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No. 67595-8-1

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

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STATE OF WASHINGTON, Respondent

v.

EDUARDO CAZADORES-VALDEZ  
AKA MARIO RUVALCABA, Appellant

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

The Appellant, Eduardo Cazadores, aka Mario Ruvalcaba, was convicted by jury of 3 counts of Rape of a Child in the First Degree, one count of Child Molestation in the first degree, one count of attempted child molestation in the first degree, and one count of Child Molestation in the 2<sup>nd</sup> degree. CP 127. Mr. Cazadores was tried in the King County Superior Court at the Regional Justice Center, the honorable Brian Gain presiding.

All counts alleged that Mr. Cazadores committed the sexual assaults against D.R. who was 9 years of age at the time of the trial. CP 105. Count 6 alleged that Mr. Cazadores committed the crime of Child Molestation against M.R., who was 12 and a half at the time and who was the older sister of D.R. *Id.*

On July 29, 2011, Mr. Cazadores was sentenced to 240 months in custody. CP 127. He is currently in custody with the Department of Corrections while appealing his conviction.

## II. ASSIGNMENT OF ERROR

**A. The Trial Judge Erred in Denying the Defendant's Motion for a New Trial after the Complaining Witnesses Recanted their Initial Accusations of Abuse.**

- B. The Trial Judge Erred in Admitting Child hearsay Evidence.**
- C. The Trial Judge Erred in Admitting “Statements of Fault” as part of and included within the Medical Diagnosis Testimony.**
- D. The Trial Court Erred in Allowing the Jury to Receive a DVD exhibit pursuant to the Recorded Recollection Hearsay Exception.**

### III. ISSUES PRESENTED

- a. Did the new discovered recantations of the complaining witnesses require a new trial ?
- b. Did the court record fail to support the trial judge’s ruling admitting the child hearsay evidence ?
- c. Did the medical diagnosis testimony improperly contain improper statements of fault ?
- d. Did the trial court err in allowing the jury to receive a DVD exhibit, being the DVD interview of a complaining witness, as Past Recorded Recollection ?

### IV. STATEMENT OF THE CASE

#### A. Statement of Procedural History

On December 12, 2008, Mr. Cazadores was initially charged in a three count information charging two counts of rape of a child in the first degree and one count of child molestation in the second degree. CP1. On May 5,

2011, the State amended the information to charge the defendant with a total of six counts as described above. CP 105.

On May 9, 2011, Judge Brian Gain presided over a child hearsay hearing which was conducted without any live testimony. RP 2-10, May 9, 2011. The hearing involved proffers from the State in addition to copies of transcripts of the victim interviews. *Id.* The State sought to admit only the hearsay statements of D.R. who was 9 years of age at the time of the trial. *Id.* The state sought to introduce her out of court statements through the following witnesses: Bonnie Paache, a retired school counselor; Yvonne Gonzalez, an ESL teacher; Carolyn Webster, a child interview specialist employed with the King County Prosecutor's office; and Andrea Robles, the mother of both D.R. and M.R. *Id.* After hearing arguments from both parties, pre-trial, the court allowed the State to introduce the child hearsay of D.R. via the above-mentioned witnesses over the defendant's objection. RP 25-28, May 9, 2011. Also important to note, the defense renewed its objection to the child hearsay ruling mid-trial after D.R. and M.R. testified, where they essentially recanted the allegations of abuse. RP 8, May 25, 2011.

Opening statements commenced on May 19, 2011, with closing arguments on May 25, 2011. On May 26, 2011, the jury found the defendant guilty on all six counts.

On July 20, 2011, the defense argued for a new trial based on the recantations of the two complaining witnesses, D.R. and M.R. The court denied the motion. RP 2, July 20, 2011.

On July 29, 2011, the defendant was sentenced to 240 months in prison. CP 127. Finally, the defense then renewed the motion for a new trial and argued that additional newly discovered recantations came to light from the brother of the two alleged victims. CP 135. On August 16, 2011, the court denied the motion. The defendant now appeals his conviction.

B. Statement of Facts

1) The Sexual Assault Allegations

Eduardo Cazadores was the stepfather to D.R. and M.R. and was married to Andrea Robles during the alleged incidents of abuse. RP 11-14, May 23, 2011. The family was one of 6 kids living at home with the youngest child born in 2008 and the eldest child born in 1992. *Id.* Of the six children, the defendant and Andrea Robles share three children in common. *Id.* The eldest child in the family is Roberto Ruiz who is now 19 years of age and was the only sibling to testify at the trial. RP at 11-14, May 23, 2011.

On December 10, 2008, D.R. was attending Madrona elementary school, which is part of the Highline school district. RP 24-26, May 19, 2011. Gretta Wilson was D.R.'s fourth grade teacher and at the time Bonnie Paache

was the counselor for the school. *Id.* On this date, Bonnie Paache had a meeting with Andrea Robles because of a “problem at home.” *Id.*, at 28. Also present at this meeting was Yvonne Gonzalez, who was an ESL teacher who translated from Spanish into English for Andrea Robles.

Bonnie Paache was called to testify about this meeting that she had with D.R. and Andrea Robles. Ms. Paache testified about what D.R. told her during this meeting concerning the “problem at home.” RP 30, May 19, 2011. Ms. Paache testified that that Mario, aka Eduardo Cazadores, had taken his privates out and made her touch it. *Id.*, at 31. She also said that “Mario put his hands down my pants.” *Id.*, at 36. Ms. Paache testified that she noticed that D.R. seemed anxious and upset. *Id.* So Bonnie Paache told Andrea Robles that she was going to call the police. *Id.* at 34. The police arrived at around 9:20 am that same day on December 10, 2008. RP 36, May 19, 2011.

Yvonne Gonzales was also present during this December 10, 2008, meeting where she essentially served as an interpreter for Andrea Robles. Yvonne Gonzales testified about various statements that D.R. made during the interview. Specifically, D.R. said her stepfather exposed himself. RP 53, May 19, 2011. D.R. also said that she told her stepfather that “you don’t do that to little girls.” *Id.* Ms. Gonzales also testified that she observed Andrea

Robles crying during the interview and that D.R. appeared to be “embarrassed” when she gave her statement. *Id.*, at 54, 59.

Carolyn Webster is a child interview specialist at the King County Prosecutor’s office. RP 84, May 19, 2011. She conducted an interview with D.R. on December 11, 2008, that was both audio recorded and video recorded. CP 118A, Exhibits 10 and 11; RP 110-112, May 19, 2011. As part of the child hearsay ruling, the trial judge permitted the jury to view the video interview and to follow along with the transcript of the interview, marked as exhibits 10 and 11 respectively. *Id.*, at 112. The Court also allowed the jury to receive Exhibit 10, the DVD interview of D.R. CP 118A.

The State called Andrea Robles to testify at trial. Ms. Robles first testified about her family and how many children she has, including the children she has with the defendant. RP 11-14, May 23, 2011. But when she was questioned about the suspected abuse as well as her conversations with the detectives, she testified that she did not remember what they had talked about. *Id.*, at 29-30. In fact, Andrea Robles testified that her two daughters, D.R. and M.R. never told her about being abused and never told her about the defendant doing anything inappropriate. *Id.*, at 29-30.

Following the mother’s testimony, the State called Dr. Naomi Sugar to the stand. Dr. Sugar conducted the sexual assault examination on both

victims. She testified that both D.R. and M.R. were examined on December 29, 2008. RP 39,48, May 23, 2011. Prior to her testimony, the defense moved in limine to exclude any testimony from Dr. Sugar's medical diagnosis attributing fault to the defendant. The trial judge denied the motion and allowed the statements into evidence. *Id.*, at 43.

As part of Dr. Sugar's examination of the children, she talked to Andrea Robles about the alleged assault. Specifically, Dr. Sugar testified that Andrea said that D.R. said that "Mario was showing his private to her." RP 50-51, May 23, 2011. Andrea Robles also told Dr. Sugar that M.R. also told her that "Mario" was touching her inappropriately as well. *Id.* Because the court overruled the defense's objection to testimony about statements of fault, the court permitted Dr. Sugar to identify the alleged abuser as part of her "medical diagnosis" testimony.

Following the interview with Andrea Robles, Dr. Sugar interviewed M.R. as part of the sexual assault examination. RP 52, May 23, 2011. Dr. Sugar once again provided "medical diagnosis" testimony that identified the defendant as the alleged abuser. Specifically, Dr. Sugar testified that M.R. mentioned the following during the examination: That Mario touched her when she was 12; That Mario "grabbed my breasts;" That Mario touched her

“front part,” And that “sometimes he would grab me and try to kiss me on the mouth.” *Id.*, at 53-54.

Right after the examination of M.R., Dr. Sugar examined D.R., who was nine years of age at the time of the examination. Similar to her testimony about M.R.’s examination, Dr. Sugar’s medical diagnosis testimony specifically identified the defendant as the one at fault for the abuse. Dr. Sugar testified that D.R. mentioned the following during the examination: That “you already know my dad is in jail;” That “he did bad things to me;” That “he was sexually harassing me;” That “he put his nuts in my ass;” That “he also used to tell me not to tell because I’m going to jail.” RP 60-62, May 23, 2011.

Following their interviews, both girls were physically examined by Dr. Sugar and the physical exam results were normal. *Id.*, at 67. Dr. Sugar explained that the normal examination meant that there were no signs of trauma and that you cannot conclude if there was in fact abuse. *Id.*, at 74.

## 2) Testimony from the Alleged Victims

The next witness to testify was D.R. who was in 6<sup>th</sup> grade and 12 years old at the time of her testimony. D.R. testified that Mario was her stepfather but that she did not remember when she first met him. RP 91-92, May 23, 2011. The prosecutor asked her if Mario had touched her inappropriately and

D.R. answered that she did not remember Mario touching her in ways that she did not like. *Id.* She also testified that she did not remember telling anyone about Mario touching her inappropriately. *Id.*, at 92.

The prosecutor then asked D.R. about her meeting with Bonnie Paache. D.R. responded that she did not remember talking to anyone about Mario. *Id.*, at 93. When asked about whether she remembers saying that Mario put his “peanut” in her “ass,” D.R. answered that she was not sure if she made all that up and that she did not remember any of this. *Id.*, at 97-98. Trial concluded for the day in the midst of her testimony, and D.R. continued with her testimony the following day on May 24, 2011.

D.R. returned for court on May 24, 2011, to finish with her testimony. When asked about specific alleged details of abuse, D.R. testified that she could not remember any of those things happening to her. RP 6-7, May 24, 2011. In sum, the sworn testimony of D.R. did not identify any instance of abuse from the defendant.

Right after the testimony of D.R., the eldest sister M.R. took the stand and testified. At the time of trial M.R. was seventeen years old. RP 15, May 24, 2011. The alleged victim of count six testified that she did not remember the defendant touching her breasts and that she did not remember telling anyone that he did anything like that. *Id.*, at 25. She also testified that she is

not sure if she would have lied to Dr. Sugar. *Id.*, at 26. The essence of M.R.'s testimony was that she did not remember anything. This, for example, was made clear early on in her testimony when she flat out told the jury, "I don't remember anything." *Id.*, at 25.

Roberto Ruiz testified next and was 19 years of age at the time of trial. RP 43, May 24, 2011. Roberto Ruiz testified that when he was either 15 or 16 years old, he walked into the living room and saw both D.R. and Mario in the living room. RP 49, May 24, 2011. Roberto initially testified that he saw D.R. in her underwear wearing a shirt and that he also saw Mario's penis hanging out of his pants. *Id.*, at 50. He testified that he did not see Mario doing anything to his sister. *Id.* As the direct examination progressed, Roberto tried to clarify that in reality he was not sure if he saw Mario's penis. *Id.*, at 52, 67. Roberto's testimony concluded where he told the prosecutor during his re-direct examination that he might have imagined this entire event. *Id.*, at 68.

### 3) The Court's Evidentiary Rulings

For this appeal, there are three evidentiary rulings that require review. First, the trial judge's ruling allowing the admission of Child Hearsay evidence involving D.R.'s allegations of abuse. Included within this analysis is the objection to allowing D.R.'s video interview into evidence as past

recorded recollection under Evidence Rule 803(a)(5). The second evidentiary ruling requiring review is the decision to allow Dr. Naomi Sugar to testify about the statements attributing fault as part of Dr. Sugar's medical diagnosis testimony. The third is the court's decision to allow the jury to receive Exhibit 19, the DVD interview of M.R., as Past Recorded Recollection.

a) *Child Hearsay*

Over the defendant's objection, the trial judge permitted the prosecutor to introduce the audio and video interview of D.R. RP 110, May 19, 2011. On May 9, 2011, the trial judge presided over a pre-trial Child Hearsay hearing. Without any live testimony, the State offered transcripts of the victim's interview together with a proffer of expected testimony to support its argument that the child hearsay evidence should be admitted. RP 2-10, May 9, 2011. Specifically, testimony from Bonnie Paache, Yvonne Rodriguez, Carolyn Webster together with Ms. Webster's audio and video recorded interview of D.R. *Id.* The audio and video recorded interview of M.R. was not part of the Child Hearsay analysis because the interview occurred when M.R. was 12 and a half years of age. The State sought to introduce M.R.'s interview under the Recorded Recollection hearsay exception, which was granted by the trial court.

As part of its ruling, the trial judge cited to the nine factors outlined in State v. Ryan, 103 Wn. 2d 165 (1984), in deciding that D.R.'s out of court statements should be admitted under RCW 9A.44.120. The defense objected to the admission of the statements arguing that the statements of D.R. were not reliable and that she had a motive to lie. RP 10, 13, 25, and 21, May 9, 2011.

The trial judge went over each of the nine Ryan factors in its oral ruling in deciding that the "indicia of reliability" requirement of the Child Hearsay statute was met. Id., at 25-28. However, the trial judge failed to apply any sort of Evidence Rule 403 balancing test to determine if the prejudicial impact of the statements outweighed its probative value.

At the time the court made its oral ruling admitting D.R.'s statements under the Child Hearsay statute, the judge was not clear about whether the court needed to hear arguments on "corroboration" in the event the D.R. suddenly became "unavailable." RP 29, May 9, 2011. The prosecutor argued that in the event D.R. appeared in court and testified that she did not remember anything, then she should be considered as being an "unavailable" witness. Id., at 29. Although the trial judge found sufficient indicia of reliability of the statements, the court reserved ruling on whether it would require the state to prove sufficient corroboration of the statement due to

witness unavailability. *Id.*, at 33-34. This is because the trial judge wanted to wait and see what would happen with the witness when she testified. *Id.*

With respect to the interview of M.R., the court held a hearing on its admissibility mid-way through trial but before M.R. testified. RP 71, May 24, 2011. The State, over the defense's objection, moved for the admission of the M.R. interview as past Recorded Recollection. CP 118A, Exhibit 19; RP 71, 93, May 24, 2011. As part of the prosecutor's arguments, the prosecutor put on the record for the first time that D.R.'s interview should also be alternatively admitted as Recorded Recollection, notwithstanding that the exhibit, being exhibit 10, had already been previously admitted as Child Hearsay. *Id.* at 71. The defense objected to both recordings being admitted into evidence and argued that both recordings lacked a sufficient "indicia of reliability." *Id.*, at 79.

The trial judge had both recordings available for review for purposes of determining if the recordings were sufficiently reliable to be admitted as past recorded recollection. Although the interview of D.R. with Carolyn Webster had previously been admitted as Child Hearsay, the trial judge made an additional ruling that in the alternative Exhibit 10 would be admitted as recorded recollection. RP 82, May 24, 2011. The trial judge made this ruling notwithstanding the fact that nowhere in D.R.'s interview does Ms. Webster

confirm with D.R. that everything stated during the interview was true and correct. CP118A, Exhibits 10 and 11. Instead, after Ms. Webster was done asking all of her questions, she asked D.R. if there was anything else she had to say. D.R. answered “no” and Ms. Webster finally indicated that she was “gonna turn the video cameras off.” There was no confirmation at the end of the interview that everything stated in the recorded interview was true and correct.

The recorded interview of M.R. was different than the interview of D.R. in that at the end of M.R.’s interview, the deputy prosecutor asked M.R. if everything was true and correct at the conclusion of the interview. CP 118A, Exhibits 19 and 20. M.R. responded in the affirmative. Furthermore, M.R. acknowledged during her live in court testimony that at the end of her interview with Detective Perez, she stated that everything was true. RP 28, May 24, 2011. The prosecutor moved for the admission of exhibit 19 over the defendant’s objection. The DVD exhibit was not just published to the jury, but it was also received by the jury for their deliberations.

The defense re-iterated its objection to the admission of the interviews as recorded recollection and incorporated the arguments presented pre-trial opposing the admission of D.R.’s child hearsay statements. RP 79, May 24, 2011. The Court ruled that D.R.’s statements were alternatively admissible as

recorded recollection. *Id.*, at 82. The Court similarly admitted M.R.’s video interview, over the defendant’s objection, as recorded recollection “on the same basis” without identifying on the record the “indicia of reliability” that is required to meet the foundational requirements of Past Recorded Recollection. *Id.* at 82-83, 93.

On May 25, 2011, and at the conclusion of D.R.’s testimony, the defense renewed its objection to the trial court’s ruling allowing the child hearsay evidence of D.R. The defense specifically re-established the objection to the court’s ruling allowing D.R.’s recorded interview into evidence. RP 8, May 25, 2011, CP 118A Exhibit 10 with Exhibit 11 as the corresponding transcript. The defense argued that because the court earlier found sufficient indicia of reliability due to the expected testimony of Roberto Ruiz, now that Roberto Ruiz was equivocal about whether he saw any abuse, the record became clear that the child hearsay was unreliable. *Id.*, at 8-9.

The trial court denied the defense’s request to withdraw exhibit 10 notwithstanding the sworn testimony of Roberto Ruiz. The court made the following ruling:

First of all, I think that [D.R.] was unavailable based on her claimed lack of memory. However, I am satisfied that there is sufficient corroboration for admission of the DVD based on the testimony that has been allowed on other bases: the testimony of

Roberto, the testimony of Dr. Sugar, and the fact that I have allowed it also in as past recollection recorded. So I am satisfied there is sufficient corroboration. Even if there is not, it is admissible on the other grounds.

RP 12-13, May 25, 2011.

The prosecutor then asked the court for clarification about whether the DVD recording, exhibit 10, was also admissible as Child Hearsay, in addition to being admissible as past recorded recollection. The court answered in the affirmative. RP 13, May 25, 2011

b) *Statements of Fault*

Before trial, the defense moved in limine to exclude any statements attributing fault that would be elicited during Dr. Sugar's medical diagnosis testimony. RP 42-43, May 9, 2011. Specifically, the defense would be objecting to testimony from Dr. Sugar that attributed fault to the defendant as the person who committed the assault or who caused D.R. and M.R. to obtain a sexual assault examination. The court denied the defense request and allowed such statements to come in as part of the medical diagnosis testimony under ER 803(a)(4). *Id.* As detailed above, Dr. Sugar was then permitted to testify at trial about statements from the victims identifying the defendant as the abuser.

c) *Admission of Exhibit 19 as Recorded Recollection*

The court record established that M.R. was endorsed as a State's Witness and was called to testify as part of the State's case in chief. When M.R. testified, she essentially testified that she had no recollection of abuse. The prosecutor then moved for the admission of Exhibit 19 under the past-recorded recollection exception to the hearsay rule. The trial judge granted the motion and permitted the jury to view the DVD. However, not in accordance with the rule, the trial judge allowed the jury to receive the DVD exhibit to take back with the other admitted evidence during their deliberations.

The trial judge permitted the same with Exhibit 10, the DVD of the D.R. interview. However, the judge allowed this exhibit to be received by the jury as admitted child hearsay evidence, in addition to it being past recorded recollection.

#### 4) *Motion for New Trial*

On June 17, 2011, the two alleged victims came into the defense attorney's office and claimed that nothing happened and that there never was any abuse. CP 139. Specifically, both D.R. and M.R. stated that the defendant had not sexually abused them. CP 139 at 2. Additionally, both D.R. and M.R. explained why they did not testify to the truth at this trial. *Id.*, at 3. For example, D.R. stated the following: "I felt really bad . . . what he did

I just make it up.” CP 139, D.R. transcript at p. 6. Apparently, there had been episodes of domestic violence between the defendant and Andrea Robles, so M.R. stated the following to explain why she was recanting her initial allegations: “I didn’t really like Mario because he started to be mean not only to my mom but to all of us.” CP 139, M.R. transcript at 2.

On July 20, 2011, the court heard arguments on the defense motion for a new trial based on the recantations of both D.R. and M.R. After hearing arguments from both parties, the court denied the motion for a new trial. RP 19, July 20, 2011. The court reasoned that the recantations were not newly discovered evidence and that the recantations would not have changed the outcome of the trial. *Id.*, at 19-20. CP 123.

On August 8, 2011, the defense filed a renewed motion for a new trial based on the newly discovered recantation of Roberto Ruiz. CP 135. This motion was based on an August 5, 2011, interview with Roberto Ruiz. In this post-conviction interview, Roberto stated that his trial testimony was false in that he never saw any inappropriate contact between the defendant and D.R. CP 135, at p.2. Roberto also confirmed that he did not see the defendant’s penis. *Id.* Roberto explained that he gave false testimony at trial because he had been smoking marijuana and also because he did not like the way the defendant had been physically abusing his mother. *Id.*

On August 19, 2011, the court heard oral arguments on the defendant's renewed motion for a new trial. RP 19-22, August 19, 2011. At this hearing, the defense argued that the new information from Roberto Ruiz would have materially impacted the trial because it was the only testimony that arguably corroborated the Child Hearsay of D.R. and the hearsay of M.R. as presented via the DVD interview. *Id.* At this hearing, the defense asked for an evidentiary hearing so that the court could take sworn testimony from the recanting witnesses. *Id.* at 22-23. The defense also put on the record that if the court is going to deny the motion because it was not brought in a timely manner then if there is any merit to the newly discovered evidence, then defense counsel should be deemed ineffective.

The Court denied the renewed motion noting that the time had passed to bring this motion, although the court did acknowledge that defense counsel had been working diligently to raise all the recantation issues in a timely manner. RP 29, August 19, 2011. The court alternatively denied the defense's motion for a new trial because the trial judge doubted the credibility of the recantation. *Id.* The court made this credibility determination without conducting an evidentiary hearing and without any explanation. *Id.*, CP 138.

## V. ARGUMENT

- A. **The Trial Judge erred in denying the defendant's motion for a new trial after the complaining witnesses recanted their initial accusations of abuse. The recantations would have a material impact on the outcome of the trial because they would exculpate the defendant and would also prohibit the Child Hearsay evidence from being admissible.**

The defense counsel for Eduardo Cazadores filed a motion for a new trial pursuant to Criminal Rules 7.4, 7.5 and 7.8 following the jury's verdict of guilty on all counts. As articulated above, the motion was based on the newly discovered recantations of D.R., M.R., and Roberto Ruiz. Without hearing any testimony, the trial judge denied the motion. Accordingly, Mr. Cazadores appeals.

Appellate review of findings of fact is limited to determining whether the findings are supported by substantial evidence, and, if so, whether the findings support the conclusions of law and judgment. *State v. Macon*, 128 Wn. 2d 784, 799 (1996). Issues of law are reviewed *de novo*. *Id.* A trial court's determination that the recantation testimony was not reliable will be reviewed for abuse of discretion. *Id.*, at 801-802.

To be successful in getting a new trial following conviction, the defense must demonstrate that the new evidence 1) will probably change the result of the trial; 2) was discovered since trial; 3) could not have been

discovered before trial by the exercise of due diligence; 4) is material; and 5) is not merely cumulative or impeaching. *State v. Macon*, 128 Wn. 2d at 800.

The *Macon* Court recognized that a number of cases required a new trial when the conviction rests solely on the testimony of the recanting witness (or recanting witnesses). See *State v. York*, 41 Wn. App. 538, 543 (1985). See also, *State v. Landon*, 69 Wn. App. 83, 90 (1993). The Court also recognized other divisions holding that when there is independent corroboration supporting the prior testimony of the recanting witness, the trial court has discretion to grant or deny the new trial. See *State v. Rhinehart*, 70 Wn. 2d 649, 652 (1967) and *State v. Shaffer*, 72 Wn. 2d 630 (1967). Nevertheless, the “corroborating evidence” supporting the prior testimony “must be sufficient in itself to justify a conviction and penal sentence.” *State v. Macon*, 128 Wn. 2d at 800. Accordingly, to properly deny a motion for a new trial, the trial court must first make a factual determination that the recantation is not reliable because of specific independent evidence corroborating the original accusations.

In the instant case, the recantations of D.R., M.R. and Roberto Ruiz combined meet all 5 requirements spelled out in *Macon* that would require a new trial. Each of the three witnesses corroborated the new information that Eduardo Casadores did not abuse anyone and that the initial accusations were

false and misleading. More important, each of these witnesses would be prepared to testify about the new information under oath where as their initial accusations that they made to the police and to investigators were not made under oath. Given that their in-court testimony did not affirmatively confirm abuse, the newly discovered recantations must be viewed as reliable for the following five reasons.

First, the recantations would most certainly change the result of the trial. This is because there was no other evidence corroborating abuse. There was no physical evidence corroborating abuse. The medical examination conducted on both D.R. and M.R. resulted in normal findings. Roberto Ruiz confirmed that he lied about seeing anything inappropriate because he was mad at the defendant for being physically abusive with Andrea Robles. As such, there can be no credible argument that Roberto Ruiz corroborated the original claims of abuse. And Finally, for these same reasons, this new recantation evidence most certainly would have excluded the admission of child hearsay evidence, and the DVD interviews of D.R. and M.R.

Second, the new evidence was discovered after trial. Initially, before trial, D.R. and M.R. claimed to investigators that the defendant sexually abused them. Roberto Ruiz similarly told investigators that one time he walked into the living room of their home and saw D.R. in her underwear and

the defendant sitting in a chair with his penis hanging out of his pants. At trial, and under oath, D.R. and M.R. did not confirm that any abuse occurred. Instead they testified that they did not remember anything bad happening to them. Roberto's testimony at trial was similar in that he testified that it was possible he imagined the incident. Post conviction, these three witnesses were prepared to testify under oath that they each affirmatively lied about the initial accusations because they were all mad at the defendant for being physically abusive. Accordingly, the recantation testimony must be considered "newly discovered evidence." *State v. Macon*, 128 Wn.2d at 799-800.

Third, this new information could not have been discovered before trial by the exercise of due diligence. If it were the case that the recantations could have been discovered before trial, then the record would demonstrate these recantations during the live testimony of these three witnesses. We expect the State to argue that these three witnesses "recanted" when they each testified that they had no recollection of sexual abuse. Our response is that lack of recollection cannot be equated with an unequivocal denial that any abuse occurred.

Fourth, the new information is material to the defense. There should be no controversy that new testimony confirming that the initial accusations were false is material to the defense. At a new trial, we would therefore

expect the three witnesses to testify that no sexual abuse occurred. With no corroboration of abuse, we see no sufficient evidence to support a conviction. The recantation testimony is therefore clearly material to the defense.

Fifth, the new recantations are neither cumulative nor impeaching. The new testimony will explain why initial claims of abuse were made to the police. The new testimony will explain why each of the three witnesses was reluctant at trial to testify that no abuse ever occurred. And finally the new testimony will unequivocally confirm that the defendant never touched the girls inappropriately. Accordingly, the new testimony is neither cumulative nor impeaching.

The record is clear that no other evidence can corroborate the initial claims of abuse. There was no physical evidence confirming abuse. The only witness at trial to provide sworn testimony about possibly witnessing suspected abuse is now prepared to testify under oath that he without a doubt did not see any abuse and that his initial claims were actually the result of anger toward the defendant for being physically abusive. For these reasons, Mr. Casadores should have a new trial.

**B. The Trial Judge Erred in admitting Child Hearsay evidence. The record failed to support a sufficient indicia of reliability. The trial judge erroneously found D.R. to be unavailable. And the trial court failed to conduct an evidence rule 403 balancing test. The error cannot be considered harmless.**

The admissibility of a child's statements is governed by RCW 9A.44.120. In our case, only the statements of D.R. were subject to this statute because she was under the age of 10 at the time the statements were made. As described in Section IV above, the trial judge admitted the hearsay statements of D.R. on two grounds. First, the court found the statements to be sufficiently reliable. And second, the court found that the witness was unavailable and that there was sufficient corroborative evidence of the alleged act. Finally, The trial judge never conducted an evidence rule 403 balancing test. This error cannot be considered harmless.

1) *Error in finding adequate indicia of reliability*

Adequate indicia of reliability "must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act." *State v. Ryan*, 103 Wn. 2d 165, 174 (1984). The Court noted that the "circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not

include those that may be added by using hindsight.” *Id.* The *Ryan* opinion then outlined nine factors that the trial court should consider in making its reliability determination. *Id.*, at 175-176. The nine factors that the court should consider are 1) whether there is a motive to lie; 2) the general character of the child; 3) whether more than one person heard the statement; 4) whether the statements were made spontaneously; 5) the timing of the declaration; 6) whether the statements contain express assertions of past fact; 7) whether cross examination could not show the declarant’s lack of knowledge; 8) the possibility of the declarant’s faulty recollection is remote; and 9) the circumstances surrounding the statement. *Id.*

In the instant case, the trial judge went over each of the nine factors outlined in *Ryan* making a finding that all factors had been sufficiently satisfied. The defense’s objection had mainly to do with challenging reliability on the bases that D.R. indeed had a motive to lie and that the circumstances surrounding the statement are such that there is reason to suppose that D.R. made material misrepresentations about the defendant’s conduct. *See RP 13, 21, and 25, May 9, 2011.*

The record before this court establishes that the State’s three material witness each admitted to providing false and misleading information to law enforcement. They each represented that their motive to lie was

predicated on the defendant's physical abuse of their mother, Andrea Robles. The totality of their recantations demonstrate that each witness had a motive to lie, which quite frankly should have been apparent to the trial judge when pre-trial representations were made that the witnesses were likely going to testify that they did not remember anything about the alleged sexual abuse. Given that the trial judge is the arbiter of evidence, the trial judge certainly had the power to conduct an evidentiary hearing, thereby compelling D.R., M.R. and Roberto to testify outside the presence of the jury for the purpose of probing their lack of recollection and subsequent recantation. Overall, the record before This Court clearly establishes that D.R., M.R., and Roberto Ruiz each had a motive to lie about the alleged sexual abuse when being interviewed by law enforcement.

2) *Error in finding D.R. unavailable*

As part of the child hearsay ruling, the trial judge admitted into evidence the DVD video interview of D.R. with Carolyn Webster over defense objection. CP 118A, *Exhibit 10 (DVD transcript is Exhibit 11)*. The court stated in its ruling that D.R. was unavailable "based on her claimed lack of memory." RP 12-13, May 25, 2011. The trial judge found D.R. to be unavailable notwithstanding the fact that D.R. testified at trial and that there was never any finding that D.R. was incompetent.

An “available” witness is one who can be confronted and cross-examined. *State v. McKinney*, 50 Wn. App. 56, 63 (1987). The fact that D.R. purportedly lacked memory of the alleged incident does not render the witness unavailable. This is because the witness was present in open court to testify and subject to cross examination. *Id.* at 64. Furthermore, there was no finding that D.R. was either incompetent to testify as a witness or was incompetent at the time the statements were made to Carolyn Webster. Accordingly, D.R.’s claimed lack of memory does not go to her availability, but instead weighs in on her credibility. It was therefore error for the trial judge to make a finding that D.R. was unavailable.

3) *Error in failing to conduct an ER 403 balancing test*

The trial court ruled that D.R.’s child hearsay statements were admissible after finding that the statements were sufficiently reliable. As described above, the trial judge went through the nine *Ryan* factors to support the conclusion that there were sufficient indicia of reliability. Furthermore, the trial judge made a finding that based on the witness’s memory lapses, the witness should be deemed unavailable. With that being the case, as described in Section IV, the court found that there was sufficient corroboration of the initial accusations.

However, the trial court never conducted an Evidence Rule 403 balancing test. Though evidence may be admissible under the child hearsay statute, the inquiry does not stop there. *State v. Bedker*, 74 Wn. App. 87, 94 (1994). These statements, like any other evidence, are subject to analysis under ER 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

*Id.*

The trial judge in our case admitted the child hearsay of D.R. without conducting an ER 403 balancing test. As such, the trial court erred in admitting the child hearsay evidence.

4) *Admission of the Child Hearsay evidence is not harmless*

The admission of the child hearsay is not harmless for several reasons. First, given D.R.'s live testimony stating that she does not recall any abuse, the only evidence to establish jurisdiction would be the child hearsay evidence. Second, given D.R.'s live testimony, the only evidence to establish separate and distinct acts would be the child hearsay evidence. It was only when the jury viewed the DVD interview that they were presented with any information about where the alleged abuse occurred, for how long, and how

many times it happened. Without that DVD evidence, there would be insufficient evidence to establish jurisdiction as well as separate and distinct acts.

Finally, we expect the State to point out that the trial judge also admitted the DVD interview into evidence under ER 803(a)(5), the recorded recollection hearsay exception. Two key foundational requirements for ER 803(a)(5) are that the record was made or adopted by the witness when the matter was fresh in the witness's memory and that the record reflects the witness's prior knowledge accurately. *State v. Derouin*, 116 Wn. App. 38, 43 (2003).

In the instant case, the DVD interview of D. R. is silent on establishing that D.R. adopted the statement as being true and correct. It is silent on having D.R. affirm or deny if everything stated in the statement is true and correct. There is simply no indication from the trial record or from her interview that everything stated therein was true and correct. We submit that without this confirmation, the foundational requirements of recorded recollection cannot be met. Therefore, we assert that the trial court's ruling admitting the DVD interview in under ER 803(a)(5) as an alternative to the admission as child hearsay cannot be a basis to affirm an erroneous child hearsay ruling under the protection of the harmless error umbrella.

**C. The Court Erred in Admitting “Statements of Fault” as part of and included within the Medical Diagnosis testimony of Dr. Naomi Sugar.**

Dr. Naomi Sugar conducted a sexual assault examination on both D.R. and M.R. requiring Dr. Sugar to question both girls about why they needed to be examined in addition to conducting a physical examination of both girls. As described in Section IV above, Dr. Sugar’s medical diagnosis testimony, over defense objection, included statements identifying “Mario” as being the one a fault for the alleged sexual assaults.

Evidence Rule 803(a)(4) allows into evidence hearsay statements that are “reasonably pertinent to diagnosis or treatment.” As such, the rule allows statements regarding causation of injury. *State v. Redmond*, 150 Wn. 2d 489, 496 (2003). The rule, however, generally does not allow statements attributing fault. *Id.*, at 496-497. For example, the statement “the victim said she was hit on the legs with a bat” would be admissible, but “the victim said her husband hit her in the face” would not be admissible. *Id.*, at 497.

In the instant case, Dr. Sugar’s medical diagnosis testimony exceeded the scope of the hearsay exception. She testified to specifics about who exactly caused the sexual assault, as relayed to her from both D.R. and M.R. during the medical history interview. Dr. Sugar’s testimony, over the defendant’s objection, identified “Mario” and “my dad” as the person at fault

for the assault as part of her medical diagnosis testimony. Dr. Sugar certainly could have testified that the girls told her during the exam that “they were touched” on or in their “private parts” and that there was concern of actual penetration. But identifying “Mario” as the person at fault served no medical diagnosis purpose and accordingly was not “reasonably pertinent to diagnosis or treatment.” Allowing Dr. Sugar to identify the defendant as the person at fault is error.

The error cannot be considered harmless. There was no physical evidence corroborating the allegations of sexual abuse. In fact, Dr. Sugar testified that the physical exam appeared to be quite normal. At trial, the two complaining witnesses testified that they did not recall any abuse.

Furthermore, Roberto Ruiz was equivocal about what exactly he saw. And even if there is clear evidence that he saw the defendant’s penis, Roberto Ruiz only testified about one alleged incident, whereas Dr. Sugar’s medical diagnosis testimony provided the jury details about several alleged incidents. In addition, Dr. Sugar’s medical diagnosis testimony provided details about the defendant assaulting more than one victim. Therefore, Dr. Sugar’s testimony that included “statements of fault” cannot be considered harmless.

**D. The Trial Court Erred in Allowing the Jury to Receive a DVD exhibit pursuant to the Recorded Recollection Hearsay Exception.**

The “recorded recollection” exception to the hearsay rule applies even if the declarant is available as a witness. ER 803(a). The recorded recollection exception permits the proponent to introduce a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection. ER 803(a)(5). To meet the foundational requirements, the proponent must demonstrate that the recording was made or adopted by the witness when the matter was fresh in the witness’s memory. *Id.* The rule goes on to state that if admitted, “the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” *Id.*

In our case, the prosecutor sought to introduce the recorded interview of its own witness. Therefore, the moving party cannot be considered an adverse party. The DVD exhibit was published to the jury where the jury could also follow along with a transcript of the interview. Although the transcript of the DVD interview, exhibit 11, did not go to the jury, the DVD was admitted and received by the jury contrary to the rule’s requirement that exhibits admitted under ER 803(a)(5) not be received by the jury unless offered by an adverse party.

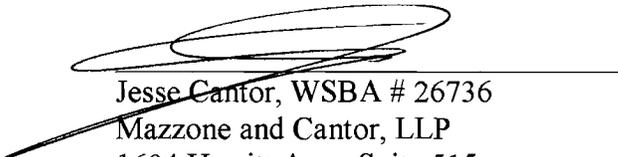
The error cannot be considered harmless for the same reasons articulated above about why the DVD interview of D.R. should not have been

admitted into evidence. The recorded interview of M.R., is the only exhibit that would arguably establish jurisdiction to support a conviction for Count 6. Since there was no other hearsay exception that would permit the exhibit to be received by the jury, the court's ruling to admit and have the jury receive the exhibit was error. Accordingly the conviction for Count 6 must be reversed.

#### VI. CONCLUSION

For the reasons stated in this opening brief, and as may further appear on the record, the Appellant respectfully requests that his judgment and conviction be vacated and that a new trial be ordered.

DATED: This 28<sup>th</sup> day of December, 2011



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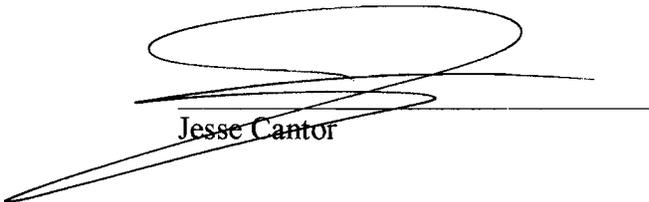
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**CERTIFICATE OF SERVICE**

I, Jesse Cantor, attorney for the Appellant, hereby certify that on This <sup>28<sup>th</sup></sup> Day of December, 2011, I served a true and correct copy of the foregoing opening brief by U.S. First Class Mail, correct postage paid, on the following parties:

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