IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MNASON RANCOURT, Petitioner.	102433-9 COA NO. 38920-1-III PETITION FOR REVIEW

A. IDENTITY OF MOVING PARTY

Petitioner Mnason Rancourt through his attorney, Shawn P. Hennessy, asks this court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Mr. Rancourt requests review of the Court of Appeals August 31, 2023 ruling affirming his conviction under case

number 389201. A copy of the decision is attached in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeals erred by refusing to consider the applicable law and relevant facts presented in Appellant's opening brief. Specifically, Mr. Rancourt argued that the court abused its discretion by allowing the hearsay statements of CJC and HEC. The Court of Appeals held:

D. STATEMENT OF THE CASE

From July 29, 2019 through August 13, 2019, Misty Challinor (Mrs. Challinor) hired her husband's niece, Samantha Oates (Ms. Oates) to babysit her then six-year-old daughter OGC. *RP. 560-563*. Ms. Oates babysat twice a week from 5:30 a.m. until 12:30 p.m. *Id*. Ms. Oates, who lived more than hour away, was driven to the Challinor's residence by her boyfriend Mr. Rancourt. *Id*. He would stay with Ms. Oates during the

babysitting hours, then drive her back home once Mrs. Challinor arrived back at the home. *Id*.

On August 17-18, 2019, OGC asked Mrs. Challinor when Mr. Rancourt and Ms. Oates were babysitting her again. *RP. 565-572*. Mrs. Challinor questioned OGC about why she was so concerned, and asked if something happened. *Id*. OGC pointed to her vaginal area and disclosed she had been touched by Mr. Rancourt. *Id*.

OGC told Mrs. Challinor that Mr. Rancourt touched her over the top of her clothes. *Id*. OGC told Mrs. Challinor that the touching happened while she and Mr. Rancourt were in the basement playing with toys. *Id*. Ms. Oates was upstairs, sleeping. OGC. said the touching happened four to five times. Id.

On August 19, 2019 Mrs. Challinor reported the alleged sexual assault to law enforcement. *RP. 581*. A Spokane Sheriff's Deputy arrived at the Challinor residence, spoke with Mrs. Challinor and documented what OGC told her in an initial

report. *RP. 978*. Detective Brandon Armstrong ("Det. Armstrong"), became the lead investigator on the case and scheduled a forensic interview for OGC at Partners with Families and Children. *Id*.

On August 26, 2019, OGC talked with Stephanie Widhalm ("Ms. Widhalm") for the forensic interview. *RP. 671*. OGC told Ms. Widhalm that she was playing downstairs with Mr. Rancourt and he touched her "privates". *RP. 69-73*. OGC also described that Mr. Rancourt told her he was touching her because she was so "cute' and when she told him "no" he told her not to tell anybody. *Id*. OGC also told Ms. Widhalm that Mr. Rancourt took her hand and tried to make her touch his penis.

Detective Armstrong interviewed OGC's grandparents, Sherry Truman ("Ms. Truman") and Dennis Truman ("Mr. Truman"). *RP. 127, 13-135, 982-983*. Around August 19th or 20th of 2019, Mr. Truman stated that he and OGC had been sitting together at his house when OGC began talking about "a guy who did a bad thing to her". *Id*. OGC told Mrs. Truman that Ms. Oates and Mr. Rancourt made her feel uncomfortable.

Because of this, OGC did not want them to babysit her ever again. *Id*. OGC told Mrs. Truman that she and Mr. Rancourt were in the basement playing with her toys when he touched her "privates". *Id*.

On August 28, 2019 Det, Armstrong received a voicemail from Krystal Williams ("Ms. Williams") stating that she needed to speak to him about one of his cases. *CP. 5-7; RP. 435, 983*. Detective Armstrong spoke with Krystal and she told him that her 10-year-old stepdaughter CJC had also been inappropriately touched by Mr. Rancourt. between March 1-2, 2019. *RP. 983-984*.

Ms. Williams recalled that she asked Ms. Oates, her sister, to babysit her children CJC, HEC and HLC. *RP. 921-923.* Ms. Williams and the children's father, Terry Clark, were going out for the evening to celebrate their anniversary. *Id*. Mr. Rancourt drove Ms. Oates to the residence and stayed with her while she babysat. *Id*.

Six months after Ms. Oates and Mr. Rancourt babysat, Ms. Williams was told by CJC that as she was lying on the floor with her sisters, Mr. Rancourt touched her inappropriately. *CP.* 5, 9; *RP. 927* Initially, Ms. Williams was not concerned with a disclosure made by CJC that she was "uncomfortable" around Mr. Rancourt, two months earlier. *RP. 940*. Ms. Williams characterized CJC as someone who often made-up stories. *RP. 941*. However, after Ms. Williams learned from her mother, Laura Carroll, about OGC's case, she sat down with CJC and spoke to her about Mr. Rancourt. *RP. 927*.

During that conversation, CJC told Ms. Williams that Mr. Rancourt put his hand down her pants, pushed his fingers further and further toward her vagina, and inserted a large finger into her vagina. *CP*. 5, 9. Ms. Williams then spoke with her other three daughters after the conversation with CJC. *CP*. 5-9. ALC and HEC told her that Mr. Rancourt rubbed their vaginal area as well. *Id*.

On September 26, 2019, CJC, HEC, and ALC were interviewed at Partners with Families and Children. During the

forensic interview, CJC testified that Mr. Rancourt touched her "downstairs" with his finger. *RP.. 791-793*; CP. 5-6; CJC stated that as Mr. Rancourt rubbed her with his finger, it "stung a little". *Id*. CJC moved away from Mr. Rancourt when he stopped and tried to find Ms. Oates. RP. 796. When Ms. Oates asked CJC why she was crying, CJC told her that she missed her mom. *Id*.

HEC disclosed that Mr. Rancourt' put his hand "in my pants." RP. 896. HEC also stated that Mr. Rancourt used his fingers to "open" her private and as a result, it started to hurt. *CP. 7*. HEC did not want Mr. Rancourt to keep doing it, so she went to the bathroom. *RP. 315-317*. ALC disclosed that when she was on the floor of her bedroom, sleeping next to Mr. Rancourt. *CP. 6.* While there, Mr. Rancourt rubbed her "private spot". Id.

After the forensic interviews, Detective Armstrong interviewed Terry Clark ("Mr. Clark"), the father of ALC, HEC and CJC. *RP. 988-989*. Mr. Clark told Det. Armstrong that CJC told him that Mr. Rancourt discussed keeping secrets with her.

CJC said that she and Mr. Rancourt laid in bed close to each other and that he pulled her close and told her to keep secrets. *Id*. She told him she got uncomfortable and left the room. *Id*.

a. Child Hearsay Hearing

The state sought to admit the child hearsay statements of OGC, ALC, HEC and CJC under the Child Hearsay Statute, RCW 9A.44.120. *CP. 23-38*. Specifically, the state sought to seek the statements OJC made to Ms. Challinor, Mr. and Mrs. Truman, and forensic interviewer Ms. Widhalm. *Id*. In regards to ALC, CJC, and HEC, the state sought to introduce the hearsay statements they made to Ms. Williams, Mr. Clark and forensic interviewer Ms. Williams. *Id*.

The trial court held a hearing and the state called OGC, ALC, CJC, HEC, Ms. Challinor, Mr. and Mrs. Truman, Ms. Williams, Mr. Clark, and Det. Armstrong as witnesses. *RP. 13-500*. After hearing testimony, the trial court issued its Finding of Facts and Conclusions of Law. *CP. 158-168; RP. 496-500*.In

it, the trial court ruled that the hearsay was admissible at trial.

Id. Specifically, the trial court found:

> 27. Mr. Clark and Krystal Williams both testified that HEC and ALC were credible and that they taught them the necessity of telling the truth and have consequences for lying.
>
> 28. Mr. Clark and Krystal Williams both testified that the children were generally truthful.
>
> 29. There was evidence that CJC and HEC have told lies, but the lies were times when they were trying to get out of trouble.
>
> 30. HEC lied to a teacher because she did not want to get in trouble for not doing her
>
> homework.
>
> 31. The instances regarding the lying by CJC. and HEC. included fighting with their sister and doing homework. They were lies because they did not want to get in trouble; characterized as "kid behavior".
>
> 63. HEC and ALC disclosed after a few months; however, they were still able to relay facts about the surrounding circumstances and their answers were descriptive despite a few months passing.
>
> 66. HEC and ALC made disclosure fairly close in time to the sexual contact.

CP. 160-163.

c. Motion for a New Trial

On March 18, 2022, Mr. Rancourt moved for a new trial pursuant Cr.R. 7.5 (a)(5), (7) and (8) on the grounds that the state did not satisfy the requirements of the Child Hearsay statute and the Confrontation Clause. *CP. 215, 221-222*; *RP. 1148-1156.* Specifically, Mr. Rancourt argued that:

> [t]estimony of numerous State's witnesses contradicted each other, challenging the credibility and believability of witnesses and the State's theory of the case. While the jury is generally considered the sole judge of the credibility of witnesses, here the contradictions were so extreme that reliability could not reasonably be deemed sufficient.

CP. 221-222. The motion argued further that Ms. Williams testimony that she did not share information and details with her children about OJC's allegations against him was contradicted by the record. *Id*. Mr. Rancourt specifically cited to the forensic interview where the children told the forensic interviewer they knew about OJC. *Id*. Mr. Rancourt also argued that trial testimony of the girls also demonstrated that Ms.

Williams shared information about OJC with them. Id. The trial court denied the motion. *RP. 1156*.

Prior to trial, the State sought to introduce alleged out of court statements made by three child witnesses: OGC, (6 years old at the time of the alleged crime and at the time of the hearsay statements); HEC, (7 years old at the time of the alleged crime) and ALC, (6 years old at the time of the alleged crime and 7 years old at the time of the hearsay statements). After a hearing, the court issued Findings of Facts and Conclusions of Law, holding that the statements of all three children were sufficiently reliable to be admitted at trial. A jury ultimately convicted Mr. Rancourt based on those hearsay statements,

d. Appeal Argument

On appeal, Mr. Rancourt argued that the trial court abused its discretion in allowing the statements of HEC and OLC made to Krystal Williams and Tatiana Williams into evidence. In evaluating the child hearsay of HEC and ALC, the trial court did not properly weigh CJC's reliability and her

influence over HEC. The record showed that CJC had sway over HEC. *Id*. Ms. Williams described CJC as bossy, independent, and the leader of her sisters. *RP. 227-228*. CJC also had a track-record of making up stories and lying *RP. 193-194*. The record also showed that CJC's mother, father, and other people caught here in lies on different occasions. In contrast to CJC, HEC was described by her mother as a follower, heavily influenced by CJC and would do anything that CJC does. *Id.* HEC has also been caught in lies, specifically to her teacher. *CP. 161*.

e. Decision of Court of Appeals, Division Three

On appeal, Division Three affirmed the conviction. In regards to the argument that the trial court abused its discretion in allowing the hearsay statements of HEC

> [a]s recognized by the trial court, none of the child witnesses had an apparent motive to tell lies about Mr. Rancourt, nor did any of the children have general reputations for dishonesty. Although HEC.'s mother admitted HEC had at times been dishonest about

> trivial things and was susceptible to the influence of CJC—who their mother described as "bossy"—such behaviors were not out of the ordinary for a child of HEC.'s age. There was no testimony impugning the children's general character: witnesses uniformly testified the children were generally trustworthy and the children themselves demonstrated they "understood the concept of truth." *State v. Ramirez*, 46 Wn. App. 223, 231, 730 P.2d 98 (1986).

Appendix, pp. 10-11. Division Three also held that the children neither harbored negative feelings toward Mr. Rancourt prior to the accusations nor were their responses to the questions at trial leading or suggestive. *Id*. Because the trial court was in the best position to assess the credibility of the CJC and HEC, Division Three held that it did not abuse its discretion and that the hearsay was properly allowed in as evidence. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b) because the Court of Appeals decision is in conflict with decisions from the State Supreme Court and the Court of

Appeals. The ineffective for failing to object to Mr. Rowley's mother's inadmissible comments that she believed her son was a repeat child molester.

Mr. Rancourt presented the following authority in support of his argument:

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)

Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970).
In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 1362 (1997)

Matter of L.H., 198 Wn. App. 190, 391 P.3d 490 (2016)

Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965)

State v. B.J.S., 140 Wn.App. 91, 169 P.3d 34 (2007)

State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006)

State v. Castro, 141 Wn. App. 485, 170 P.3d 78 (2007)

State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1996)

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)

State v. Harstad, 153 Wn.App. 102, 18 P.3d 624 (2009)

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)

State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010)

State v. Land, 172 Wn. App. 593, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013)

State v. Mines, 163 Wn.2d 387, 179 P.3d 835 (2008)

State v. Moses, 193 Wn. App. 341, 372 P.3d 147 (2016)

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984)

Cr.R. 7.5.

The Court of Appeals decision ignored this legal authority and these facts fits the criteria under RAP 13.4(b)(1)(2), (3).

RAP 13.4(b) provides in relevant part:

> 1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> 2. If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

> 3. If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> 4.. If a significant question of law under the Constitution of the State of Washington or of the United States is involved.

The cases presented by appellate counsel provided conclusive legal authority for Mr. Rancourt's argument that the trial court abused its discretion in admitting the hearsay testimony of CJC and HEC.

On appeal, review of the trial court's decision to admit child hearsay evidence is done under an abuse of discretion standard. *State v. Moses*, 193 Wn. App. 341, 361–62, 372 P.3d 147 (2016). "A trial court abuses its discretion 'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *State v. Borboa,* 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard" or

if it is "based on untenable grounds if the factual findings are not supported by the record" or if it "is based on applies an incorrect standard or the facts do not meet the requirements of the correct standard." *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016) (*citing In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Under a *de novo* review, findings of fact that are not supported by substantial evidence must be vacated. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *B.J.S.,* 140 Wn. App. at 97. Findings that do not support the conclusions are insufficient as a matter of law. *State v. Crediford*, 130 Wash.2d 747, 927 P.2d 1129 (1996).

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965); U.S. Const. Amend. XIV. *Crawford v.*

Washington, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004). If the declarant appears for cross-examination at trial, the Confrontation Clause is not implicated. *Crawford,* 541 U.S. 59, n. 9.

Hearsay statements of a child under the age of 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child, the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability, and the child testifies at the proceedings. RCW 9A.44.120. To determine whether a child's statements have sufficient indicia of reliability, the trial court considers the following nine factors:

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.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (*citing Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970)). The hearsay statements in this case were not reliable and therefore do not meet the *Ryan* criteria. *Ryan*, 103 Wn.2d at 175-76.

In its findings of fact, the trial court found:

28. Mr. Clark and Krystal Williams both testified that the children were generally truthful.

29. There was evidence that C.J.C. and H.E.C. have told lies, but the lies were times when they were trying to get out of trouble.

30. H.E.C. lied to a teacher because she did not want to get in trouble for not doing her homework.

> 31. The instances regarding the lying by C.J.C. and H.E.C. included fighting with their sister and doing homework. They were lies because they did not want to get in trouble; characterized as "kid behavior".

In its Conclusions of Law, the trial court held:

> 15. The first *Ryan* Factor, whether there is an apparent motive to lie, weighs in favor for reliability for O.G.C., H.E.C., and A.LC.
>
> 16. Although there is evidence that H.E.C. has told lies, they are not significant enough to tip the scale against reliability.

The trials courts findings and conclusions were erroneous and as a result, the admission of the hearsay statements from both CJC and HEC were an abuse of discretion. Division's Three's findings were also erroneous and not supported by the record.

First, despite finding facts that indicated it found CJC reliable and that her lies were common behavior for a child, the trial court did not address the reliability of CJC in its conclusions. As a result, CJC's testimony was admitted despite nothing in its written findings and conclusions

allowing so. Second, the trial court's own findings contradicted its conclusions. The trial court found CJC had been caught in lies before. However, in its conclusions, it held that she was reliable and trustworthy.

Division Three also contradicted itself in finding that the children have been known to lie, but nonetheless found their testimony trustworthy and affirmed the conviction. Both courts erred.

The record shows that CJC and HEC have been caught making up stories and lying by their parents. *RP.. 193-194*. On different occasions, CJC was caught in lies, whether to her father, mother or others. Further, HEC's mother described her as a follower who was heavily influenced by CJC. She characterized HEC as somebody that would do anything that CJC does, including lie. As a result, HEC was also been caught in lies, specifically to her teacher. *CP.. 161*.

In evaluating the reliability of the child hearsay, both courts ignored that both children had a propensity to lie.

Accordingly, Mr. Rancourt suffered prejudice due to the admittance of both CJC's and HEC's hearsay, which was in violation of this Court's ruling in *Ryan*, 103 Wn.2d at 175-76

F. CONCLUSION

For the reasons stated herein and in the referenced opening brief on appeal, this Court should accept review under RAP 13.3(b)(2), (3).

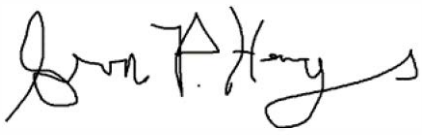
DATED THIS 29th day of September, 2023.

Under RAP 18.17, I certify the word count in this document is 3,621.

Respectfully submitted,

Shawn P. Hennessy
Attorney for Petitioner
LAW OFFICES OF LISE ELLNER

I, Shawn P. Hennessy, a person over the age of 18 years of age, served The Clark C~~ounty Prosecuto~~r at cntypa.generaldelivery@clark.wa.gov and Jarel Newson, DOC No. 432600, Stafford Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed on September 29, 2023. Service was made electronically to the prosecutor and via U.S. Postal to Mr. Newson.



Shawn P. Hennessy

APPENDIX

FILED
AUGUST 31, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. MNASON JUSTIN RANCOURT, Appellant.	)))))))))	No. 38920-1-III UNPUBLISHED OPINION

PENNELL, J. — Mnason Rancourt appeals his convictions for first degree child molestation and attempted first degree child molestation. We affirm.

FACTS

Six-year-old O.C., six-year-old A.C., seven-year-old H.C., and ten-year-old C.C.[1] each disclosed—first to parents, then to forensic interviewers—that Mnason Rancourt, their babysitter's boyfriend, had rubbed their genitals.

O.C.'s disclosure came first. After begging her mother not to leave her in the care of Mr. Rancourt and his girlfriend, O.C. told her mother she had been sexually abused by Mr. Rancourt. Her mother then reported this information to law enforcement.

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[1] To protect the privacy interests of the minor children, we refer to them by their initials throughout this opinion. *See* Gen. Order 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

Siblings A.C., H.C., and C.C. are O.C.'s cousins.[2] Like O.C., the three siblings were also babysat by Mr. Rancourt and his girlfriend.

The mother of the siblings learned the general nature of O.C.'s disclosure and became concerned. She talked to each of her children individually. Without sharing what O.C. had reported, she asked the three children if Mr. Rancourt had ever done anything to make them feel uncomfortable. *See* 2 Rep. of Proc. (RP) (Mar. 7, 2022) at 928-29, 932. All three children described being sexually abused by Mr. Rancourt. The three children had not previously discussed the abuse with any adult. However, C.C. had previously asked her younger siblings if Mr. Rancourt had touched either of them. Both A.C. and H.C. responded affirmatively. The mother of A.C., H.C., and C.C. also reported her children's disclosures to law enforcement.

All four children participated in forensic interviews where they described sexual abuse by Mr. Rancourt. The interviews were video recorded.

Mr. Rancourt was arrested and charged with one count of child rape, four counts of first degree child molestation and one count of attempted first degree child

[2] The mother of A.C., H.C., and C.C. is a niece of O.C.'s father. *See* 2 Rep. of Proc. (RP) (Mar. 2, 2022) at 554; 2 RP (Mar. 7, 2022) at 914, 925. The sets of cousins are largely unacquainted. *See* 2 RP (Mar. 2, 2022) at 584, 604; 2 RP (Mar. 3, 2022) at 772-73; 2 RP (Mar. 7, 2022) at 937.

molestation. The case was set for trial.

Prior to trial, the State filed a motion seeking to admit child hearsay statements from O.C., A.C., and H.C.[3] pursuant to Washington's child hearsay statute, RCW 9A.44.120.[4] The trial court held a multiday hearing on the issue, which included testimony from all four child witnesses along with other individuals. During cross-examination, the mother of A.C., H.C., and C.C. agreed with defense counsel that she had previously described C.C. as "bossy," the "leader" of her siblings, and wielding "influence" over H.C., and that she had described H.C. as a "follower" who likes to do anything C.C. does. 1 RP (Jan. 12, 2022) at 227-29. For their part, O.C., A.C., and H.C. were all able to answer the prosecutor's questions about the difference between the truth and lies, and adults in their lives described the children as generally truthful, notwithstanding the occasional fib to get out of trouble.

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[3] Specifically, the State sought to introduce O.C.'s hearsay statements through the testimony of her mother, her grandparents, and the forensic interviewer. The State sought to introduce A.C. and H.C.'s hearsay statements through the testimony of their mother and another forensic interviewer. The State did not seek to admit any out-of-court statements from C.C.; her hearsay statements were not admissible under the child hearsay statute because C.C. was over 10 years old at the time of her disclosure. *See* RCW 9A.44.120(1)(a)(i).

[4] The statute was amended effective July 28, 2019. The 2019 amendment added a subsection not relevant here and did not alter the text applicable to this case. *Compare* RCW 9A.44.120 *with* former RCW 9A.44.120 (1995).

The trial court concluded the children's hearsay statements bore sufficient indicia of reliability and admitted all relevant statements. In its oral ruling, the trial court expressly analyzed all nine of the factors prescribed by *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court reduced its oral ruling to a written order, making 75 findings of fact and memorializing its analysis.

At trial, all four children testified and were subject to cross-examination. In addition to other witness testimony, the State presented the video recordings of the forensic interviews of O.C., A.C., and H.C.

In their trial testimony, the four child witnesses described Mr. Rancourt touching their genitals over and under the clothing. During her testimony, O.C. stated Mr. Rancourt told her he was touching her because she was "'cute.'" 2 RP (Mar. 2, 2022) at 617. The evidence included C.C.'s testimony that Mr. Rancourt told her to keep the touching a secret. *See* 2 RP (Mar. 3, 2022) at 794. H.C. testified that while Mr. Rancourt touched her, she asked him to stop, but he refused. *See id.* at 827-28. A.C. demonstrated Mr. Rancourt's touching as a circular rubbing motion. *See* Ex. P-5 at 16 min., 9 sec. through 17 min., 44 sec.

After presentation of evidence, the State moved to dismiss the rape charge. The jury found Mr. Rancourt guilty of the remaining counts.

Mr. Rancourt was sentenced to indeterminate confinement of 149 months to life. The trial court also imposed lifetime community custody as part of Mr. Rancourt's sentence, and ordered a condition—community custody condition 15—requiring Mr. Rancourt to "submit to polygraph testing to ensure compliance" with other conditions of his sentence. Clerk's Papers (CP) at 263; *see also* 3 RP (May 6, 2022) at 1200.

Mr. Rancourt timely appeals.

ANALYSIS

Sufficiency of the evidence

Mr. Rancourt argues his convictions must be overturned with prejudice because the State failed to elicit sufficient evidence that he touched O.C., A.C., H.C., and C.C. for the purpose of sexual gratification. This is a definitional requirement for a first degree child molestation conviction. *See* RCW 9A.44.083(1)[5] (first degree child molestation requires proof of "sexual contact"); RCW 9A.44.010(13)[6] (defining "sexual contact" as

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[5] This statute was amended, effective April 26, 2021. The amendment deleted an exception, not relevant here, that required a child molestation victim not be the offender's spouse. We cite the current version of the statute because the language relevant to Mr. Rancourt's challenge remains the same. *Compare* RCW 9A.44.083(1) *with* former RCW 9A.44.083(1) (1994).

[6] At the time of Mr. Rancourt's charged conduct, this definition was found under former RCW 9A.44.010(2) (2007). We cite the current definition because it has simply been renumbered. The definition itself remains unchanged.

"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").

When reviewing a sufficiency challenge we are "highly deferential" to a jury's decision. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (plurality opinion). The issue is not whether we would reach the same verdict as the jury. Rather, the question is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

The evidence presented at trial amply supports the inference Mr. Rancourt touched the children for the purpose of sexual gratification. Although they unsurprisingly used age-appropriate anatomical euphemisms, all four children testified Mr. Rancourt purposefully touched their genital areas. According to the testimony, Mr. Rancourt's actions were not fleeting and they involved rubbing motions, which are indicative of sexual motivation. *See State v. Harstad*, 153 Wn. App. 10, 22-23, 218 P.3d 624 (2009).

Additional circumstantial evidence supports an inference that Mr. Rancourt's conduct was sexually motivated. In all cases, "the touching occurred . . . in a place where he and the [children] would not be easily observed" by Mr. Rancourt's girlfriend, the

adult responsible for the children's supervision. *State v. Wilson*, 56 Wn. App. 63, 69, 782 P.2d 224 (1989). Furthermore, Mr. Rancourt's statements that he touched O.C. because she was cute, his instructions to keep his actions a secret, and his refusal to stop when asked all support the inference that Mr. Rancourt was acting for the purpose of sexual gratification. *See Harstad*, 153 Wn. App. at 22-23 (inferring purpose of sexual gratification from defendant's heavy breathing and whisperings); *State v. T.E.H.*, 91 Wn. App. 908, 916, 960 P.2d 441 (1998) (inferring sexual motive because "[w]hen told to stop, [the defendant] continued").

While Mr. Rancourt argues that he was engaged in a babysitting role because he assisted his girlfriend with supervision of the children, this does not undermine the strength of the State's proof. Inadvertent contact with a child's genitalia can sometimes be an innocuous part of childcare duties. However, Mr. Rancourt's conduct did not meet this description. Mr. Rancourt was not responsible for bathing the children, changing diapers, or helping the children change clothes. The fact that Mr. Rancourt had accompanied his girlfriend to her babysitting job did not excuse him for purposefully rubbing the children's genitalia. *See Harstad*, 153 Wn. App. at 23 (rejecting a similar argument because defendant was never engaged in "the kind of caretaking that requires close contact with an unrelated child's intimate parts").

Mr. Rancourt's additional criticisms of the State's proof—such as his claim the children were clothed, there was no penetration, and there was no corroborating physical evidence—all lack legal merit. Contact with a child's intimate parts over clothing can be sufficient to sustain a finding of sexual gratification, so long as there is additional evidence of sexual intent. *See id.* at 21.[7] Proof of penetration is not required for a charge of child molestation, as opposed to child rape. *Compare* RCW 9A.44.083 *and* RCW 9A.44.010(13) *with* RCW 9A.44.073 *and* RCW 9A.44.010(14). And the validity of a victim's allegation does not turn on the existence of corroborating physical evidence. *See* RCW 9A.44.020(1); *State v. Jennen*, 58 Wn.2d 171, 179, 361 P.2d 739 (1961). Sufficient evidence supports Mr. Rancourt's convictions.

Child hearsay

Mr. Rancourt contends the trial court erred by admitting out-of-court statements under RCW 9A.44.120, Washington's child hearsay statute. Although he does not assign error to any of the trial court's 75 factual findings, he argues the child witnesses'

[7] Furthermore, there was evidence Mr. Rancourt touched C.C., H.C., and O.C. under their clothing.

statements[8] were not reliable under the factors prescribed by *Ryan.* 103 Wn.2d at 175-76. Specifically, Mr. Rancourt claims C.C. influenced her younger siblings to lie and that the six months between the alleged touching and A.C. and H.C.'s disclosures rendered the disclosures untrustworthy.

Where, as here, the child witnesses testify at trial, admissibility of statements under the child hearsay statute turns on reliability. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (plurality opinion).[9] Nine nonexclusive factors govern the reliability analysis. Known as the *Ryan* factors, they are:

> (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) whether] the statement contains [any] express assertion about past fact, [(7) whether] cross[-]examination could . . . show the declarant's lack

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[8] Mr. Rancourt assigns error to the trial court's admission of child hearsay statements of C.C. and H.C. *See* Appellant's Opening Br. at 2. However, the trial court did not admit any hearsay statements of C.C. pursuant to RCW 9A.44.120, nor could it have. C.C. was over 10 years old when she made the statements, taking her statements out of the statute's coverage. RCW 9A.44.120(1)(a)(i). Rather, the trial court admitted hearsay statements of O.C., A.C., and H.C. *See* CP at 167. Despite his assignment of error only mentioning C.C. and H.C., Mr. Rancourt also complains in his argument section about the admission of A.C.'s statements. *See* Appellant's Opening Br. at 26-27. The discrepancy is irrelevant because, as we explain below, we find no abuse of discretion in the trial court's admission of *any* of the child hearsay statements.

[9] Mr. Rancourt alludes to confrontation principles in his brief. But because all child victims testified and were subject to cross-examination, this case "does not present a confrontation clause issue." *State v. Price*, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006).

> of knowledge, [(8) whether] the possibility of the declarant's faulty recollection is remote, and [(9) whether] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

103 Wn.2d at 175-76 (citing *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982) and *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)).

Reviewed for abuse of discretion, *see State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990), we affirm the trial court's assessment of reliability under the *Ryan* factors. As recognized by the trial court, none of the child witnesses had an apparent motive to tell lies about Mr. Rancourt, nor did any of the children have general reputations for dishonesty. Although H.C.'s mother admitted H.C. had at times been dishonest about trivial things and was susceptible to the influence of C.C.—who their mother described as "bossy"—such behaviors were not out of the ordinary for a child of H.C.'s age. There was no testimony impugning the children's general character: witnesses uniformly testified the children were generally trustworthy and the children themselves demonstrated they "understood the concept of truth." *State v. Ramirez*, 46 Wn. App. 223, 231, 730 P.2d 98 (1986); *see also Woods*, 154 Wn.2d at 624 (child declarant's reliability bolstered where child has "a normal memory and ability to perceive").

Nor was there any indication that the children or any other family members harbored negative feelings toward Mr. Rancourt prior to the abuse.[10] The children's statements were spontaneous, in that they were responses to questioning that was "neither leading nor suggestive." *State v. Henderson*, 48 Wn. App. 543, 550, 740 P.2d 329 (1987); *see State v. Kennealy*, 151 Wn. App. 861, 883, 214 P.3d 200 (2009) (holding child's statements were spontaneous where father's questioning of child did not suggest the child should respond affirmatively to father's question, "'[did] he touch you?'"). In addition, the stories the children relayed to the forensic interviewers were consistent with the stories they previously told their parents, and the children's disclosures "took place in . . . trusting [and] clinical atmosphere[s]." *Kennealy*, 151 Wn. App. at 884; *see id.* at 883 (noting a child's out-of-court statements are more reliable when a child tells "a similar story of abuse" to "more than one person").

The trial court had the opportunity to observe the child declarants and hear them testify in person. This court on review did not. As such, "the trial court [was] in the best position to make the decisions as to [their] competency and credibility." *Swan*, 114 Wn.2d at 667. Mr. Rancourt has provided no reason for this court to abandon its usual practice of

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[10] The trial court found O.C., A.C. and H.C. "all had a positive relationship with" Mr. Rancourt and his girlfriend. CP at 159.

deference and upend the trial court's determination that the children's out-of-court statements were reliable. The trial court properly concluded the *Ryan* factors were substantially met. *See Woods*, 154 Wn.2d at 623-24. We therefore affirm the decision to admit the out-of-court statements.

Community custody condition 15

Mr. Rancourt apparently contends the trial court's imposition of community custody condition 15 is unconstitutional. In his brief, Mr. Rancourt purports to quote condition 15 as requiring "polygraph and/or plethsmograph [sic] testing." Appellant's Opening Br. at 28 (quoting CP at 145-46). But this language is not found on the pages he cites, nor is it found on any other page of the record. As the State correctly notes, the trial court did not order Mr. Rancourt to undergo plethysmograph testing. Community custody condition 15 requires Mr. Rancourt to "submit to *polygraph* testing to ensure compliance" with other conditions of community custody. CP at 263 (emphasis added).[11]

[11] A plethysmograph is a gauge placed on the penis and used to measure bloodflow as a proxy for sexual arousal while the subject is shown various stimuli. *See State v. Riles*, 135 Wn.2d 326, 343 n.57, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Sanchez Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In contrast, a polygraph is "[a] piece of equipment used to determine whether someone is lying," usually by measuring heart rate. BLACK'S LAW DICTIONARY 1403 (11th ed. 2019). Polygraph testing is permissible as a routine monitoring condition, while plethysmography is a valid condition only when ordered incident to crime-related treatment. *See State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007).

Because the trial court did not impose plethysmograph testing, we need not further address Mr. Rancourt's arguments regarding his community custody conditions.

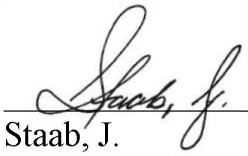
CONCLUSION

The judgment and sentence is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:



Staab, J.

Siddoway, J.P.T. [12]

[12] Judge Laurel H. Siddoway was a member of the Court of Appeals at the time argument was held on this matter. She is now serving as a judge pro tempore of the court pursuant to RCW 2.06.150.

LAW OFFICER OF LISE ELLNER, PLLC

September 29, 2023 - 10:59 AM

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Appellate Court Case Title:	State of Washington v. Mnason Justin Rancourt
Superior Court Case Number:	19-1-04060-3

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