101737-5

No. 84590-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEFFREY ANTEE, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY

THE HONORABLE JUDGE JAMES J. DIXON

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
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253-445-7920

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INTRODUCTION

The Child Hearsay Statute, RCW 9A.44.120 supports the testimony of young child witnesses through the testimony of those who have interviewed or spoken with the child. Under Washington law, where a child is an available witness, but does not give live-in court testimony describing acts of sexual contact, the child has not testified for purposes of the child hearsay statute. It becomes a violation of the Confrontation Clause to allow incriminating child hearsay statements to then be considered by a jury where they lack corroborative evidence.

In this matter, prosecutors accused Jeffrey Antee of sexual abuse of his step-daughter. At both the competency hearing and trial, the child adamantly testified the incidents never occurred. Mr. Antee was convicted of sexual assaults based only on hearsay

statements of adults. The convictions must be reversed and dismissed with prejudice.

I. IDENTITY OF PETITIONER

Petitioner Jeffrey Antee, the appellant below, asks the Court to review the decision of Division I of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Jeffrey Antee seeks review of the Court of Appeals unpublished opinion entered on January 23, 2023. A copy of the opinion is attached as an appendix.

III. ISSUES PRESENTED FOR REVIEW

A. Was Mr. Antee's right to confront the witness violated when the child's testimony denied the alleged acts never occurred?

B. Did Mr. Antee receive ineffective assistance of counsel when counsel stipulated to admission of the adult testimony about allegations of abuse, which the child, under oath, consistently denied ever occurred?

IV. STATEMENT OF THE CASE

Thurston County prosecutors charged Jeffrey Antee by amended information with 3 counts of rape of a child in the first degree, one count of child molestation in the first degree, one count of assault of a child second degree, and two counts of assault of a child in the third degree. CP 359-361. Mr. Antee entered a not guilty plea to each charge and the matter proceeded to a jury trial. (3/13/18 RP 10; 9/19/19 RP 184).

PRETRIAL HEARING

Before trial, the State moved to include child hearsay statements under RCW 9A.44.120 (9/24/18 RP 14). At the child hearsay hearing, the four year old, described a time when Antee had held her upside down and bonked her head. She said he was mean. (9/24/18 RP 23-24). When asked if he did anything else mean, she said, “He didn’t do anything else.” When asked “You don’t want to talk about what Jeffie did or he didn’t do anything?” She twice answered, “He didn’t do anything”. (9/24/18 RP 24-25).

Her mother, Mr. Antee’s ex-wife alleged that in December 2017 she took a picture of what she believed to be blood in her daughter’s underwear. (4/18/19 RP 209). A pediatrician examined the child, determined she did not have a urinary tract infection, and gave no recommendation for a follow up appointment. (4/18/19 RP 110).

Ms. Antee recounted that in January 2018 Antee told her he had fallen asleep while taking care of the child and awoke to her crying. He found the child in the bathroom, and she had cut her vagina with a broken pen. (4/18/19 RP 123). Ms. Antee took a photo. (4/18/19 RP 124). She brought the child to Mary Bridge Sexual Assault Clinic. (4/18/19 RP 125). The clinicians examined the child, talked to mother and child, and then "they sent us home and told us she was going to be okay." (4/18/19 RP 125).

In February 2018, Ms. Antee arrived home from work and heard what sounded like the child gagging. She saw Antee holding the child by her head and face, with his fingers in her mouth. He said the child was choking. (9/24/18 RP 51).

One of Ms. Antee's housemates, Ms. Wallace, testified about that event at the child hearsay hearing. (9/24/18 RP 61). Wallace reported she believed she

heard the child say Antee was “looking in her pee-pee.” (9/24/18 RP 64). Ms. Antee, who was holding her child, did not hear that statement.

On that day, mother noticed a goose egg sized bump on the side of the child’s head. (9/24/18 RP 41,49.).

The child explained she slipped and hit her head on the wall near a bathroom. She showed her mother the area on the wall. (9/24/18 RP 48,53-54). Antee corroborated the child’s explanation. (9/24/18 RP 52-53).

Eight months later, only a few days before mother’s testimony, the child allegedly changed the story about the head bump. Ms. Antee reported the child most recently said Antee had lifted her upside down by her legs and swung her head into the wall. (9/24/18 RP 48; 4/1819 RP 115-116).

After a family member requested a welfare check by police because of the bump on the child’s head, the child was removed from Ms. Antee’s care by CPS. (9/24/18 RP

48,65,77). Mother reacquired custody about six weeks later.

Mother said after the child returned home, she alleged other incidents. (4/18/19 RP 119). The child told her Antee used a spatula “on her butt and pee-pee and that he puts his pee-pee on her pee-pee and that it hurt.” (4/18/19 RP 119). She said the child told her Antee “peed on her” in the shower, and “put his pee-pee in her mouth and it tasted like raspberries.” (4/18/19 RP 119). Ms. Antee kept peach raspberry lube in the home. (4/18/19 RP 120).

Ms. Antee recorded herself interviewing the child. Mother asked the child leading and suggestive questions. (9/24/18 RP 134-135). She described a conversation after the child had a nightmare:

> She told me that a knife was in her tummy and her throat, and she later told me that it was from his -- she -- I asked if it was in reference to his pee-pee, and she said it was.

(4/18/19 RP 121). Ms. Antee stated she, not the child, associated the "the knife" with a penis. (4/18/19 RP 125).

Two weeks after the child had been removed from the home, an officer listened in on her forensic interview. (9/24/18 RP 75). The child did not disclose any sexual abuse. (9/24/18 RP 78).

The officer also listened in on an interview conducted in conjunction with the forensic medical examination. (9/24/18 RP 76). The officer heard the child say "Jeffie's pee-pee had gone into where her pee-pee was and that his pee-pee had also gone into her mouth and tasted like raspberries." (9/24/18 RP 76).

Ruling

The court found the four-year-old child competent to testify, specifically finding she "clearly understood the different between truth and a lie. She understood that obligation." CP 103. The court concluded the child was

available within the meaning of RCW 9A.44.120, and the child hearsay statements were reliable and admissible. CP 103-104.

Defense counsel stipulated to admission of the medical testimony of Nurse Lisa Wahl. (9/24/18 RP 103).

Trial Testimony by Child

The child was 7 years old at the time of trial. (6/21/21 RP 573). When directly asked if Antee ever touched her “peepee”, she said “No.” (6/21/21 RP 595).

When asked if he “put his pee-pee” in her mouth she testified: “That never happened.” (6/21/21 RP 583).

When asked, “Do you remember telling people it tasted like raspberries?” she answered, “That never happened either.” (6/21/21 RP 583; 595).

Trial Testimony by Mother

Ms. Antee testified that in January 2018, she brought the child to the Mary Bridge Children’s Advocacy

Center for a physical exam and a forensic interview after she thought the child's vaginal area had been injured by a broken pen. (6/21/21 RP 702). Clinicians told Ms. Antee they did not believe the child had been sexually assaulted. (6/21/21 RP 661-62;703).

In December 2017 Mother reported she had taken a photograph of what she alleged was blood in the child's underwear. (6/21/21 RP 658). The child's pediatrician examined her for a bladder infection or a UTI. There was no infection. (6/21/21 RP 700-01). The physician directed mother to bring the child back if the problem reoccurred. (6/21/21 RP 700). Months later, after mother regained custody, she reported the child told her Antee had put his pee-pee in her pee- pee and mother assumed that was the genesis of the alleged blood in the underwear. (6/21/21/ RP 701).

The State played a phone video of mother questioning the child.

[MOTHER]:…Jeffy was mean to you because he put his pee-pee on you?
[CHILD]:Yeah.
[MOTHER]: Where did he put his pee-pee on you?
[CHILD]: (Indiscernible).
[MOTHER]: Where did he put his pee-pee on?
[CHILD]: Right here.
[MOTHER]: Right there on your pee-pee?
[CHILD]: (Nodding).
[MOTHER]: And he was mean?
[CHILD]: (Indiscernible).
[MOTHER]: Where else did he put it on you?
[CHILD]: He did it on my (indiscernible), on my tummy and my eye and my head.
[MOTHER]: When he peed on you?
[CHILD]: Yeah.
[MOTHER]: And he put it – did he put it in your mouth?
[CHILD]: Yeah.
[MOTHER]: Yeah. Did it taste like anything when he put it in your mouth?
[CHILD]: Yeah. It tasted like pee.

(6/21/21 RP 676-679).

Testimony of Child's Therapist

Marilyn Yearian began treating the child shortly after CPS returned her to her mother. (6/21/21 RP 742). She

believed the child's experience of being separated from her mother by the police had been traumatic for the her.[1] (6/21/21 RP 797).

In therapy, the child called Antee "a monster." (6/21/21 RP 746). The therapist read trauma books to the child aimed at "normalizing feelings of sadness and anger regarding sexual abuse." (6/21/21 RP 747). Months into therapy, after one story the child said, "Jeffy touched my private parts." (6/21/21 RP 747,772). No further details were provided. (6/21/21 RP 747).

Later in therapy, the child said, "Jeffy also put his butt on me and rubbed it around" and "Jeffy put his penis in my pee-pee and it hurt." (6/21/21 RP 762). By August

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[1] She testified that a four-year-old child is too young to be diagnosed with PTSD, so she relied on mother's reporting of nightmares and difficulty with separation. (6/21/21 RP 743).

of 2018, the child reported “Jeffy put his pee-pee in my mouth” and “all over my face”. (6/21/21 RP 755,774). She reported Antee put his penis and poop in her mouth. (6/21/21 RP 754).

The therapist made notes the child had drawn pictures that were scribbles and described it as his “penis going all over the place.” (6/21/21 RP 755).

After about a year of treatment, the child did not want to meet with the therapist and therapy tapered off. (6/22/21 RP 764).

Lisa Wahl ARNP Testimony

Lisa Wahl, a family nurse practitioner, examined the child about two weeks after she had been removed from her mother’s home. The child was living with a relative at the time and the record was unclear as to how often she visited the child during that time period. (6/22/21 RP 831). The nurse practitioner recommended the child have only supervised visitation with her mother. (6/22/21 RP 841).

In response to a direct question, the child to Wahl that Antee put his penis in her mouth and “the pee-pee that came out tasted like raspberries.” (6/22/21 RP 837). Without detail, the child said Antee put “his hands on her pee-pee”. (6/22/21 RP 837).

The nurse could not fully examine the child because the child became too anxious. (6/22/21 RP 839). She reported that what she did examine was normal and healthy. (6/22/21 RP 844).

After a finding of guilt on 5 of the 7 charges alleged in the fifth amended information, Mr. Antee filed a notice of appeal. CP 359-361; 367-375; 523.

The Court affirmed the convictions, finding that Mr. Antee’s right to confrontation was not offended.

V. Argument Why Review Should Be Accepted

RAP 13.4 provides a petition for review may be accepted in the Supreme Court if the decision of the Court of Appeals conflicts with a decision by this Court.

The decision in this matter conflicts with *State v. Rohrich,* 132 Wn.2d 472, 939 P.2d 697 (1997). Also, this Court may accept review where there is a significant question of law under the Washington State Constitution or the U.S. Constitution. RAP 13.4(b)(1,3).

To meet the requirements of a constitutional trial, a defendant must have effective assistance of counsel and must be afforded a real opportunity to cross examine a complaining witness under oath. *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489(1970); U.S. Const. amend. VI; Wash. Const. Art. I, § 22.

An error raised for the first time on appeal will be reviewed where the appellant can show the error is manifest and truly of constitutional dimension. *State v. O'Hara,* 167 Wn.2d 91, 98, 217 P.3ds 756 (2009); RAP 2.5(a)(3).

Mr. Antee raises two errors: (1) a finding of competency was a precondition to admission of the child

hearsay statements the State sought to admit as evidence. *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984). Child hearsay statements are admissible if made by a child under the age of 10 describing any act of sexual contact or assault that results in substantial bodily harm. RCW 9A.04.110.

The court must first find the time, content, and circumstances provide a sufficient indicium of reliability. The statute further requires the child either testify at the proceedings; or is unavailable as a witness, except that when unavailable, the statements may only be admitted if there is corroborative evidence of the alleged acts. RCW 9A.44.120(1)(a)(i)-(b), (c)(i-ii).

The issue on appeal is the failure to meet the statutory requirement: the child, available as a witness, must testify as to the acts of sexual contact alleged in the hearsay as a condition to admission of the hearsay

statements. RCW 9A.44.120; *State v. Rohrich,* 132 Wn.2d 472, 939 P.2d 697 (1997).

As here, in *Rohrich,* the child was an available witness, but in her testimony did not describe any acts of sexual contact. The State presented numerous witnesses who provided hearsay statements the child allegedly made to them about illegal sexual contact. *Id.* at 474-75.

The word "testifies" as used in RCW 9A.44.120 must be viewed "in light of the requirements of the Confrontation Clause." *Id.* at 477. The child hearsay statute "does not fall within a firmly rooted hearsay exception, nothing about child hearsay indicates the hearsay statement is more reliable than an in-court declaration of the same accusation." *Id.* at 480.

The Court concluded that where the child was available to testify, "the Confrontation Clause's preference for live testimony requires that she herself testify as to the acts of sexual contact alleged in the hearsay as a

condition to its admission under RCW 9A.44.120." *Id*.(emphasis added).

Even in an instance where the child does not fully recall the events described in the hearsay statement, there must be some acknowledgment that an event occurred for the hearsay statements to be admissible. See *State v. Kilgore*, 107 Wn.App. 160, 174-75, 26 P.3d 308 (2001)(aff'd 147 Wn.2d 288, 53 P.3d 974 (2002).(child testified the defendant touched her private parts on her bare skin but could not recall whether he had penetrated, and she testified about the statements she made to others about the alleged rapes.)

Here, the child was asked if Mr. Antee perpetrated any sexual acts and her answers were clear: She was adamant he had not committed sexual acts: "No." "That never happened." By contrast, her descriptions of the alleged physical assaults of spanking and bonking her head against the wall were precise.

The Confrontation Clause is to guarantee a defendant's constitutional right to a fair trial. A trial in which he can come face to face with his accuser and challenge or dispute his claims. *When allegations which have no basis in fact are believed, an innocent adult can face a lifetime of imprisonment*.

Here, the evidence incriminating Mr. Antee of child rape and molestation was not the testimony of the child. Like *Rohrich*, the State did not "elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses." Id. at 478. Here, the State asked the questions, but the problem was that the child did not testify to the allegations: she did not describe any sexual acts.

Under *Rohrich*, where the child does not describe any sexual acts, the hearsay statements are inadmissible and violate the guarantees of the Confrontation Clause.

The constitutional error was manifest, and it was not harmless.

Under the harmless error analysis of either the overwhelming untainted evidence, or contribution test the error here was not harmless. Excising the hearsay statements of mother and others, there was no evidence to convict Mr. Antee.

At least two medical facilities had contact with the child about mother's concerns. Mother brought the child to her pediatrician when she allegedly saw blood in her underwear. The pediatrician, a mandated reporter, ruled out an infection process. There was no evidence the physician suspected any child abuse or suggested a follow up appointment.

A month before CPS removed the child from the home, mother took her to the Child Advocacy Center (Mary Bridge). The child was interviewed and examined. The experts at the Advocacy Center, who specialize in

sexual assault of children and are mandated reporters, did not suspect sexual abuse.

Depending on how a child is questioned about an alleged event, the questions may “distort substantially” her collection of actual events. False memory implantation from improper interviewing techniques is a known problem particularly with very young children. John R. Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash.L.Rev. 705, 707 (1987).

Suggestiveness can occur most especially when an interviewer is a “trusted authority figure”. Repetitive questioning, vilification or criticism of the accused can create a false memory in a young child. Child Sexual Abuse: Moving Toward A Balanced and Rational Approach To The Cases Everyone Abhors, 34 Am.J.Trial Advoc. 517, 545 (2011). Problems caused by improper or suggestive questioning has been extensively

documented. Young children are more suggestible than older children to responding to questions, so it pleases the questioner, but has no relationship to the truth.[2]

Here, there is no evidence how often mother spent time with the child, discussing the allegations, or even how often she unintentionally coached the child before she made a "disclosure".

Mother's video of interviewing her child contributed to the verdict. "…preparation procedures will suggest facts and stimulate fantasies the child will thereafter report and recall as truth." 62 Wash.L.Rev. 707. The video purporting to confirm the child's allegations, instead shows improper questioning, and directing incriminating answers to a four-year old.

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[2] See Dana B, Anderson, Assessing the Reliablity of Child Testimony in Sexual Abuse Cases, 69 S.Cal.L.Rev. 2117, 2161 (1996); Stephen J. Ceci & Maggie Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psycho. Bull. 403-04 (1993).

Admission of the hearsay statements of mother and the officer was a manifest constitutional error. The untainted evidence of sexual abuse was nil. The convictions must be reversed because there is more than a reasonable probability the use of the inadmissible evidence was vital to reach a guilty verdict.

Ineffective assistance of counsel

Effective assistance of counsel is a constitutional right. Manifest errors affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Washington courts are hesitant to deny review of an issue where a party's fundamental constitutional rights were violated in the proceedings below. For that reason, constitutional issues have been considered even though

raised for the first time in a motion for reconsideration, in a reply brief, and in a petition for review. [3]

This Court has even held, "An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision." *Fall v. Keane Corp.,* 113 Wn.2d 645, 659, 782 P.2d 974 (1989). Counsel respectfully asserts that reaching the merits of a second error, an ineffective assistance of counsel claim is necessary to a proper decision, and that justice is not served by a decision that fails to address an argument which would result in the reversal of Mr. Antee's convictions.

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[3] *Connor v. Universal Util's*., 105 Wn.2d 168, 171, 712 P.2d 840 (1986); *Levinson v. Horse Racing Commission,*48 Wn.App. 822, 740 P.2d 898 (1987); *State v. Kitchen,* 46 Wn.App. 232, 234, 730 P.2d 103 (1986); *State v. Purdom,* 106 Wn.2d 745, 748, 725 P.2d 622 (1986); *State v. McCullum,* 98 Wn.2d 484, 487, 656 P.2d 1064 (1983).

To establish ineffective assistance of counsel, a defendant must show that the attorney's performance was deficient, and he was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If defense counsel's performance was not reasonably effective under prevailing professional norms the first prong is met. The second prong is met by a showing that, but for counsel's errors, the outcome would have been different. *State v. McFarland* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Counsel was ineffective for failing to object to the statements made by Nurse Lisa Wahl and the child's therapist regarding sexual assault. And in fact, stipulating to their admission. (CP 240).

ER 803 (a)(4) provides as nonhearsay:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

> inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Spontaneous declarations and statements to a doctor while receiving medical care are considered reliable because the motive is to obtain treatment. And the medical professional must have relied on it for treatment. *State v. Doerflinger*, 170 Wn.App. 650, 664, 285 P.3d 217 (2012).

Where a child is too young to have a treatment motive, a statement may be admissible in the instance where adequate treatment and injury prevention require identifying the child's injuries, the source of the injury, and the risk of further abuse. *State v. Butler,* 53 Wn.App. 214, 220, 766 P.2d 505 (1989).

Here, while there was corroborating evidence of physical injury to the child: bruises and a head bump. Those injuries were either observed by others in real time

or the bruising was clear. The child testified about those injuries.

By contrast, there was no corroborating evidence of sexual abuse. The child did not testify about the sexual assaults. The child had been interviewed and examined by medical professionals shortly before she was removed from her mother's care. There was no concern about sexual abuse by those professionals.

The nurse and therapist met the child after she had been removed from the home. The video showed mother supplied all the terms and spoon fed the child information. There is a distinct and real possibility the child fabricated the memories which she then repeated to the nurse and counselor.

> But what if the child has not been abused? Under these circumstances the interview can be an exercise in learning, not recall. Here is this person, the interviewer, who wants something from him. His mother or father wants something from him as well.

> They want him to say something, to tell them about something. The child is bound to try to figure out what they are after, especially since it is clear that he gets a positive reaction from them when he says certain things. If he can determine what they want him to say, they will be happy and love him. So, he listens to their questions and tries to sort it out…. The child may even determine that they want him to tell a certain kind of story, and he invents one. They love him for it. At the next interview, it will not take as long for the child to learn[4].

The therapist testified she read books to the child about sexual abuse. She provided affirmation when the child talked about "pee pees". There were no particular guarantees of trustworthiness of the child's statements. *This is most especially true, when the child was under*

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[4] John R. Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash. L. Rev. at 712–13.

oath, understanding she was expected to tell the truth, promptly disavowed any allegations of sexual abuse.

Accusations in the form of hearsay, under an ER 803 (a) analysis must possess indicia of reliability by virtue of their *inherent* trustworthiness. *State v. Florczak,* 76 Wn.App. 55, 882 P.2d 199 (1994).

In *Florczak,* a young child made statements to her therapist about sexual abuse by her mother and a male. The Court held that the type of evidence necessary to corroborate child hearsay statements under ER 803 (a)(4) required that evidence must be part of the totality of the circumstances under which the child makes the statements. *Id.* at 66.

Here, because of a stipulation by counsel, the court did not consider the reliability of the statements made to Nurse Wahl or the counselor. (CP 101). With the child's testimony that Mr. Antee had done none of the things they

testified to, the reliability of their statements must be seriously questioned.

Prejudice is shown when there is a reasonable probability that but for counsel's ineffective assistance, the result would have been different. A reasonable probability means a probability sufficient to undermine confidence in the outcome. *In re Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Mr. Antee was denied effective assistance of counsel. The convictions must be vacated.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Antee respectfully asks the Court to accept review of his petition.

This document has 4,403 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Submitted this 22nd day of February 2023.

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APPENDIX

FILED
1/23/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY LEE ANTEE, Respondent.	No. 84590-0-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — Jeffrey Antee was convicted of rape, molestation, and assault of his stepdaughter. He appeals his conviction for rape of a child in the first degree, contending that admission of child hearsay statements violated his constitutional right to confrontation. Because the child declarant testified and Antee had ample opportunity for cross-examination, admission of the statements did not infringe on his right to confrontation. We affirm.

FACTS

The State charged Antee with three counts of rape of a child in the first degree, one count of child molestation in the first degree, one count of assault of a child in the second degree, and two counts of assault of a child in the third degree based on allegations of sexual and physical abuse against his 4-year-old stepdaughter, D.D.[1]

[1] The second degree assault of a child charge and one of the third degree assault of a child charges carried domestic violence designations.

Prior to a jury trial, the State sought admission of statements by D.D. to her mother, family friend, police officer, Sexual Assault Nurse Examiner (SANE), and therapist. These statements consisted of descriptions of physical and sexual contact between Antee and D.D. As required by the child hearsay statute, RCW 9A.44.120(1)(b), the court held two hearings to assess whether D.D. was competent as a witness and whether her statements had sufficient indicia of reliability for admission under the child hearsay statute. At the conclusion of the hearings, the trial court concluded that D.D. was competent as a witness, she was available to testify within the meaning of RCW 9A.44.120, and her statements about sexual abuse to her mother, the family friend, and the police officer were reliable and admissible child hearsay pursuant to that statute. As for D.D.'s statements to the SANE and her therapist, the court did not consider their admissibility under the child hearsay statute because Antee had stipulated the statements were admissible as hearsay exceptions for medical diagnosis or treatment through ER 803(a)(4).

By the time of trial, D.D. was 7 years old. She testified at trial and provided some testimony describing physical assaults by Antee. When asked by the State about specific instances of sexual contact, D.D. did not remember them or denied that they happened.

> Q. [D.D.], do you remember Jeffy[2] touching your pee-pee?
> A. No.
> Q. Do you remember Jeffy putting his pee-pee in your pee-pee?
> A. No.

[2] D.D. testified that "Jeffy" is the name she used for Antee.

Q. Do you remember his pee-pee going into your mouth?
A. That never happened.
Q. Okay. Do you remember telling people it tasted like raspberries?
A. That never happened either.

D.D.'s mother, family friend, therapist, and the SANE nurse provided testimony on D.D.'s hearsay statements about physical and sexual contact with Antee. The police officer testified only about D.D.'s statements regarding nonsexual physical injuries, including bruising on her head.

The jury acquitted Antee of one count of first degree rape of a child and one count of third degree assault of a child. The jury convicted Antee of two counts of first degree rape of a child, one count of first degree child molestation, one count of second degree assault of a child, and one count of third degree assault of a child. The jury found that he and D.D. were members of the same family or household for the second degree assault of a child. For all convictions, the jury also returned special verdicts finding that Antee used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. Based on the special verdicts, the trial court sentenced Antee to an exceptional sentence. Antee appeals only the conviction for rape of a child in the first degree.

DISCUSSION

On appeal, Antee contends his constitutional right to confrontation was violated by admission of D.D.'s hearsay statements. Antee further claims that without the inadmissible hearsay evidence, the State introduced insufficient evidence to support the child rape convictions. We disagree.

Hearsay is an out-of-court statement offered to prove the truth of the

matter asserted. ER 801. Generally, hearsay evidence is not admissible unless subject to an exception under rule or statute. ER 802.

Admission of hearsay evidence impinges on a criminal defendant's Sixth Amendment right to confrontation, which guarantees that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." See State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001); U.S. CONST. amend. VI. Although hearsay implicates this right, "the admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross-examination." State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999).

Here, the trial court admitted the challenged hearsay statements to the mother, family friend, and police officer under the child hearsay statute, RCW 9A.44.120. The statute allows for admission of hearsay evidence "made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm . . . ." RCW 9A.44.120(1)(a)(i). When deciding whether to admit hearsay evidence, the court must conduct a hearing outside the presence of the jury and find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1)(b). Specifically, the Supreme Court has identified nine factors that courts should consider when assessing admissibility of child

hearsay statements pursuant to RCW 9A.44.120.[3] See State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Additionally, the child must testify at the proceedings or be unavailable as a witness. RCW 9A.44.120(1)(c). If the child is unavailable, admission of the statements requires corroborative evidence of the act. RCW 9A.44.120(1)(c)(ii).

The trial court conducted the child hearsay hearing and determined D.D. was competent as a witness, she was available to testify, and the statements were reliable and admissible child hearsay. The court issued findings of fact and conclusions of law addressing each of the nine Ryan factors before concluding the hearsay statements were admissible. See Ryan, 103 Wn.2d at 175-76. Antee does not challenge this decision. Instead, he argues admission of the hearsay evidence violated his confrontation right because D.D. did not testify as to the specific alleged acts of sexual contact as required by RCW 9A.44.120(1).

In support of this claim, Antee points to State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997). There, the child testified but "was not asked about and did not testify about any alleged abuse," and the defendant did not cross-examine

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[3] The nine Ryan factors are:

> (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement.

State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).

her. Rohrich, 132 Wn.2d at 474. The Washington State Supreme Court concluded, "[t]he Confrontation Clause requires the term 'testifies,' as used in the child hearsay statute, RCW 9A.44.120(2)(a), to mean the child gives live, in-court testimony describing the acts of sexual contact to be offered as hearsay." Rohrich, 132 Wn.2d at 482.

Antee ignores the salient facts that D.D. testified at trial, was asked about the alleged sexual contact, physical harm, and her hearsay statements, and was cross-examined. Rohrich is inapposite. Instead, this case is more akin to two post-Rohrich cases, State v. Clark, 139 Wn.2d 152, 985 P.2d 377, 380 (1999), and State v. Price, 158 Wn.2d 630, 642, 146 P.3d 1183 (2006).

In Clark, the trial court determined that the child hearsay statements satisfied the Ryan factors and were sufficiently reliable for admission. 139 Wn.2d at 155. However, Clark argued the child was "effectively unavailable" as a witness because she denied the sexual contact and said that her previous statements to the hearsay witnesses were lies. Id. at 159. The Washington Supreme Court concluded that the hearsay evidence did not violate Clark's right to confrontation because he had a full opportunity to cross-examine the child about her hearsay statements, the State did not shield the child from difficult questions, and the child was not evasive in her answers. Id. at 161. The child declarant "was not only sworn in as a witness at trial, asked about the alleged incidents, and provided answers to the questions put to her, but she was actually cross-examined." Id. at 159.

Similarly, in Price, the defendant claimed the child declarant was unavailable for purposes of the confrontation clause when she testified that she could not remember the alleged abuse. Price, 158 Wn.2d at 632. The Court noted that the testimony satisfied the "Clark test," which requires the child declarant to have been asked about the underlying events and prior statements, and the defendant to have had an opportunity for full-cross examination. Price, 158 Wn.2d at 648. As a result, "because all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall, an inability to remember does not render a witness unavailable for confrontation clause purposes." Id. at 651.

Here, on direct examination, D.D. denied sexual contact and her hearsay statements about sexual contact. Antee then questioned D.D. as to whether he had ever "touched [her] pee-pee" or "put his pee-pee in [her] mouth." D.D. replied "no" to both questions. D.D. denied the alleged incidents described during the hearsay testimony, but her denials did not negate that Antee had the opportunity to cross-examine her, and did so. D.D.'s testimony and Antee's cross-examination of her satisfy the Clark test. Antee had the opportunity to explore the alleged events and the hearsay statements D.D. made to her mother and family friend. Thus, his right to confrontation was not violated. " '[T]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " Price, 158 Wn.2d at 642 (alteration in original) (internal

quotation marks omitted) (quoting United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)).

Antee also challenges the statements that D.D. made to the SANE and the therapist. But Antee did not object to admission of D.D.'s hearsay statements to her therapist and the SANE under ER 803(a)(4).[4] As a result, RAP 2.5(a) precludes review of Antee's evidentiary challenge to statements admitted under this exception. Additionally, the Washington Supreme Court has explicitly adopted the requirement that a defendant raise an objection at trial or waive the right of confrontation. State v. Burns, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). Therefore, Antee has also waived any argument that admission of hearsay statements to the SANE and the therapist was a violation of his right to confrontation.

Finally, Antee challenged the sufficiency of the State's evidence based solely on the contention that "[a]bsent the child hearsay statements, no rational trier of fact could have found the elements of the crimes beyond a reasonable doubt." Because we conclude the hearsay evidence was properly admitted, we need not address Antee's claim of insufficiency of evidence.

Affirmed.

[4] In fact, Antee stipulated the statements were admissible as hearsay exceptions for medical diagnosis or treatment through ER 803(a)(4).

Chung, J.

WE CONCUR:

Cohen, J.

Andrus, C.J.

CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington, that February 22, 2023, I electronically served, a true and correct copy of the Petition for Review to: Thurston County Prosecuting Attorney at paoappeals@co.thurston.wa.us.

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February 22, 2023 - 3:27 PM

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