

FILED

MAY 31, 2013

Court of Appeals

Division III

State of Washington

No. 30707-7

89926-6

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CASMER J. VOLK, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KITTITAS COUNTY

REPLY BRIEF

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TABLE OF CONTENTS

I. Summary of Reply1

II. Statement of Facts on Reply1

III. Argument6

IV. Conclusion16

TABLE OF AUTHORITIES

Washington Cases

In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 979 P.2d 417 (1999) 14

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). 8

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) 15

State v. Bedker, 74 Wn.App. 87, 871 P.2d 673 (1994)..... 9

State v. Garcia–Martinez, 88 Wn.App. 322, 944 P.2d 1104 (1997) 9

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 13

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)..... 13

State v. Hirschfield, 99 Wn. App. 1, 987 P.2d 99 (1999)..... 8

State v. Hyder, 159 Wn.App.234, 244 P.3d 454 14

State v. Jackson, 46 Wn.App. 360, 730 P.2d 1361(1986)..... 7

State v. Leavitt, 111 Wn.2d 66, 758 P.2d. 982 (1988)..... 10

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977)..... 13

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003) 9

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984)..... 6

State v. Sammons, 47 Wn.App. 762, 737 P.2d 684 (1987) 7

State v. Smith, 118 Wn.App. 288, 75 P.3d 986 (2003) 9

U.S. Supreme Court Cases

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2351, 65 L.Ed.2d 597 (1980) 6

Statutes

RCW 9.94A.535..... 13
RCW 9.94A.537(6)..... 14
RCW 9A.44.120..... 6

Rules

ER 403 9

SUMMARY ON REPLY

In reply, Mr. Volk maintains that the evidence was insufficient to convict him of the charged crime. Additionally, he maintains not only that the court erred in allowing multiple repetitive hearsay statements without conducting the proper analysis, but also that he received ineffective assistance of counsel for waiver of that hearing. Mr. Volk also points out that the sentencing court was required to prepare and file written findings of fact and conclusions of law to support an exceptional sentence, the length of the sentence imposed is excessive, and the sentencing court acted outside its authority in imposing community custody conditions that were either unconstitutionally vague or were not directly related to the circumstances of the offense.

I. STATEMENT OF FACTS ON REPLY

The facts of this case were set forth in appellant's opening brief. Appellant offers the following clarifications of facts as well as a correction of some facts presented in the State's response brief.

1. On page 9 of Respondent's brief, counsel has misquoted the record, attributing statements to defense counsel that were actually made by the State. The State's counsel, not defense counsel, made the following statements:

“ Therefore, Your Honor, State believes the only analysis that is needed if we even need it, is under 9A.44 at this point. And the only reason the State says “if we need it” is before going into the first trial we reached an agreement that all the child hearsay statements –“we” meaning the State and the defendant, all the statements the child made to others alleging this act would be admitted on condition that the child testify. And we sought to meet that condition. So the State is believes we are in exactly the same situation previously and we believe that unless the State is seeking to ask this court to declare the child unavailable, that we should just simply proceed and certainly at that point if the defendant has any issues under 9A.44 regarding any particular witness or all the witnesses, then the State is willing to address those.” (Jan. 6 RP 6-7).

In response, defense counsel traced the history of the previous trial, in which the court found the child witness incompetent to testify and ruled the interview videos were inadmissible. (Jan. 6 RP 7-8). Contrary to the State’s recitation of facts, defense counsel did not agree on the record that *all* child hearsay statements were admissible. Rather, defense counsel stated he wanted the interview videos introduced. (Jan. 6 RP 7-8).

This understanding of what defense counsel agreed to was confirmed after the court found the child witness competent to testify:

“The judge has ruled. I’ll accept the ruling. There is no purpose in asking any questions. Good. I want to be understood though

because judge ruled he is competent. I plan to introduce into evidence two taped interviews....I want to make sure I can introduce those taped statements that are –. (RP 22).

Although the court made its ruling on the competency of the witness, it did not hold an RCW 9A.44.120 to determine whether any of the numerous hearsay statements contained ample indicia of reliability for admission.

2. The State's response brief incorrectly numbers the individuals who reported L.H.'s out of court statements as 5. (Br. of Resp. at 22,25,27). There were in fact, six individuals who repeated the statements at trial. (RP 124;242-44;344;336-37;407,424).

3. Forensic Evidence Testimony

Lab technicians tested a number of items for this case. Items in the SANE kit included: the body and cavity swabs taken from L.H., and the Black Ranger underwear. (RP 272). Also submitted were items retrieved from the home: a diaper pull-up, various underpants, clothes worn during the previous days, a cover to the child car seat, and reference samples. (RP 179; 272). The Spiderman underwear worn by L.H., and the Star Wars fitted sheet that he slept on the first night he returned home, as well as swabs from the mattress he slept on and the floor area were also tested. (RP 287-88).

The Spiderman underwear, the mattress, and Star Wars sheets all tested negative for semen. (RP 288). The blood on the sheet was tested and Mr. Volk was excluded from the DNA profile. (288-99).

The crime lab's second testing on the Black Ranger underwear allowed for an amplification to target a "Y" male profile. The test developed a single source male profile from that sample, which matched L.H. Mr. Volk was excluded as a source of the male DNA obtained from that sample. (RP 306-07; 311).

4. Sentencing

In its response, the State has summarized the record in a somewhat confusing way:

"On the record, the sentencing court told the appellant that he found L.H. competent and commended his "bravery" in testifying. He told the appellant his criminal history counted against him. However, he underlined that he was sentencing the appellant to "the minimum sentence ...at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison...because of the particular vulnerability of the child." (Br. of Resp. at 15 citing to 2RP 736-739).

The record actually reads as follows:

"We need to wrap it up here. All right. Let me make a couple comments or observations first off I guess for the benefit of the parents of, L's parents, I found L to be an extremely bright and certainly energetic young man. Neither one of the parents were in

the courtroom when he testified but I'll tell you that he was very interested in this gavel and wanted me to give him the gavel, asked several times and I finally just said it's not mine to give. So in any event he quite clearly was a competent witness and I think demonstrated his intelligence and I think to a great degree his bravery as well too when he testified in this setting that is intimidating to everyone and certainly is and was to a 5 year old child." RP 735.

The court went on to discuss how it arrived at Mr. Volk's offender score. And then stated:

"So, given those circumstances then they have an offender score of 6, which gives—renders a range for the purpose of the minimum sentence of 162 to 216, *then the aggravating factors found by the jury that the child was – because of the particular vulnerability of the child which was assisted in the commission of this particular offense, taking all those matters into consideration I believe that the top of the range is the appropriate for the setting minimum sentence to be served. So that will be set at 216 months, which is 18 years of confinement.* And then the question becomes as to what or what is appropriate in regards to the aggravating, what sanction should be imposed regarding the aggravating factor? Well my intention is to impose significant amount of time in regards to the aggravating factor and that amount of time is 120 months. So the equivalent will be 28 years of confinement. So did I just add—do I put 216 plus 120 on there?' RP 737-738.

The court did not file the mandatory written findings of fact and conclusions of law as to whether it found substantial and compelling reason to impose additional time of incarceration in the form of an exceptional sentence.

II. ARGUMENT

A. The Court Was Required To Comply with RCW 9A.44.120

At pre-trial, the parties, including the court, appear to have conflated a *Crawford* analysis with RCW 9A.44.120. (Jan. 6 RP 6-7). These are separate and distinct tests, both of which must be satisfied for child hearsay statements to be admissible. Here, once the court determined L.H. was competent to testify there was no Sixth Amendment concern.

However, because child hearsay statements do not fall within any firmly rooted hearsay exception, their admissibility is conditional, dependent on the court determining whether the content and circumstances surrounding the statement indicate they are reliable. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2351, 65 L.Ed.2d 597 (1980); *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984); RCW 9A.44.120. Under Washington law, failure to comply with the hearing requirements of RCW 9A.44.120 is error. *State v. Jackson*, 46 Wn.App. 360, 730 P.2d

1361(1986); *State v. Sammons*, 47 Wn.App. 762, 737 P.2d 684 (1987). In this case, the court's failure to hold the hearing was error.

The Respondent's brief appears to conduct a *Ryan* analysis, concluding that the court would have ruled the statements admissible. (Br. of Resp. 23-27). However, the facts are that the court conflated the *Crawford* analysis with an RCW 9A.44.120 test and did not make a finding on admissibility on the hearsay statements. Further, while defense counsel stated he wanted the hearsay statements from the video interviews brought into evidence, counsel did not agree to or stipulate on the record that all hearsay statements were admissible. L.H. made numerous fantastical statements in his allegations. (RP 240, 244,249-50). It is unknown whether the court would have excluded at least some of the hearsay statements because they were not reliable or were unnecessarily cumulative.

Upon questioning, the child made an initial statement to his mother: "he put macaroni, lots of cream up my butt and his pee pee in my butt." (RP 138). His mother testified she was hysterical in front of the child, admitting that hysterical was a strong word to use. (RP 139).

L's statements were interwoven with other fantastical allegations as well. He claimed that Mrs. Volk put macaroni in his butt, that Mr. and Mrs. Volk both hit him with a pan, that they both spanked him with a

wooden spoon, that Mr. Volk put a wooden spoon in his butt (RP 244,249-50, 422). Then, after making all the allegations to the interviewer, he was questioned as to whether he was telling the truth. In response, L stated several times that it was a lie that Cas “put his pee pee in your butt”. (RP 251).

When asked, “Has your son L ever lied to you?” his mother answered, “That’s hard to explain. He was four at the time. He is 5 and his brother and him – L did something then L is going to blame it on C. C will blame it on L. I wouldn’t call it a lie. It’s like a child’s lie so they don’t get in trouble.” (RP 145-46). The logical conclusion is that L was a preschooler who did not tell the truth on occasions when he perceived the consequences would be detrimental to him and developmentally, had little understanding of the difference between fact and fiction once he started telling a story.

The trial court’s decision to admit child hearsay statements under RCW 9A.44.120 is reviewed for abuse of discretion. *State v. Hirschfield*, 99 Wn. App. 1, 3, 987 P.2d 99 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A “discretionary decision is based on untenable grounds for made for untenable reasons if it rests on facts

unsupported in the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Moreover, a court can also abuse its discretion by failing to exercise it. *State v. Smith*, 118 Wn.App. 288, 292, 75 P.3d 986 (2003) (citing *State v. Garcia–Martinez*, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997)).

Here, the court either applied the wrong legal standard, that is, conflating the Sixth Amendment right to confrontation with RCW 9A.44.120, or simply did not exercise its discretion in making any finding. As argued in appellant’s brief, child hearsay statements are also subject to exclusion if the danger of unfair prejudice, or the needless presentation of cumulative evidence potentially outweighs their probative value. ER 403; *State v. Bedker*, 74 Wn.App. 87, 93, 871 P.2d 673 (1994). Here, because there was no reliability determination, and the court did not perform the necessary balancing test under ER 403, Mr. Volk was unfairly prejudiced. As cited in appellant’s brief, the concern regarding the use of hearsay statements is the risk of an erroneous conviction: this is especially true where there is no evidence consistent with the child’s allegations and statements were admitted based on mere repetition rather than reliability. *State v. Ryan*, 103 Wn.2d at 174.

The court's failure to hold the hearsay admissibility hearing was error. The court's conflation of the *Crawford* analysis with an RCW 9A.44.120 analysis was error. The court's failure to perform an ER 403 analysis on the record was error.

B. Mr. Volk Received Ineffective Assistance of Counsel Where Counsel Failed To Object To the Multiple Repetitive Child Hearsay Statements Offered At Trial.

Appellant stands on the argument and authorities cited in his opening brief, which is incorporated by reference, and adds the following.

In *Leavitt*, the Supreme Court briefly considered the issue of ineffective assistance of counsel because of waiver of a reliability hearing. *State v. Leavitt*, 111 Wn.2d 66,72, 758 P.2d. 982 (1988). There, the Court explained the Court of Appeals held that counsel's performance was deficient and counsel was not merely employing trial strategy by failing to timely object to the failure to hold the hearing. *Id.*

In *Bedker*, the appellant argued there was no legitimate purpose in allowing adults to repeat prior consistent statements of a child witness which alleged sexual misconduct. *Bedker*, 74 Wn.App. at 92. There, in a pretrial hearing, the defense did not object to the original disclosures to the medical doctor, but did object to statements the child made to an

interviewer at the sexual assault center and other counselors. *Id.* at 91.

The trial court admitted the statements to the interviewer, but excluded as cumulative statements made to others. Finding that the trial court carefully exercised its discretion in determining which statements would be admitted and which would be excluded, the reviewing court ruled there was no abuse of discretion. *Id.* at 94.

In contrast, here, there was no objection or limitation on the number of cumulative statements that were admitted. The repetitive hearsay statements, which were not evaluated for reliability, were central to the State's case. The failure of counsel to object and require the proper scrutiny and analysis under RCW 9A.44.120 and ER 403 constituted incompetence justifying reversal.

C. The Evidence Was Insufficient To Sustain The Conviction.

Appellant stands on the argument and authorities cited in the opening brief, incorporates them by reference, and adds the following.

The State's case here rested on the repetition of the child's allegations and the fact that semen was found in the child's underwear that he put on the day *after* he had already been taken back to his family's home.

To substantiate its claim for sufficiency of the evidence Respondent's brief states:

“His [L.H.] testimony was corroborated by his mother, a police detective, a SANE nurse, a second detective sergeant, and a child forensic interviewer. In addition, the appellant admitted that L.H. told him: ‘Cas you hurt me.’”

(Br. of Resp. at 32).

Appellant points out that the accusation was never “corroborated” but rather simply repeated. Repetition amounts to neither veracity nor reliability. Moreover, Mr. Volk’s testimony regarding the child’s allegation was as follows:

“L said that I hurt him and I didn’t know what he was talking about. I didn’t engage. He had marker all over his face and legs so I asked him what he did to himself and said – he said he liked to do that.”

(RP 608).

Mr. Volk’s acknowledgment that L.H. spoke to him was not an admission of culpability.

Although the State made much of DNA testing at trial, Respondent has conceded the forensic testing does not establish any link to Mr. Volk. (Br. of Resp. at 33). The underwear worn by the child during his stay at the Volk home did *not* test positive for semen. The diaper pull up, sheets, and car seat cover used by the child were tested and no evidence was presented at trial there was any semen located on those items. The blood

that was found in the Black Ranger underpants and other items excluded Mr. Volk as a contributor.

Even drawing all reasonable inferences from the evidence in favor of the State, no rational trier of fact could have found guilt beyond a reasonable doubt in this case. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). This court should find the evidence insufficient and order reversal and dismissal. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

D. The State Did Not Present Sufficient Evidence To Prove Beyond A Reasonable Doubt The Aggravating Sentencing Factor.

Appellant stands on the argument and authorities cited in appellant's opening brief and incorporates them by reference.

E. The Trial Court Erred When It Failed To Enter Written Findings of Fact To Support The Exceptional Sentence.

Appellant stands on the argument and authorities cited in appellant's opening brief and incorporates them by reference.

Respondent's brief does not cite any authority to counter the statutory requirement that the sentencing court *shall* enter written findings of fact and conclusions of law, setting forth its reasons for its decision in imposing an exceptional sentence. RCW 9.94A.535. An aggravating factor found by the jury does not automatically mean the court must

impose an exceptional sentence. Rather, the court *may* impose a sentence that exceeds the standard range, *if* it determines that there are substantial and compelling reasons justifying such a sentence. RCW 9.94A.537(6). The written findings ensure the reasons for the exceptional sentence are articulated. On appeal, this Court then reviews *de novo* whether those reasons are substantial and compelling. *State v. Hyder*, 159 Wn.App.234, 262, 244 P.3d 454, *rev. denied*, 171 Wn.2d 1024 (2011). Because there is no meaningful review of the court's reasoning here, this Court should not uphold the trial court's reliance on an aggravating factor said to support the exceptional sentence. Alternatively, Mr. Volk requests this Court remand for entry of the required findings and allow supplemental briefing. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999).

F. The Length Of The Exceptional Sentence Imposed By The Trial Court Is Excessive.

Appellant stands on the argument and authorities cited in appellant's opening brief and incorporates them by reference.

G. The Sentencing Court Acted Outside Its Authority By Imposing Community Custody Conditions That Were Either Unconstitutionally Vague Or Were Not Directly Related To The Circumstances Of The Offense.

Appellant rests on the argument and authorities cited in the opening brief and incorporates them by reference.

Respondent's brief does not address the Supreme Court's holding that the community custody condition prohibiting the viewing of pornography was unconstitutionally vague because there were no ascertainable standards for enforcement. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). Apart from the State's speculation that alcohol might disinhibit an individual, the State does not cite any crime-related facts that would allow for a prohibition of alcohol. (Br. of Resp. at 40). Similarly, Respondent has not cited any authority to counter appellant's argument that a condition to refrain from frequenting establishments where alcohol is the main source of revenue is too broad. The conditions should be stricken.

III. CONCLUSION

Based on the foregoing facts and authorities, Mr. Volk respectfully asks this Court to reverse and dismiss for insufficiency of the evidence.

Or alternatively, to set the matter for a new trial based on ineffective assistance of counsel.

Dated this 31st day of May 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant CASMER VOLK, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Reply Brief was sent by first class mail, postage prepaid on May 31, 2013 to: Casmer Volk, DOC # 314231 Airway Heights Correction Center, PO Box 2049, Airway Heights, WA 99001; and by electronic service per agreement between the parties to: Chris Herrion, Kittitas Co. Prosecuting Attorney, 205 W. 5th Ave Ste 213, Ellensburg, WA 98926, at: Chris.Herion@co.kittitas.wa.us.

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