72017-1

72017-1

No. 72017-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

Daylon G.,

Appellant.

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

BRIEF OF APPELLANT

KATHLEEN A. SHEA
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Washington Statutes

Washington Rules

A. INTRODUCTION

Daylon G. was found guilty of first degree child molestation after his stepmother observed him and his stepbrother, D.W., together under a blanket and D.W. claimed, in response to his mother's suggestive questioning, that Daylon had touched him inappropriately. At trial, the court found Daylon competent to testify despite his inability to recount the time and location of the alleged events and significant inconsistencies and inaccuracies in his account of the incident under the blanket. It also admitted the complaining witness's hearsay statements, despite the fact that D.W. had an apparent motive to lie, had made untruthful allegations in the past, and made the claims only in response to his mother's leading questions. The court erred in finding D.W. competent and admitting his out-of-court statements, and this error requires reversal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted the hearsay statements of the complaining witness.

2. The trial court erred when it found the complaining witness competent to testify.

3. The trial court erred when it entered Finding of Fact 2. CP 41.

4. The trial court erred when it entered Finding of Fact 3. CP 42.

5. The trial court erred when it entered Finding of Fact 6. CP 42.

6. The trial court erred when it entered Finding of Fact 7. CP 42.

7. The trial court erred when it entered Finding of Fact 9. CP 42.

8. The trial court erred when it entered Finding of Fact 13. CP 42.

9. The trial court erred when it entered Finding of Fact 24. CP 44.

10. The trial court erred when it entered Finding of Fact 27. CP 44.

11. The trial court erred when it entered Finding of Fact 31. CP 44.

12. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 2. CP 45.

13. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 3. CP 45.

14. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 4. CP 45.

15. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 5. CP 45.

16. To the extent it is deemed to be a finding of fact, the trial court erred in entering Conclusion of Law 6. CP 45.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under RCW 9A.44.120, hearsay statements made by young children may be admissible at trial when they are determined to be reliable. The reliability of the statements is assessed according to nine factors articulated in *State v. Ryan.*[1] These factors must be "substantially met" before the hearsay statements may be admitted. The evidence showed that the complaining witness, D.W., had an apparent motive to lie, had made similar, untruthful allegations in the past, and made the claims in response to his mother's leading questions after she had expressed anger at the respondent. Did the court abuse its

[1] 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

discretion when it admitted D.W.'s hearsay statements despite the fact that the *Ryan* factors were not substantially met?

2. In order to determine whether a child is competent to testify at trial, the court should consider the five factors outlined in *State v. Allen.*[2] A child may be found competent only if all five factors are satisfied. D.W.'s inability to identify the time and location of most of the alleged incidents demonstrated he did not have the mental capacity to accurately perceive the events. The inconsistencies and inaccuracies in his account of the incident for which Daylon was convicted of first degree child molestation showed that he did not retain an independent recollection of the occurrence. Given that not all of the *Allen* factors were satisfied, did the court abuse its discretion when it found D.W. competent to testify at trial?

D. STATEMENT OF THE CASE

Kelly G. and Wendy G. began dating in 2010 and married two years later, in July 2012. 4/29/14 RP 99; 4/30/14 RP 94. Both had been married before and had at least one child from their prior marriages. 4/29/14 RP 121-22; 4/30/14 RP 94-95. Mr. G had a son, Daylon G., who was 15 years old at the time of the marriage. 4/30/14

[2] 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

RP 15. Ms. G had three children from three different marriages, including two sons, Christian M. and D.W. 4/29/14 RP 121-22. She had full custody of only her youngest son, D.W., who was eight years old at the time the couple married. 4/29/14 RP 99, 122.

In May 2012, Ms. G and D.W. moved into Mr. G's three bedroom mobile home, which he shared with Daylon. 4/29/14 RP 99; 4/30/14 RP 95. The boys each had their own room but the mobile home was small, with thin walls. 4/29/14 RP 26, 156-57.

One evening, Ms. G came out her bedroom and saw Daylon and D.W. on a loveseat in the living room under a blanket. 4/20/14 RP 105. Ms. G asked the boys to get up, and when she went to lift the blanket off her son, she saw that his pants were unzipped. 4/29/14 RP 109. Ms. G immediately confronted Daylon in front of D.W., questioning whether something inappropriate happened between the boys. 4/29/14 RP 110. Daylon vehemently denied her accusations and Ms. G told D.W. to go to his room. 4/29/14 RP 110.

Daylon left the house and Ms. G went into D.W.'s bedroom and asked D.W. if Daylon had touched him. 4/29/14 RP 110. In response to her leading questions, D.W. said yes. 4/29/14 RP 110. At trial, D.W. testified that Daylon had repeatedly touched him and forced him

to touch Daylon in his room, Daylon's room, and the living room. 4/29/14 RP 33-35. He claimed Daylon had performed oral sex on him and attempted to penetrate him anally. 4/29/14 RP 39, 42. However, Ms. G testified that she had never seen Daylon in D.W.'s room at night, in bed together, or under a blanket before. 4/29/14 RP 157-58.

At trial, the court found D.W. competent to testify and admitted his out-of-court statements to his mother, the forensic nurse examiner, and the child interview specialist over Daylon's objections. 4/30/14 RP 75-76; 5/1/14 RP 12. The trial court found Daylon not guilty of two counts of first degree rape of a child and not guilty of two counts of first degree attempted rape of a child. CP 45 (Conclusions of Law 7, 8). However, it found Daylon guilty of first degree child molestation based on the incident described by D.W. in the living room. CP 45 (Conclusion of Law 6); 5/6/14 RP 62.

E. ARGUMENT

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

a. A child's hearsay statements are admissible only when they are reliable.

In specific circumstances, out-of-court statements made by young children are admissible at trial when they are determined to be reliable. *Ryan*, 103 Wn.2d at 177. Under RCW 9A.44.120,

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact 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... is admissible in evidence in... criminal proceedings, including juvenile offense adjudications, in the court of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness.

In order to assess the reliability of child hearsay statements, the trial court must consider 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) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76.

No single factor, taken alone, is decisive. *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). However, "the factors must be 'substantially met' before a statement is demonstrated to be reliable." *Id.* A trial court's decision to admit child hearsay statements is reviewed for an abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).

b. D.W.'s hearsay statements were not admissible under the "reliability" exception.

Over Daylon's objection, the trial court permitted Ms. G and Tierra Phillips, a forensic nurse examiner, to testify about D.W.'s accusatory out-of-court statements. 4/29/14 RP 110, 117, 174; 5/1/14 RP 12; CP 42, 45. It also admitted D.W.'s recorded statements to a

child interview specialist, Carolyn Webster. 4/29/14 RP 93; 5/1/14 RP 12; CP 42, 45. When the court found these hearsay statements admissible under the *Ryan* factors, it erred. 5/1/14 RP 12; CP 42 (Findings of Fact 6, 7, 9, 13), 45 (Conclusions of Law 3 and 4). Consideration of the *Ryan* factors reveal that the factors were not substantially met here.

i. *Apparent Motive to Lie*

In its oral ruling, the trial court found that D.W. had no motive to lie because Daylon appeared more upset about the newly blended family than D.W. did. 5/1/14 RP 3. When examining this factor, "[t]he critical inquiry is whether the child was being truthful at the time the hearsay statements were made." *State v. Gribble*, 60 Wn. App. 374, 383, 804 P.2d 634 (1991). Simply because Daylon articulated his frustration about his new stepfamily did not demonstrate that D.W. was not equally upset, if not more so, but simply less capable of describing his feelings. In fact, the evidence showed that both boys struggled to adapt to the new living arrangements. Ms. G testified that although things went well when she and D.W. initially moved into the home, the boys began arguing, and she later noticed changes in both of the boys' behavior. 4/29/14 RP 129.

In addition, whether D.W. was motivated to lie is not contingent upon a finding that he wished Daylon harm. On the evening Ms. G observed the boys on the couch together she confronted Daylon about her suspicions in front of D.W. 4/29/14 RP 110. She was shocked and angry about what she thought she had seen, and Daylon eventually walked out of the house. 4/29/14 RP 110. By the time Ms. G spoke with D.W., he knew that his mother was angry, but that her anger was directed at Daylon based on the assumptions she had made. Thus, D.W. had a motive to lie in order keep his mother's ire directed at Daylon, rather than risk getting himself in trouble.

ii. *General Character*

The court found that D.W's "character is such that it's got some indicia of reliability." 5/1/14 RP 5. The basis for this factor is whether the child has a reputation for telling the truth. *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). In making its finding, the trial court disregarded evidence that D.W. had wrongly alleged both that Daylon had inappropriately touched D.W.'s older half-brother, Christian, and that Christian had inappropriately touched D.W. 5/1/14 RP 4. The court found that the accusations that Christian had also been abused could simply be a manifestation of D.W.'s unspoken fears.

5/1/14 RP 4. It did not consider evidence that D.W. claimed, and then later recanted, an accusation that Christian had touched him inappropriately.[3] 5/1/14 RP 4-5.

D.W.'s prior false allegations against Daylon and Christian demonstrated that D.W. did not have a reputation for telling the truth. That fact that he had lied about Daylon touching Christian, and Christian touching him, showed that he had made this kind of allegation without any regard for whether it was actually true.

iii. *Spontaneity of the Statements*

For purposes of determining reliability, statements made by an alleged child victim of sexual abuse are "spontaneous" if they are not the result of leading or suggestive questions. *Lopez*, 95 Wn. App. at 853. According to Ms. G, after Daylon left the house, she engaged in the following exchange with her son:

> I said: Please don't lie to me. I need to know what happened. Did he touch you? And he said: Yes, he did.

4/29/14 RP 110. Ms. G started with an assumption and, using a leading and suggestive question, asked D.W. to confirm that assumption.

---

[3] D.W. denied making this accusation during his testimony, and the court excluded testimony by other witnesses that D.W. alleged Christian touched him. However, even if excluded for purposes at trial, such evidence would have been useful in evaluating the reliability of D.W.'s statements for purposes of the child hearsay hearing.

Despite Ms. G's suggestive language, the trial court found that D.W.'s statements were spontaneous, relying on *State v. Henderson*, 48 Wn. App. 543, 550, 740 P.2d 329 (1987) and *State v. C.M.B.*, 130 Wn. App. 841, 849. 125 P.3d 211 (2005). However, neither case supports the court's finding. In *Henderson*, the court found it was necessary to consider the context of the statement. 48 Wn. App. at 550. When the detective asked the child why it hurt when her father touched her vagina, the child volunteered that the father inserted his fingers in her vagina. *Id.* Similarly, in *C.M.B.*, the court found it was evident from the record that the mother did not ask questions that suggested any particular conduct. 130 Wn. App. at 849.

This was not the case here. Ms. G's language to D.W. very clearly suggested the conduct with which D.W. agreed. The statements to his mother were not spontaneous. The fact that D.W. later made similar statements to the nurse and child interview specialist does not change the fact that Ms. G initially proposed the conduct to D.W. Ms. G's leading questioning of D.W. suggests that all of the statements D.W. made are unreliable. *In the Matter of the Dependency of A.E.P.*, 135 Wn.2d 208, 231, 956 P.2d 297 (1998) (a court should consider the

possibility of suggestive interviews leading to tainted child hearsay statements).

iv. *The Timing and Relationship*

A child's statements are considered more reliable when told to a neutral party. *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988) (child's statements were found reliable in part because she made them to a social worker, who was a neutral party who had no prior relationship with the child). D.W.'s initial statements were made to his mother. 4/29/14 RP 110. She had just confronted Daylon, was shocked and angry, and asked D.W. to validate her suspicions. 4/29/14 RP 110. D.W.'s relationship with his mother and the circumstances under which she questioned him were far from neutral.

While the questioning by the forensic nurse examiner and child interview specialist was done in a more neutral way, both of these occurred after Ms. G had confronted D.W. and elicited his agreement with her statements. Thus, the timing of these interviews weigh against a finding of reliability.

v. *The Surrounding Circumstances*

Ms. G testified that when she lifted the blanket off D.W., "he had that like shocked look on his face, like mom just caught me,

something." 4/29/14 RP 109. However, Ms. G then directed her anger at Daylon, and asked D.W. to confirm her suspicions. Under these circumstances, the safest and easiest course of action for D.W. was to agree with his mother. Thus, the circumstances suggested that D.W. may have misrepresented Daylon's actions that evening and his statements are unreliable.

c. The trial court's error in admitting the child hearsay statements requires reversal.

A review of the *Ryan* factors shows that the factors were not substantially met, and D.W.'s statements were improperly admitted under this hearsay exception. *See Kennealy*, 151 Wn. App. at 881. A trial court's evidentiary error is reversible if it prejudices the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is prejudicial where, within reasonable probabilities, the outcome would have differed but for the error. *Bourgeois*, 133 Wn.2d at 403. The evidence against Daylon was magnified and repeated through the witnesses who testified to D.W.'s hearsay statements. Given that the admission of these hearsay statements allowed D.W.'s allegations to be reiterated throughout the trial, rather than heard just once during D.W.'s trial testimony, there is a reasonable probability the outcome of

the trial would have been different if not for the error, and reversal is required.

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

The State may argue that even if the statements were not reliable under the child hearsay exception, D.W.'s statements to the forensic nurse examiner were admissible under ER 803(a)(4). However, when the trial court found D.W.'s statements to the forensic nurse examiner admissible under this exception, it erred. CP 45 (Conclusion of Law 5).

In order for D.W.'s statements to be admissible under this hearsay exception the declarant's motive in making the statement must have been to promote treatment and the medical professional must have reasonably relied on the statement for purposes of treatment. *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). "Statements admitted under this exception to the hearsay rule are commonly those made by a patient to a medical care provider, where the reliability of the statements is established by the patient's incentive to be truthful in order to obtain proper care." *Doerflinger*, 170 Wn.

App. at 664 (citing *State v. Bishop*, 63 Wn. App. 15, 24 n.8, 816 P.2d 738 (1991)).

The State failed to establish that D.W. had an incentive to be truthful in order to obtain appropriate medical care when the trial court admitted the forensic nurse's testimony over Daylon's objection. 4/29/14 RP 168-72. D.W. declined a rectal exam and no evidence was presented that he directed the nurse to any specific areas of concern. 4/29/14 RP 169. In fact, D.W. informed the nurse that he was not experiencing any health issues. 4/29/14 RP 180-81. The forensic nurse was not D.W.'s regular medical provider and not an individual whom he would see for any follow-up appointments. 4/29/14 RP 185. Thus, the State failed to show that D.W. had any incentive to be truthful in order to gain medical care. Absent this showing, D.W.'s statements to the forensic nurse were inadmissible under ER 803(a)(4).

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

a. A child's competency to testify at trial should be evaluated under the factors set forth in *State v. Allen.*

A child's competency to testify at trial is determined within the framework of RCW 5.60.050, which defines the types of persons deemed incompetent witnesses at trial. *State v. C.J.*, 128 Wn.2d 672, 682, 63 P.3d 765 (2003). This includes:

> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or relating them truly.

RCW 5.60.050.

"[C]hildren who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly" are not competent to testify. CrR 6.12. In order to determine whether a child is competent to testify, the court must examine whether the witness has:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692. The absence of any one of these elements is fatal to a finding of competence. *Jenkins v. Snohomish County Pub. Util. Dist. No. 1*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986). This court reviews the trial court's finding of competency for an abuse of discretion. *A.E.P.*, 135 Wn.2d at 223.

b. D.W. was not competent to testify because he did not have the mental capacity at the time of the occurrence to accurately perceive it and did not retain an independent recollection of the incident in the living room.

The trial court found Daylon not guilty of both counts of first degree rape of a child and both counts of first degree attempted rape of a child. CP 45 (Conclusions of Law 7, 8). It found Daylon guilty of the lone remaining count of first degree child molestation, citing to the incident D.W. described on the living room couch which Ms. G allegedly interrupted. CP 45 (Conclusion of Law 6); 5/6/14 RP 62. In its oral ruling, the court found that this was the only incident that was not contradicted by other evidence. 5/6/14 RP 62.

Indeed, evidence of the other alleged incidents was limited and refuted by Ms. G's testimony. D.W. had difficulty identifying when the other alleged incidents had occurred. He initially claimed that one incident took place before his mother's marriage when he was living in Rochester, but was later adamant that the incident occurred when he was living in Tenino. 4/29/14 RP 58, 117. Ms. G testified that Daylon had visited their home only once in Rochester and that Daylon had never visited their home in Tenino. 4/29/14 RP 124, 127. D.W. claimed that Daylon had touched him repeatedly after he and his mother moved into the mobile home, but he could not provide any

information to otherwise narrow the timeframe. 4/29/14 RP 33-36, 39-45. Ms. G's statements directly contradicted these claims. She testified that before the incident in the living room she had never witnessed D.W. and Daylon together under a blanket, in D.W.'s room at night, or in bed together. 4/29/14 RP 157-58.

In its oral ruling, the trial court found that "it was apparent that [D.W.] did not remember specific locations or times where the anal and oral penetrations happened. He was more than confused about locations." When a court is provided with such limited information about an alleged incident, it is not permitted to find that the child witness is competent because it is impossible to determine whether the child had the mental capacity at the time of the incident to receive an accurate impression of it. *A.E.P.*, 135 Wn.2d at 225 (finding a child witness could not be deemed competent to testify because she could not identify when the alleged abuse actually occurred).

Despite the fact that additional evidence regarding the time and location of the incident in the living room was supplied by Ms. G, D.W.'s account of that alleged event was similarly fraught with discrepancies. D.W. testified at trial that he was sleeping in his bed when Daylon woke him up, carried him into the living room, and

tossed him on the couch. 4/29/14 RP 71-72. During his interview with the child interview specialist, Ms. Webster, he told her that he had been watching a movie with Daylon that night. 4/29/14 RP 72. In the first scenario, Daylon pulled D.W.'s pants down and then his own after throwing D.W. onto the couch. 4/29/14 RP 72. In the second scenario, Daylon asked D.W. to "snuggle" and D.W. agreed. 4/29/14 RP 73. At trial, D.W. testified that Daylon put his hand on D.W.'s penis and moved it up and down. 4/29/14 RP 73. When the defense interviewed D.W. 18 days before trial, D.W. claimed that Daylon also performed oral sex on him and forced him to touch Daylon's penis. 4/29/14 RP 73-74.

These fundamental discrepancies and inconsistencies preclude a finding of competence. When a child's story remains consistent, it demonstrates that the child has an adequate memory of the event. *Kennealy*, 151 Wn. App. at 878. Here, the inconsistencies in D.W.'s account of what allegedly happened on the living room couch indicate that D.W. did not yet have the ability to retain an independent memory of the event. While Ms. G was able to supply additional evidence regarding that evening, her testimony does not support a finding that D.W. was competent to testify about the alleged incident. D.W.'s

inability to present a consistent description demonstrated that he was not competent to testify about that event.

c. Reversal is required.

When the trial court improperly relies on the testimony of an incompetent witness, this Court should reverse. *A.E.P.*, 135 Wn.2d at 226. Because D.W. did not have the mental capacity at the time of the alleged event to perceive it accurately, and did not retain an independent recollection of the event, he was not competent to testify and this court should reverse.

F. CONCLUSION

For the reasons stated above, Daylon asks that this court reverse his conviction.

DATED this 31st day of December, 2014.

Respectfully submitted,

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

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	DOUGLAS GOGEL (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	( ) ( ) (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF DECEMBER, 2014.

X_____

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