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No. 65977-4-I

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

Skagit County No. 09-1-00818-2

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

MARCIAL RAMOS TENORIO,

Appellant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In its response, the State argues:

(1) That the Court's granting of the State's Motion *in Limine* to exclude an allegation that the Defendant's ex-wife had threatened to get even with him for reporting her to the police for child abuse was proper even though the threat was made just two days before the Defendant's wife pressured her children to accuse their father of sexual abuse.

(2) That highly suggestive statements made by the Defendant's vindictive wife and her sister in the presence of her children, claiming that the Defendant was a child molester during the same conversation when the ex-wife pressured her children to accuse the Defendant of sexual misconduct, were not admissible.

(3) That these errors by the trial court were harmless beyond a reasonable doubt.

(4) That there was sufficient evidence to support the conviction on Count III based on testimony that, while sleeping with his children, the Defendant rubbed up against his daughter's thigh while both he and his daughter were dressed in pajamas.

As argued below, none of the State's arguments are persuasive and the Court should reverse the Defendant's conviction and dismiss the remaining Count III, as a matter of law, for insufficient evidence.

II. ARGUMENT

At the outset, it is important to note that the trial judge took the extraordinary step of dismissing Count IV at the conclusion of the State's

case for insufficient evidence, finding that there “has to be something more than just, I felt his penis on the back of my leg for whatever period of time it was, however brief it was. . . . So I would grant the motion to dismiss IV.” RP (7/27/10) at 219. The jury then acquitted the Defendant on Counts I and II, but convicted him on Count III. CP 90-92.

Therefore, this was a very weak case and it is simply not reasonable to assume the jury would have convicted the Defendant on even one of the four charges if they had heard evidence of the mother’s threat “the Friday night before all these accusations were first made” in retaliation for the Defendant reporting her to the police for child abuse. RP (7/26/10) at 7. The judge excluded evidence that she threatened him “You will pay for this. I will hurt you in a way that . . . you won’t be able to recover,” after the Defendant reported her to the police. *Id.* at 8.

The mother, Gabriella Cuevas, even admitted that she and her sister coached the children extensively over a period of two days, pressuring them to accuse their father, despite their denials, yet the jury was not allowed to hear evidence that she had explicitly informed her children that the Defendant was a child molester.

A. **The Mother's Threat to Get Even with the Defendant for Reporting Her to the Police was Directly Relevant to Her Testimony as a Critical Prosecution Witness, and the Exclusion of that Threat is Reversible Error.**

The defense made an offer of proof that, when the Defendant picked up his children on Friday:

he sees that Steven's hand is bleeding. He goes over to the police station and brings the officer over to the house. Then the officer talks about it with all the parties who are involved. My client leaves with the kids. Then, and then has this conversation with Ms. Cuevas.

RP (7/26/10) at 10. At a pretrial hearing, Gabriella Cuevas admitted that her son "started getting out of control about it, and I smacked his hand with the thing that I cleaning with, the refrigerator . . . and then he, Steven was crying because I smacked on the hand." RP (7/14/10) at 39-40. The Defendant "saw a police officer" and reported the incident. *Id.* at 40. According to Cuevas, the Defendant "called the police on [her] so many times, and he's called CPS." *Id.* at 42-43. However, the judge ruled he would not allow testimony about the Friday incident "unless the kids connect the dots" between the mom's anger and a fabrication. RP (7/26/19) at 12-13.

As the State points out in its response, defense counsel was unable to elicit testimony from the children that their mother or aunt had explicitly instructed them to fabricate a claim against the Defendant.

However, the admissibility of this threat does not require defense counsel to “‘establish a nexus’ between the disclosures by the kids and the alleged threat,” in order to make it “relevant,” as argued by the State. *See* Respondent’s Brief at 6-7. The State’s argument that “The trial court did not abuse its discretion since there was only speculation that there was this connection,” (Respondent’s Brief at 23) ignores the fact that the threat was undeniably relevant to the testimony of Gabriella Cuevas, the person who made the threat, because she was a child hearsay witness, not to mention the fact that she coerced her children into accusing their father of sexual abuse.

To the extent that trial counsel for the Defendant failed to argue that the threats by Ms. Cuevas were relevant to the credibility of Ms. Cuevas herself as a crucial witness and therefore waived the argument, such failure would clearly constitute ineffective assistance of counsel because the failure to make a proper legal argument can never be deemed a legitimate tactical decision. *See State v. Dawkins*, 71 Wn.App. 902, 909-11, 863 P.2d 124 (1993).

The State also argues that “the allegation of repeated coaching is an over-statement of the fact that Cuevas had asked J. some questions based upon the way she was acting.” Respondent’s Brief at 24. However, even a cursory examination of the record demonstrates that both Gabriella

Cuevas and her sister Sylvia Cuevas repeatedly coached, questioned, and urged the children to accuse the Defendant of sexual abuse despite their repeated denials that any abuse had ever occurred.

1. **Evidence of Coaching**

Gabriella Cuevas claimed that, when J. came back from her last visit, just two days after the Defendant had reported her to the police and she had threatened to get even, J. “looked a little different. She was a little more quieter.” RP (7/27/10) at 30.¹ Ms. Cuevas immediately “assumed” her daughter J. had been molested, but J. repeatedly denied anything had occurred:

I was asking her if she was okay, and I was holding her, and if anything had happened or if her dad had been doing anything to her or been inappropriate or anything. She kept saying, no, no, no, and her eyes were tearing and she was looking down. Her eyes were big, too.

Id. at 40. Ms. Cuevas kept asking “if there is anything that I should know or something. I think it was something like that.” *Id.* at 43.

The next day Gabriella Cuevas then enlisted her sister Sylvia’s help. Gabriella told Sylvia “you know, Sylvia, I feel bad. I think something is wrong with the kids. I don’t know. Can you talk to them?”

¹ This is not surprising because the entire family was under a great deal of stress because their house had just burned down and they were crammed into “temporary housing.” *Id.* at 34. Gabriella’s sister, Sylvia Cuevas confirmed that Gabriella and her children “just got through a house fire, and they were trying to find a place to live, in and out of a hotel,

Id. at 68. Sylvia then told the children a long story about a child molestation case involving a pastor or priest who carried a brush in his pocket. *Id.* at 45-46. She told the children that “if you guys ever feel anything like that, that brush or anything like that, that’s not okay. It’s called a male organ.” *Id.* at 46-48.

In her testimony, Sylvia Cuevas explained:

I said, if you ever feel something like this on your body, it’s a man’s organ that’s acting inappropriately. You need to let someone know if it makes you feel uncomfortable and I left it at that.” RP 64-65. Then Sylvia told her sister who said “yes, something inappropriate is going on, and we left it at that.” RP 65.

I made the comment, you know, in the past there was little girls affected by this priest. He would use a hairbrush in his private area, and then put it up against – he would do the little horsey thing, and it wasn’t a hairbrush. It was a man’s organ, and these girls were confused. They didn’t know until they actually saw the hairbrush.

Id. at 63-66. After J. was told the story about the priest “she freaked out.”

Id. at 65.

Sylvia Cuevas further explained how she put a wooden spoon inside her pants and explained it was a man’s organ. *Id.* at 70-71. She actually pressed the spoon up against J. “around her hip area.” *Id.* at 73.

trying to situate living out of boxes and stuff. So I would come over. I would help her cook, cleaning, pick up.” RP (7/26/10) at 34-35; 58.

J. testified that her Aunt Sylvia “asked me questions.” She doesn’t remember “what she said.” She does remember “she pulled out a wooden spoon . . . she told me to feel it, and then she asked me if it felt like that,” and she answered “yes.” RP (7/28/10) at 183. Prior to the demonstration with the spoon she did not know “what a man’s body part felt like.” When her Aunt Sylvia showed her the spoon “I thought it was the same thing.” *Id.* at 183-84.

Since the defense theory was based on Gabriella Cuevas’ threat to get even with her husband for reporting her to the police just two days earlier, and that she coached and coerced her children with highly suggestive discussions to accuse their father of sexual abuse, the excluded evidence basically undercut the entire defense case. It is not surprising that J. testified she had been touched with “a wooden spoon” after the shocking story, demonstration, and highly suggestive and leading questions by her mother and her Aunt Sylvia.

As argued in Appellant’s Opening Brief, the defense had an absolute, constitutional right under the Confrontation Clause to elicit this testimony. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). In *Coy v. Iowa*, 487 U.S. 1012 (1988), the court expressly noted that the right to confrontation is critical to “reveal the child coached by malevolent adults.” *Id.* at 1020. *Accord: Olden v. Kentucky*, 488 U.S. 277 (1988). In

State v. Roberts, 25 Wn.App. 830, 611 P.2d 1297 (1980), our court held that this right to elicit evidence of motivation to fabricate is absolute, although the full extent of the cross-examination is subject to the trial court's discretion. However, "the denial of a criminal defendant's right to adequately cross-examine an essential state's witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment's right of confrontation." *Id.* at 835 (emphasis in original).

B. The Trial Judge Erred in Excluding Testimony that Gabriella Cuevas Told J. Her Father Was a Child Molester.

The trial judge granted a motion *in limine* to prohibit questioning of R. about the fact that R. had previously

indicated that her mom had told J. that her dad is a child molester. That was the night before J. told her aunt that she felt this wooden spoon. . . . We are offering these merely, as Your Honor mentioned earlier, that this is background. These are things that are said in the context of a conversation that was had.

RP (7/27/10) at 98-99. The defense argued

we're just trying to show that these statements were actually made, not that the statements were true. . . . This is all completely relevant. This goes to an 8 year old girl – statements that she made the next morning to her aunt when she was told that she couldn't be protected from her father and was shown a wooden penis or whatever. How is this not relevant? This is exactly part of the child hearsay.

Id. at 101-102.

J. testified that she remembered sitting on her mom's bed, and "she was asking me questions" about "my dad." RP (7/28/10) at 181. Her mother asked "if my dad had ever touched me," but she doesn't "remember if I did" answer that question. She also talked to her "Aunt Sylvia" about her dad: "If he had ever touched me." *Id.* at 182.

In addition, Gabriella confirmed that both J. and R. were present for the questioning. She testified that she called her daughter R. in to join them "next to the bed with us . . . then I started asking J. if she's okay." RP (7/14/10) at 28.

Gabriella Cuevas testified she didn't recall telling J. "that her father is a child molester." RP (7/27/10) at 43. However, there was ample evidence that the statement was made by Gabriella to both J. and R. during the course of Gabriella's interrogation of her children. In an offer of proof, the defense advised the Court that "R. had indicated that her mom had told J. that her dad is a child molester. That was the night before J. told her aunt that she felt this wooden spoon." *Id.* at 98-99.

The State argues in its response, consistent with the trial court's ruling, that the statements would be admissible only if J. testified that she heard the statements, whether or not R. would testify that "she heard Mom's statements to J." Respondent's brief at 25-27; RP (7/27/10) at 102. The trial judge reasoned "there has got to be connective tissue there, and

the connective tissue is J. heard the statements . . . but as far as asking R. whether she heard mom's statements to J., that's hearsay." RP (7/27/10) at 102. The defense objected. *Id.*

This trial court's ruling was clearly error because the statements were simply not hearsay. An out of court statement is only hearsay if it is offered to prove "the truth of the matter asserted." ER 801(c). Washington Courts "strictly appl[y] the definition of hearsay in ER 801(c)." *In re Theders*, 30 Wn.App. 422, 432, 126 P.3d 34 (2005). The defense was clearly offering the testimony of R., not for the truth of the matter asserted (i.e., to prove that the defendant *was* in fact a child molester) but to establish the effect that it had on J. by influencing her to finally believe, a day later, that her father was a child molester. As such, it is clearly not hearsay and should have been admitted. *See, e.g., State v. Williams*, 85 Wn.App. 271, 932 P.2d 665 (1997); *State v. Alvarez*, 45 Wn.App. 407, 726 P.2d 43 (1986). Contrary to the State's contention, ER 801 contains no requirement that the listener testify the statement was heard.

Such testimony is particularly important in a case such as this where a young and impressionable witness has been influenced by highly suggestive and coercive questioning. J. initially denied her father had done anything wrong and, whether she remembers her mother's statement

about her dad being a child molester or not, the fact that R. witnessed her mother making this statement to J. is highly relevant to show the improper influence that her mother was exerting on J. to make her believe she had been molested.

C. These Errors Were Not Harmless.

As already argued, the denial of cross-examination “to impeach a prosecution witness with evidence of bias or a prior inconsistent statement is guaranteed by the constitutional right to confront witnesses.” *State v. Johnson*, 90 Wn.App. 54, 69, 950 P.2d 981 (1998) (citing *Davis v. Alaska, supra*, and *State v. Dickenson*, 38 Wn.App. 457, 469, 740 P.2d 312 (1987)). *Accord: State v. Smits*, 58 Wn.App. 333, 338, 792 P.2d 565 (1990) (“preclusion of any inquiry into possible suit or financial interest was error,” requiring reversal).

As the Court aptly stated in *State v. Whyde*, 30 Wn.App. 162, 632 P.2d 913 (1981):

Bias and interest are relevant to the credibility of a witness. This is of special significance here because the entire State’s case depended on the credibility of one witness . . .

* * *

The question of a possible lawsuit related directly to the bias, prejudice and interest of S [the complainant]; the trial court’s ruling prevented the defense from making a factual record on which to base its contention that S. fabricated the rape story for her own financial benefit, and was erroneous.

It was also error to exclude this issue from S's cross-examination. To call these errors harmless would inevitably presume the truth of S's testimony and thereby beg the question.

Id. at 166-67 (internal citations omitted). These cases make clear that a trial judge does not have discretion to preclude this kind of cross-examination in its entirety. Therefore, it is obviously not harmless error.

D. The Evidence of Sexual Contact is Insufficient to Support the Conviction.

During the trial, J. claimed she was touched "on the side of me, my leg." When asked "on your leg. Where on your leg?" she answered "I don't know, like upper leg." She "was lying flat on my back . . . I always lay flat on my back." When asked how her dad was laying she answers "he's always hugging me. . . . He'd be turning facing me." RP (7/28/10) at 177. She explained that the wooden spoon would "move up and down. . . I don't know if it ever stopped because I ended up falling asleep." *Id.* at 178. When she turned away it would stop. *Id.* at 179. She agreed that she is "a pretty crazy sleeper" and testified: "Yeah. I am a crazy sleeper, and I kick the covers off. Everybody got upset." *Id.* at 187.

The night she came back from her dad's her mom "was asking you if your dad touched you in your private parts," but she didn't tell her "yes." She agreed that the movement was "on the side of [her] leg" and that her dad would either wear pajamas or sleep in his boxers. *Id.* at 188.

She wore pajamas to bed “all the time.” *Id.* at 189. She agreed that she didn’t know what an organ was until her Aunt Sylvia explained it to her by showing her a wooden spoon. *Id.* at 190-91.

The State relies on *State v. Whisenhunt*, 96 Wn.App. 18, 980 P.2d 232 (1999) to assert that the location and manner of alleged touching in this case is sufficient to support a finding of sexual gratification and therefore “sexual contact.” The facts in *Whisenhunt*, however, are significantly distinguishable from those in this case. In *Whisenhunt*, the alleged victim testified that the defendant, a fellow passenger on a school bus, “sat in the seat ahead of her on the school bus and reached his arm over the seat to touch her vaginal area” on three separate occasions. *Id.* at 24. There could be no doubt in that case that based on the lack of relationship between the involved persons, the manner and nature of touching (over a bus seat, and in the vaginal area), and the repeated occurrences, there was sufficient evidence to support a finding that the contact was done for the purpose of gratifying sexual desire, and that there was no “innocent explanation.”

In the instant case, however, the facts do not similarly indicate that the alleged touching constituted acts done by the defendant for the “purpose of gratifying sexual desire.” Rather, the facts in this case are more similar to those in *State v. Powell*, 62 Wn.App. 914, 816 P.2d 86

(1991), which was discussed extensively in both Appellant's Opening Brief and the Respondent's Brief, where the Court found insufficient evidence of sexual conduct. The *Powell* Court noted that the alleged victim was "clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests not to tell were made." *Powell*, 62 Wn.App. at 918. The court explained that when the evidence shows touching "through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification." *Id.* 917.

Here, as in *Powell*, the alleged touching was through clothes and there were no threats, bribes, or requests not to tell. Because the alleged touching in this case was "through clothing," Washington requires additional evidence of sexual gratification to constitute sexual contact. Where J. testified that she felt something hard against her thigh or the back of her leg while in bed, and there are no additional indicators of sexual gratification such as those in *Whisenhunt*, there is simply insufficient evidence to conclude that the alleged touching was sexual contact.

Considering the lack of evidence and the highly suggestive and coercive way that she was questioned, this Court should find that there was insufficient evidence of sexual contact, and should reverse and dismiss Count III, as the court did in *Powell*.

III. CONCLUSION

For all these reasons, and because of the cumulative effect of these serious errors at trial, this Court should reverse Defendant's conviction on Count III and dismiss this case with prejudice for insufficient evidence.

RESPECTFULLY SUBMITTED this 9th day of September, 2011.

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PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 9th day of September, 2011, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Reply Brief directed to attorney for Respondent:

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