NO. 97038-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A.E.W.,
Petitioner.

PETITION FOR REVIEW OF THE COURT OF APPEALS JANUARY 29, 2019 DECISION IN STATE V. A.E.W. COA#50750-1-II

LISE ELLNER, WSBA NO. 20955
ERIN SPERGER, WSBA NO. 45931
Attorneys for Petitioner

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

RULES, STATUTES, AND OTHERS

A. IDENTITY OF MOVING PARTY

Petitioner A.E.W. through his attorneys, Lise Ellner and Erin Sperger, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

A.E.W. requests review of the Court of Appeals January 29, 2019 ruling and its March 11, 2019 decision denying reconsideration. A copy of the decisions are attached (Appendix).

C. ISSUE PRESENTED FOR REVIEW

1. Does a trial court's decision to admit child hearsay statements involve an issue of substantial public interest that should be determined by the Supreme Court when the trial court heavily relied on only two of the nine *Ryan* factors?

D. STATEMENT OF THE CASE

The facts relevant to this petition are set forth in appellant's opening brief and incorporated herein by reference.

In addition, the following facts are relevant:

Prior to trial, the state sought to admit child hearsay statements pursuant to RCW 9A.44.120. CP 15. A.E.W. objected to the admissibility of the child hearsay statements and the court conducted a full child hearsay hearing and heard the testimony sought to be admitted. CP 37-44; RP 1, 17, 105-06 (8/13/17). After the hearing, the court admitted the child hearsay pursuant to RCW 9A.44.120. CP 53.

After the reliability hearing the juvenile court entered the following findings of fact:

> The reporting party, Steve Aguilar, stated that his sons E.G.A. and T.N.A. reported that respondent, [A.W.], had put a finger in E.G.A.'s rectum while the boys were playing at their grandparent's house. CP 50 (FF 2).
>
> During E.G.A.'s forensic interview he disclosed that the respondent had put his finger up E.G.A.'s butt. E.G.A. stated that this had happened at his grandparent's house behind the couch. CP 51 (FF 4).
>
> Steven Aguilar observed and treated an injury to E.G.A.'s rectum at the time of the disclosure. CP 51 (FF 12).
>
> Ms. Villa's forensic interview was not conducted

> primarily for the purpose of a criminal investigation but also for the purpose of providing medical attention. CP (FF 13).
>
> T.N.A.'s statement though in response to his father's question was also spontaneous in the sense that the details were provided by the child and not suggested by his father's question. CP 52 (FF 23).

A different judicial officer presided over the trial and the state offered the order on admissibility of child hearsay statements as Plaintiff's Exhibit 13 without further objection from the defense. RP 5-6.

In its unpublished opinion, the Court of Appeals found that "AEW agreed to the admission at trial of the court's written order on the admissibility of the child hearsay statements. Accordingly, the trial court considered it as substantive evidence. To the extent the court used the findings of facts in the order to adjudicate AEW's guilt, AEW is precluded from arguing that insufficient evidence supports those findings." *A.E.W.,* No. No 50750-1-II, slip opinion, at 4 (citing RAP 2.5(a)).

Further, the Court of Appeals found that substantial

evidence supports the juvenile court's challenged findings of fact from the child hearsay hearing. *A.E.W.,* No 50750-1-II, slip opinion, at 4.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS' DECISION THAT THE CHILD HEARSAY WAS RELIABLE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT

The Court of Appeals incorrectly held that A.E.W. agreed to the admissibility of the child hearsay statements when defense counsel did not object to admitting the court's order on admissibility of child hearsay statements as an exhibit at trial. *A.E.W.*, No. 50750-1-II, slip opinion, at 4. Further, the Court of Appeals incorrectly held that "[t]o the extent the court used the findings of facts in the order to adjudicate AEW's guilt, AEW is precluded from arguing that insufficient evidence supports those findings." *A.E.W.*, No. No 50750-1-II, slip opinion, at 4 (citing RAP 2.5(a)).

Here, A.E.W. objected to the child hearsay and following a hearing, the juvenile court denied the objection. Contrary to the

Court of Appeals' decision, A.E.W. was not required to continue to object after the juvenile court entered its ruling. *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984); *State v. Ramirez*, 46 Wn. App. 223, 229, 730 P.2d 98 (1986). "[U]nless the trial court indicates further objections are required when making its ruling" the trial court's decision is final and the party against whom the evidence was admitted has a standing objection. *Ramirez*, 46 Wn. App. at 229; (citing *Kelly*, 102 Wn.2d at 193); *See also, State v. C.M.B*., 130 Wn. App. 841, 847, 125 P.3d 211 (2005) (A party must object to competency at the first opportunity; a failure to do so precludes further objection). Here, A.E.W., objected at the first opportunity, thus he preserved the issue for appellate review.

Ramirez is on point. In *Ramirez*, the state sought to admit testimony from a child victim's mother. *Ramirez*, 46 Wn. App. at 225. The defense objected but after a child hearsay hearing the court ruled the testimony was admissible both as an excited utterance and under the child sex abuse hearsay exception statute, RCW 9A.44.120. The state offered the same testimony to the jury without further objection by defense counsel. *Ramirez*, 46 Wn. App. at 225.

The *Ramirez* Court held the defendant did not waive his objection to the mother's testimony by failing to further object because the court's ruling was made after a full reliability hearing, it was not advisory or tentative, the predicate for the ruling was not hypothetical, and the court heard the same testimony that was offered to the jury. *Ramirez*, 46 Wn. App. at 229.

Like in *Ramirez*, here the juvenile court held a full reliability hearing on the admissibility of the children's statements, it was not advisory or tentative, and it was not hypothetical – both the first and second judicial officers heard the same testimony that was offered at the reliability hearing. RP 53, 109, 112; *Ramirez*, 46 Wn. App. at 229.

Further, the juvenile court's order on admissibility was final, thus, any further challenge to it would have been futile. A.E.W.'s agreement to the admissibility of the order was an acknowledgment that the court was authorized to enter the order. This was not an agreement to the validity or admissibility of statements contained within the order, and moreover did not constitute a waiver of the issue on appeal. *Ramirez*, 46 Wn. App. at 229.

This Court of Appeals reviews the trial court's decision to admit child hearsay evidence for an abuse of discretion. *State v. Moses*, 193 Wn. App. 341, 361–62, 372 P.3d 147 (2016). A trial court abuses its discretion if its decision is based on untenable grounds. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is "based on untenable grounds if the factual findings are not supported by the record." *Littlefield*, 133 Wn.2d at 47. The trial court's findings of fact will not be disturbed if they are supported by substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the premise's assertion. *Halstien*, 122 Wn.2d at 128.

The Court of Appeals reviewed the record for substantial evidence incorrectly holding that A.E.W. was precluded from challenging the court's evidentiary ruling, *A.E.W.*, No. No 50750-1-II, slip opinion, at 4. This was an abuse of discretion because the child's hearsay statements did not meet the *Ryan* test for reliability. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

To determine the reliability of child hearsay statements, the trial court is to consider the following nine factors from *Ryan*, 103 Wn.2d at 175-76:

> 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;
> 5. The timing and relationship between the declarant and the witness;
> 6. Whether the statement contained assertions about past fact—if not, it carries on its face a warning to the jury not to give the statement undue weight;
> 7. Whether cross-examination could establish that the declarant was not in a position of personal knowledge to make the statement;
> 8. How likely is it that the statement was founded on faulty recollection; and
> 9. Whether the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.
> 10.

Ryan, 103 Wn.2d at 175-76.

Each of the trial court's findings of fact that A.E.W. challenged were unsupported by substantial evidence and, when taken together, showed there were untenable grounds for finding that T.N.A.'s and E.G.A.'s statements were reliable. Despite the juvenile court's finding that T.N.A. reported A.E.W. put a finger in E.G.A.'s rectum, T.N.A. did not witness the incident E.G.A. reported

to his father. CP 50 (FF 2); RP 17, 105-06 (8/13/17). The trial court's finding that S.G.A. observed and treated an injury to E.G.A.'s rectum at the time of disclosure does not corroborate E.G.A.'s statement because the "injury" was only a little redness and the "treatment" was placing Vaseline on the rectum. CP 51 (FF 12); RP 110 (8/13/17).

Contrary to the juvenile court's finding, Ms. Villa's forensic interview was conducted primarily for the purpose of a criminal investigation. CP 51 (FF 13). It was commenced after the investigation was underway, it was conducted in an interview room and not in a doctor's office, and Ms. Villa never testified it was conducted to provide medical attention. RP 5, 13, 14, 107 (8/13/17). Further, T.N.A. understood he was being interviewed to discuss the "crime" that A.E.W. committed. RP 50 (8/13/17).

Despite the juvenile court's finding that T.N.A.'s statement to his father's question was spontaneous, the evidence in the record shows that T.N.A. only accused A.E.W. after being prompted by his father. CP 52 (FF 23). And T.N.A. only provided further details after the investigation started and during his interview with Ms. Villa. RP 52-53, 55-56, 104-05, 109 (8/13/17).

Because the testimony does not support the court's findings, and in fact contradicts the juvenile court's findings, the court's findings are untenable and not supported by substantial evidence. Because the juvenile court's challenged facts are not supported by substantial evidence they must be vacated. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Without the challenged findings of fact, the only evidence to support the juvenile court's conclusion that the child hearsay statements were reliable and admissible, was the children's demeanor on the stand, Ms. Villa's testimony that E.G.A.'s misuse of the word "appropriate", and T.N.A.'s use of the word "crime" – that was not suggestive of coaching, and the fact the children were interviewed by a professional. CP 50-52.

This evidence focuses heavily on *Ryan* factors five and nine to the exclusion of the others. Under *Ryan,* the evidence is insufficient to demonstrate reliability, because the *Ryan* test must be "substantially met before a statement is demonstrated to be reliable." *See State v. Griffith*, 45 Wn. App. 728, 739, 727 P.2d 247 (1986). No single *Ryan* factor is decisive and the reliability

assessment is based on an overall evaluation of the factors. *State v. Young,* 62 Wn. App. 895, 902–03, 802 P.2d 829 (1991).

The evidence here, failed to address, four of the nine *Ryan* factors: whether the children had a motive to lie; the general character of the declarant; whether more than one person heard the statements; and whether the statements were made spontaneously. This omission precludes a finding that the court substantially complied with the *Ryan* factors, which undermines the court's order on reliability and admissibility. The Court of Appeals was wrong to conclude otherwise.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Here, the Court of Appeals should have reversed and remanded for dismissal with prejudice because without the children's hearsay testimony there is insufficient against A.E.W. to establish the crime charged (no physical evidence, no witnesses other than the children, and no confession).

The juvenile court's admission of child hearsay evidence is a matter of substantial public interest. The legislature specifically requires a separate hearing to determine whether a child's statement is reliable. RCW 9A.44.120. This Court, in *Ryan*, provided further guidelines on how to ensure the reliability of a child's statement and to protect the rights of a defendant being accused by a child. *Ryan*, 103 Wn.2d at 169. Further, it is a matter of public interest that a defendant have the right to appeal the outcome of any reliability hearing under RCW 9A.44.120. Precluding a defendant from challenging the trial court's findings on appeal once the trial court's order on admissibility is entered into evidence would essentially force the defendant to appeal prior to trial. This would create judicial inefficiency by either delaying the trial proceedings or causing multiple appeals to be filed in the same case.

Therefore, this Court should accept review to ensure the rights of a defendant being accused by a child whose testimony is inherently less reliable.

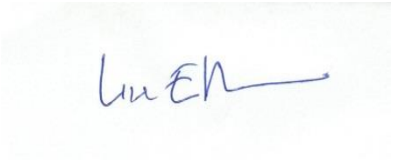
F. CONCLUSION

For the reasons stated herein and in the opening brief, this Court should accept review.

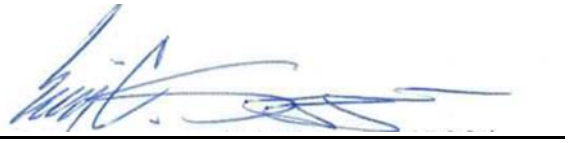
DATED THIS 4th day of April 2019.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

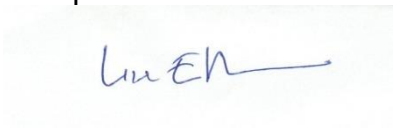


LISE ELLNER, WSBA 20955
Attorney for Petitioner



ERIN SPERGER, WSBA No. 45931
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurson.wa.us and A.E.W., c/o Green Hill School, 375 SW 11th Street, Chehalis, WA 98532 on April 4, 2019. Service was made electronically to the prosecutor and to A.E.W. by depositing in the mails of the United States of America, properly stamped and addressed.



_____Signature

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

January 29, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. A.E.W. Appellant.	No. 50750-1-II UNPUBLISHED OPINION

MELNICK, J. — AEW appeals his adjudications for rape of a child in the first degree and child molestation in the first degree. AEW argues that insufficient evidence exists to support his adjudications after a bench trial in juvenile court.

We affirm.

FACTS

I. INCIDENT

In March 2016, SGA, the father of EGA (then age five) and TNA (then age nine), called the police to report that AEW had sexually abused his children. SGA learned of the abuse from his children.

Tumwater Police Department Detective Tim Eikum arranged forensic interviews for the children. Sue Villa interviewed EGA and TNA separately at Monarch Children's Justice and Advocacy Center (Monarch). After the interviews, Eikum arrested AEW.

The State charged AEW, then age sixteen, with rape of a child in the first degree of EGA and child molestation in the first degree of TNA. AEW pleaded not guilty. He proceeded to trial in juvenile court.

II. CHILD HEARSAY HEARING

Before trial, the State moved to admit statements made by EGA and TNA to Villa and SGA. All four testified at the child hearsay hearing.

A superior court commissioner presided over the hearing and ruled on the admissibility of the child hearsay statements. A different judicial officer presided over the subsequent trial.

Villa testified that during EGA's interview, EGA asked her, "'Can I tell you something that's very, very appropriate?'" Report of Proceedings (RP) (Aug. 3, 2017) at 17. EGA then stated, "'[AEW] just stuck his—stuck my finger in his butt—in my butt, actually.'" RP (Aug. 3, 2017) at 17. Villa asked, "'Stuck his finger in your butt?'" RP (Aug. 3, 2017) at 17. EGA responded, "'Yeah.'" RP (Aug. 3, 2017) at 17.

Villa testified that during TNA's interview, he told her that he was there "'to talk about the crime that [AEW] did.'" RP (Aug. 3, 2017) at 50. TNA discussed an incident where AEW tackled him to the ground and humped him. TNA also told Villa about an incident approximately two years prior where AEW tackled TNA behind a tree and touched his privates. TNA discussed another incident where AEW had TNA touch him. TNA stated that AEW's behavior happened frequently for two years.

SGA testified about when he initially learned of the abuse. EGA was getting out of the shower "then he just kind of announced to everybody that his . . . butt hurt." RP (Aug. 3, 2017) at 105. When SGA asked him why, EGA stated that it hurt because AEW touched it. SGA asked where AEW touched his butt, and EGA pointed to his rectum and said, "'In the middle.'" RP

(Aug. 3, 2017) at 105. SGA visually inspected EGA's rectum and noticed it was red, so he put Vaseline on it. SGA then asked TNA whether AEW had ever done the same to him. TNA responded that AEW had done the same thing to him the week prior.

EGA testified that he told SGA and Villa that AEW had touched him in his privates on the back. He described where AEW touched him.

TNA testified that he remembered AEW touching him. He indicated that AEW touched his penis. He also stated that AEW touched him under his clothes on his butt.

The court ruled that EGA's and TNA's statements to SGA and Villa were admissible at trial. The court entered a written order on the admissibility of the child hearsay statements. It included findings of fact and conclusions of law.

III. TRIAL

At trial, the parties agreed to the admission of the order on the admissibility of the child hearsay statements as an exhibit. This admitted exhibit included the actual child hearsay statements.

The State called Tumwater Police Department Detective Tyler Boling, Eikum, Villa, SGA, TNA, and EGA as witnesses. AEW called Amber Herrera, JH, Tona Miller, Qing Xin Lee, Patrick Williams, and HNM, AEW's mother. AEW also testified.

The court found AEW guilty on both counts and entered written findings of fact and conclusions of law. AEW appeals.

ANALYSIS

AEW argues that substantial evidence does not support findings of fact 2, 4, 12, 13, 16, and 23 from the child hearsay hearing. He argues that because these findings are not supported by substantial evidence, insufficient evidence supports his convictions. We disagree.

"[F]ollowing a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Evidence is substantial if it is "sufficient to persuade a fair-minded person of the truth of the asserted premise." *Homan*, 181 Wn.2d at 106. Unchallenged findings of facts, along with findings of fact supported by substantial evidence, are verities on appeal. *Homan*, 181 Wn.2d at 106. We review conclusions of law de novo. *Homan*, 181 Wn.2d at 106.

AEW agreed to the admission at trial of the court's written order on the admissibility of the child hearsay statements. Accordingly, the trial court considered it as substantive evidence.

To the extent the court used the findings of facts in the order to adjudicate AEW's guilt, AEW is precluded from arguing that insufficient evidence supports those findings. RAP 2.5(a). We also note that AEW does not challenge any of the court's findings of fact or conclusions of law that it entered following AEW's trial. Failure to do so precludes AEW from arguing that insufficient evidence supports his conviction. *Homan*, 181 Wn.2d at 105-06.

Notwithstanding the above, we have taken it upon ourselves to review the record and we conclude that substantial evidence supports the court's challenged findings of fact from the child hearsay hearing.

"[W]e review the trial court's decision to admit child hearsay evidence for an abuse of discretion." *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). A court abuses its discretion "'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *Borboa*, 157 Wn.2d at 121 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)).

We review challenges to findings of fact supporting the admission to determine whether substantial evidence supports each challenged finding and review the trial court's conclusions of law de novo to determine whether the findings support the challenged conclusions. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993); *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007); *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the premise's assertion. *Halstien*, 122 Wn.2d at 129.

"RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse." *State v. Brousseau*, 172 Wn.2d 331, 351, 259 P.3d 209 (2011). RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or attempts at, "sexual contact performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child "[t]estifies at the proceedings."

In determining the reliability of child hearsay statements, the trial court is to consider the following nine factors from *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984):

> "(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; . . . (5) the timing of the declaration and the relationship between the declarant and the witness"[;] . . . [(6)] the statement contains no express assertion about past fact[; (7)] cross examination could not show the declarant's lack of knowledge[; (8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

(Quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982).)

"No single *Ryan* factor is decisive." *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). A court does not abuse its discretion where it follows the requirements of RCW 9A.44.120 and the *Ryan* factors in concluding that a child's hearsay statements are reliable. *C.J.*, 148 Wn.2d at 686.

Here, the court did not abuse its discretion because it followed the requirements of RCW 9A.44.120 and analyzed the child hearsay statements under the *Ryan* factors. Furthermore, substantial evidence supports the challenged findings of fact[1] from the child hearsay hearing.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Lee, J.

[1] AEW argues that both EGA and TNA had a motive to lie, but AEW did not assign error to finding of fact number 17. Clerk's Papers at 52 ("There is no evidence that either child had any motive to lie."). His challenge is therefore precluded under RAP 10.3(g). Regardless, our review of the record shows that substantial evidence supports the finding.

Filed
Washington State
Court of Appeals
Division Two

March 11, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

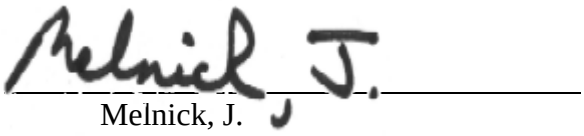
STATE OF WASHINGTON, Respondent, v. A.E.W. Appellant.	No. 50750-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, A.E.W., moved this court for reconsideration of the January 29, 2019 unpublished opinion. After consideration, we deny the motion.

IT IS SO ORDERED.

PANEL: Jj. Maxa, Lee Melnick.

FOR THE COURT:



Melnick, J.

LAW OFFICES OF LISE ELLNER

April 04, 2019 - 1:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50750-1
Appellate Court Case Title:	State of Washington, Respondent v. A.E.W, Appellant
Superior Court Case Number:	16-8-00110-5

The following documents have been uploaded:

- 507501_Petition_for_Review_20190404132333D2036337_2218.pdf
  This File Contains:
  Petition for Review
  The Original File Name was AEW P4R FINAL.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us
- Lise Ellner (Undisclosed Email Address)
- Erin Cheyenne Sperger (Undisclosed Email Address)

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20190404132333D2036337