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NO. 63206-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES ARTHUR HARGITT,

Appellant.

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

The Honorable James H. Allendoerfer, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

JUDICIAL ESTOPPEL PRECLUDES THE STATE FROM CLAIMING ADDELMAN'S TESTIMONY ABOUT WHAT R.H. SAID IS ADMISSIBLE FOR THE TRUTH OF THE MATTER ASSERT.

Judicial estoppel precludes a party from asserting one position in a court proceeding and then later, in a different court, seeking an advantage by taking a clearly inconsistent position. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005).

The Supreme Court adopted the following elements for judicial estoppel:

- “(1) The inconsistent position first asserted must have been successfully maintained;
- (2) a judgment must have been rendered;
- (3) the positions must be clearly inconsistent;
- (4) the parties and questions must be the same;
- (5) the party claiming estoppel must have been misled and have changed his position;
- (6) it must appear unjust to one party to permit the other to change.”

Markley v. Markley, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948) (quoting 19 Am.Jur. 709, Estoppel § 73).¹

These elements are met here. Turning to element "(3)" first, the State's positions at trial and on appeal are "clearly inconsistent." At trial,

¹ In Johnson v. Si-Cor Inc., 107 Wn. App. 902, 28 P.3d 832 (2001), after reviewing the application of the judicial estoppel doctrine in Washington, the court opined that subsequent to Markley, Supreme Court adopted less stringent elements for application of the doctrine; "A party will not be permitted to plead matters that are inconsistent with his pleadings in a former action between the same parties, if he prevailed upon those

in response to a defense hearsay objection, the State asserted R.H.'s statement to Addleman was "not offered for the truth of the matter asserted." 2RP 189. In other words, in order to gain admission of Addleman's testimony about what R.H. told, the prosecutor position the evidence could not be considered as substantive proof R.H. no longer wanted to stay at Hargitt's house. On appeal, however, the State claims Addleman's testimony about what R.H. said is not hearsay, and to the extent it is, it is admissible under the state of mind exception, and therefore was properly admitted to show R.H. no longer wanted to go to Hargitt's. Brief of Respondent (BOR) at 12-17. These positions are clearly inconsistent.

Turning to element "(1)", the State successfully maintained its 'not-offered-for-the-truth-of-the-matter-asserted' position at trial. The trial court relied on this assertion by the State to admit the evidence. 2RP 189.

Turning to element "(2)", a judgment was rendered here. See CP 22-39 (judgment and sentence), 59-62 (verdict forms).

Turning to element "(4)", the parties are clearly the same, and so too is the underlying legal question; what limitations should be placed on the jury's consideration of Addleman's testimony about what R.H. told

pleadings and if the other party has been misled thereby." 107 Wn. App. at 907-09 (quoting Witzel v. Tena, 48 Wn.2d 628, 633, 295 P.2d 1115 (1956).

her? The State claimed at trial it could not be considered for the truth of the matter asserted, but takes the opposite position on appeal.

Element "(5)" is met. Hargitt relied on the State's position that Addlemen's testimony about what R.H. said was not hearsay only because it was not admitted for the truth of the matter asserted, to argue on appeal that the State's subsequent reliance on the evidence in closing argument for the truth of the matter asserted, coupled with the trial court's refusal to instruct the jury on the limited use of the evidence, violated his right to a fair trial. Brief of Appellant (BOA) at 15-19.

Finally, element "(6)" is met as well. Having obtained admission of Addleman's testimony about what R.H. said on the basis that it was not being admitted for the truth of the matter asserted, it is patently unfair for State to now take the position that there should have been no such limitation on the jury's consideration of that evidence.

As set forth in the opening brief, to the extent Addleman's testimony about what R.H. told her was admissible for some limited purpose, then the defense request for a limiting instruction should have been granted and the refusal to do so constitutes an abuse of discretion. State v. Redmond, 150 Wn.2d 489, 496, 78 P.3d 1001 (2003). Allowing the jury to consider Addleman's hearsay testimony for the truth of the matter asserted -- that R.H. did not want to go to Hargitt's and wanted her

grandmother to lie for her to avoid going -- unfairly bolstered R.H.'s credibility with regard to her claim Hargitt molested her. Because the verdict turned on who the jury found more credible, Hargitt or R.H., admission of the evidence without an appropriate limiting was not harmless error. Reversal of Hargitt's convictions is required.

B. CONCLUSION

For the reasons addressed above and in appellant's opening brief, this court should reverse Hargitt's convictions and remand for a new trial.

DATED this 8th day of October, 2009.

Respectfully submitted,

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DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63206-0-1
)	
CHARLES HARGITT,)	
)	
Appellant.)	

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 OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] CHARLES HARGITT
DOC NO. 326442
AIRWAY HEIGHTS CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER 2009.

x *Patrick Mayovsky*

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