. removed clothes from a male doll and placed the male doll in a sitting position with its legs out. She then removed clothes from a baby doll and placed the baby doll on the lap of the male doll, facing the male doll. Id. B.A. told Heriot that it hurt. 5RP 93. On the way home from the session, B.A. told Lisa Burgess that once when Burgess was not at home, she sat on Beadle's lap on the floor and he needed a towel. 4RP 50-51.

Beadle testified he never touched B.A. inappropriately and he never had her touch him inappropriately. 5RP 25.

1. Child Hearsay Hearings

A child hearsay proceeding was held on three separate days, November 16th 20th and December 19, 2007. At the November 16th

hearing, Heriot, Jensen and Damon Burgess testified about B.A.'s statements to them and the circumstances surrounding the statements. 1RP 7-43. Jensen testified she assisted Detective Buster with B.A.'s February 22, 2007 interview as a courtesy and that the interview was strictly for law enforcement purposes. 1RP 27, 31.

Jensen also testified B.A. was in a corner in the courthouse in a fetal position. 1RP 32. Jensen said that after about 20 minutes, she and Burgess managed to get B.A. to play but B.A. indicated she did not want to talk. 1RP 32. Later, the deputy prosecuting attorney told the court that it did not look as if B.A. was going to come into the courtroom to testify. 1RP 46. Shortly thereafter, however, the deputy prosecuting attorney informed the court that B.A. was now "willing to come into the courtroom." 1RP 47. The court had other matters to deal with so it continued the hearing without taking B.A.'s testimony. 1RP 47, 49.

The hearing resumed November 20, 2007. During that phase of the hearing Lisa Burgess and Buster testified. At the end of their testimony, the deputy prosecuting attorney told the court that "[B.A.] is not willing to come into the courtroom, so the State has no further witnesses." 2RP 46. There is nothing in the record to indicate B.A. had been brought to the courthouse that day or was asked to testify. The

hearing was continued to December 19 2007 to allow the State to present McAdams' testimony. 2RP 46.

At the conclusion of the December 19, 2007 hearing, the State asked the court find B.A. unavailable to testify at trial based on Jensen's November 16, 2007 testimony that B.A. refused to come into the courtroom that day and testify. 3RP 18. The State argued, "[t]o bring her (B.A.) into court would obviously cause her a lot of trauma, and she doesn't want to come in, so I think that's a basis to find her unavailable." Id. The court found B.A. was unavailable based on her initial refusal to testify at the November 16, 2007 hearing. 3RP 24.

Beadle argued B.A.'s hearsay statements to Detective Buster and Jensen were testimonial and inadmissible if B.A. did not testify at trial. 3RP 19-20. The court ruled under the holding in State v. Shafer² the test to determine if a child's hearsay statements are testimonial is whether the child intended her statements be used in any subsequent prosecution. 3RP 35-36. The court found that from Buster and Jensen's perspective, B.A.'s statements were testimonial. 3RP 35-36. But, because B.A. was only four years old she could not have intended that her statements to Buster and Jensen would be used to prosecute Beadle and therefore from B.A.'s perspective the statements were not testimonial. Id. The court concluded

² 156 Wn.2d 381, 128 P.3d 87 (2006)

that B.A.'s statements to Jensen and Buster were not testimonial and those statements were admissible under RCW 9A.44.120. 3RP 34-36; 39-40.

2. Facts Pertaining to Issue

On the day the trial began, January 30, 2008, the State moved to admit testimony describing B.A.'s initial behavior and refusal to testify at the November 16, 2007 child hearsay hearing. 4RP 13. Beadle objected arguing the evidence was too prejudicial because there are a number of "explanations as to why a child would not want to come into court and testify." 4RP 14-15. The court conceded there was no evidence about the reasons for B.A.'s behavior or refusal: "I don't now if it was trauma or fear or what..." 4RP 15. Nonetheless the court ruled the State could present testimony that B.A. cried became upset and resisted attempts to get her testify. 4RP 16.

At trial Burgess was allowed to testify that at the November 16, 2007 hearing B.A. was brought to court to testify and was ready and willing to testify but she ran into a corner and stayed there for an hour crying and refused to talk. 4RP 55-56. Jensen too was allowed to testify that B.A. was balled up in a fetal position and appeared upset. 4RP 112.

3. Court of Appeals Decision

A majority of the Court of Appeals ruled that despite B.A.'s eventual willingness to come to court during the November 16th child

hearsay hearing and despite the lack of any evidence that B.A. was asked to testify at any of the subsequent child hearsay hearings or at the trial and despite the lack of any evidence B.A. could not testify by any other alternative means, the majority ruled the trial court did not abuse its discretion by finding B.A. unavailable and that she could not testify by any alternative means. Slip. Op. at 10-11. The

In her dissent, Judge Hunt found that under this Court's decision in State v. Smith, 148 Wn.2d 122, 59 P.3d 74 (2002), the State failed to meet its burden to show that another alternative, such as closed-circuit television, would not make B.A. available for live testimony and cross-examination. Slip. Op. at 16. Judge Hunt took issue with the majority's reasoning that the lack of any evidence B.A. would have been able to testify by an alternative means supported the trial court's finding of unavailability. Slip. Op. at 18-19. Judge Hunt reasoned that under Smith, the State bears the burden of making an affirmative showing the child is unavailable to testify by some alternative means and the State failed to make that showing. Slip. Op. at 20. Judge Hunt would have reversed Beadle's convictions. Id.

The majority also ruled it was "not persuaded" that B.A.'s statements to Detective Buster and CPS investigator Ronnie Jensen were testimonial because it was uncertain B.A. intended her statements to be

used at trial. Slip. Op. at 12. Finally, the majority found that admission of the evidence regarding B.A.'s initial reaction at the first child hearsay hearing was error. Slip. Op. at 13-14. Nonetheless, it found the error was harmless. Id.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENTS

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ISSUES OF WHETHER THE TRIAL COURT IMPROPERLY FOUND B.A. UNAVAILABLE TO TESTIFY LIVE OR BY SOME ALTERNATIVE MEANS CONFLICTS WITH THIS COURT'S DECISION IN STATE V. SMITH AND INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Under the Confrontation Clauses of both the United States and Washington constitutions, the admissibility of hearsay statements in criminal trials depends, in part, on whether those statements are testimonial.³ Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A testimonial statement is inadmissible unless the declarant either: (1) appears at trial; or (2) is unavailable and the defendant had a prior opportunity to cross-examine on the statement. Id. at 68. Testimony admitted under the child hearsay statute too must be interpreted

³ "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .". U.S. Const. amend. VI. The Washington Constitution provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . .". Const. art. I, § 22.

in light of the requirements of the confrontation clause. State v. Rohrich, 132 Wn.2d 472, 476, 939 P.2d 697 (1997).

Under the child hearsay statute, the statement of a child less than 10 years old describing any act of sexual contact is only admissible if (1) the court finds the statement is reliable and (2) the child testifies or, if the child is unavailable, there is corroborative evidence of the act. RCW 9A.44.120. It is the State's burden to prove both the child's unavailability and corroborative evidence. State v. Rohrich, 82 Wn. App. 674, 676, 918 P.2d 512 (1996), *aff'd*, 132 Wn.2d 472, 939 P.2d 697 (1997) (citing RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984)).

B.A. initially refused to testify at the November 16, 2007 child hearsay hearing. It was based on that initial refusal that led the court to conclude B.A. was unavailable to testify at the trial. CP 41-44 (Finding of Fact 1.9, Conclusion of Law 2.2). However, before the court recessed for the day the State informed the court, "[n]ow I'm told that she (B.A.) is willing to come into the courtroom" but the court did not take her testimony because it was scheduled "to do the prelims." 1RP 47. Thus, despite B.A.'s initial refusal to testify the record shows she was available to testify at the hearing.

Moreover, there was no showing B.A. was unavailable to testify at the trial, which occurred over 2 ½ months after the initial child hearsay hearing in November. There are many possible reasons why B.A. initially refused to testify at the first child hearsay hearing. For example, she may have been intimidated because Beadle was in the courtroom; traumatized by the idea of telling her story to a room of strangers; physically ill; or even scared because she lied and she was afraid by testifying her lie would be discovered. The trial did not begin for months following that first hearing. There were two other child hearsay hearings between the first hearing and the trial. There is no evidence the State attempted to procure B.A.'s testimony or even her presence at those hearings. The reason B.A. refused to testify at the first child hearsay hearing may have had no bearing whatsoever on her ability or willingness to testify at any of the other two hearings or the trial. The State failed to meet its burden to show B.A. was unavailable to testify at the trial.

In addition, it was based on B.A.'s initial refusal to testify at the first child hearsay hearing that also led the court to conclude B.A. was unable to testify by alternative means, including closed-circuit television.

This Court has held that "in determining whether a witness is unavailable, under the good faith requirement, a court should consider what options are available to the State in securing the child victim's

testimony.” Smith, 148 Wn.2d at 136. The Smith Court ruled the use of RCW 9A.44.150, which provides prosecutors with the option of using closed-circuit television if a child witness is unable to testify in open court, is one such option. Id. at 137.

In Smith this Court found in determining a child witness’ availability to testify necessitates a trial court consider what options are available to the State in securing the testimony, including the option of closed-circuit television, where there is some evidence the child may be able to testify. Smith, 148 Wn.2d at 137-138. This Court held the child’s hearsay statements were inadmissible because the trial court did not explore alternatives to live court room testimony, such as remote testimony via closed-circuit television, before deciding to allow the child hearsay testimony. State v. Smith, 148 Wn.2d at 137.

Here, there is nothing in the record to show why (1) B.A. initially refused to testify at the first child hearsay hearing; (2) why she apparently changed her mind before the hearing was continued; (3) whether she was asked to testify at the subsequent child hearsay hearings or via a closed-circuit television, or; (4) if she would have testified at the time of trial months after the hearing. On these facts it is impossible to conclude that B.A. could not have testified at trial via a closed-circuit television or by some other alternative means.

The Court of Appeals majority reasoned the lack of evidence that the State attempted to procure B.A.'s testimony at any of the other two hearings or by any alternative means met the Smith good faith requirement. Slip. Op. at 10. As Judge Hunt correctly points out in her dissent, under Smith, it is the State's burden to explore alternative measures to obtain a witness's testimony and it did not meet that burden here where the only evidence was B.A.'s initial refusal to come into the courtroom and then her later change of mind. Slip. Op. at 17-18.

The Court of Appeals decision here conflicts with this Court's decision in Smith because it shifts the burden to the defendant to prove a child witness is unavailable to testify against the defendant. RAP 13.4(b)(1). Its decision that B.A. was unavailable and her hearsay statements admissible also present a significant question of law under the confrontation clauses of the Washington and United States constitutions. RAP 13.4(b)(3).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ISSUE OF WHETHER THE TRIAL COURT IMPROPERLY ADMITTED B.A.'S HEARSAY STATEMENTS TO THE DETECTIVE AND SOCIAL WORKER CONFLICTS WITH THIS COURT'S DECISION IN STATE V. SHAFER AND INVOLVES SIGNIFICANT QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The Confrontation Clause permits an unavailable witness's testimonial statements to be introduced at trial only if the witness has been subject to the rigors of cross-examination. Crawford v. Washington, 541 U.S. at 53-54. While Crawford did not provide a comprehensive definition of the term testimonial it articulated three core classes of testimonial statements: ex parte, in-court testimony or its functional equivalent; extrajudicial statements in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. State v. Shafer, 156 Wn.2d 381, 389 n. 6, 128 P.3d 87 (2006) (citing Crawford, 541 U.S. at 51-52). "[C]asual remarks made to family, friends, and nongovernment agents are generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused." Shafer, 156 Wn.2d at 389 (citing Crawford, 541 U.S. at 51).

A statement “knowingly given in response to structured police questioning” is testimonial under “any conceivable definition.” Crawford, 541 U.S. at 53 n. 4. “Whatever else the term covers” (referring to 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). In Shafer, this 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 official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court. Shafer, 156 Wn.2d at 389.

The Court of Appeals ruled it was “not persuaded” that B.A.’s statements to Detective Buster and CPS investigator Ronnie Jensen were testimonial because there was uncertainty whether B.A. intended her statements be used at trial. Slip. Op. at 12. B.A.’s statements to Jensen and Detective Buster were made at the police station in response to questions during a police interview conducted to gather evidence in anticipation of a possible trial. Jensen testified, and the court found, the interview as conducted for law enforcement purposes. The interview falls squarely within the category of police interrogations and B.A.’s statements

made at the interview constitutes testimonial hearsay.⁴ It does not matter if the four year old child intended or even knew her statements would be used at a trial, assuming she even knew what a trial was.

The Court of Appeals decision that B.A.'s statements to Jensen and Buster were not testimonial because it was uncertain B.A. intended her statements to be used at trial conflicts with this Court's decision in Shafer and presents a significant question of law under the confrontation clauses of the Washington and United States constitutions. RAP 13.4(1) and (3).

3. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE ISSUE OF WHETHER THE TRIAL COURT'S IMPROPER ADMISSION OF TESTIMONY DESCRIBING B.A.'S INITIAL BEHAVIOR AT THE FIRST CHILD HEARSAY HEARING WAS HARMLESS CONFLICTS WITH THIS COURT'S HARMLESS ERROR STANDARD.

The Court of Appeals correctly ruled testimony that B.A. was curled up in a fetal position on the courthouse floor, crying and non-

⁴ Other jurisdictions have reached the same conclusion. See, T.P. v. State, 911 So.2d 1117, 1123-24 (Ala.2004) (child's statements about sexual abuse to interviewer employed by Department of Human Resources at interview that was attended by a sheriff's investigator were testimonial); Anderson v. State, 833 N.E.2d 119, 125-26 (Ind.Ct.App.2005) (child's statements about sexual assault made to social worker during interviews that were coordinated and directed by police detective were testimonial); State v. Justus, 205 S.W.3d 872, 880-81 (Mo.2006) (child's statements describing sexual abuse during interviews conducted by child abuse investigator for division of family services and by licensed social worker employed at a children's advocacy center were testimonial); State v. Blue, 717 N.W.2d 558, 564-65 (N.D.2006) (child's videotaped statements describing sexual assault to a forensic interviewer made while police officer watched the interview on television from another room were testimonial); Rangel v. State, 199 S.W.3d 523, 532-35 (Tex.App.2006) (child's statements describing sexual assault during videotaped interview conducted by a Child Protective Services investigator were testimonial).

responsive when she was brought to the first child hearsay hearing was both irrelevant and unfairly prejudicial. Slip. Op. at 13-14. The court, however, concluded the evidence was harmless. The court misapplied the harmless error standard.

In Cunningham v. State, 801 So.2d 244 (Fla. App. 2001), the defendant was charged with sexually abusing a child. At a pretrial hearing on the State's request to admit the victim's statements into evidence, the child testified but became emotionally upset and could not continue. Id. at 245. At the trial a psychiatrist was allowed to testify that the child was emotionally unavailable to testify because she would most likely shut down and not answer questions. Id. at 246.

The Cunningham court held the testimony was irrelevant and unfairly prejudicial. The court reasoned that the jury could improperly infer from the testimony the child's emotional 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. Id. at 247. The court held an explanation of a child witness's unavailability because such testimony inflames the passion and sympathy of the jury. Id.

An error is not harmless if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The Court of Appeals found the error was harmless because B.A. repeated her accusations against Beadle to several people and drew explicit pictures of a “tail” she said was Beadle’s. Slip. Op. at 14.

That B.A. repeated the accusation is of little value to the harmless error analysis. A false accusation does not become credible because it is repeated. Repetition does not make something true. State v. McDaniel, 37 Wn.App. 768, 771, 683 P.2d 231 (1984). Additionally, B.A. also told her mother she saw Damon Burgess’s “tail.” SRP 3. Thus, her knowledge of the male anatomy could have been from a source other than Beadle.

The State’s evidence consisted solely of B.A.’s repetitive vague hearsay statements. Beadle testified and denied the allegations. The jury’s decision came down to a credibility determination, despite B.A.’s absence from trial. Even though there was no evidence about the reason for B.A.’s behavior and initial refusal to testify, it is likely the jurors decided B.A. was the more credible because they inferred B.A. was so traumatized and afraid of Beadle that she could not testify in front of him, therefore he must have molested her. Jurors also likely sympathized with B.A., a young child who exhibited an emotional reaction when asked to

testify against the man she accused of molesting her, and based their decision on that sympathy and not on a reasoned analysis of the facts. The error in admitting the irrelevant and prejudicial testimony was not harmless under the correct harmless error standard. RAP 13.4(1).

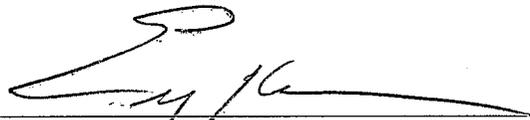
F. CONCLUSION

For the above reasons, this Court should accept review.

DATED this 8 day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
STATE OF WASHINGTON

DIVISION II

BY  DEPUTY

STATE OF WASHINGTON,

No. 37508-7-II

Respondent,

v.

STEVEN BEADLE,

UNPUBLISHED OPINION

Appellant.

RECEIVED
JAN 27 2011
Nielsen, Broman & Koch, P.L.L.C.

Penoyar, A.C.J. — Steven Beadle appeals two first degree child molestation convictions, arguing that the trial court erred by admitting (1) the child’s hearsay statements, and (2) irrelevant and unfairly prejudicial testimony regarding the child’s behavior at the first child hearsay hearing. We affirm.

FACTS

I. BACKGROUND

In early 2006, then three-year-old BA drew something she referred to as a “tail.”¹ When her mother, Lisa Burgess, asked her about the drawing, BA told her that the “tail” was what Beadle, Burgess’s ex-boyfriend, told her to call what she had drawn. BA then told Burgess that Beadle tried to put his “tail” inside her and that her “potty” hurt. Report of Proceedings (RP) (Jan. 30, 2008) at 40. Burgess later testified that BA used the term “potty” to refer to her vagina. According to Burgess, when she confronted him, Beadle cried and screamed at BA, telling her that he would go to prison for life if she said anything. Because Beadle was about to go to prison for an unrelated matter, Burgess put the incident “to the back of [her] mind.” RP (Jan. 30, 2008) at 34.

¹ According to her mother, BA had been drawing these “tails” on a weekly basis for approximately one year.

In February 2007, BA again drew a picture of a “tail” and showed it to Burgess’s husband, Damon Burgess.² When Damon asked BA whose “tail” it was, she responded that it was Beadle’s “tail.” Damon then asked whether BA had ever seen it. BA said yes and explained that Beadle had to help her wash her hands because they became sticky. According to Damon, when he held out his hand and asked BA to show him how she touched Beadle’s “tail,” BA stroked his finger. BA also told Damon that she did not want to get Beadle into trouble.

After Damon informed Burgess of his conversation with BA, Burgess asked BA if Beadle had ever helped her wash her hands. BA told her that she came into Burgess’s and Beadle’s bedroom once when they were sleeping and got into their bed. There, Beadle had her touch his “tail” and then helped her wash her hands because they became sticky. Burgess then asked BA about the first time she told Burgess her “potty [hurt].” RP (Jan. 30, 2008) at 47. BA responded that she had already told Burgess about it. BA then told Burgess that while she was touching Beadle, Beadle told her that he loved her and that she was a good girl. She also told Burgess that she had seen Damon’s “tail” once by accident, but that Beadle’s “tail” was different because it was strong and tough.

The following day, Burgess contacted law enforcement and arranged for Lewis County Detective Carl Buster to interview BA. On February 22, 2007, Buster interviewed BA with Child Protective Services (CPS) investigator Ronnie Jensen’s assistance. Using a “narrative” interviewing style, Buster and Jensen asked BA open-ended questions and allowed her to respond in a manner and pace with which she appeared to feel comfortable. During the interview, BA pointed to the genital area of a stuffed bear and identified the location of Beadle’s

² To avoid confusion, we refer to Damon Burgess as “Damon” throughout this opinion and mean no disrespect in doing so.

“tail.” BA explained that this was where Beadle told her to touch him and that it got wet. BA told Buster and Jensen that she had to wash her hands after touching it as they had become slippery.

Subsequently, on April 13, 2007, Cascade Mental Health (CMH) clinician Carrie McAdams evaluated BA. When McAdams asked BA if she knew why she was visiting her, BA responded that it was because “Steve did things to me.” RP (Jan. 30, 2008) at 80. BA told McAdams that Beadle helped her wash her hands, which had become sticky from his “tail.” She also told McAdams that sometimes Beadle sat BA on a towel on his lap and made her touch his “tail.” BA explained that this happened three times and that it made her “potty” hurt.

CMH therapist Margaret Heriot counseled BA. During their first session together, BA told Heriot that Beadle hurt her “potty.” During their third session, BA removed clothes from a male doll and placed the doll in a sitting position with its legs out. She then removed the clothes from a baby doll and placed that doll on the lap of the male doll, facing it. BA told Heriot that it hurt. After that session, BA told Burgess that once when Burgess was not home, she sat on Beadle’s lap on the floor, and that Beadle had needed a towel.

Beadle denied ever touching BA inappropriately or Burgess ever confronting him about touching BA. The State charged him by amended information with three counts of first degree child molestation.

II. PRETRIAL PROCEEDINGS

The trial court held child hearsay hearings over the course of three days. During the first hearing, on November 16, 2007, Damon, Jensen, and Heriot testified regarding BA’s statements to them. Jensen also testified that BA, who was not present in the courtroom, was lying in the fetal position in a corner of the courthouse. Jensen testified that after about twenty minutes, she

and Burgess managed to get BA to play but that BA indicated she did not want to talk. Subsequently, the State informed the trial court that it did not look as though BA would be able to testify at the hearing. Shortly thereafter, the State indicated that BA was willing to enter the courtroom but did not indicate whether she would be willing to answer questions. Because the trial court had to address other preliminary matters, BA was not brought into the courtroom that day.

During the second hearing, on November 20, Burgess and Buster testified. At the conclusion of their testimony, the State once again informed the trial court, “[BA is] not willing to come into the courtroom, so the State has no further witnesses.” RP (Nov. 20, 2007) at 46. McAdams testified during the final hearing. At the conclusion of the hearing, on December 19, the State requested that the trial court find BA unavailable to testify at trial based on “what happened when we tried to bring her in the courtroom and her age.” RP (Dec. 19, 2007) at 18. The State argued, “To bring [BA] into court would obviously cause her a lot of trauma, and she doesn’t want to come in, so I think that’s a basis to find her unavailable.” RP (Dec. 19, 2007) at 18.

The trial court ultimately found that BA was unavailable to testify, explaining:

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 State] at that time related to the court -- and it was not disputed by [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.

RP (Dec. 19, 2007) at 24 (emphasis added). The trial court also concluded that the evidence did not suggest that BA would be able to testify by use of a closed-circuit television under RCW 9A.44.150.³

Beadle then argued that BA's hearsay statements were unreliable or uncorroborated and that the statements she made to Buster and Jensen were testimonial and therefore inadmissible if BA did not testify at trial. The trial court ruled that because BA's statements were non-testimonial and were both reliable and corroborated, they were admissible under RCW 9A.44.120. The trial court also ruled that BA's statements to Burgess, Damon, Heriot, and McAdams were reliable, corroborated, and admissible under RCW 9A.44.120 and that her statements to Heriot and McAdams were also admissible under the medical exception to the hearsay rule.

III. TRIAL

Before trial began, the State moved to admit testimony regarding BA's behavior and initial refusal to testify at the first child hearsay hearing. Beadle objected, arguing that the evidence was too prejudicial. The trial court ruled that the State could present testimony that BA cried, became upset, and resisted attempts to get her to testify. At trial, Burgess testified that BA ran into a corner, cried for an hour, and refused to talk at the first hearing. Jensen also testified that BA assumed the fetal position and appeared upset.

A jury convicted Beadle of two counts of first degree child molestation. It also found that he abused his position of trust to facilitate crimes and that the crimes were part of an

³ Under certain circumstances, on motion of the prosecuting attorney in a criminal proceeding, the trial court "may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify[.]" RCW 9A.44.150(1).

ongoing pattern of sexual of abuse. The trial court imposed an exceptional sentence, sentencing Beadle to a minimum term of 396 months' confinement and a maximum life term. Beadle now appeals.

ANALYSIS

I. BA'S HEARSAY STATEMENTS

A. AVAILABILITY

Beadle first argues that the trial court erred by admitting BA's hearsay statements⁴ under RCW 9A.44.120 and violated his right to confrontation because it "erroneously concluded [that] BA was unavailable to testify at the trial and was likely unable to testify via closed-circuit television." Appellant's Br. at 14. The State responds that the trial court did not abuse its discretion by finding that BA was unavailable to testify. We agree.

RCW 9A.44.120 provides that a statement made by a child when under the age of ten "describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in criminal proceedings . . . if:"

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act [.]

⁴ Beadle argues that the trial court erred by admitting BA's statements to Burgess, Damon, Heriot, McAdams, Jensen, and Buster.

We review the trial court's decision to admit child hearsay evidence for an abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006) (citing *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)). A trial court abuses its discretion "only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *Borboa*, 157 Wn.2d at 121 (quoting *C.J.*, 148 Wn.2d at 686).

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article 1, section 22 of the Washington State Constitution also provides, "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." Neither clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule. *State v. Ryan*, 103 Wn.2d 165, 169, 691 P.2d 197 (1984) (citing *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)).

The Sixth Amendment requires a demonstration of unavailability when the declarant witness is not produced. *Ryan*, 103 Wn.2d at 170 (citing *Roberts*, 448 U.S. at 65)). "Unavailability" means that the proponent is not presently able to obtain a confrontable witness's testimony. *Ryan*, 103 Wn.2d at 171. It is usually based on the physical absence of the witness, but it may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. *Ryan*, 103 Wn.2d at 170 (citing ER 804(a); 5A K. TEGLAND, WASH. PRACTICE: EVIDENCE LAW AND PRACTICE § 393 (2nd ed. 1982)). Unavailability in the constitutional sense additionally requires the prosecutor to make a good faith effort to obtain the witness's presence at trial. *Ryan*, 103 Wn.2d at 171 (citing *Roberts*, 448 U.S. at 74). With respect to RCW 9A.44.120, our legislature has clearly established prerequisites for allowing child hearsay in a

criminal trial at which the child does not testify. *State v. Hopkins*, 137 Wn. App. 441, 451, 154 P.3d 250 (2007). “A primary prerequisite is that the trial court must conduct a hearing and find that a child witness is unavailable to testify.” *Hopkins*, 137 Wn. App. at 451 (citing RCW 9A.44.120(1) and (2)(b)).

In this case, the trial court conducted three child hearsay hearings and, after the final hearing, determined that BA was unavailable to testify. At the first hearing, Jensen explained that BA did not want to come into the courtroom, had assumed the fetal position, and was virtually nonresponsive when she arrived at the courthouse. During the second hearing, the State again explained that BA was unwilling to testify. At the conclusion of the third hearing, the trial court concluded that BA was unavailable to testify. It subsequently made the following finding:

On November 16, 2007, at the time of the Child Hearsay Hearing, the State attempted to bring [BA] into the courtroom to testify; [BA] 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 [her] to come out of the corner; [BA] did not leave her spot in the corner for over an hour[.]

Clerk’s Papers (CP) at 42.⁵ It then concluded that BA was unavailable to testify as a witness at trial and that the evidence did not suggest that she would be able to testify by the use of closed-circuit television.

Beadle appears to suggest that because BA may have been willing to testify for a brief period during the first hearing, the trial court’s ruling constituted an abuse of discretion. The record demonstrates, however, that the State (as well four others involved in BA’s case) attempted to persuade BA to testify on more than one occasion. The record clearly indicates that

⁵ It also found that Heriot believed that BA exhibited behavior consistent with a history of sexual abuse and consistent with the diagnoses of Post-Traumatic Stress Disorder and Sexual Abuse of a Child.

the State made a good faith effort to obtain her presence at trial. After hearing testimony regarding BA's behavior at the first hearing and her unwillingness to testify again at the second hearing, the trial court determined that she would not be available to testify at trial.

Beadle cites *State v. Smith*, 148 Wn.2d 122, 59 P.3d 74 (2002), in support of his argument that the trial court erred by concluding that the evidence did not suggest that BA would be willing to testify by the use of closed-circuit television pursuant to RCW 9A.44.150. *Smith*, however, is distinguishable from the present case. In that case, the defendant sought reversal of his first degree rape of a child conviction, arguing that the trial court violated his state and federal confrontation clause rights when it ruled that the child victim was unavailable to testify under the child hearsay statute without first requiring the State to show that the child could not testify via closed-circuit television. *Smith*, 148 Wn.2d at 126. Below, the child's social worker had testified that she might be able to testify under certain circumstances (i.e. in chambers) and that she might be able to tolerate a courtroom setting if she were not exposed to the perpetrator; the social worker also indicated that given time to prepare, the child's ability to testify would improve. The child's therapist also testified that she might be able to testify via video, but "probably not." *Smith*, 148 Wn.2d at 127-28. We affirmed the trial court's ruling in a split decision. *Smith*, 148 Wn.2d at 129.

Our Supreme Court subsequently reversed and vacated *Smith*'s conviction, holding that before a court can find a child victim unavailable for the purpose of admitting her hearsay statements, "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." *Smith*, 148 Wn.2d at 139. The court limited its holding, however, "to situations in which evidence is

presented that the child victim may be able to testify through alternative means.” *Smith*, 148 Wn.2d at 137.

Unlike *Smith*, in this case there was no “evidence that the child victim [would have been] able to testify in an alternative setting.” *Smith*, 148 Wn.2d at 139. The only indication that BA was willing to talk about the incidents at all was that, at one point, she was at least willing to come into the courtroom. But even then BA gave no indication that she was actually willing to speak. The fact that BA talked with Buster, Jensen and various therapists on earlier occasions is not dispositive because her interactions with them were intimate, conversational, and relatively brief. Additionally, obtaining formal, and likely lengthy, testimony from BA via one-way closed-circuit television would have necessarily involved multiple participants (at a minimum, counsel, court reporter, and, in most cases, the trial judge).

This case is also unlike *Smith* because the trial court affirmatively considered whether BA could testify by one-way closed-circuit television. In doing so, the court considered BA’s repeated refusals to come into the courtroom. The trial court also considered the strength of four year old BA’s emotional refusals, including unresponsiveness, kicking, crying and screaming for prolonged periods in the court’s hearing, and lying in a fetal position in the corner of a room outside the courtroom. Despite the passage of time, the past is often the best indicator of the future; BA’s unwillingness to testify two months prior to trial indicated that subsequent attempts to obtain testimony from her would have been fruitless, as well as potentially traumatizing. The trial court had more than sufficient evidence to conclude that BA would also be unwilling to testify via closed-circuit television. Where such evidence of unwillingness exists, RCW 9A.44.150 does not require the trial court to document a child’s unwillingness by forcing the child to appear on closed-circuit television as a prerequisite to finding that the child is

unavailable to testify. Beadle has failed to demonstrate that the trial court abused its discretion by ruling that BA was unavailable and subsequently admitting her hearsay statements at trial.⁶

B. TESTIMONIAL STATEMENTS

Beadle next argues that the trial court violated his right to confrontation by admitting BA's testimonial statements to Buster and Jensen. He contends that because her statements were made "in response to questions during a police interview conducted to gather evidence in anticipation of a possible trial[.]" they were inadmissible. Appellant's Br. at 24. The State responds that BA's statements were non-testimonial and therefore admissible. The State's argument is persuasive.

We review the trial court's decision to admit evidence for an abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). A trial court abuses its discretion "only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *Borboa*, 157 Wn.2d at 121 (quoting *C.J.*, 148 Wn.2d at 686). Both parties rely on our Supreme Court's decision in *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), in support of their respective positions. Furthermore, the State argues that we recently "employed reasoning that does not square with *Shafer*" in *Hopkins*, 137 Wn. App. 441.⁷ It "respectfully suggests that the ruling in *Shafer* must control this Court's analysis in cases such as this where the declarant is a child of

⁶ The trial court properly considered and made findings regarding the reliability and corroboration of BA's statements before admitting them. RCW 9A.44.120(1)(b).

⁷ In *Hopkins*, we held that statements a child made during a second interview with a CPS investigator were testimonial under [*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], and therefore inadmissible. 137 Wn. App. at 458. In that case, we focused on the fact that (1) there was no longer an ongoing emergency at the time of the interview, and (2) the investigator was acting in a governmental capacity for CPS, and, in that capacity, she obtained statements from the child that the State used to prosecute the defendant. *Hopkins*, 137 Wn. App. at 458. We did not, however, explore the issue of intent in that case.

tender years.” Resp’t’s Br. at 17. We are not persuaded that BA’s statements were testimonial under *Shafer* or *Hopkins* or that the trial court abused its discretion by admitting them. In any case, any error was harmless.

Confrontation clause errors may be harmless. *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007) (citing *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005)). Under the “overwhelming untainted evidence” test, if the untainted evidence is overwhelming, the error is deemed harmless. *Mason*, 160 Wn.2d at 927 (citing *Davis*, 154 Wn.2d at 305). If there is no “reasonable probability that the outcome of the trial would have been different had the error not occurred,” the error is harmless. *Mason*, 160 Wn.2d at 927 (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)). In addition to BA’s statements to Buster and Jensen, the trial court admitted statements BA made to several other adult family members and mental health professionals and pictures she drew depicting Beadle’s “tail.” The jury weighed this evidence and determined that it was more credible than Beadle’s testimony denying the abuse. Credibility determinations are for the trier of fact and are not subject to review on appeal. *Thomas*, 150 Wn.2d at 874 (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The evidence independent of BA’s statements to Buster and Jensen against Beadle was overwhelming; therefore, any error in this case was harmless.

II. TESTIMONY REGARDING BA’S BEHAVIOR

Beadle next argues that the trial court erred by admitting testimony regarding BA’s behavior and refusal to testify at the first child hearsay hearing, as this evidence was both irrelevant and unfairly prejudicial. The State fails to address whether this evidence was in fact relevant, but it responds that the trial court did not abuse its discretion by allowing this non-

prejudicial and “limited testimony.” Resp’t’s Br. at 23. Although Beadle’s argument that the trial court should not have admitted this evidence is persuasive, any error was harmless.

Again, we review the trial court’s decision to admit evidence for an abuse of discretion. *Thomas*, 150 Wn.2d at 856. ER 402 provides: “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state.” Evidence that is not relevant is not admissible. ER 402. “Relevant evidence” means “evidence 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. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

This evidence did not have any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would have been without the evidence. ER 401. The only potential relevance of this testimony was to inform the jury that BA was unavailable to testify for either side at trial; the reason for her unavailability, however, was clearly irrelevant. That the trial court may have limited the scope of this testimony⁸ has no bearing on its relevance in the present case. Moreover, even if this evidence had been relevant, the danger of unfair prejudice would have substantially outweighed its probative value. The image of BA curled up in fetal position on the courthouse floor, crying

⁸ The trial court ruled, “I don’t want an extended presentation [of what happened] . . . just that she resisted coming into the courtroom . . . that she went off to a corner and for an hour couldn’t be coaxed out.” RP (Jan. 30, 2008) at 15-16. Had the trial court done no more than inform the jury that BA was unavailable to testify, the State’s concerns could have been addressed without any potential prejudice to Beadle.

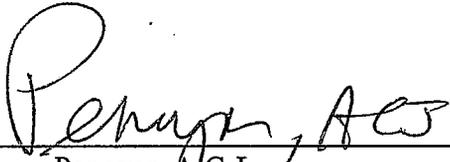
and non-responsive, likely generated speculation amongst the jurors regarding the reasons for BA's extreme behavior and related absence. Therefore, the trial court erred by admitting this prejudicial testimony.

The State's argument that any error was harmless, however, is also persuasive. If there is no "reasonable probability that the outcome of the trial would have been different had the error not occurred," the error is harmless. *Mason*, 160 Wn.2d at 927 (quoting *Powell*, 126 Wn.2d at 267). Beadle argues that "[i]t is likely the jurors decided BA was the more credible because they inferred she could not testify in front of [him] because he traumatized her and she was afraid of him." Appellant's Reply Br. at 11. Furthermore, he contends, this testimony "inflamed the passions and sympathy of the jury." Appellant's Reply Br. at 11. The record demonstrates, however, that the trial outcome would not have differed had the trial court not admitted this evidence. BA told several different (non law enforcement) persons that Beadle interacted with her sexually. Furthermore, she drew explicit pictures of Beadle's "tail" on more than one occasion. Beadle has failed to demonstrate that the jury would not have convicted him had it not heard the testimony regarding BA's pretrial behavior. His argument that this evidence made BA's version of events more credible is without merit.

37508-7-II

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.



Penoyar, A.C.J.

I concur:



Quinn-Brintnall, J.

Hunt, J. (dissent) — This is a close case. I respectfully dissent. I agree with the majority that the record fully supports the trial court’s ruling that the child victim was unavailable to testify in open court. But I disagree that the State met its burden to show that another alternative, such as closed-circuit television, would not make the child victim, BA, available for live testimony and cross-examination by Beadle. In my view, our Supreme Court’s decision in *State v. Smith*, 148 Wn.2d 122, 59 P.3d 74 (2002), requires such a showing.

As the Supreme Court noted in *Smith*:

Where the out-of-court statement does not fall under one of the firmly rooted hearsay exceptions, the confrontation clause requires the proponent of the statement to demonstrate that the declarant is unavailable and that the statement “bears adequate ‘indicia of reliability.’” . . . A witness may not be considered unavailable unless the State has made a “good faith effort to obtain the witness’ presence at trial.” . . . The State is not required to perform a “futile act,” but “‘if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.’”

Smith, 148 Wn.2d at 132-33 (citations omitted). At issue here is application of the last sentence in this quote: Did the State explore the possibility of attempting to make the child victim declarant “available” by video conferencing, even though the potential success of this alternative might have seemed “remote”?

I do not question the trial court’s assumption that the screaming child victim, curled in a fetal position outside the courtroom, refusing to enter, would likely react similarly to the prospect of testifying remotely by video conference from some other setting. Nevertheless, the record does not actually show, or even suggest, that attempting to obtain BA’s testimony remotely in an alternative setting would have been a “futile act.”⁹ Therefore, the record is not sufficiently

⁹ On the contrary, the record shows that apparently on the first day of the originally scheduled trial, the child was eventually coaxed into agreeing to enter the courtroom. But by that point, the trial court had other matters to handle and could not take the child’s testimony.

developed to meet the *Smith* standard requiring actual exploration of an alternative before rejecting it. For example, the State offered no testimony that BA would similarly be unwilling, unable, and unavailable to testify by closed-circuit television from a remote location, away from the courtroom setting, which was clearly stressful to her. On the contrary, the record shows only that she was “not willing to come into the courtroom.” Report of Proceedings (RP) (Nov. 20, 2007) at 46.

Furthermore, the State specifically asked the trial court to find BA unavailable to testify at trial based on “*what happened when we tried to bring her in the courtroom and her age.*” RP (Dec. 19, 2007) at 18 (emphasis added). Consequently, in finding BA “unavailable” to testify, the trial court relied solely on her behavior outside the courtroom: “[T]his 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.*” RP (Dec. 19, 2007) at 24 (emphasis added).

The majority here notes: “The trial court also concluded that the evidence did not suggest that BA would be able to testify by use of a closed-circuit television under RCW 9A.44.150.” Majority at 5. This evidence, however, showed only BA’s reaction to entering the courtroom; there was no evidence of what her reaction might have been in response to a non-courtroom alternative, such as testifying remotely by closed-circuit television.

The majority distinguishes the facts here from those in *Smith* by noting that in *Smith*,

[T]he child’s social worker had testified that she might be able to testify under certain circumstances (i.e. in chambers) and that she might be able to tolerate a courtroom setting if she were not exposed to the perpetrator; the social worker also indicated that given time to prepare, the child’s ability to testify would improve. The child’s therapist also testified that she might be able to testify via video, but “probably not.” *Smith*, 148 Wn.2d at 127-28.

Majority at 9. The majority here further notes, “Unlike *Smith*, there was no evidence that BA would have been able to testify through alternative means.” Majority at 10.

In my view, the majority misapplies the *Smith* test. The State does not meet the *Smith* test for unavailability of a witness with a mere lack of evidence of the child’s ability to testify through alternative means. Rather, under *Smith*, as the proponent of the child’s hearsay testimony, it is the State’s burden to show that it has explored alternative measures to obtain the witness’s testimony but that such measures would be futile. *Smith*, 148 Wn.2d at 132-33. Mere speculation about the futility of an alternative forum does not suffice.

The record contains no showing that the State explored any such alternative measures here. Instead, the record contains speculation, based on BA’s reaction to testifying in the courtroom, that she would be unlikely to testify in an alternative setting. That these speculative conclusions may ultimately prove to be correct does not remedy the lack of supporting evidence in the record presently before us on appeal. See, e.g., *Smith*, 148 Wn.2d at 135-38, where the Supreme Court rejected *Smith*’s argument and our court’s majority holding that the State had met its burden to use “all available means” to procure the child victim’s testimony, even though the State had not pursued the video conference alternative.

I agree with the majority that, unlike *Smith*, the record here does not show that BA might have been amenable to testifying by alternative means such as video conferencing. I acknowledge that the following excerpt from *Smith* is unclear about who bears the burden of producing evidence that the child victim might be able to testify by alternative means:

In determining whether a witness is unavailable, under the good faith requirement, a court should consider what options are available to the State in securing the child victim's testimony. See, e.g., *Barber*, 390 U.S. at 723-24 [88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)]; *Goddard*, 38 Wn. App. at 513 n.2 [, 685 P.2d

674 (1984)]. This would include the use of RCW 9A.44.150 *where there is evidence that the child victim may be able to testify by alternative means.*

Smith, 148 Wn.2d at 136 (emphasis added). This language supports the majority's factual distinction of *Smith* based on the lack of affirmative evidence that BA might have been able to testify using closed-circuit television.

Nevertheless, earlier language in this same Supreme Court opinion suggests that, as the child hearsay proponent, it is the State's burden to produce such evidence for the trial court to consider in rendering its decision on the availability of the child victim whose hearsay statements the State seeks to substitute for the child's live testimony, subject to cross-examination, at trial:

Where the State wishes to introduce hearsay statements against a criminal defendant, *the confrontation clause requires that it show the unavailability* of the declarant or that the "out-of-court statement is inherently more reliable than any live in-court repetition would be." *Rohrich*, 132 Wn.2d at 479, 939 P.2d 697 [(1997)].

Smith, 148 Wn.2d at 132 (emphasis added). Further,

Where the out-of-court statement does not fall under one of the firmly rooted hearsay exceptions, *the confrontation clause requires the proponent of the statement to demonstrate that the declarant is unavailable* and that the statement "bears adequate 'indicia of reliability.'" *Ohio v. Roberts*, U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Smith, 148 Wn.2d at 132 (emphasis added). I read these earlier passages of *Smith* as requiring the State to make some affirmative effort to produce such evidence¹⁰ and that mere silence on

¹⁰ For example, the State might try setting up a remote "dummy" conferencing room with a television and attempt to coax the child into a practice testimony session. If BA similarly vehemently protested, as she had done in response to efforts to coax her into the courtroom, then the record would support a finding of unavailability. Here, however, no such efforts were made. And neither we nor the trial court can know with reasonable certainty how BA might have responded.

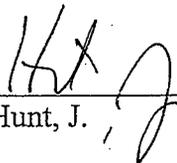
this point is not sufficient.¹¹

The Supreme Court in *Smith* noted my dissent when the case had been before us:

Dissenting, Judge Hunt disagreed that J.S. was unavailable for purposes of RCW 9A.44.120 and that the hearsay statements were corroborated by independent evidence. Relying on the Washington Rules of Evidence (ER), Rule 804(a)(4), she reasoned that a witness should not be considered unavailable unless the proponent of the hearsay statements shows that it has been unable to procure the testimony by “ ‘other reasonable means.’ ” *Because the record did not show that the State attempted, but was unable to procure, a closed-circuit television system, it had not met its burden. She also concluded that the State's failure to make such a showing as well as its failure to show that J.S. could not have testified by such methods violated Smith's confrontation rights under both the state and federal constitutions.*

Smith, 148 Wn.2d at 130 (footnotes omitted; emphasis added). This reciting of my *Smith* dissent rationale also supports my conclusion that the State bears the burden of making some affirmative showing that the child victim is actually unavailable to testify by some alternative means *before* the trial court can conclude that the child witness is “unavailable” to testify, thereby allowing the child hearsay statements in lieu of live testimony and extinguishing the defendant’s right to confront and to cross-examine the witness.

I would reverse and remand for a new trial, including, if necessary, a new child hearsay “unavailability” determination that meets the requirements of *Smith* and ER 804(a)(4).



Hunt, J.

¹¹ I agree with the majority that “RCW 9A.44.150 does not require the trial court to document a child’s unwillingness by *forcing* the child to appear on closed-circuit television as a prerequisite to finding that the child is unavailable to testify.” Majority Opinion at 10 (emphasis added).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

vs.)

STEVEN BEADLE,)

Appellant.)

SUPREME COURT NO. _____
COA NO. 37508-7-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LORI SMITH
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF FEBRUARY, 2010.

X Patrick Mayovsky