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State of Washington

Opinion Information Sheet

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JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 31879-2-II

Respondent,

v.

ANDRE ROACH HOPKINS, OPINION

PUBLISHED IN PART

Appellant.

Hunt, J. - Andre Hopkins appeals his jury conviction and exceptional minimum sentence for first degree rape of a child and his jury conviction for first degree child molestation. He argues that (1) the State and the trial court failed to meet the statutory prerequisites for finding the child victim unavailable to testify for purposes of the child hearsay statute, RCW 9A.44.120; (2) the child victim's hearsay statements were testimonial and, thus, violated his Sixth Amendment confrontation rights;1 and (3) his exceptional minimum sentence under RCW 9.94A.712 violated Blakely2 because a jury did not decide the underlying aggravating factors. In his Statement of Additional Grounds (SAG),3 Hopkins asserts illegal witness tampering, malicious

prosecution, incorrect offender score calculation, and ineffective assistance of counsel.

1 U.S. Const. amend VI; Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

2 Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

3 RAP 10.10.

Holding that RCW 9A.44.120 required the trial court to conduct a competency hearing before finding the child unavailable to testify for child-hearsay statutory purposes, we reverse and remand.

FACTS

A jury convicted Andre Hopkins of raping and molesting his girlfriend's two-and-one-half-year-old daughter, MH. Because of MH's young age at the time of the incident and because she was three-and-one-half years old at the time of Hopkins' trial, the State chose not to call her as a

witness.

I. Pretrial

Rather than call MH, the State proposed to call Samantha Hannah (MH's mother), Janet Blake (Hannah's mother), and Patricia Mahaulu-Stephens, a CPS social worker, to testify about MH's hearsay disclosures to them concerning her allegations against Hopkins. The trial court held a child hearsay hearing to determine whether MH's hearsay statements were admissible under the child hearsay statute.4 During the child hearsay hearing, the trial court heard testimony from the State's three adult witnesses. But it did not interview MH, and Hopkins' counsel did not object to the trial court's failure to interview the child.

Nor did the trial court conduct a child competency hearing under RCW 9A.44.120. Instead, the State and defense counsel agreed that MH was incompetent to testify based on "her young age." The trial court made no express findings about whether MH was incompetent and,

therefore, unavailable to testify for purposes of RCW 9A.44.120.

4 RCW 9A.44.120.

Nonetheless, the trial court ruled that MH's hearsay statements to the State's three adult witnesses were admissible based on State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003), and State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), because her statements bore evidence of reliability and there was sufficient corroborating evidence under RCW 9A.44.120.

II. Trial

At trial, the State called Hannah, Blake, and Mahaulu-Stephens to relate MH's disclosures to them about Hopkins' sexual contact with her. The State also called the emergency room physician and the sexual-assault-clinic nurse practitioner who had examined MH following her

disclosures, neither of whom conclusively found that MH had been sexually molested, based on their respective physical examinations of her.5

MH did not testify at trial. Thus, she was not subject to cross examination by Hopkins.

Hopkins called his friend, Julie Roth, who testified that (1) she had seen MH and her infant sister immediately before Hopkins had returned them to their mother, after spending two days with Hopkins, during which the alleged sexual contact had occurred; and (2) she had noted nothing strange in their behavior. Hopkins also took the stand in his own defense and denied ever having touched MH in an inappropriate manner.

The jury convicted Hopkins on both counts. Hopkins moved for a new trial based on a new Supreme Court decision, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). The trial court denied Hopkins' motion, reasoning that the child hearsay statements were not "testimonial" in nature and, thus, Crawford did not apply.

5 The emergency room physician's report stated that the genital area was "not normal." The nurse

practitioner found "no evidence of sexual abuse at this time in this child."

III. Sentencing

At sentencing, the trial court calculated Hopkins' offender score as six, based on a prior juvenile child-rape adjudication. For Count I, first degree rape of a child, the trial court sentenced Hopkins to life imprisonment and set an exceptional minimum sentence of 260 months under RCW 9.94A.712. The trial court based this exceptional minimum sentence on Hopkins' denial of his guilt for the child rape to which he pled had guilty as juvenile and the vulnerable age of the victim. For Count II, first degree child molestation, the trial court sentenced Hopkins to 130 months confinement, a standard range sentence.

Hopkins moved for reconsideration of his exceptional minimum sentence, citing another

new Supreme Court case, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The trial court denied the motion and entered written findings of fact and conclusions of law supporting the exceptional minimum sentence based on the victim's age and Hopkins' abuse of his position of trust.

Hopkins appeals both convictions and his exceptional minimum sentence on Count I.

ANALYSIS

I. Child Hearsay Statements

Hopkins argues that the trial court improperly admitted MH's statements under the child hearsay statute based on both constitutional and statutory grounds. Finding dispositive the trial court's failure to conduct a mandatory competency hearing for MH before admitting her hearsay statements at trial, we address the statutory ground first.

A. RCW 9A.44.120 -- Competency Hearing Requirement

Hopkins argues that the trial court improperly admitted MH's statements under the child hearsay statute, RCW 9A.44.120, because (1) the trial court failed to conduct the statutorily required competency hearing,6 and (2) the State failed to show that she was unavailable to testify with the meaning of the statute. We agree.

RCW 9A.44.120 provides, in pertinent part:

> 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, . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . in the courts of the state of Washington 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.

(Emphasis added.)

It is uncontroverted that (1) MH was under the age of ten; (2) but for this statutory exception, her hearsay statements to the State's adult witnesses were not otherwise admissible;[7] and (3) MH did not testify at Hopkins' trial, RCW 9A.44.120(2)(a). Therefore, we focus on

6 Hopkins not only failed to challenge MH's competency below, but also agreed that she was incompetent to testify because of her young age. Nonetheless, he can raise this issue for the first time on appeal because a finding of witness unavailability is constitutionally mandated. See State v. Swan, 114 Wn.2d 613, 646, 790 P.2d 610 (1990).

7 See ER 801, 802, 803, and 804. See also reserved ER 807, which references RCW 9A.44.120's the special hearsay exception for statements by children describing sexual contact.

whether the trial court conducted a hearing under RCW 9A.44.120(1) and found that MH was "unavailable as a witness" under RCW 9A.44.120 (2)(b).

A child may be "unavailable as a witness" under RCW 9A.44.120(2)(b) if she is incompetent to testify. RCW 5.60.050 governs witness competency. A witness is incompetent to testify if she is (1) of unsound mind or intoxicated at the time of her production for examination or (2) "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."8 Arguably the plain language of RCW 9A.44.120(1) can be read to limit the hearing requirement to the trial court's inquiry and determination of whether the child's hearsay statements have "sufficient indicia of reliability."

But in Ryan, our Supreme Court expressly ruled that the RCW 9A.44.120 hearing requirement also applies to RCW 9A.44.120(2). The Court held that: (1) "[s]tipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability,"9 and (2) the trial court must determine a child's competency within the framework of RCW 5.60.050 by conducting a competency hearing to examine the child's manner, intelligence, and memory.10 103 Wn.2d at 172

8 A trial court can find a child competent if the child understands an obligation to testify truthfully and possesses (1) the mental capacity accurately to perceive events at the time of occurrence, (2) sufficient memory to retain the events in question, (3) the ability to express orally her memory of the event, and (4) the capacity to understand and to answer simple questions about the event. C.J., 148 Wn.2d at 682.

9 In reversing Ryan's conviction, the Court held that the trial court erred in allowing the child victims' mothers to testify about their children's out-of-court statements, even though the parties had stipulated that the five-year-old children were incompetent and, therefore, "unavailable" to testify at trial. Ryan, 103 Wn.2d at 167.

10 Ryan, 103 Wn.2d at 172, citing Laudermilk v. Carpenter, 78 Wn.2d 92, 457 P.2d 1004 (1969).

The record before us does not reflect that the trial court here conducted a hearing to determine whether MH was incompetent as a witness on any ground.11 On the contrary, it appears that the trial court neither interviewed nor evaluated this child victim. Here, as in Ryan, the trial court (1) erroneously relied on the parties' agreement, and apparently its own non-hearing assessment, that MH was too young to testify;12 (2) based on this assumption, erroneously

presumed that she was unavailable to testify; and (3) erroneously allowed her hearsay statements into evidence, ostensibly under the child hearsay statute.

Neither our Legislature nor our state courts have set an age below which a child is presumed incompetent to testify and a competency hearing is superfluous.13 See Ryan, 103 Wn.2d at 171-7214; see also State v. Shafer, 156 Wn.2d 381, 385, 128 P.3d 87 (2006)

11 Although the trial court made findings about the reliability of MH's statements and the presence of corroborating evidence, these findings do not satisfy the separate statutory requirement that it specifically conduct a competency hearing and make findings about MH's competency, or incompetency, as a witness, independent of the parties' agreement that the child was incompetent because of her young age. See Ryan, 103 Wn.2d at 172.

12 The trial court noted, "[T]his is a classic case where we have a victim who is under the age of four." Report of Proceedings (RP) at 179-80. Although the trial court's conclusion may appear reasonable under the circumstances here, such conclusion does not satisfy the legislatively-prescribed prerequisites for the admissibility of child hearsay under RCW 9A.44.120. Furthermore, not even the possibility of the trial court's reaching this same conclusion, after it conducts the statutorily required competency hearing on remand, obviates the statutory necessity for conducting the hearing.

13 Although we can foresee a situation in which a very young child may be presumed incompetent, for example, a non-verbal infant, such is not the case here.

14 Ryan appears to preclude any assumptions about statutory incompetency for any age. 103 Wn.2d at 172 ("The unexplained failure of the State to produce the children exemplifies the fears of one commentator that RCW 9A.44.120 may serve as a disincentive to call the child witness.").

(competency hearing for a three-year-old).15 On the contrary, our Legislature has clearly established prerequisites for allowing child hearsay in a criminal trial at which the child does not testify herself. A primary prerequisite is that the trial court must conduct a hearing, and find that a child witness is unavailable to testify. RCW 9A.44.120 (1) and (2)(b). Absent compliance with the strict requirements of RCW 9A.44.120 or falling within some exception to the Rules of Evidence generally excluding hearsay, a child hearsay statement is simply inadmissible as a matter of law when the child does not testify at trial.

Finding Ryan controlling, we hold that (1) the trial court erred in presuming MH's incompetency from her age, in spite of the parties' apparent agreement; (2) the trial court erred in failing to conduct a competency hearing and to enter the statutorily required findings before finding MH "unavailable" to testify at trial; (3) therefore, MH's hearsay allegations of Hopkins' sexual contact were not admissible under RCW 9A.44.120; and (4) because MH's hearsay statements were not otherwise admissible, the trial court improperly allowed them into evidence.

B. Harmless Error

The State argues that even if the trial court's failure to conduct a competency hearing was error under Ryan, the error was harmless because there was "overwhelming evidence" that MH was incompetent. We disagree.

15 Moreover, Washington courts have found no abuse of discretion when trial judges found children close in age to MH competent to testify. See, e.g., State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d. 536 (1991), review denied, 120 Wn.2d 1022 (1993) (finding no abuse of

discretion when trial court found three-and-one-half year old sexual abuse victim competent to testify); State v. Borland, 57 Wn. App. 7, 11, 786 P.2d 810, review denied, 114 Wn.2d 1026 (1990) (no abuse of discretion in finding four year old competent to testify).

When a party fails to produce a witness, the Sixth Amendment16 demands proof of that witness's unavailability. Ohio v. Roberts, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). A constitutional error is harmless only if the court is "convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error." State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State bears the burden of showing that a constitutional error was harmless. Id. Such is not the case here.

We are not convinced beyond a reasonable doubt that, without MH's hearsay statements, a reasonable jury would have convicted Hopkins. The State produced no conclusive physical

evidence that MH was sexually assaulted by anyone. Without MH's hearsay statements, the State could not prove a sexual assault or, if proven, that Hopkins was the perpetrator.

Accordingly, we reject the State's harmless error argument, reverse Hopkins' convictions, and remand to the trial court to conduct a child witness competency hearing for MH.

C. Sixth Amendment -- Crawford

Hopkins further argues that the trial court's admission of MH's hearsay statements through witnesses Hannah, Blake, and Mahaulu-Stephens violated his constitutional protections under the Sixth Amendment. Because this issue may reoccur following remand, we address it here. Whether these statements violated Hopkins' Sixth Amendment rights is a question of law, which we review de novo. Bishop v. Miche, 137 Wn.2d 518, 523, 973 P.3d 465 (1999).

We note at the outset that if on remand the trial court finds MH competent to testify at Hopkins' retrial, the Crawford issue would be moot. Hopkins would have an opportunity to

16 U.S. Const. amend VI.

cross examine her at trial. Even if MH cannot recall and relate her previous allegations of Hopkins' sexual assault when she was two-and-a-half years old, her being called as a witness at trial, subject to questioning about the event, would satisfy both the Sixth Amendment and subsection (2)(a) of RCW 9A.44.120. See State v. Clark, 91 Wn. App. 69, 76, 954 P.2d 956 (1998). Therefore, because the trial court already found MH's hearsay statements to bear sufficient "indicia of reliability" under RCW 9A.44.120(1), MH's hearsay statements to the three adult witnesses would satisfy the prerequisites for admissibility under the child hearsay statute.

If, however, on remand the trial court finds MH incompetent to testify, then the Crawford Sixth Amendment issues become relevant. Accordingly, we address them here. We divide MH's

hearsay statements into two general categories -- statements to family members and statements to non-family members.

1. MH's Hearsay Statements to Family Members

We first address MH's statements to her mother, Hannah, and to her grandmother, Blake. A child's hearsay statements made to family members are nontestimonial and, thus, do not violate a criminal defendant's Sixth Amendment Rights. See Shafer, 156 Wn.2d at 389-90; Crawford, 541 U.S. at 51.

In Shafer, a three-year-old child told her mother that her Uncle had "touched her privates" and had told her to kiss his privates. 156 Wn.2d at 383-84. The child had no previous exposure to sexually explicit material. The trial court denied Shafer's motion to exclude the child's out-of-court statements to a family friend17 based the United States Supreme Court's Crawford decision.

17 The family friend previously worked as a law enforcement informer, but when she interviewed the child she was not acting in any official capacity.

156 Wn.2d at 384-85. Our Supreme Court rejected Shafer's contention that the child's statements to her mother were testimonial because the child had relayed events to a family member and the mother had not solicited the statements from her child. 156 Wn.2d at 389-90. Our Court (1) relied on Crawford's notion that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," 541 U.S. at 51; and (2) reasoned that a victim's statements to friends and family are generally nontestimonial statements because there is no "contemplation of bearing formal witness against the accused." Shafer, 156 Wn.2d at 389.18

With respect to MH's hearsay statements to her mother and to her grandmother, our Supreme Court's analysis in Shafer is directly on point. Like the child in Shafer, MH made disclosures to her family members, who were concerned for her physical safety. Hannah and

Blake sought answers to their questions precipitated by MH's disclosures, not in contemplation of prosecuting a criminal case against Hopkins, but rather to assess MH's physical well-being and her future safety. Moreover, neither Hannah nor Blake asked leading questions; nor did they engage in a structured interrogation of MH.

Just as our Supreme Court relied on these factors in holding a child's statements to be non-testimonial in Shafer, 156 Wn.2d at 390, we similarly hold here that Hannah's and Blake's testimonies about MH's disclosures to them did not violate Hopkins' Sixth Amendment right to confront the witness against him.

18 See also Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266, 2276-77, 165 L. Ed. 2d 224 (2006) (holding a 911 call to be non-testimonial when the primary reason for the call is to resolve a present emergency rather than to investigate past facts); and State v. Anthony Lamont Williams, No. 56461-I, slip op. at 15-16 (Wash. Ct. App. January 2, 2007).

2. MH's Hearsay Statements to Child Protective Services

We next decide whether non-family member Mahaulu-Stephens' testimony relating MH's hearsay disclosures violated Hopkins' Sixth Amendment protections. This issue represents an unsettled area of law.19 Mahaulu-Stephens is a government officer, not a member of MH's family. Nonetheless, her initial role was to ensure MH's safety rather than to investigate Hopkins for his alleged sexual abuse of her.

In Shafer, our Washington Supreme Court faced a similar issue when a child made statements to a family friend who also worked for law enforcement. 156 Wn.2d at 390. Significantly, the Court noted,

> Of the testimonial statements identified [a]s 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.

156 Wn.2d at 389 (emphasis added). Reasoning that the witness was not acting in her official capacity when the child victim made her disclosures, the Court held that the witness's statements were admissible under the child hearsay statute. Shafer, 156 Wn.2d. at 390-91.20

19 Scholars have made persuasive policy arguments on both sides of the debate. On the one hand, a broad definition of "testimonial evidence" will provide a windfall to domestic violence perpetrators because their victims are more likely to be unavailable. On the other hand, a narrow definition of "testimonial evidence" will provide an incentive for prosecutors not to interview or to produce witnesses, which will, in turn, jeopardize a defendant's Sixth Amendment rights. Compare Carol A. Chase, Is Crawford a "Get out of Jail Free" Card for Batterers and Abusers? An Argument for a Narrow Definition of Testimonial, 84 Or. L. Rev. 1093, 1095-96 (2005) with Robert P. Mosteller, Exploring the Future of the Confrontation Clause in Light of Its Past: Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases, 71 Brooklyn L. Rev. 411, 425 (2005).

20 But see other jurisdictions' holdings that children's statements to social workers investigating abuse are testimonial: Snowden v. State, 846 A.2d 36, 47 (Md. 2004) (holding that Crawford

Here, Mahaulu-Stephens' capacity appears to fall in between the lines drawn in Shafer and

in other jurisdictions. Mahaulu-Stephens was a government-employed social worker. But she was not working at the behest of law enforcement when she first interviewed MH. On the contrary, several examples show that she was working on behalf of MH's welfare. First, the trial court's undisputed findings of fact state that Mahaulu-Stephens, at least initially, performed a safety check of MH, unrelated to any potential criminal prosecution of Hopkins. Second, Mahaulu-Stephens testified that she performed the safety assessment in order to "ensure that the child is really safe and secure where she's living." Report of Proceedings (RP) at 128. Third, when Mahaulu-Stephens questioned MH, she asked innocuous, non-leading questions, in response to which MH spontaneously reported Hopkins' sexual abuse. These factors tend to show that MH's initial disclosures to Mahaulu-Stephens were primarily "non-testimonial" under

prevented a state social worker from testifying about a child's statements when the social worker was assigned to investigate allegations of abuse and to speak for the child in court); State v. Mack, 101 P.3d 349, 352-53 (Or. 2004) (Caseworker who interviewed a child so that police

officers could videotape the child's statement for use in a criminal proceeding was "serving as a proxy for the police."); T.P. v. State, 911 So. 2d 1117, 1123 (Ala. Crim. App. 2004) (Because the child's statements resulted from social worker's interview and police investigators as part of a criminal investigation, the interview was similar to a police interrogation.); State v. Blue, 717 N.W.2d 558, 564-47 (N. D. 2006) (statements to a forensic interviewer were testimonial, when he conducted a videotaped interview while a police officer watched from a different room, because the interviewer acted in concert with or as an agent of the government.); In re Rolandis G., 817 N.E.2d 183, 188, 288 (Ill. App. 2004) (statements to a child advocacy worker were testimonial when they came in response to formal questioning, with a police officer watching through a two-way mirror.); In re T. T., 815 N.E.2d 789, 801-803 (Ill. App. 2004) (a social worker is an agent of law enforcement when she works at the behest of and in tandem with the prosecution with the intent of aiding in the prosecutorial effort.)

But see also State v. Edinger, No. 05AP-31, 2006 Ohio LEXIS 1527, at ** 47 (Ohio Ct. App. May 24, 2006) (statements to a social worker were nontestimonial when (1) she was not a state employee, (2) did not work at behest of government, (3) the purpose of interview was solely for treatment, and (4) the police did not watch the process.).

Crawford. See State v. Anthony Lamont Williams, No. 56461-I, 2007 LEXIS at 1 (COA I January 2, 2007).

But Mahaulu-Stephens visited MH a second time for a CPS investigation because of new disclosures. Although the purpose of this visit, too, can be characterized as protecting MH, it also had the potential to lead to criminal prosecution of Hopkins, which is what actually happened. That Mahaulu-Stephens was also conducting a CPS investigation moves her second meeting with MH closer, though not conclusively, on the continuum toward criminal investigation and information that is "testimonial" under Crawford.21

The following evidence suggests that MH's statements to Mahaulu-Stephens were testimonial. Mahaulu-Stephens testified that (1) her job was "to investigate whether or not those allegations [of abuse and neglect] are accurate, if there is any truth to the referral," RP at 467; (2) it was her practice to record information gained during the investigation and then to "[a]sk them more questions if there's something they're talking about that's a little more concerning," RP at 473-74; and (3) she records her notes for the explicit purpose of "[d]ocument[ing] that [the

21 The United States Supreme Court's recent holding in Davis does not help us resolve this issue. In Davis, the U.S. Supreme Court examined when a court should consider a 911 call "testimonial" for Crawford purposes. 126 S. Ct. at 2273-74. Without adopting a bright line rule, the Court reasoned that a victim's 911 call statement is likely to be nontestimonial in nature when the primary purpose is to obtain assistance to treat an ongoing emergency. See also Division I's recent decision in Williams, slip op. at 15-16 (past facts collected during a 911 call, including those used to prosecute, are admissible as long as the primary purpose of the 911 call was to treat an ongoing emergency.) But such statements are likely to be testimonial when there is no ongoing emergency and the rationale for the 911 dispatcher's questioning of the caller is to establish past facts, for the potential purpose of prosecution. Davis, 126 S. Ct. at 2273-74.

Here, MH's disclosures to Mahaulu-Stephens were not made in an emergency context, such as a 911 call. And although her initial primary purpose was to secure MH's safety, there later evolved a secondary, investigatory purpose (during the second meeting), which apparently led to criminal charges against Hopkins.

victim] made a spontaneous disclose and be able to give that information to law enforcement." RP at 488.

We find instructive here the Washington Supreme Court's dicta in Shafer that the

common thread uniting testimonial statements is "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." 156 Wn.2d at 389. Thus, while Mahaulu-Stephens might not have been working at the behest of law enforcement officers, she was a government employee and her eventual CPS investigatory role overlapped with and aided law enforcement.

Looking for additional guidance to the 911 call cases, such as Davis and Williams,22 we hold that MH's hearsay statements to Mahaulu-Stephens do not meet the Shafer test. First, by the time Mahaulu-Stephens interviewed MH, there was no ongoing emergency. And even if their first meeting could be characterized as a continued emergency to assure MH's safety from Hopkins, MH did not incriminate Hopkins at this first interview; thus, it produced no hearsay statements that the State sought to introduce under the child hearsay statute.

The second meeting between Mahaulu-Stephens and MH, however, did produce

incriminating statements, which the State used against Hopkins at trial. This second meeting was even more removed from any ongoing emergency than their first meeting. Moreover, at this second meeting, Mahaulu-Stephens was also acting in a government capacity for CPS and, in that capacity, she obtained statements from MH that the State used to prosecute Hopkins. See Shafer.

We hold, therefore, that MH's hearsay disclosures to Mahaulu-Stephens, during the

22 See n.21, infra.

second interview were "testimonial" under Crawford and, therefore, their admission at trial violated Hopkins' Sixth Amendment protections because MH did not testify at trial.

III. Exceptional Minimum Sentence

Hopkins also argues that the trial court's imposition of an exceptional minimum sentence

under RCW 9.94A.712 was unconstitutional because the trial court, not the jury, found the aggravating factors justifying the exceptional minimum sentence,23 contrary to Blakely.

The Washington Supreme Court's recent decisions in State v. Clarke, 156 Wn.2d 880, 887-88, 134 P.3d 188 (2006), and State v. Borboa, 157 Wn.2d 108, 117, 135 P.3d 469 (2006), conclusively resolve this issue against Hopkins' position. Our Supreme Court held that (1) a criminal defendant serves an indeterminate life sentence for a conviction under RCW 9.94A.712; and (2) judicial fact-finding that increases a defendant's minimum sentence under RCW 9.94A.712 does not violate the Sixth Amendment as interpreted by the United States Supreme Court in Blakely. Clarke, 156 Wn.2d at 893; Borboa, 157 Wn.2d at 117.

We hold, therefore, as in Clarke and Borboa, that the trial court's setting an exceptional minimum sentence under RCW 9.94A.712, based on judicial fact-finding of aggravating factors,

23 The jury convicted Hopkins of first degree child rape and first degree child molestation. The trial court sentenced Hopkins under RCW 9.94A.712 to life in prison, with an exceptional minimum term of 260 months. The trial court based the exceptional minimum term on MH's

peculiarly vulnerable age, an aggravating circumstance under RCW 9.94A.535(3), and that Hopkins maintained he was innocent of his previous juvenile sex-offense adjudication. See note 27, infra, for further discussion of RCW 9.94A.535(3) factors.

did not violate Hopkins' Sixth Amendment Blakely rights.24

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.