72017-1

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May 1, 2015
Court of Appeals
Division I
State of Washington

No. 72017-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Daylon G.,

Appellant.

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

APPELLANT'S REPLY BRIEF

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

A. ARGUMENT IN REPLY

1. The trial court erred when it admitted D.W.'s hearsay statements.

a. The *Ryan* factors were not substantially met.

In particular circumstances, out-of-court statements made by young children are admissible at trial when they are determined to be reliable. *State v. Ryan*, 103 Wn.2d 165, 177, 691 P.2d 197 (1984). To determine whether the statements are reliable, the trial court must consider nine factors. *Id*. at 175-76. These "factors must be 'substantially met' before a statement is demonstrated to be reliable." *Id*. In his opening brief, Daylon G. explained why five of the nine factors had not been met. Op. Br. at 9-14.

i. *Apparent Motive to Lie*

In its response, the State inaccurately claims Daylon alleged D.W. was motivated to lie in order to get Daylon in trouble. Resp. Br. at 13. As explained in the opening brief, the trial court improperly found D.W. had no motive to lie because Daylon appeared more upset than D.W. about their newly blended family. Op. Br. at 9; 5/1/14 RP 3. Because the evidence at trial demonstrated both boys were struggling to adapt to their new living arrangements, this finding was made in error. 4/29/14 RP 129; 5/1/14 RP 3.

However, the trial court did not need to find D.W. wanted to cause harm to Daylon in order to find D.W. had a motive to lie. Op. Br. at 10. Ms. G was angry and upset about what she believed she had seen, giving D.W. a motive to keep any negative emotions directed toward Daylon. 4/29/14 RP 110. The State claims there was no evidence of this because D.W. never "expressed fear of being in trouble at home." Resp. Br. at 14. But simply because D.W. did not testify to this does not mean the record lacked evidence. Circumstantial evidence is just as probative as direct evidence. *State v. Hudlow*, 182 Wn. App. 266, 288, 331 P.3d 90 (2014) ("elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other"); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("circumstantial evidence is not to be considered any less reliable than direct evidence").

Here, the evidence showed Ms. G was upset and had engaged in a confrontation with Daylon that resulted in him leaving the home. 4/29/14 RP 110. Only eight years old, and having just watched Daylon get in trouble, D.W. had a motive to lie in order to keep his mother's anger directed at Daylon.

ii. *General Character*

When the trial court found D.W.'s character had "some indicia of reliability," it disregarded evidence D.W. had wrongly alleged that Daylon touched D.W.'s older half-brother, Christian, and that Christian had inappropriately touched D.W. 5/1/14 RP 4. The State ignores these facts in its response, arguing only that the trial court found D.W. trustworthy and this determination should be not be disturbed on appeal. Resp. Br. at 15.

The basis for this factor is whether the child has a reputation for telling the truth. *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). The trial court explained away the allegations that Christian had been abused and failed to consider D.W.'s allegation that Christian had also touched him inappropriately. 5/1/14 RP 4-5. Given that these false allegations involved exactly the same kind of behavior at issue in Daylon's case, the trial court's decision to disregard this evidence and find D.W. had a reputation for telling the true, when in fact the exact opposite was true, is not entitled to deference.

iii. *Spontaneity of Statements*

The State claims Ms. G's statement to D.W., asking "Did he touch you?" was no more leading than if she had asked "What happened on the couch?" Resp. Br. at 18. This is simply not correct. Unlike the example provided by the State, Ms. G's question to D.W. suggested a possible answer.

For support the State relies primarily on *State v. Henderson*, 48 Wn. App. 543, 740 P.2d 329 (1987) and *State v. Madison*, 53 Wn. App. 754, 770 P.2d 662 (1989). In *Henderson*, this Court found a detective's question asking a child why it hurt when her father touched her vagina was not leading or suggestive, and the child's answer was spontaneous. *Henderson*, 48 Wn. App. at 550. In *Madison*, this Court found the child spontaneously volunteered information in response to a foster mother's general question while reading a book. 53 Wn. App. at 759. The State suggests that like in *Henderson* and *Madison*, D.W. statements were reliable because he provided details spontaneously. Resp. Br. at 17. However, unlike in the cases cited by the State, Ms. G directly asked whether a specific person (Daylon) had committed a specific act (touched D.W.). This is what was missing in both

Henderson and *Madison*, and is why D.W.'s statements were not spontaneous here.

While D.W. later made similar statements to a nurse and child interview specialist, this does not change the fact Ms. G initially proposed the conduct to D.W. The State's bare assertion that the record does not show D.W.'s initial statement tainted the later statements is misleading. *See* Resp. Br. at 18. A court should consider this possibility based on common sense and logic. *See In re Dep. of A.E.P.*, 135 Wn.2d 208, 231, 956 P.2d 297 (1998). When the initial statement is made in response to suggestive questioning, the repetition of that statement is no more spontaneous.

iv. *The Timing and Relationship*

The State argues Ms. G did not have "an ax to grind" and therefore D.W.'s relationship with his mother should not be weighed against a finding of reliability. Resp. Br. at 19. However, a child's statements are considered more reliable when told to a neutral party. *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988). Simply because Ms. G was not hoping to hear Daylon had touched D.W. does not make her a neutral party. Ms. G had just confronted Daylon, she was upset and angry, and she was looking to D.W. to validate her

suspicions. Given the nature of the parent-child relationship, Ms. G was not a neutral party regardless of her presumably good intentions.

v. *The Surrounding Circumstances*

As explained in the opening brief, the surrounding circumstances suggested that D.W.'s easiest course of action, when confronted by his mother, was to agree with her suggestive questioning. This weighed against a finding of reliability.

b. Reversal is required.

Because the *Ryan* factors were not substantially met D.W.'s statements were improperly admitted by the trial court. *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). Reversal is required because, as explained in the opening brief, there is a reasonably probability the outcome of the trial would have been different had the statements not been admitted. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); Op. Br. at 14-15.

c. The statements to the forensic nurse examiner were not admissible under the hearsay exception for statements made for the purpose of medical diagnosis or treatment.

For the reasons set forth in Daylon's opening brief, the statements to the forensic nurse examiner were not admissible under

the medical diagnosis and treatment hearsay exception. *See* Op. Br. at 15-16.

2. D.W. was not competent to testify.

For the reasons set forth in Daylon's opening brief, the trial court erred when it found D.W. competent to testify and this Court should reverse. *See* Op. Br. at 16-21.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse.

DATED this 1st day of May, 2015.

Respectfully submitted,

KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72017-1-I
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	)	
DAYLON G.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JANICE ALBERT, DPA [jalbert@co.snohomish.wa.us] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON, THIS 1ST DAY OF MAY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711