Supreme Court No. 99665-2
(COA No. 80590-8-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Lakendrick Butts,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Lakendrick Butts asks this Court to review the opinion of the Court of Appeals in *State v. Lakendrick Butts*, 80590-8-I (issued on March 15, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Whether it violates the Sixth and Fourteenth Amendment rights to present a defense and confront adverse witnesses when, in a trial for rape of a child, the trial court excludes evidence the alleged victim had an alternate source of precocious sexual knowledge.

2. Whether unreliable child hearsay statements must be excluded where the nine-factor test set forth in *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984), is not substantially met.

3. Whether it violates an accused's Sixth Amendment right to adequately prepared counsel to permit an untimely amendment to the charging period which undermines the accused's partial alibi defense.

STATEMENT OF THE CASE

1. Kenny's Background and Home Life.[1]

Kenny comes from a large, close-knit, multi-generational family. He lived with his mother, Gloria Butts, his two younger siblings, and his

[1] Most of Kenny's family members share his last name. For clarity, members of the Butts family will be referred to by first name.

uncle Dennis who has special needs. RP 1078. His older sister lives on her own. RP 1086. He has one maternal aunt, Francis Butts, and three maternal uncles, who have families of their own. RP 642-43, 645. Francis has six children and 18 grandchildren. RP 626, 644-46.

In Fall 2016, Gloria moved her family to Mississippi to care for her ailing mother. RP 1005. The family moved back to Federal Way after Kenny's grandmother passed the following February. RP 1006. In addition to her three minor children, Gloria took in her brother Dennis and her nephew Cortes and his family. RP 1006-07. Gloria's nephew, Jeffries, lived with his girlfriend in their vehicle in the driveway, with access to the house for their basic needs. RP 1011-12. During the spring and summer of 2017, 12 people lived in Gloria's home.

Gloria's home was the family gathering place, and people would often visit informally or for specific events. RP 1017-21. These formal and informal gatherings sometimes had up to 40-50 guests. RP 1020. When guests visited, people were everywhere. RP 1086. As such, Gloria required her kids to keep their bedroom doors open, did not allow girls to go into her sons' room or boys to enter her daughter's room, and did not allow small children to play in her teenagers' rooms. RP 1024, 1032-33, 1037.

Overcrowded at home, Kenny tried to spend as much time out of the house as possible. RP 1079. He reconnected with old friends, and

began working out to earn back a spot on the football team. RP 1080. From spring 2017 to spring 2018, he worked at Wild Waves, Dominos Pizza, and McDonalds. RP 1082, 1084. When working, he spent his time at the community center working out, playing football and basketball, or spending time with his friends. RP 1080-85. After football season, Kenny also participated in an afterschool homework club. RP 1083.

Kenny's friends were with him nearly every weekend during the charging period and hung out with him four times a week during and after school. RP 491-99, 1066-77. Usually, Kenny spent time away from home, and his friends did not visit his house. *Id*. According to Kenny's friend's father, Cesar Luna, Kenny visited his home at least twice a week, and Kenny often spent the night on weekends or during the week. RP 1002-03.

2. M.M.'s allegations.

In spring 2017, Francis Butts began fostering five-year-old M.M., who had been removed from her biological mother and grandmother due to mistreatment and trauma. CP 35; RP 129. M.M. was Francis's daughter's goddaughter. RP 1052, 1054. Prior to this placement, M.M. lived with her maternal great grandmother, Desiree Henderson. CP 35. With Ms. Henderson, M.M. asked inappropriate questions about sex and required intervention for her lack of boundaries. CP 35, 62, 65. CPS records indicate M.M. needed to work on "no hugs with everyone," and

"should especially not sit on men's laps." CP 62. She asked her great-grandmother about babies and when she could have sex. CP 63.

While placed with Francis, M.M. often spent time with Francis's family. Francis's daughters babysat M.M. when Francis went to work or school, and M.M. would visit with other family members, including Gloria. RP 628, 630, 632. M.M. never spent the night at Gloria's home.

M.M. began school at Sunset Primary. RP 67-68. M.M. occasionally had behavioral issues requiring a school counselor to intervene. RP 611-12. At times she would cry under a table and refuse to come out without the help of her assigned counselor, Kyra Miller. *Id*. Sometimes M.M. cried for no discernable reason, other times due to a "class correction," or sometimes due to a disagreement with another child. *Id*. In response, Ms. Miller would give M.M. her undivided attention, acting kindly and warmly towards the child. RP 612.

In June 2018, Ms. Miller presented a "good touch, bad touch" lesson to M.M.'s kindergarten class. RP 72, 604-06. The lesson included a story about a girl's interactions with different people, including a friend, a parent's friend, and an older boy. RP 605-06. In the story, the older boy asks to touch the girl's "private parts." RP 606. Following the story, Ms. Miller asked in a call-and-response manner what the children would say if someone was inappropriate with them. RP 593-94. Many children

responded, blurting things aloud out of turn. RP 607. During this time, M.M. stated, “When my cousin asks me to suck his private I’m just going to say no.” RP 594. Ms. Miller could not recall what other children were saying or if they were giving other examples of saying “no.” RP 606.

Ms. Miller questioned M.M. in the hallway. RP 74. M.M. stated she visited her cousin Kenny on weekends, and that he gave her gum in exchange for a sex act. RP 75. She reported she “sometimes” had to do it. RP 77. Ms. Miller told M.M. she was “glad” M.M. had shared, and that she would get help. RP 87. Ms. Miller made a CPS referral. RP 596.

CPS investigator Margarite Hatter later interviewed M.M. at school with Ms. Miller present. RP 100, 707. M.M. gave Ms. Hatter a hug and was upbeat and talkative. RP 100. Although she should have obtained a promise from M.M. to tell the truth, Ms. Hatter neglected to do so. RP 126-27. She agreed research showed a promise to be truthful resulted in more reliable responses from children. RP 137. When asked about Kenny, M.M. stated he was big, in high school, and went to work all the time, and that she feels safe around him a “little bit” because he sometimes kicks her out of his room. RP 110. She did not initially disclose anything about sexual abuse, rather stating that Kenny was not typically at home. RP 132.

Ms. Hatter began using closed-ended questions to prompt M.M. RP 113-16, 131-32. She agreed such questions can lead to unreliable

statements from young children, who tend to be suggestible. RP 131. In response to closed-ended and leading questions, M.M. stated that Kenny had put his "privates" in her mouth or showed them to her. RP 113-16.

Four days later, Alyssa Layne conducted a forensic interview with M.M., the third interview in one week. RP 159. M.M. preempted Ms. Layne's rule explanation, showing she had been interviewed before. RP 163. When asked to identify her patella, a question forensic interviewers use as an example of when to answer, "I don't know," M.M. instead pointed to her knee. RP 848. Ms. Layne was concerned M.M. had been questioned twice, stating multiple interviews can cause misunderstanding, miscommunication, and less reliable statements. RP 164.

During the interview, Ms. Layne obtained a promise from M.M. to tell the truth, which she agreed increased honesty from young children. RP 856. M.M. initially said she "told a lie on Kenny." RP 178. She denied Kenny had showed his penis to her and worried he would be upset that she lied. RP 181, 184. For more than half the interview, M.M. made no disclosures of any sexual assault. RP 966. Ms. Layne agreed it is best practice to ask open-ended questions to obtain the most reliable statements from children. 968-69. However, when M.M. failed to make statements about any sexual abuse, Ms. Layne began asking closed-ended questions, delaying M.M.'s request for a break and telling her, "I thought you told

[Ms. Hatter] about something with private parts that I haven't heard about yet." RP 839-41. Only after this leading question did M.M. say Kenny exposed himself or engaged in oral sex with her. RP 841-42. Ms. Layne rewarded M.M. with a break following these responses. RP 844-45.

Consistently, Kenny denied all of M.M.'s allegations. RP 912-24, 1094.

3. Trial Court Rulings.

During pretrial motions, the State moved to amend the charging period. RP 52. For nearly a year the State had alleged the incident took place during a one-month period in the spring of 2018, but now the State sought to expand the charging period to over a year, from April 2017 to June 2018. CP 1, 72. Defense counsel opposed the late motion to amend, arguing it substantially prejudiced Kenny's rights. CP 30-32; RP 52-62.

Counsel argued she had invested significant time in interviewing witnesses and investigating the case, providing recorded interviews establishing an alibi for Kenny based on where he and M.M. were respectively during the one-month period initially charged. CP 30-31; 58-59. The State's late decision to amend the charging period left counsel "scrambling to create a 368-day [sic] time period" to establish both Kenny's and M.M.'s whereabouts throughout the year. RP 59. Counsel further argued she had procured witnesses specifically to address the

original one-month period, and the State's delayed amendment left no time to obtain additional witnesses to reconstruct more than a year of Kenny's life. CP 31. The State argued counsel could simply interview witnesses again, placing Kenny in the precarious position of choosing to go forward with inadequately prepared counsel, or delaying his trial. RP 57. The trial court permitted the amendment. RP 62.

Additionally, Kenny sought to introduce evidence M.M. had an alternate source for her precocious knowledge. Counsel made an offer of proof that M.M. had been exposed to sexual situations and prostitution in her biological home. Counsel sough to admit evidence that M.M. lacked boundaries with men and asked questions about sex not appropriate for her age before she lived with Francis. RP 235-36. Despite this offer of proof, the court found this evidence overly prejudicial and precluded counsel from introducing it. RP 241-42.

The court also admitted M.M.'s three prior statements under the statutory child hearsay exception, finding the statements each substantially satisfied the factors for reliability established in *State v. Ryan*. RP 380-83.

The jury convicted Kenny as charged. CP 92.

4. The Court of Appeals affirmed Kenny's conviction.

On review, the Court of Appeals rejected Kenny's arguments that the trial court erroneously excluded evidence of M.M.'s source of

precocious knowledge, that M.M.'s child hearsay statements were unreliable, and that the court erred by permitting the State to make a late amendment to the charging period. Slip Op. at 4-15.

The Court found the trial court did not abuse its discretion in excluding evidence of M.M.'s alternate source of precocious sexual knowledge because the evidence relied on inferences. Slip Op. at 7-10. The Court further found the court did not err in finding the nine-factor test set forth in *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984), to assess the reliability of a child hearsay statement was substantially met. Slip Op. at 10-15. Finally, the Court concluded it was not error to permit the State to amend the charging period after trial had begun because Kenny was not prejudiced by the late amendment. Slip Op. at 4-7.

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Whether the trial court's exclusion of evidence a child has another source for precocious sexual knowledge infringes on a person's rights to present a defense and confront the witnesses against him is a significant constitutional question.

a. The rights to present a defense and to confront witnesses are fundamental to due process.

No state interest is compelling enough to preclude the introduction of highly probative evidence vital to the defense. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 298, 359 P.3d 919 (2015); U.S. Const. amend.

VI; Const. art. I, § 22. "The right of an accused in a criminal trial to due process is . . . the right to a fair opportunity to defend against the State's accusations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The right to defend includes the right to confront and cross-examine adverse witnesses U.S. Const. amend. VI; Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). "The primary and most important component" of confrontation "is the right to conduct a meaningful cross-examination." *Darden*, 145 Wn.2d at 620 (citing *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998)).

Thorough cross-examination tests the perception, memory, and credibility of witnesses. *Darden*, 145 Wn.2d at 620 (citing *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)). Rigorous cross-examination as a means of confrontation helps assure the accuracy of the fact-finding process. *Id*. (citing *Chambers*, 410 U.S. at 95). If the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. *Chambers*, 410 U.S. at 295.

Evidence rules that infringe upon the weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve abridge this essential right. *Cayetano-Jaimes*, 190 Wn. App. at 298 (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). If evidence is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

b. The trial court denied Kenny his right to present a defense and his right to confront the State's witnesses.

The trial court denied Kenny his rights to present a defense and to confront witnesses against him when it excluded evidence that could explain why M.M. had sexual knowledge at a young age. The evidence would not have disrupted the fairness of the trial. The court's exclusion of this evidence deprived Kenny of his right to present a defense and to confront witnesses. *State v. Carver*, 37 Wn. App. 122, 124, *review denied*, 101 Wn.2d 1019 (1984).

To determine whether relevant evidence that a child has previously been exposed to age-inappropriate sexual information is admissible, courts balance the probative value of the evidence against its possible prejudice pursuant to ER 403. *State v. Kilgore*, 107 Wn. App. 160, 177, 29 P.3d 308, 317 (2001), *aff'd*, 147 Wn.2d 288 (2002) (citing *Carver*, 37 Wn. App. at

122). There is no absolute bar on the details of the alternate source of a child's precocious knowledge, especially when those details are highly relevant. *Kilgore*, 107 Wn. App. at 317.

Like *Carver*, Kenny sought to introduce evidence M.M. had been exposed to sex and prostitution to show why she knew about sexual acts. The *Carver* court found excluding evidence under circumstances similar to here "unfairly curtailed the defendant's ability to present a logical explanation" for the child's statements. *Carver*. 37 Wn. App. at 125; *see also State v. Horton*, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003).

Here, the trial court found, and the Court of Appeals agreed, such an inquiry into an alternate source for M.M.'s precocious sexual knowledge would require the jury to draw "multiple layers of inferences." RP 241-42; Slip Op. at 7-10. The proffered evidence would have shown that before M.M. lived with Francis, her biological family engaged in prostitution, she had an age-inappropriate curiosity about sex and saw men in their underpants, she showed a lack of boundaries with strangers—particularly men, and she wanted to sit on men's laps. CP 35-71.

Implicitly recognizing the relevance of this evidence, the court focused only on its perceived prejudice. The court found the evidence "potentially" would be "more confusing to a jury in terms of weighing out the evidence than it would be probative in this matter." RP 242. This

analysis fails to address the question of whether the evidence itself was so substantially prejudicial as to render the trial unfair. Evidence of M.M.'s prior home environment and exposure to prostitution would have would have helped explain why a child her age would have such precocious sexual knowledge. This evidence would directly rebut the presumption that M.M. could not have had such knowledge unless the State's allegations against Kenny were true. The evidence was vital to Kenny's defense and would not have rendered the trial unfair or confused the jury.

Evidence rules that conflict with an accused's Sixth Amendment rights "may not be applied mechanistically to defeat the ends of justice," but must meet "traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302. Because the trial court excluded essential facts of high probative value, the court prevented Kenny from presenting his defense and confronting witnesses to refute the government's claims.

Denial of these rights, especially where they could expose M.M.'s untrustworthiness or inaccuracy, is constitutional error of the first magnitude. *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984) (citing *Davis*, 415 U.S. at 318) (internal quotations omitted). This Court should accept review to consider this constitutional question. RAP 13.4(b)(3).

2. The admission of unreliable child hearsay statements presents a question of substantial public interest warranting review.

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 child may testify about statements she made when under the age of ten if the statements if the statements describe actual or attempted sexual contact with the child.

Before admitting "child hearsay," 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 factor 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*.

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

Over Kenny's objection, the trial court permitted Kyra Miller, Marargite Hatter, and Alyssa Layne, to testify about M.M.'s out-of-court statements. CP 94-101. The court erred in finding these hearsay statements admissible under the *Ryan* factors. Consideration of those factors reveal they were not substantially met here.

First, M.M. had a motive to, and admitted she did, lie. "The critical inquiry" under this factor "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). Here, M.M. had a motive to lie and admitted to actually lying about the incident, telling Ms. Layne, "I told a lie on Kenny." RP 178. Ms. Miller testified M.M. sought adult attention, and in making her allegations against Kenny, she received that very attention. RP 612. This evidence demonstrates M.M. craved the attention of older children and adults, which she received after making allegations of sexual abuse against Kenny, giving her a motive to lie.

Second, M.M. does not have general character for truthfulness. 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 concluding M.M. had a truthful character, the trial court disregarded

evidence M.M. admitted to lying, and the State presented no evidence M.M. had a reputation for telling the truth. CP 99; RP 373. This weighs against a finding she had a character for truthfulness.

Third, M.M.'s claims were not spontaneous. Statements made by an alleged victim of abuse are more reliable if spontaneous and not the result of leading or suggestive questions. *Lopez*, 95 Wn. App. at 853. Here, Ms. Miller prompted M.M. to speak by asking the class, "[I]f someone asks you to touch their privates, what do you say?" RP 72. Most kids were "kind of blurting things out," including M.M. RP 90-91.

M.M.'s subsequent statements to Ms. Miller, Ms. Hatter, and Ms. Layne also involved significant leading questions in order to coax a disclosure from her. For example, M.M. did not mention sexual abuse until Ms. Layne specifically asked to hear about "private parts" involving Kenny. RP 839-41. Moreover, M.M. made all three statements in one week, undergoing substantially the same interview multiple times and repeating the same statement she admitted was a lie. The manner in which M.M. was questioned, as well as the number of times she was questioned, suggests that all of her statements are unreliable.

Fourth, M.M. did not make the claims to a neutral party, which would make them more reliable. *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988) (child's statements were reliable in part because they

were made to a social worker with no prior relationship with the child). M.M.'s initial statement was made to a school counselor with a preexisting relationship with M.M. M.M.'s history with Ms. Miller and the circumstances of the questioning were not neutral. While M.M.'s later two statements were made to people she did not know, both occurred after Ms. Miller had already questioned her, and Ms. Miller was actually present when Ms. Hatter interviewed M.M. All three adults questioned M.M. within one week. The timing of the interviews and M.M.'s established relationship with Ms. Miller, weigh against a finding of reliability.

Finally, the circumstances of M.M.'s initial disclosure weigh against reliability. M.M. made her initial statement in class after a lesson on inappropriate touching involving an older boy specifically asking to touch the private parts of a younger girl. Many children were speaking at once, and Ms. Miller invited the kids to say when they should say "no" to inappropriate situations. This suggests M.M.'s first statement was heavily influenced by the surrounding circumstances, a statement that was later compounded by multiple adults asking M.M. to repeat the statement again and again. This factor weighs against a finding of reliability.

c. The trial court improperly admitted M.M.'s hearsay statements, and this Court should grant review.

M.M.'s statements were improperly admitted. *See Kennealy*, 151 Wn. App. at 881. The evidence against Kenny was magnified and repeated through the witnesses who testified to M.M.'s hearsay statements. Given that the admission of these statements allowed M.M.'s allegations to be reiterated and bolstered throughout the trial, rather than heard just once during her trial testimony, there is a reasonable probability the outcome of the trial would have been different if not for the error. This Court should grant review because the question of how to apply the *Ryan* factors and the admissibility of child hearsay statements is a matter of public interest. RAP 13.4(b)(4).

3. Whether an untimely amendment to the charging period prejudices an accused's right to adequately prepared counsel is a constitutional question and a matter of public interest requiring review.

a. The charging document may only be amended if substantial rights of the defendant have not been prejudiced.

CrR 2.1(d) controls the amendment of a charging document. It provides: "The court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." CrR 2.1(d). "CrR 2.1[(d)] necessarily operates within the confines of article 1, section 22." *State v. Pelkey*, 109 Wn.2d 484, 490,

745 P.2d 854 (1987). While amendments to the information are liberally allowed between arrest and trial, the constitutionality of amending the information once trial has already begun presents a different question. *Id*. at 490. This is because the stages of trial, including pretrial motions, jury selection, opening statements, and the questioning and cross-examination of the State's witnesses, are based on the "precise nature of the charge alleged in the information." *Id*.

b. The State's late amendment to the information substantially prejudiced Kenny.

Here, Kenny's substantial rights were prejudiced by the late amendment. The State initially charged Kenny with an offense occurring during a one month period in spring 2018. Counsel expended significant effort it investigating the case, interviewing the State's witnesses, and procuring defense witnesses who could account for Kenny's and M.M.'s whereabouts during that month. Counsel also worked to establish M.M. did not spend the night at Gloria's home during that period, or spend time with Kenny in his room.

With trial commenced, and a year after initially charging Kenny, the State expanded the charging period to 400 days, 370 of which counsel had not investigated or explored with the various witnesses. Counsel was left "scrambling" to recreate an entire year of Kenny's life, forced to ask

his friends and family what Kenny's schedule was generally rather than what he was doing specifically during the month of May 2018. CP 30-32. The late amendment forced Kenny to choose between proceeding with a trial that had already started or delaying in order to have adequately prepared counsel. *See State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997) (finding State's three-month delay in amending the information prejudiced defendant who was forced to choose between right to speedy trial and competent counsel). This prejudice to Kenny's substantial rights is untenable, and this Court should grant review. RAP 13.4(b)(3) and (4).

D. CONCLUSION

Based on the foregoing, Kenny respectfully requests that review be granted. RAP 13.4(b)(3) and (4).

DATED this 14th day of April 2021.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. LAKENDRICK L. BUTTS, Appellant.	)	No. 80590-8-I UNPUBLISHED OPINION

VERELLEN, J. — Lakendrick "Kenny" Butts was convicted of one count of first degree rape of a child.

Butts contends the court prejudiced him by allowing an amendment to the charging period in the information. Because the amendment did not change an essential element of the crime charged and he fails to show prejudice from the amendment, the court did not abuse its discretion.

Butts argues the court prejudiced his right to present a defense by rejecting his proffered evidence that the victim's biological grandmother was a prostitute whose trade gave the victim a precocious sexual knowledge. Because this evidence was itself an inference built upon other inferences and only exculpatory by inference, the court did not abuse its discretion by excluding the evidence under ER 403 as unduly prejudicial and confusing to the jury.

Butts argues the court abused its discretion by admitting unreliable child hearsay. Because the trial court's unchallenged findings of fact and the record as a whole support its conclusion that the victim's hearsay statements were reliable, Butts fails to show the court abused its discretion.

Therefore, we affirm.

FACTS

M.M. was placed with foster mother Francis Butts in late April of 2017. Francis[1] is the mother of M.M.'s godmother. Francis's sister, Gloria, is the mother of then-17-year-old Kenny. Butts family gatherings were often held at Gloria's house, and Francis brought M.M. and her grandchildren to Gloria's house at least once per month. There was a computer in Kenny's room, and M.M. would go in there to play games. Kenny was at home at least "once a month" when M.M. and his cousins were visiting.[2]

On June 1, 2018, guidance counselor Kyra Miller was teaching a lesson to M.M.'s kindergarten class about appropriate and inappropriate touching. After reading a story in which an older boy asks to touch the private parts of the main character, Miller wrapped up the lesson by asking the class what they should do if someone tried to touch them inappropriately. M.M. "blurted out, '[W]hen my cousin tells me to suck his private, I'm going to say no.'"[3] After class, Miller spoke

[1] Because Lakendrick, Francis, and others have the same last name, we refer to them by their first names.

[2] Report of Proceedings (RP) (Aug. 22, 2019) at 1086.

[3] RP (Aug. 7, 2019) at 73.

privately with M.M., and M.M. confirmed what she had said in class. Miller filed a report that day with Child Protective Services (CPS).

Over the following week, CPS investigator Margarite Hatter and forensic child interview specialist Alyssa Lane both interviewed M.M. In her interview with Layne, M.M. said May 2 was the last time Kenny made her perform oral sex on him. Detective Heather Castro of the Federal Way Police Department arrested and interviewed Kenny. In August of 2018, the State charged Kenny with committing one count of first degree child rape between May 1 and June 1. The State later told defense counsel it would expand the charging period to include the entire duration of M.M.'s time in Francis's care.

On the first day of pretrial motions and before jury selection, the State moved to amend the information by expanding the charging period to encompass the time from April 17, 2017 through June 1, 2018. The court concluded the amendment would not prejudice Kenny and granted the motion. The court also held a child hearsay hearing, made findings of fact, and concluded M.M.'s hearsay statements were admissible under RCW 9A.44.120. A pretrial defense motion sought permission to argue M.M.'s precocious sexual knowledge came from living with her biological grandmother, whom Kenny alleged was a prostitute who took customers to her home. The court denied the motion, concluding the defense's offer of proof was insufficient given the potential for undue prejudice and jury confusion.

In Kenny's opening statement, defense counsel explained 11 people lived in Gloria's house, and the teenaged Kenny wanted to "make himself as scarce as possible" because he "[did] not want to be in a place where there is no quiet, there is no privacy, and there is no space."[4] M.M. testified at trial and reiterated that Kenny made her perform oral sex on him between five and seven times. Miller also testified, relating M.M.'s initial disclosures in school. M.M.'s interviews with Hatter and Lane were played for the jury. The jury found Kenny guilty.

Kenny appeals.

ANALYSIS

I. Amended Information

CrR 2.1(d) allows amendment of an information any time before the verdict if the substantial rights of the defendant will not be prejudiced. We review a decision to grant a motion to amend an information for abuse of discretion.[5] A court abuses its discretion when its decision rests on untenable grounds or was made for untenable reasons.[6]

Kenny argues the court abused its discretion because it allowed an amendment of the charging period on the first day of pretrial motions. A constitutionally permissible charging document must allege "all essential elements of a crime to inform a defendant of the charges against him and to allow for

[4] RP (Aug. 19, 2019) at 582-83.

[5] State v. Brooks, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020).

[6] Id.

preparation of his defense."[7] The date when a defendant committed first degree rape of a child is not an essential element of the crime.[8] Because the date is not an essential element, Kenny has the burden of proving prejudice from the amended charging period.[9]

Kenny argues he was prejudiced because defense counsel had closely investigated the original charging period and did not have time to investigate his whereabouts for the amended charging period. He explains that because he raised a "partial alibi defense,"[10] "[t]he late amendment forced Kenny to choose between proceeding with a trial that had already started or delaying in order to have adequately prepared counsel."[11]

Although Kenny now asserts he raised an alibi defense, his stated defense before trial was general denial. His arguments at trial also reflected a general denial. Kenny's defense theory was that Gloria's house was too crowded, too

[7] Brooks, 195 Wn.2d at 97 (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22).

[8] See RCW 9A.44.073(1) ("A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim."); see also State v. Goss, 186 Wn.2d 372, 379, 378 P.3d 154 (2016) (essential elements are "necessary to establish the very illegality of the behavior charged") (internal quotation marks omitted) (quoting State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)).

[9] See Brooks, 195 Wn.2d at 98 (concluding the defendant had the burden of proving prejudice because the amended charging period in an information did not change the essential elements of the charged crime).

[10] Reply Br. at 5.

[11] Appellant's Br. at 28-29.

busy, and he was too infrequently present to have had the opportunity to rape M.M.[12] For example, he called three friends, a friend's father, and a former manager as witnesses to testify about how often he was busy outside his home. Kenny also introduced more than one dozen photos of his house to show its layout and explain how crowded it was. During closing argument, defense counsel argued "Kenny is simply not really home. . . . [H]e is frequently at work, he is out with friends, he is spending the night elsewhere."[13] This is a general denial defense based upon lack of opportunity, not an alibi. We also note that Kenny's strategy of accounting for every moment of the original charging period was impractical when his own testimony demonstrated he was home "like once a month" when M.M. and his cousins visited.[14] M.M. testified at least one rape occurred in May of 2018 when she was visiting Kenny's house with her cousins, and Francis testified that Kenny, M.M., and her grandchildren were at Gloria's house during a May 2018 birthday party. Kenny fails to explain how expanding the charging period impacted his defense.[15]

[12] See RP (Aug. 19, 2019) at 584-85 (explaining that Kenny was "not home" and "does not want to be home" and that "[t]he evidence is going to show that when you look at the photos of this house, the sketch of this house, and you hear the evidence and number of kids running in and out of rooms, . . . the number of grownups who are around on the regular, you will conclude that Kenny did not commit this crime.").

[13] RP (Aug. 26, 2019) at 1157-58.

[14] RP (Aug. 22, 2019) at 1086.

[15] We also note that even after the State had disclosed its intent to expand the charging period, Kenny opposed the State's motion to continue the trial from July 22 to August 12. Such opposition to the continuance is inconsistent with a claim that the expanded charging period prejudiced Kenny. See State v. Gehrke,

Because Kenny fails to prove prejudice from the amended charging period in the information, the court did not abuse its discretion.[16]

II. Not Admitting Evidence of Exposure to Prostitution

In his opening brief and statement of additional grounds, Kenny argues the court harmed his right to present a defense by refusing to admit evidence.[17] He sought to advance a theory that M.M. gained precocious sexual knowledge before entering foster care because her grandmother was a prostitute operating out of her home. He moved to admit evidence of this theory, and the court denied the motion as unduly prejudicial or confusing to the jury.

We review a court's evidentiary decisions for abuse of discretion and review de novo whether the defendant's right to present a defense was violated.[18] Relevant evidence can be excluded under ER 403 when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[19]

193 Wn.2d 1, 18, 434 P.3d 522 (2019) ("Failure to seek a continuance indicates a lack of surprise and prejudice only when the amendment is made at the beginning of trial.").

[16] See CrR 2.1(d) (court may allow amendment of an information before a verdict unless the defendant's substantial rights are prejudiced).

[17] Kenny also contends his Sixth Amendment confrontation clause rights were harmed, but he does not identify any witnesses who he was prevented from cross-examining after they testified against him. Thus, we decline to address this alleged violation.

[18] State v. Bedada, 13 Wn. App. 2d 185, 194, 463 P.3d 125 (2020).

[19] ER 403.

A court considers the whole case when weighing the risk of unfair prejudice, including

> "the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction."[20]

"A court does not violate a defendant's constitutional rights when the materiality of an absent witness's testimony is merely speculative or overwhelmed by uncontroverted evidence."[21] A defendant has no right to introduce inadmissible evidence.[22] Only when the evidence is of high probative value, "'it appears no state interest can be compelling enough to preclude its introduction'" without violating the state and federal constitutions.[23]

Kenny compares this case to State v. Carver, where the court held the trial court erred by excluding evidence of past sexual abuse that the defendant stepfather sought to introduce to explain the victims' precocious sexual knowledge.[24] On cross-examination, the stepfather wanted to ask one victim about a statement she had made to the authorities that only her grandfather had

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[20] Bedada, 13 Wn. App. 2d at 193-94 (quoting State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987)).

[21] State v. Cayetano-Jaimes, 190 Wn. App. 286, 296, 359 P.3d 919 (2015).

[22] State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002).

[23] State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

[24] 37 Wn. App. 122, 123-24, 678 P.2d 842 (1984).

sexually abused her.[25] The trial court relied upon the rape shield statute to exclude the evidence, and the appellate court reversed because the statute did not apply and the highly relevant and exculpatory nature of the evidence outweighed any prejudice from the testimony.[26]

Unlike Carver, the proffered evidence here was highly speculative and required making, as the trial court explained, "a pretty big leap."[27] Kenny admitted he did not have any direct evidence M.M.'s grandmother was a prostitute or that M.M. witnessed acts of prostitution. He explained that "[n]o one is going to say that her grandmother was a prostitute because I don't have that specific evidence."[28] And he admitted the relevant evidence was an inference based upon other inferences. Also unlike Carver, the proffered prostitution evidence was not directly exculpatory and required inferring that M.M.'s precocious sexual knowledge likely came only from witnessing acts of prostitution and not from having been raped. Because the proffered evidence was highly speculative and only inferentially exculpatory, the trial court did not abuse its discretion by concluding the evidence was unduly prejudicial or substantially more confusing

[25] Id. at 125.

[26] Id. at 124-25.

[27] RP (Aug. 8, 2019) at 241.

[28] Id. at 237.

than probative and excluding it under ER 403.[29] And because the evidence was inadmissible, Kenny's right to present a defense was not implicated.[30]

III. Child Hearsay

RCW 9A.44.120 allows admission of child hearsay when a child under 10 described a sexual act performed on the child by another and when the trial court finds the child's statements are reliable.[31] We review a trial court's decision to admit child hearsay for abuse of discretion.[32] We review the trial court's findings of fact for substantial evidence.[33] Unchallenged findings of fact are verities on appeal.[34]

Kenny contends the court abused its discretion by admitting M.M.'s hearsay statements through Miller, Hatter, and Layne. He does not challenge the trial

[29] To the extent that Kenny's statement of additional grounds alleges M.M. gained sexual knowledge because her biological relatives let her be molested, this is a new argument unsupported by any evidence in the record, and we decline to consider it.

[30] Darden, 145 Wn.2d at 624; see Cayetano-Jaimes, 190 Wn. App. at 296 ("A court does not violate a defendant's constitutional rights when the materiality of an absent witness's testimony is merely speculative or overwhelmed by uncontroverted evidence.").

[31] The statute also allows admission of child hearsay under other conditions not present here.

[32] State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1176 (2005).

[33] State v. A.X.K., 12 Wn. App. 2d 287, 298, 457 P.3d 1222 (2020).

[34] Id.

court's findings of fact, making them verities on appeal.[35] Thus, the question is whether the court's findings of fact supported its conclusions of law.[36]

Courts use nine factors from State v. Ryan[37] to gauge the reliability of child hearsay:

> "(1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement, (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."[38]

No single factor is determinative, but a statement is not considered reliable until the factors are substantially met.[39]

In the court's oral and written ruling, it concluded all nine factors indicated M.M.'s hearsay statements were reliable. Kenny challenges the court's conclusions about the first, second, fourth, fifth, and ninth Ryan factors.

He argues the court erred about the first factor because M.M. said she "told a lie on Kenny" and therefore had a motive to lie.[40] But he overlooks M.M.'s

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[35] Id.

[36] Id.

[37] 103 Wn.2d 165, 691 P.2d 197 (1984).

[38] A.X.K., 12 Wn. App. 2d at 299 (quoting State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009)).

[39] Kennealy, 151 Wn. App. at 881.

[40] Appellant's Br. at 21.

motive for lying. The court found that after M.M. first disclosed Kenny's attacks, M.M. asked Miller "[D]id you tell my mom [Francis]?" and was then afraid she would "get into trouble."[41] According to the court's findings, M.M. said she "told a lie" after Francis learned of M.M.'s disclosure and then told M.M. that she "told [Miller] a lie" and that "you won't see your grandma 'till you're 18-years-old."[42] The court also found M.M. felt sad during her interview with Hatter because she was afraid of having to go live with "a stranger."[43] Because the evidence did not show M.M. had a motive to tell harmful lies about Kenny, the court did not err by concluding the first Ryan factor indicated reliability.

Kenny argues the court erred on the second factor by concluding M.M. was a truthful child when no evidence showed she had a reputation for truthfulness. But the court explained M.M. "consistently talked about the same sort of details" regarding Kenny's attacks, and "the continued statements [were] consistent to most degree[s] with what was originally told" in school to Miller.[44] The only evidence of dishonesty was M.M.'s lie about lying, which she told after Francis suggested she had lied. Because the evidence does not demonstrate M.M. had a dishonest character and other evidence allowed an inference of an honest character, the court did not err by concluding M.M. was truthful.

[41] CP at 96.

[42] CP at 98.

[43] Id.

[44] RP (Aug. 13, 2019) at 382.

For the fourth factor, Kenny contends M.M.'s claims were not spontaneous, but the record does not support him. The court found M.M.'s first disclosure occurred when she "unexpectedly blurted out" in class what Kenny made her do[45] and found the disclosure "was so spontaneous and really startled the person that was hearing it."[46] Similarly, M.M.'s responses to Hatter and Layne were also spontaneous, although they were responses to interview questions. For evaluating child hearsay, statements are spontaneous when the entire context of the statement shows the question was not leading or suggestive.[47] For example, M.M. began telling Hatter about Kenny's attacks after Hatter asked, "Do you remember saying something last week at school? . . . Can you tell me about that?"[48] M.M. responded, "I was saying that Kenny would sometimes show[ ] me his private parts."[49] Hatter then asked "And when was the last time that Kenny showed you his private part?" and M.M. volunteered new information by answering "Like, five times."[50] Hatter's questions did not suggest the answers M.M. gave.

Layne's questions were necessarily more pointed because M.M. initially said she had lied about Kenny, so Layne had to explore M.M.'s past explanations to Miller and Hatter. Thus, Layne's questions, while superficially leading because

[45] CP at 95.

[46] RP (Aug. 13, 2019) at 381.

[47] State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991).

[48] RP (Aug. 7, 2019) at 113.

[49] Id.

[50] Id.

they asked directly about Kenny revealing his genitals to M.M., were contextually appropriate and did not steer M.M. toward confirming one version of events over the other. Because the record shows M.M.'s disclosures were spontaneous, the court did not err.

For the fifth factor, Kenny contends M.M's non-neutral relationship with Miller made her initial disclosure and all that followed unreliable. But the law does not discount child hearsay statements only because they were made to someone familiar. Indeed, the court in State v. Kennealy explained a child's hearsay statement is more likely reliable "[w]hen the witness is in a position of trust with a child," such as a nurse with "an authoritative position in the community."[51] Miller was M.M.'s school guidance counselor who had helped her with emotional difficulties several times during the year.[52] Because Miller was a trusted authority figure akin to a familiar medical provider, the court did not err by concluding this relationship demonstrated reliability.

For the ninth factor, Kenny argues, without authority, that the circumstances of M.M.'s initial disclosure weigh against her statements' reliability. The court found M.M.'s initial disclosure was unexpected and appeared "very organic."[53] The court explained that the initial details of M.M.'s disclosure remained consistent

[51] 151 Wn. App. 861, 884, 214 P.3d 200 (2009).

[52] See RP (Aug. 7, 2019) at 69 (guidance counselor Miller explaining she helped M.M. around five times during the year when she was struggling emotionally).

[53] CP at 95.

over the next week even as she revealed additional details in other settings. Kenny fails to show how the court erred by concluding these circumstances favored reliability.

The trial court concluded all nine Ryan factors favored admitting M.M.'s hearsay statements. Kenny fails to show the court erred by doing so. Because the Ryan factors support concluding M.M.'s hearsay statements were reliable, the court did not abuse its discretion by admitting them.

Because Kenny fails to establish any basis for reversal, we affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80590-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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