NO. 19429-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, PLAINTIFF

v.

CHRIS ALLEN FORTH, RESPONDENT

BRIEF OF RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Waldo F. Stone

No. 93-1-02523-0

JOHN W. LADENBURG
Prosecuting Attorney

By
BARBARA COREY-BOULET
Sr. Appellate Deputy
WSB #11778

946 County-City Building
Tacoma, WA 98402
PH: (206) 591-7400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

FEDERAL

WASHINGTON

Statutes

Appendices

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it admitted pursuant to RCW 9A.44.120 hearsay statements made by the child sex crimes victim? (Appellant's Assignment of Error No. 1)

2. Was there adduced at trial sufficient evidence to support defendant's conviction for the crime of first degree child molestation?

B. STATEMENT OF THE CASE.

1. Procedure

CHRIS ALLEN FORTH, hereinafter referred to as defendant, was charged by Information filed in Pierce County Superior Court cause no. 93-1-02523-0 with the crime of child molestation in the first degree (CP 1-2). After defendant failed to appear for omnibus hearing, defendant was also charged with the crime of bailjumping (CP 3-5).

The case subsequently was assigned for jury trial to Department 2, the Honorable Waldo StoNe presiding. At trial, the State advised that it intended to offer child hearsay statements pursuant to RCW 9A.44.120 made to the victim's mother, stepfather, and caseworker (RP 10/31/94 4).

Christina Forth testified at the hearing to determine the admissibility of child hearsay statements (RP 11/1/94 4). Christina was nine years old (RP 11/1/94 11). Christina identified defendant as her father (RP 11/1/94 5). Christina related that something bad happened when she visited defendant during the summer after kindergarten (RP 11/1/94 6). Christina was six years old (RP 11/1/94 20). She related that the bad event involved touching and that she disclosed the touching to her mother and to Linda Olson - a caseworker (RP 11/1/94 6). Christina related that she understood the difference between telling the truth and telling lies; Christina agreed to tell the truth in court (RP 11/1/94 9). Christina did not recall discussing defendant's conduct with her stepfather (RP 11/1/94 11).

Tina Bennett, defendant's ex-wife and mother of Christina, testified (RP 11/1/94 12-13). She recalled that the last time Christina visited defendant was the summer after kindergarten, in 1991 (RP 11/1/94 14, 15). Mrs. Bennett stated that Christina disclosed the abuse in August 1992 (RP 11/1/94 15). On that occasion, Christina got out of bed, contacted her mother and stepfather in the living room, and

proceeded to hug her stepfather (RP 11/1/94 15-16). Christina asked for "special attention" (RP 11/1/94 15-16). Christina clarified that she wanted special attention "like daddy Chris gives me" (RP 11/1/94 24). Neither Mr. nor Mrs. Bennett knew what Christina meant (RP 11/1/94 16). Mrs. Bennett followed Christina to her bedroom and asked her about "special attention" (RP 11/1/94 16). Christina indicated that she was not supposed to tell about the "special attention" (RP 11/1/94 25). Christina related that defendant had touched her on her chest and private parts (RP 11/1/94 17). Christina pointed to her chest and pubic area (RP 11/1/94 26). Christina also stated that she and defendant had played the "toilet game"; in this activity, Christina sat on defendant's face and peed on him (RP 11/1/94 17). The "toilet game" was played in the bathroom at night (RP 11/1/94 29). Christina also related that defendant put his mouth on her nipples (RP 11/1/94 17).

Linda Olson, a caseworker for Children's Services Division in Oregon, also testified (RP 11/1/94 31). She interviewed Christina on August 21, 1992 (RP 11/1/94 33). In her interview, Ms. Olson assessed Christina's ability to differentiate between truth and

falsity (RP 11/1/94 36). Christina knew the difference (RP 11/1/94 36). Using anatomically correct drawings, Christina circled as areas that defendant had touched her breasts and genitalia (RP 11/1/94 39). Using drawings of a male, Christina showed that defendant had touched her with her hands and mouth (RP 11/1/94 39). Christina stated that the touching occurred while she visited defendant in the summer of 1991 at his parents' home (RP 39). Christina recalled that she had been wearing a nightgown and no panties and that defendant wore undershorts (RP 11/1/94 40). Christina stated that defendant told her to keep the activities "a secret" (RP 11/1/94 40).

Subsequent to the testimony of these witnesses, the State argued that the child hearsay statements satisfied the Ryan factors (RP 11/1/94 51-55). In response, defendant conceded that Christina was testimonially competent (RP 11/1/94 55).

The court then ruled that the child hearsay statements were admissible (RP 11/1/94 59).

During the trial and prior to the testimony of Don Bennett, the court considered the admissibility of Christina's statement to him regarding her request for

"special attention" (RP 11/2/94 59). Defense counsel stipulated to the admissibility of these statements (RP 11/2/94 65).

The jury subsequently convicted defendant of the crimes of first degree child molestation and bailjumping (RP 11/8/94 2).

On March 29, 1995, defendant was sentenced pursuant to the Special Sex Offender Sentencing Alternative (SSOSA), RCW 9.94A.120(7)(a) (CP 24-31). Specifically, defendant was sentenced within the standard range to 75 months on Count I, suspended on condition that defendant, inter alia, complete sexual deviancy treatment, and to 14 month on Count II, to run concurrent (Id.)

Defendant thereafter was terminated from treatment and a warrant issued for defendant's arrest (CP 39). That warrant remains outstanding.

2. Facts

In August 1992, after she had been put to bed, Christina Forth AKA Tina Bennett got out of bed and approached her stepfather, Don Bennett, asking him for "special attention" (RP 11/2/94 7, 71). When asked what she meant, Christina replied that she wanted "special attention like her daddy Chris gives her" (RP

11/2/94 8, 72). When no "special attention" was forthcoming, Christina returned to her bed (RP 11/2/94 8-9). Her mother, Tina Bennett, followed her into the bedroom (RP 11/2/94 9).

Mrs. Bennett asked Christina what she meant by "special attention" and Christina replied that she could not tell (RP 11/2/94 9). Christina then related that defendant had touched her breasts and private parts during visitation in the summer of 1991 (RP 11/2/94 10). Christina stated that defendant touched her with his hands and mouth (RP 11/2/94 11). Christina also related that she and defendant had played the "toilet game" where she sat on defendant's face and peed in his mouth (RP 11/2/94 11). Christina appeared to be scared when she discussed these events (RP 11/2/94 11).

After this disclosure, Mrs. Bennett called Children's Services [the Oregon equivalent of Child Protective Services] (RP 11/2/94 12, 35).

Linda Olson, of Oregon Children's Services Division, interviewed Christina on August 21, 1992 (RP 11/294 37). Olson took notes during that interview and later wrote a report summarizing the interview (RP 11/2/94 38). Olson's trial testimony was consistent

with her previous testimony at the hearsay hearing (Passim).

During the last summer visit she had with defendant, Christina Forth experienced "bad touching" (RP 11/3/94 15). Defendant touched her private area (between her legs) with his hands and also touched her chest with his mouth (RP 11/3/94 16-17). This touching occurred in defendant's bedroom (RP 11/3/94 18-19). On another occasion, defendant took Christina into the bathroom (RP 11/3/94 20). Defendant ordered Christina to sit on his face and pee on him (RP 11/3/94 23-24). Defendant told Christina that she would be in "big trouble" if she told anyone about these activities (RP 25).

Defendant's date of birth is 10/4/62 (RP 11/3/94 111).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED PURSUANT TO RCW 9A.44.120 HEARSAY STATEMENTS MADE BY THE CHILD SEX CRIMES VICTIM.

The trial court's decision to admit child hearsay statements pursuant to RCW 9A.44.120 is reviewed under

an abuse of discretion standard. State v. Swan, 114 Wn.2d 622, 648, 790 P.2d 610 (1990). RCW 9.94A.120 states:

> 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 dependency proceedings under Title 13 RCW and 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.

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court listed nine factors to be applied in determining whether a child's out-of-court statements are reliable. The first five derive from State v. Parris, 98 Wn.2d 140, 654 P.2d 77 (1982) and include:

> (1) whether there is an apparent motive to lie;
> (2) the general character of the declarant;
> (3) whether more than one person heard the statements;
> (4) whether the statements were made spontaneously; and

(5) the timing of the declaration and the relationship between the declarant and the witness.

The next four factors to be considered, derived from Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S. Ct. 210 (1970), are:

(1) the statement contains no express assertions about past facts;
(2) cross-examination could not show the declarant's lack of knowledge;
(3) the possibility of the declarants faulty recollection is remote; and
(4) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

In the instant case, the trial court heard argument regarding the admissibility of Christina's statements to her mother and the caseworker. The argument specifically highlighted the Ryan factors (RP ___). The trial properly exercised its discretion when it admitted the statements.

(a) Whether there is an apparent motive to lie.

There was no evidence suggesting that Christina had any motive to lie.

(b) The general character of the declarant.

The evidence to established that Christine was a

relatively normal child. There was no testimony indicating that she had a poor reputation for truthfulness.

(c) Whether more than one person heard the statements.

Excluding the initial statements about Christina's request for "special attention", Christina's statements to her mother were made when they were together in Christina's bedroom. Christina's statements to the caseworker were not overheard by any other person.

(d) Whether the statements are spontaneously made.

The requirement of spontaneity does not mean literally that the child must initiate the discussion of the topic and speak without any questioning. Rather, the details of the event and the identity of the perpetrator must not be suggested by the questioner. State v. Madison, 53 Wn. App. 754, review denied, 113 Wn.2d 1002 (1989); State v. Henderson, 48 Wn. App. 840, 740 P.2d 329 review denied 109 Wn.2d 1008 (1987); Dependency of S.S., 61 Wn. App. 488, 814 P.2d 204 (1991). Hearsay statements made to a child's mother in response to the mother's questions about whether anyone had touched her private parts were held

to be spontaneous and admissible in State v. McKinney, 50 Wn. App. 56, 747 P.2d 329 (1987). In State v. Swan, 114 Wn.2d at 114, the court approved reasoning of the trial court in finding hearsay statements made in response to questioning by daycare employees admissible, as follows:

> I don't believe it's the purpose of the indicia of reliability to eliminate from evidence all statements of children which are offered in response to questions of children. That would be, it seems to me, eliminating all possibility of an interview of a child resulting in admissible evidence.
> . . .
>
> With respect to B.A., it seems to me the issue comes down to whether or not asking leading questions of a difficult child witness render the ultimate statements of the child unreliable. In this circumstance, where statements or similar statements were made by the child in response to open-ended questions and in a much more spontaneous context, it seems to me it does not. Quite clearly not.

Christina's statements to her mother and also to the caseworker were made in response to open-ended, nonleading questions.

(e) The timing of the declaration and the relationship between the declarant and the witness.

Delayed reporting by child sex crimes victims is a well-recognized phenomenon. State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984). "To treat a

lapse of time between abuse and accusatory statements as necessarily indicative of unreliability would also overlook the tendency of abuse victims to delay reporting that abuse occurred." State v. Carlson, 61 Wn. App. 865, 873 n. 3, 812 P.2d 536 (1991).[1] A lapse of time between the criminal event and statements made in counselling does not automatically render the statements inadmissible; rather, the statements must be shown to have been "affected" by the lapse of time and intervening counselling before they become inadmissible. State v. Carlson, supra. In Carlson, the court affirmed the admission of the child victim's statements to a babysitter more than three months after the last episode of sexual assault.

Statements to professional interviewers have been regarded to have enhanced reliability. State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991); State v. Bishop, 63 Wn. App. 15, 25-26, 816 P.2d 738 (1991). This is because:

> Professionals are, by definition, trained to be objective in assessing whether a child's complaint merits further investigation, and

---

[1] See attached monograph, "How Children Tell: The Process of Disclosure in Child Sexual Abuse," Teena Sorensen and Barbara Snow, Child Welfare, Volume LXX, Number 1, January-February 1991.

> unlike parents, their perceptions are not impaired by a personal attachment to the child.

State v. Young, 62 Wn. App. at 901, citing State v. Henderson, 48 Wn. App. at 551.

(f) The statement contains no express assertions about past fact.

This factor has been held to be inapplicable when considering the admissibility of RCW 9A.44.120 hearsay. State v. Stange, 53 Wn. App. 638, 769 P.2d 873 (1989); State v. Leavitt, 111 Wn.2d 66, 758 P.2d 982 (1988).

(g) Cross-examination could not show the declarant's lack of knowledge.

The defendant must be afforded the opportunity for effective cross-examination; the defendant is not guaranteed the right to effective cross-examination. State v. Bishop, 63 Wn. App. 15 at 22, citing United States v. Owens, 484 U.S. 554, 559, 98 L.Ed.2d 951, 108 S. Ct. 838 (1988).

In the instant case, Christina testified and was cross-examined. There were no difficulties noted during cross-examination.

(h) The possibility of the declarant's faulty recollection is remote.

Here the court must examine whether the

statements made after the child commenced disclosing sexual abuse are consistent. Dependency of S.S., 61 Wn. App. at 499.

There were no material inconsistencies in the child's post-disclosure statements.

(i) The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

The courts have held that this factor is similar to the second Allen factor, the mental capacity to receive accurate impressions of the event at the time it happened. State v. Gribble, 60 Wn. App. at 383; Dependency of S.S., 61 Wn. App. at 499, n. 6.

Again, there was no evidence that Christina misrepresented defendant's involvement.

Where the trial court conducted a hearing to determine the admissibility of the child hearsay statements and where the Ryan factors were argued and therefore considered by the court, the trial court properly exercised its discretion when it admitted the hearsay statements. Defendant's argument rests on the premise that the trial court must orally address each Ryan factor on the record. Although that is undoubtedly the preferred practice, where the record

is clear that the trial court was aware of the Ryan factors and heard argument regarding each factor, the trial court record is sufficient to establish that the trial court considered the factors.

2. THERE WAS ADDUCED AT TRIAL SUFFICIENT EVIDENCE TO SUSTAIN DEFENDANT'S CONVICTION FOR FIRST DEGREE CHILD MOLESTATION.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of

the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), rev. denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor in of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, rev. denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and

evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> great deference . . . is to be given the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In the instant case, defendant was charged with first degree child molestation, RCW 9A.44.083:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

"Sexual contact" is defined to include "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

In the instant case, the State adduced evidence as to each element of the crime charged. Defendant argues that because Christina could not recall specific dates of the sexual abuse, she somehow was not credible. The lack of specificity regarding charging dates has been held to go to the credibility of the State's case. State v. Cozza, 71 Wn. App. 252, 259, 858 P.2d 270 (1993). Moreover, the deputy prosecutor's decision to charge the case over a broad charging period does not in any way impeach the victim. Further, defendant has misrepresented the holding in State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992). Although the Alexander court reversed and remanded for new trial, the court did not disapprove the well-established practice of charging child sex abuse cases over broad time frames. Rather, in Alexander, 64 Wn.App. at 158, the court held that the evidence was insufficient on one count of child rape not only because the child victim was strikingly inconsistent on dates (including trial testimony which placed the court well outside the already expanded charging period) but also because she could not clearly relate what, if anything, had occurred.

Likewise, whether or not the "toilet game" could have occurred as described by the victim was a matter for the jury to decide. Defendant on appeal would have this court re-weigh the credibility of the trial witnesses, which is clearly not this court's function.

Moreover, that the child recalled at trial that she had had dreams about dinosaurs in no way impeaches her statements. There is no evidence that anyone had questioned her about the content of her dreams at any earlier date.

The evidence at trial supported the conclusion that defendant had kissed and sucked Christina's breasts, touched her genitalia with his hand, and also had her sit on his face and urinate thereon. Where other evidence established that Christina was under the age of twelve and that defendant, her father, was more than 36 months older than the child, the State met its burden of proof.

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this court to affirm defendant's convictions.

DATED: May 15, 1996.

Respectfully submitted,

JOHN W. LADENBURG
Pierce County
Prosecuting Attorney

Barbara Corey-Boulet
Senior Appellate Deputy
WSB # 11778

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant/respondent and appellant ~~a true and correct copy~~/copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5-15-96 R Taylor
Date Signature

forth.bcb

APPENDIX "A"

DOC#: 728948

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

CHRIS ALLEN FORTH,
BOOKING NUMBER: UNK

Defendant.

CAUSE NO. 93-1-02523-0

BENCH WARRANT

FILED
IN COUNTY CLERK'S OFFICE
A.M. NOV 29 1995 P.M
PIERCE COUNTY, WASHINGTON
BY, COUNTY CLERK
DEPUTY

UNKNOWN/LKA: {INPUT}TYPE DEFENDANT'S LAST KNOWN ADDRESS

TO ALL PEACE OFFICERS IN THE STATE OF WASHINGTON, GREETINGS:

WHEREAS, an order of court has been entered directing the Clerk of the above entitled court to issue a warrant for the arrest of the above named defendant CHRIS ALLEN FORTH

SEX M; RACE W; EYES BLU; WEIGHT 240; HEIGHT 5'10" ; DATE OF BIRTH 10/4/62; POLICE AGENCY WA02700; DATE OF VIOLATION 6/1/91 8/31/91; POLICE AGENCY CASE NO. 92-262-0404;

You are hereby commanded to forthwith arrest the said CHRIS ALLEN FORTH, for the crime of CHILD MOLESTATION IN THE FIRST DEGREE and BAIL JUMPING, said defendant having violated the conditions of community supervision or other conditions of the sentence and bring said defendant into court to be dealt with according to law. BAIL IS TO BE SET IN OPEN COURT.

WITNESS THE HONORABLE WALDO F. STONE
Judge of the said court and seal thereof affixed
This 29th day of November, 1995.

TED RUTT
Clerk of the Superior Court

By _____ Deputy

STATE OF WASHINGTON)
)ss.
County of Pierce)

This is to certify that I received the within bench warrant on the _____ day of _____, 19____, and by virtue thereof on the _____ day of _____, 19____, I arrested the within named defendant, _____, and now have defendant in full custody.

_____
PEACE OFFICER

___Local___WACIC___NCIC

Warrant Service Fee $15/Return Fee $5/Mileage $____/TOTAL $____

mmk

BENCH WARRANT

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (206) 591-7400