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No. 63506-9-1

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

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STATE OF WASHINGTON, Respondent/Cross-Appellant

v.

JESSE SHANE ALDERMAN, Appellant/Cross-Respondent

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APPELLANT/CROSS-RESPONDENT'S BRIEF

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ORIGINAL

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The Trial Court Erred in Failing to Hold a Child Hearsay Hearing Pursuant to RCW 9A.44.120.
2. Defense Counsel was Ineffective by Failing to Object to the Admissibility of Hearsay.
3. Insufficient Evidence Existed for a Rational Trier of Fact to Find Beyond a Reasonable Doubt that Defendant Committed the Crimes Charged.

### **B. Issues Pertaining to Assignments of Error.**

1. Was the Trial Court's Failure to Hold the Child Hearsay Hearing a Violation of Defendant's Right to Due Process when the State Failed to Provide Notice of Its Intent to Use Child Hearsay?
2. Was Counsel Ineffective for Failing to Object to the Admission of Child Hearsay and other Hearsay which was Detrimental to Defendant?
3. Did Sufficient Evidence Exist for a Rational Trier of Fact to Find Beyond a Reasonable Doubt that Defendant Committed the Crimes Charged, When the Alleged Victim Failed to Provide Evidence to Support the Crimes Charged?

## **II. STATEMENT OF THE CASE**

### **A. Facts.**

Between 1996 and 2003, the appellant, Jesse Alderman, had a sporadic intimate relationship with Jacqueline Zink. RP 119, ll. 4-5; RP 121, ll. 18-20. In July, 1997, a daughter, A.Z., was born to Jesse and Jacqueline.

RP 118, ll. 3-4.

In April, 2003, Jacqueline began a relationship with Frank Zink, and Jacqueline and A.Z. moved to Kansas with Frank. RP 129, ll. 11-19.

Four years later, around October 9, 2007, Jacqueline and Frank contacted Kansas authorities and reported that Jacqueline found A.Z.'s, journal in which A.Z. alleged that Jesse had sex with her when she was four or five years old. RP 132, ll. 20-25; 133, ll. 1-20.

On October 15, 2007, Jacqueline contacted Snohomish County Sheriff's Office and reported A.Z.'s allegations. RP 162, ll. 4-22.

The Snohomish County Sheriff's Office contacted Kansas authorities and arranged for A.Z. to be interviewed. RP 162, ll. 23-25; 163, ll. 1-4. A.Z. was interviewed at the Sunflower House in Kansas. RP 137, ll. 18-23. At that time, A.Z. told the interviewer, Jennifer, that something occurred with Jesse. A.Z. did not go into any detail and told the interviewer that she did not remember feeling anything during the alleged incidents. RP 97, ll. 13-20.

In February, 2008, in furtherance of the criminal investigation, Snohomish County authorities made arrangements for Jacqueline and A.Z. to travel to Snohomish County for an interview as well as an examination by a clinical coordinator for Providence Intervention Center for Assault and

Abuse, Nurse Barbara Haner. RP 155, ll. 21-25; 156, ll. 1-6.

Nurse Haner interviewed Jacqueline, and A.Z., and then examined A.Z. RP 172, ll. 12-13. During her interview with A.Z., Haner asked A.Z. why she was there. A.Z. informed Haner that she believed she was there to talk to some people. RP 178, ll. 10-11. Later, Haner asked her what happened with Jesse that she was here to talk to people about. RP 179, ll. 22-25. A.Z. replied, “He did stuff to me.” RP 180, l. 3. Haner asked, “What kind of stuff?” RP 180, l. 4. A.Z. replied, “He touched me.” *Id.* Haner drew gingerbread-person type pictures, labeled them “A.Z.” and “Jesse”, and asked A.Z. where Jesse touched her. RP 180, ll. 10-14. A.Z. circled the groin area on the one bearing her name. RP 180, ll. 12-14. When A.Z. was asked by Haner, what Jesse touched her with, A.Z. circled the groin area on the one named Jesse. RP 180, ll. 14-15. When asked if it hurt, A.Z. nodded. RP 180, ll. 18-20. In a non-responsive answer to Haner’s next question, A.Z. responded, “When it hurt, it hurt really bad.” RP 180, ll. 23-25; 181, l. 1.

Haner’s physical examination of A.Z. resulted in a “non-specific” finding. RP 206, ll. 21-25. Haner’s examination could not conclude, one way or the other, whether A.Z.’s allegations were true or false. RP 207, ll. 2-3.

**B. Procedural History.**

On August 28, 2008, amended charges were filed against Jesse, by criminal information, in Snohomish County Superior Court, alleging three counts of first degree Child Molestation and one count of first degree Rape of a Child. CP, Vol. I, 330-331. All the charges were alleged to be separate and distinct from the others, but no specific time frame was stated, other than the alleged acts occurred between “May 30, 2000 and April 30, 2003.” *Id.*

**C. Trial.**

The jury trial took place in Snohomish County Superior Court from December 1, 2008 to December 3, 2008. At trial, without prior notice that it would be using child hearsay evidence, the State introduced, repeatedly discussed, and admitted into evidence A.Z.’s journal entry.<sup>1</sup>

In the State’s opening statement, the child hearsay, a journal entry, and its content, was disclosed to the jury:

State: In that journal, A[Z] had written something about the defendant having sex with her when she was five or four.  
RP 43 ll. 16-19.

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<sup>1</sup> In its Response to Defense Motion for a New Trial, the State asserted that “It was never clear when A.Z. wrote the journal entry. She said that she guessed she wrote it when she was 8 or 9, but didn’t know. In order to admit this statement as child hearsay, the State would have to prove that A.Z. wrote it when she was under the age of 10. Because that seemed unlikely, the State chose not to move to admit the statement under RCW 9A.44.120, and thus did not file notice.” CP 56, Vol. I, 88-187, p.12.

Defense did not object.  
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State: She [Jacqueline] asked A[.Z.] if what she had written was true, and A[.Z.] hung her head and said yes.  
RP 43, ll. 23-25.

Defense did not object.  
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Then, on direct examination of A.Z., the State's first witness, the child hearsay was marked as Exhibit #1 and was offered for the truth of the matter asserted:

State: Did somebody find what you wrote in your diary?

A.Z.: Yes.

State: Who was that?

A.Z.: My mom.

State: Did she ask you about it?

A.Z.: Yes, yeah.

State: Did she ask you if that really happened?

A.Z.: Yes.

State: What did you say?

A.Z.: Yes.

RP 57, ll. 21-25; 58, ll. 1-5

Defense did not object.  
-----

State: Can you tell me what you wrote in your journal? You can just read it if you like.

A.Z.: It says, "When I was four or five...when I was four or five Jesse had sex with me."

State: When you said "sex" what did you mean?

A.Z.: What moms and dads do at night.

State: And had you ever told anybody that before?

A.Z.: No.

State: Is that true what it says there?

A.Z. Yes.  
RP 62, ll. 16-19.

Defense did not object.  
-----

Next, the State again introduced testimony about the child hearsay  
when it conducted its direct exam of Jacqueline:

State: (shows JZ copy of journal entry) That's what you found?  
Jacqueline: Yes.  
RP 133, ll. 15-17.  
-----

State: No. Do you recall....Tell me about that conversation. How  
did that go?

Jacqueline: I asked her about the letter or journal entry. And she  
just hovered down, and I said, "It's okay, you're not in trouble  
by any means. Whatever happened is not your fault." And  
she's like, "Okay." And I said, "Did it have to do with your  
private parts?" She nodded, "Yes." And I didn't ask her  
anything further.

State: Did you ask her if that really happened?

JZ: I'm not sure. I don't remember.  
RP 135, ll. 11-19, 25; RP 136, ll.1.

Defense did not object.  
-----

Finally, on re direct examination of Jacqueline, the State sought to  
admit the child hearsay into evidence:

State: I would move to admit Ex. 1.

Court: Mr. Grier?

Defense: No objection. It's been talked about so much.  
RP 159, ll. 1-4.  
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In addition to the improper admission of the child hearsay statement,

the record also shows that A.Z.'s testimony regarding her recollection of events was vague and contradictory, as demonstrated by the following exchanges:

State: Did you tell somebody there about things that happened?  
A.Z. No.  
State: At the police station?  
A.Z.: No.  
State: Did you tell a lady in Kansas about things that had happened with Jesse?  
A.Z.: No.  
State: Do you remember watching a DVD?  
A.Z.: Yes.  
State: Do you know when that DVD was made?  
A.Z. No.  
RP 59, ll. 14-25.

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Defense: How many people have you talked to about this?  
A.Z.: Just my mom and dad.  
RP 82, ll.9-10.

-----  
Defense: You told us that he had sex with you?  
A.Z.: Yes.  
Defense: And you told that to the interviewer back in Kansas, right?  
A.Z.: Yes.  
Defense: She talked to you about what sex was, didn't she?  
A.Z.: Yes.  
Defense: She asked you what it was?  
A.Z.: Yes.  
Defense: Do you remember what you told her?  
A.Z.: I told her...  
Defense: You what?  
A.Z.: I told her that I don't really remember.  
Defense: You don't remember what sex is or you don't remember what you told her?  
A.Z.: I don't remember what I told her.

Defense: Okay. You told us that you learned about sex from a teacher in Kansas?

A.Z.: Yes.

Defense: Do you remember what she told you about sex?

A.Z.: No.

Defense: You don't remember?

A.Z.: (shook head.)

RP 90, ll. 2-22.

Likewise, A.Z.'s general memory regarding the allegations was inconsistent and contradictory, as shown by the following exchanges:

Defense: ...what is the first time you remember living with Jesse? Actually, living in the same house with him and your mom?

A.Z.: In that duplex?

Defense: In that duplex?

A.Z.: Yes.

Defense: So, before that you don't remember if you did or not?

A.Z.: No.

RP 87, ll. 16-24.

-----  
State: Is there anywhere else you remember living with Jesse?

A.Z.: In a trailer nearby.

RP 112, l. 21-23.

-----  
Defense: ...Do you remember her [Kansas child interviewer] asking you what you felt when you were talking to her about what Jesse did to you?

A.Z. : Yes.

Defense: You told her you didn't feel anything, right?

A.Z. : Yeah.

Defense: Was that true?

A.Z. : No.

Defense: Why were you not being truthful?

A.Z.: Because I didn't remember.

Defense: You didn't remember? So you told her you didn't feel anything because you didn't remember what you felt?

A.Z.: Yeah.

Defense: When did you remember?

A.Z.: A few months ago.

Defense: A few months ago? After you came out here and talked to some people out here?

A.Z.: Yeah.

RP 83, ll. 18-25, 84, ll. 1-13.

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Defense: You didn't know? How come you didn't know what it felt like?

A.Z.: Because sometimes I have a bad memory. Later on things come. Then I remember.

RP 97, ll. 17-20.

-----  
Defense: You told us that you were not telling the truth when you told Jennifer that you didn't feel anything, right?

A.Z.: Yes.

Defense: Did you think it was okay to not tell the truth then?

A.Z.: No.

Defense: Why didn't you want to tell the truth?

A.Z.: Because I really didn't know.

Defense: Really didn't know what?

A.Z.: What I felt.

Defense: You didn't know what you felt? You had to think about that some or what?

A.Z.: Yeah, I had to think about it.

Defense: When was the first time you told somebody about that, that you did feel something?

A.Z.: It would be two days ago.

Defense: Pardon me?

A.Z.: Two days ago.

Defense: Probably before that though, right?

A.Z.: I'm not sure.

RP 116, ll. 10-16.

-----  
A.Z.'s testimony on cross examination, regarding what the only

potential recipient of the child hearsay, Hannah, might know, was confusing:

Defense: Who is Hannah?

A.Z.: One of my friends.

Defense: Right in the same entry, page five, you wrote, "Ask Hannah about this", right after you wrote this?

A.Z.: Yeah.

Defense: What would Hannah know?

A.Z.: She wanted to know what would happen, but I didn't tell her because I thought she would tell everyone.

RP 92, ll.19-25, 93, ll.1-2.

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Finally, the State introduced more hearsay statements of A.Z. through

State's witness Barbara Haner, a forensic assault nurse:

State: Is that unusual in this situation?

Haner: ....So I asked who she was supposed to talk about? She said, "Jesse". I asked, "Who is he?" She said, "He used to be my dad." I asked, "What happened with Jesse that you had to talk to some people about?" She lifted up her head, looked at me and then laid her head back down, and then looked at her and she said, "He did stuff to me." I asked "What kind of stuff?" She said, "He touched me." I asked what he touched. She shrugged her head, kept her head on the table. I asked what she touched with. She touched her head on the table and shrugged. I asked if I drew people, would she be able to point to where she touched. She nodded. I drew gingerbread appearing figures. ...And labeled one Jesse, one A[Z] and asked where he touched on her. She circled the groin area. I asked what he touched with. She circled his groin area. I asked what he - I asked with what he touched with, and pointed to where she had circled, if it hurt, and she nodded. ... [she] then stated, "When it hurt, it hurt really bad." I asked if it happened once or more than once. She looked at me and said, "More than once."

RP 179, l. 4-25; 180, ll.1-21, 25; 181, ll. 1-3.

On December 3, 2008, the jury returned guilty verdicts on two counts of first degree Child Molestation and one count of first degree Rape of a Child and acquitted Jesse on one count of first degree Child Molestation.

On March 26, 2009, Jesse argued for a new trial, based on the child hearsay issue and ineffective assistance of counsel. CP 53, Vol. I, 188-200; Vol II, 201-224. On April 27, 2009, the trial court signed a written order denying Jesse's motion for a new trial based on the fact that it was not timely filed. CP 63, Vol. I, 44-47.

On May 5, 2009, Jesse was sentenced to concurrent sentences of the high end of 198 months on counts I, and II, first degree Child Molestation, and the high end of 318 months on count IV, first degree Rape of a Child.

This appeal timely follows.

### **III. LEGAL AUTHORITY/ARGUMENT**

#### **A. The Trial Court Erred in Failing to Hold the Child Hearsay Hearing.**

##### **1. The journal entry is child hearsay, governed by RCW 9A.44.120.**

Hearsay is defined as "an out of court oral or written assertion made by the declarant offered at trial for the truth of the matter asserted". ER 801.

The hearsay statement at issue here is the journal entry of A.Z. It reads:

“When I was 5 or 4 my Jesse had sex with me. Ask Hannah about this.”

Ex. 1.

A.Z. testified at trial that she guessed she was eight or nine when she wrote the statement in her journal. RP 56, ll. 10-13. The writing is an out of court statement, and it is undisputable that it was offered at trial for the truth of the matter asserted. RP 57, ll. 21-25; 58, ll. 1-5; 62, ll. 16-19.

Accordingly, the admissibility of the statement is governed by Washington’s child hearsay statute. RCW 9A.44.120.

Although the journal entry was included in discovery, the State failed to notify the defendant of its intent to admit the child hearsay into evidence at trial pursuant to RCW 9A.44.120. CP 58, Vol. I, 58-62.

The State sought to use the child hearsay from the outset of the trial as the central piece of evidence to support its otherwise, much weaker case.

First, the State introduced the specific language of the journal entry to the jury during its opening statement. RP 43, ll. 16-19, 23-25. The trial court failed to stop the hearing for a child hearsay hearing and defense counsel failed to object to the lack of a child hearsay hearing.

Second, the State then made the child hearsay the foundation of its case, by having the complaining victim read it out loud in open court and

testify as to what she told her mom when she was questioned about the journal entry, four years after the alleged incident, and whether, in fact, it was true or not. RP 62, ll 16-19; RP 57, ll. 21-25; 58, ll. 1-5. Once again, both the trial court and defense counsel failed to note any errors in the State's use of the child hearsay.

Third, the State returned to the child hearsay while questioning A.Z.'s mother, Jacqueline, eliciting other hearsay, without objection, and attempting to confirm, through Jacqueline, whether the child hearsay was true. RP 135, ll. 11-19; 136, l.1.

Finally, the State moved to admit the child hearsay into evidence. Defense counsel did not object, stating, "It's been talked about so much." RP 159, ll. 1-4. The trial court improperly allowed the child hearsay to be admitted into evidence without a separate child hearsay hearing.

**2. A child hearsay hearing was required under RCW 9A.44.120.**

RCW 9A.44.120, the Washington state statute governing the admissibility of child hearsay, reads in pertinent part:

A statement made by a child when under the age of 10 describing any act of sexual contact performed with or on the child by another...not otherwise admissible by statute or court rule, is admissible in evidence in ...criminal proceedings...in the courts 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 ...:
  - (a) Testifies at the proceedings;

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9A.44.120. Emphasis added.

Compliance with RCW 9A.44.120 mandates, without exception, a hearing to address child hearsay even where the child testifies at trial. *State v. Sammons*, 47 Wn.App. 762 , 765, 737 P.2d 684 (1987). Thus, any argument that because the victim testified and was subject to cross examination, the statute need not be complied with, must fail. *Id.*

The trial court must find that the circumstances surrounding the making of the statement render the statement inherently trustworthy. *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765, (quoting *State v. Rice*, 120 Wn.2d 549, 565-66, 844 P.2d 416 (1993)); *State v. Anderson*, 107 Wn.2d 745, 750-

51, 733 P.2d 517 (1987)).

In *State v. Leavitt*, a case similar to the present case-also involving multiple allegations and child hearsay, our Supreme Court found that “[T]he trial court’s failure to hold the [child hearsay] hearing ...was error.” 111 Wn.2d 66, 71, 758 P.2d 982 (1988).

In *Leavitt*, the State gave notice of its intent to rely on hearsay testimony pursuant to RCW 9A.44.120, but “bootstrapped” it with a competency hearing held by the court, and defense counsel failed to object to the hearsay evidence when it was given. *Id.* The *Leavitt* Court found that the record in that case “establishe[d] that the hearsay statements were reliable, and admissible, and therefore the lack of [a]timely objection to the failure to hold the hearing did not affect the outcome of the trial.” *Id.* at 73. Particularly important to the *Leavitt* Court, were the facts that both the child declarant and the recipients of the hearsay statements were present at trial and subject to full cross examination and the fact that the record showed the hearsay statements were reliable. *Id.* at 72-73. Therefore, the *Leavitt* Court agreed with the Court of Appeals that any error for failure to conduct a child hearsay hearing was harmless. *Id.* at 71.

In the present case, unlike *Leavitt*, the State never notified the defense

of its intent to offer the child hearsay statement. This omission was a direct violation RCW 9A.44.120 and prevented the defense from being prepared to meet the particulars of the statement at trial. See *State v. Lopez*, 95 Wn.App. 842, 851, 980 P.2d 224 (1999). Also, in contrast to *Leavitt*, there was no separate competency hearing to which hearsay issues might have been bootstrapped. Indeed, no competency finding regarding A.Z. was held by the trial court, including testimonial competency and competency at the time A.Z. made the statements.

Further, the instant case is distinguishable from *Leavitt* because, arguably, the most important recipient of the out of child hearsay statement which catalyzed initiation of the charges, Hannah, was not interviewed by either side, nor was she present and subject to cross examination at trial. Finally, distinguishable from *Leavitt*, the record in this case, as presented *infra*, shows that the alleged victim's child hearsay statement was inherently unreliable.

**3. The child hearsay statement was unreliable based on a *Ryan/Dutton* analysis.**

In *State v. Ryan*, the Supreme Court adopted the following set of factors applicable to determining the reliability of out of court declarations:

- (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; and (5) the timing of the declaration and the relationship between the declarant and the witness.

103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)).

Also to be considered are the additional factors outlined in *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970), which include the following:

(6) whether the statement contains an express assertion of past fact, (7) whether cross examination could show declarant's lack of knowledge, (8) the probability that the declarant's recollection is faulty; and (9) whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

*Ryan*, at 176. Washington courts have not given much weight to *Dutton* factors' (1) and (2). *Leavitt*, 111 Wn.2d at 75.

Applying the *Ryan/Dutton* factors to the present case clearly demonstrates the unreliability of the hearsay statements. First, because the hearing was not held, the general character of A.Z., as well as her motive or lack of motive to lie, was never determined. Next, at the time the writing

took place, the only person who could possibly have heard the statement was Hannah, and she did not testify and was not subject to cross examination. All other statements (to Zink and Haner) were not related until years later. Further, it is unknown whether or not the statement was made spontaneously or stemmed from a discussion with Hannah. No investigation was ever conducted into the nature of the relationship between A.Z. and Hannah. Finally, the timing of the statement goes to its unreliability. According to A.Z.'s testimony, she wrote the statement when she was eight or nine years old. RP 56, ll. 10-13. According to the statement itself, A.Z. was writing about something that happened to her three or four years prior, when she was four or five years old. Ex.1. This factor alone weighs heavily against reliability.

As to the *Dutton* factors, it is true that A.Z.'s statements were an assertion of past fact, and conceivably the defense could have revealed an inadequate knowledge basis through a more extensive cross examination, however, as stated supra, Washington courts have found that these factors do not weigh heavily in favor of reliability. *Leavitt*, 111 Wn.2d at 75.

The *Leavitt* Court, analyzing the facts of its case using the *Ryan/Dutton* framework, placed great weight on the fact that because the

hearsay statements were made shortly after the incident, and were consistent with statements made to others, the possibility of faulty recollection was remote. *Id.*

Critically distinguishable from *Leavitt*, in this case, is the fact that three to four years had passed, before A.Z. made any statements whatsoever, to anyone, about incidents that allegedly took place when she was four or five years old. These facts make it extremely likely that A.Z.'s recollection was faulty. That likelihood increases when the trial record is reviewed.

On cross examination, A.Z. could not recall, without prompting, the relatively recent events of talking to people in Kansas about the incident. RP 59, ll. 14-25. Also, on cross examination, A.Z. acknowledged telling authorities in Kansas that she did not feel anything during the alleged incidents, but later "remembered" after talking with Snohomish County authorities. RP 83, ll18-25, 84, ll. 1-13. When asked by defense how many people she had talked to about this incident, she replied, "Just my mom and dad." RP 82, ll9-10. On cross examination regarding the basis for her allegations, A.Z could not recall what she learned at the class that she claimed prompted her journal entry, nor could she recall what she told the Kansas authorities about what "sex" was. RP 90, ll.2-22. On cross examination

regarding her recollection of her memory surrounding the allegations, A.Z. testified that she didn't remember her living arrangements prior to living in "the duplex". RP 87, ll. 16-24. Yet, on re-direct, A.Z. remembered living "In a trailer nearby." RP 112, ll. 21-23. Finally, A.Z. admitted to not having a good memory. RP 97, ll. 19-20.

Likewise, the circumstances surrounding the making of the journal entry itself, are highly indicative of unreliability, given the lapse of time, the fact that A.Z. testified that she had attended a sexual education class in 3<sup>rd</sup> grade that, according to her testimony, did not go into any detail, yet prompted her to write the entry in her journal. Also inconsistent, is the fact that A.Z. crossed out the journal entry immediately after she wrote it, stating her reason for doing so as it was not proper and it was personal, even though there was no evidence that anybody else looked at her journal. Further, the next sentence in her journal, which she wrote at the same time as the accusatory statement, makes reference to something that A.Z. testified never happened i.e., talking to Hannah about Jesse. Yet, later in her testimony, in response to a question posed on cross examination as to what Hannah might know, A.Z. inexplicably stated that "Hannah wanted to know what would happen." RP 92, 21-25; 93, 1-2. It appears that Hannah could have shed some

light on the veracity of the child hearsay statement.

The above *Ryan/Dutton* factors weigh heavily against reliability for the above stated reasons. Accordingly, the child hearsay should not have been admitted at trial. The trial court's error in failing to hold the child hearsay hearing was not harmless. The defendant was clearly prejudiced by the trial court's error.

**4. Defendant was deprived of his Due Process right to a fair trial by the State's failure to notify defense of its intent to use child hearsay at trial.**

In *Leavitt*, the Supreme Court found defendant failed to show a violation of his due process rights by a failure to hold a child hearsay hearing when the declarant was present at trial and subject to cross examination. 111 Wn.2d at 72.

The State was required to notify defendant, and the court, of its intent to use child hearsay at trial. RCW 9A.44.120. The child hearsay statute is an exception to the rules of evidence. Child hearsay is generally inadmissible unless it meets the requirements of RCW 9A.44.120.

Distinguishable from *Leavitt*, in the present case, defense never received notice of the State's intent to use the child hearsay. The State failed to notify either defendant or the trial court of its intent to use the child

hearsay statement at trial, despite the fact that the State made the child hearsay statement the foundation of its case. The State was at a distinct advantage in this case, having centered its entire theory of the case on a piece of evidence that it did not notify the defense that it was planning on using at trial.

The State should not be able to take advantage of its failure to comply with the notice requirements of RCW 9A.44.120, surprise the defense with its use of the child hearsay as the center piece of its case against the defendant, and then expect the verdict to be affirmed on appeal because the defense failed to object to the surprise at trial. The State's failure to comply with the notification requirements of RCW 9A.44.120 deprived Jesse of his due process right to a fair trial.

Accordingly, Jesse respectfully requests that this Court reverse the convictions entered at the trial court level and remand for a new trial.

**B. Defense Counsel's Failure to Object to the Lack of a Child Hearsay Hearing Rises to the Level of Ineffective Assistance of Counsel.**

The test for ineffective assistance of counsel is whether (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *Strickland v.*

*Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

**1. Defense counsel's performance fell below an objective standard of reasonableness.**

**(a) Defense counsel failed to object to the lack of a child hearsay hearing.**

Failure to timely object to the admissibility of child hearsay waives any argument on appeal absent an issue of constitutional magnitude. *Leavitt*, 111 Wn.2d at 71.

This Court, in *Leavitt*, found defense counsel's failure to object to the lack of a child hearsay hearing satisfied the first prong of the ineffective assistance test, and was deficient performance. *State v. Leavitt*, 49 Wn.App. 348, 359, 743 P.2d 270 (1987). We cannot perceive a legitimate trial strategy in counsel's apparent decision to waive a reliability hearing. *Id.*

In the present case, even though the State blindsided defense with the child hearsay issue at trial, once defense counsel was on notice, he failed to object to the admission of the child hearsay and request a child hearsay hearing. The State discussed the content of the journal entry in opening statement. Defense counsel failed to object or request a child hearsay hearing. The State went over the journal entry again when A.Z. testified, having A.Z. read the statement out loud. Again, defense counsel did not object. During

A.Z.'s mother's testimony, the State moved to admit the child hearsay statement. Defense counsel did not object, stating, "It's been talked about so much." RP 159, ll. 1-4.

In failing to object to the introduction, repeated statements surrounding, and eventual request for admittance of the child hearsay statement into evidence, defense counsel's performance fell below an objective standard of reasonableness.

**(b) Defense counsel failed to object to the introduction of A.Z.'s statements to her mother.**

An objection must be made as soon as the basis of the objection becomes known and at a time when the trial judge may act to correct error. Leavitt, 49 Wn.App. at 357, (citations omitted).

At trial, Jacqueline Zink testified regarding the journal entry and A.Z.'s responses to her questions regarding the journal entry. RP 135, ll. 11-19, 25; 136, ll.1. That was hearsay and inadmissible.

Defense counsel failed to object to the State's use of this witness to introduce hearsay testimony, and therefore his performance fell below an objective standard of reasonableness.

**(c) Defense counsel failed to object to the introduction of A.Z.'s statements to Nurse Haner.**

At trial, Nurse Haner testified to A.Z.'s responses to Haner's questions in her pre-examination interview of A.Z. Haner testified that A.Z. told her that Jesse "did stuff to me", and that "he touched me". RP 180, ll. 3-4. Haner also testified that she drew figures, labeled one Jesse and the other A.Z., and A.Z. pointed to the groins on both figures in response to Haner's questions on where A.Z. was touched, and with what part of Jesse she was touched. RP 180, ll. 8-15. Haner further testified that A.Z. told her that "When it hurt, it hurt really bad". RP 180, l. 25; 181, l.1. And finally, Haner testified she asked A.Z. if it happened once or more than once, and A.Z. responded "More than once." RP 181, ll. 1-3. This was inadmissible hearsay.

For hearsay statements to be admissible under the medical treatment and diagnosis exception to the hearsay rules, declarant's apparent motive must be consistent with receiving treatment, and the medical provider must reasonably rely on the information for diagnosis or treatment. ER 803(a)(4), *State v. Moses*, 129 Wn.App. 718, 728-729, 119 P.3d 906 (2005).

In *Moses*, this Court found hearsay arising out of a medical examination was admissible under the medical treatment exception, particularly because the treating physician "had no role in the investigation of the assault and he was not working in conjunction with the police or

government officials to develop testimony for the prosecution.” *Id* at 730. Also, the *Moses* Court noted that the victim “had no reason to believe that her statements to [the treatment provider] would be used in a later trial.” *Id*.

Distinguishable from *Moses*, in this case, Nurse Haner had a key role in the investigation of the assault. The interview and examination took place around six years after the incident allegedly occurred. RP 138, l. 25; 139, ll. 1-2. Kansas police and the Snohomish County Sheriff’s Office had already launched a criminal investigation and had a child interview conducted of A.Z. in Kansas. RP 162, ll. 123-25; 163, ll. 1-9. The medical examination was conducted at the request of Snohomish County authorities. RP 155, 18-24. Nurse Haner, the examiner, administers a team of forensic nurses whose purpose is to assess claims of interpersonal violence. RP 165, ll. 14-21.

Based on the facts present surrounding the examination: the length of time after the alleged incidents, that the exam was scheduled by Snohomish County authorities in furtherance of their criminal investigation, and that it was scheduled with an examiner who headed an abuse assessing unit, the only reasonable conclusion is that the examination was for forensic purposes, to collect evidence for the prosecution of defendant.

No reasonable person, in A.Z.’s position, would believe that any

statements made during the interview/examination with Nurse Haner, would not be used in furtherance of prosecution.

There was no legal basis for the State's introduction of the hearsay evidence through Haner. Defense counsel should have objected. Defense counsel did not object and the hearsay statements from the examination came in to support the State's case and to the detriment of defendant. Accordingly, defense counsel's performance fell below an objective standard of reasonableness.

**2. Defendant was prejudiced by defense counsel's deficient performance.**

In order to demonstrate prejudice, to fulfill the second prong of the ineffective assistance of counsel claim, the defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *Leavitt*, 111 Wn.2d at 72.

A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case. *Id.* at 693

In *Leavitt*, the Supreme Court didn't conclude that counsel's deficient performance was ineffective because it affirmed this Court's ruling that the

child hearsay was reliable, thus, any error was harmless, and Leavitt could not show that there was a reasonable probability that the outcome would have been different. 111 Wn.2d at 72.

Distinguishable from *Leavitt*, the record in the present case shows that the child hearsay statement at issue here did not contain sufficient indicia of reliability pursuant to *Ryan* and *Dutton* and therefore the failure to hold the child hearsay hearing was not harmless error. Also distinguishable from *Leavitt*, the evidence presented at trial in the present case, outside of the child hearsay statement introduced by the State, was vague and uncorroborated. Haner's forensic examination produced no conclusive results. RP 206, ll. 21-25; 207, ll. 1-3. As shown above, the only other evidence the State had was, at best, inconsistent. Absent the child hearsay evidence, the State's case was considerably weaker. That is evident from the State's presentation of its case. As a result, if the child hearsay would have been found inadmissible, there is a reasonable probability that the outcome would have been different.

Accordingly, defendant was prejudiced by defense counsel's deficient performance, the verdicts should be reversed, and this case should be remanded for a new trial.

C. **Insufficient Evidence Existed for a Rational Trier of Fact to Find Beyond a Reasonable Doubt that Defendant Committed the Crimes Charged.**

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. *State v. Hayes*, 81 Wn.App. 425, 430, 914 P.2d 788 (1996) (citations omitted) Thus, “all *reasonable* inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citations omitted). (Emphasis added).

In the present case, the evidence provided by the alleged victim was insufficient for a rational trier of fact to find beyond a reasonable doubt that it supported the charged crimes, three counts of child molestation and one count of rape of a child.

1. **In the light most favorable to the State, there was specific testimony of two sexual contacts.**

In her testimony at trial, A.Z. gave specific testimony regarding two separate occasions where she alleged that defendant had sexual contact with her.

First, A.Z. alleged that Jesse had sex with her at the duplex. She alleged that he called her upstairs, told her to get on the bed, covered her head

with a blanket and pillow, told her to take her pants and panties off, and had sex with her. RP 63, ll. 16-25; 64-69; 70, ll. 1-18.

Second, A.Z. alleged that Jesse had sex with her at his mom's house. She claimed that she was playing with her cousin downstairs, that he called her upstairs, that he left the door open a crack, and that this time Jesse took her pants and panties off. Otherwise the incident was alleged to have occurred exactly as the duplex incident. RP 72, ll.3-25; 73-75; 76, ll. 1-8.

The State presented no specific evidence, other than unsupported allegations, that it occurred more than once at Jesse's mother's house. So, when the record is viewed in the light most favorable to the State, there is specific evidence of only one incident occurring at Jesse's mother's house and one incident at the duplex.

**2. In the light most favorable to the State, all reasonable inferences show that there was insufficient evidence of other sexual contacts.**

This is not a case of "generic" testimony as outlined in *Hayes*. 81 Wn.App. at 435-439. The facts of *Hayes* define "generic" testimony as that testimony given by alleged victims in cases involving serial molesters, where the alleged victim's allegations are that the acts occurred regularly or routinely. *Id.* at 435-436. In the present case, notwithstanding the fact that, at one point or another, A.Z. speculated wildly at the number of offenses before

being reminded by the State of her prior statements, this case was about, at most, a handful of alleged incidents. This was not a case where the alleged victim was claiming that it happened to her daily, weekly, or even regularly. Accordingly, each alleged incident must be supported with evidence sufficient for a reasonable juror to find that the State proved that each crime charged occurred beyond a reasonable doubt. That was not the case here.

Assuming, *arguendo*, that these other alleged incidents are deemed to be “generic” contacts, these contacts fail to meet the standard for sufficiency of evidence set forth in *Hayes*. The *Hayes* Court recognized the difficult competing issues facing both the accused and the accuser in cases involving allegations of multiple acts of sexual conduct with minors. 81 Wn.App. at 438. To strike a balance between a defendant’s due process rights and the inability of a young alleged victim to recall extensive details from numerous alleged incidents, the *Hayes* Court stated that, “at a minimum”, the following three-part test must be met:

- 1) the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed;
- 2) the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution; and

3) the alleged victim must be able to describe the general time period in which the acts occurred.

*Id.* at 438.

In the present case, in response to State's questioning regarding Jesse's sexual contacts with A.Z. at the duplex, A.Z. alleged, without any specifics, that Jesse did the same thing to her on numerous occasions at the duplex.

The only evidence provided by A.Z., describing any other separate and distinct act occurring at the duplex, was when she testified that the second time Jesse took off her pants and panties. RP 101, ll. 4-5. A.Z. could not describe the number of acts committed with any certainty. This lack of specificity, did not prevent A.Z. from speculating that she thought that it happened over ten times at the duplex. RP 71, ll. 3-9. Yet, when questioned by the State whether she could remember specifically any other time where something different happened, A.Z. stated she could not. RP 71, ll. 10-13. And, in the next sentence, A.Z. acknowledged that she had told the State previously that she was "pretty sure" it only happened three times and that she could not say that it happened more. *Id.*

In the present case, even accepting all reasonable inferences in the light most favorable to the State, A.Z. failed to provide sufficient evidence

regarding the generally alleged incidents to sustain convictions on those accusations. The evidence presented at trial, A.Z.'s blanket allegations, fails to meet two of the three prongs in the *Hayes* Court's three-part test: 1) A.Z. provided no description of what happened in those other alleged occurrences, other than to say, on the second occasion he took her pants and panties off; and 2) A.Z.'s testimony showed that she could not describe with any certainty the number of other alleged incidents that occurred.

For the foregoing reasons, defendant respectfully requests that this Court vacate two of the convictions because no rational trier of fact could find that the evidence adduced at trial supports, beyond a reasonable doubt, the charged crimes.

#### **IV. CONCLUSION**

The trial court erred in failing to hold a child hearsay hearing. The State was able to take advantage of the fact that, intentionally or not, it failed to comply with the notice requirement of the child hearsay statute, and did not put the trial court or defense counsel on notice of its intent to use child hearsay. The State understood the magnitude of the child hearsay in this case, making it the centerpiece of its argument. The trial court erred in failing to hold the child hearsay hearing once trial started and it became aware that

child hearsay was an issue in the case. The trial court's failure to hold the child hearsay hearing was not harmless error because the child hearsay was inherently unreliable, and should not have been admitted into evidence.

The State's failure to notify defense of its intent to use the child hearsay statement in this case was critical to the outcome of this case. The State should not be able to capitalize on its failure to comply with the child hearsay statute's notification requirements. Defendant's due process right to a fair trial was compromised by the acts and/or omissions of the State.

Defense counsel's performance was deficient because once he was on notice of the fact that the State intended to use the child hearsay statement, he failed to object to its admission and request a child hearsay hearing. Other hearsay evidence was also introduced at trial without objection from the defense. Defense counsel's performance prejudiced the defendant because, based on the other evidence presented at trial, there was a reasonable probability that, but for counsel's failure to object to the admission of the child hearsay, the outcome of the trial would have been different. If this Court finds that defense counsel's failure to timely object to the lack of a child hearsay hearing waived Jesse's child hearsay argument on appeal, then it is unquestionable that counsel was ineffective, because not only did he fail to

object to the admissibility of the unreliable evidence at trial, he failed to preserve the issue on appeal.

This case involved allegations for which there existed no supporting evidence, other than blanket statements by the alleged victim that it occurred. Insufficient evidence existed in this case for any rational trier of fact to find that the evidence supported a finding of guilt, beyond a reasonable doubt, on the charged crimes. The convictions based on insufficient evidence must be vacated.

For the foregoing reasons, defendant respectfully requests that this Court vacate the unsupported convictions for insufficient evidence and reverse and remand the remaining convictions, for a new trial.

Respectfully submitted this 7<sup>th</sup> day of August, 2009.

MAZZONE AND MARKWELL, LAWYERS



Michael Torgesen, WSBA# 34337



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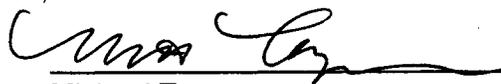
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,	)	No. 63506-9-1
	)	
Respondent,	)	DECLARATION OF SERVICE
	)	
	)	
ALDERMAN, JESSE	)	
Appellant.	)	
_____	)	

I, Michael Torgesen, am employed as an attorney in the law office of MAZZONE AND MARKWELL, LAWYERS. I hereby declare that I personally served the Original of Appellant's Brief to The Court of Appeals, Division One and a copy to Snohomish County Prosecuting Attorney's Office on August 7, 2009.

I declare under penalty of perjury and laws of the State of Washington that the above is true and correct.

Dated this August 7, 2009 in Everett, WA.

  
Michael Torgesen

ORIGINAL