

NO. 67595-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDUARDO CAZADORES-VALDEZ,
AKA MARIO RUVALCABA,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 12 PM 2:54
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court exercised sound discretion in denying the defendant's motions for a new trial because the witnesses' recantations were unreliable and would not have made a difference to the outcome of the trial.

2. Whether the trial court exercised sound discretion in finding that the younger victim's out-of-court statements were admissible under the child hearsay statute after weighing all of the necessary factors and finding that the statements were reliable.

3. Whether the trial court exercised sound discretion in admitting the victims' statements identifying their abuser under the hearsay exception for statements pertinent to medical diagnosis or treatment because such statements are admissible when the perpetrator is a member of the victims' household.

4. Whether the defendant has failed to preserve his claim that the trial court did not follow the procedure set forth in the hearsay rule regarding recorded recollections because the issue is not of constitutional magnitude and the defendant did not object at trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Eduardo Cazadores-Valdez, aka Mario Ruvalcaba, with the following crimes:

Count I: Child Molestation in the First Degree
(victim D.R.);

Count II: Rape of a Child in the First Degree
(victim D.R.);

Count III: Attempted Child Molestation in the First Degree
(victim D.R.);

Count IV: Rape of a Child in the First Degree
(victim D.R.);

Count V: Rape of a Child in the First Degree
(victim D.R.);

Count VI: Child Molestation in the Second Degree
(victim M.R.)

CP 43-45. The charges were based on a series of acts committed against the two eldest daughters of Andrea R., the defendant's live-in girlfriend. CP 1-7.

A jury trial on these charges was held in May 2011 before the Honorable Brian Gain. Before the trial began, the trial court considered an offer of proof submitted by agreement of the parties to determine the admissibility of D.R.'s out-of-court statements under the child hearsay statute. RP (5/5/11) 4-8; RP (5/9/11) 2;

Ex. 1, 3, 10, 11; 14. After considering these exhibits, the trial court ruled that D.R.'s hearsay statements were reliable and admissible at trial. RP (5/9/11) 25-28. The court also ruled that the statements that D.R. and M.R. made to Dr. Naomi Sugar during their sexual assault examinations were admissible under the hearsay exception for statements related to medical diagnosis or treatment. RP (5/9/11) 25.

Although D.R. and M.R. recanted at trial, and testified that they did not remember any abuse by the defendant or any of the hearsay statements that they had made, the jury convicted the defendant of all counts as charged. CP 120-25.

Prior to sentencing, the defendant made a motion for a new trial under CrR 7.5 on grounds that D.R. and M.R. had further recanted, and were claiming that their original allegations against the defendant were fabricated. CP 400-33. The trial court denied the motion on grounds that the later recantations were not newly-discovered evidence, they were not reliable, and they would not have made a difference to the outcome of the trial. RP (7/20/11) 19-21.

At sentencing, the trial court imposed an indeterminate sentence composed of a standard-range minimum term and a maximum term of life in prison. CP 301-14; RP (7/29/11) 12-14.

After sentencing, the defendant made another motion for a new trial under CrR 7.8 on grounds that D.R. and M.R.'s older brother, R.R., was also recanting. CP 331-47. The trial court denied this motion on the same grounds as the previous motion.¹ RP (8/19/11) 29.

The defendant now appeals. CP 315-30.

2. SUBSTANTIVE FACTS

In December 2008, Andrea R. was living in SeaTac with the defendant and her six children: her son R.R. (dob 3/27/92), and her daughters M.R. (dob 1/27/95), D.R. (dob 4/5/99), E.E.R. (dob 9/11/03), A.R. (dob 4/22/05), and E.R. (dob 8/13/11). The defendant is the father of the three youngest girls; Andrea R.'s ex-husband is the father of R.R., M.R. and D.R. RP (5/23/11) 12-17.

¹ The trial court also rejected defense counsel's argument that he was ineffective for not obtaining R.R.'s recantation sooner. RP (8/16/11) 29.

On December 9, 2008, Andrea R. called D.R.'s school, Madrona Elementary, to request a meeting with a counselor. RP (5/19/11) 27-28, 49-50. On December 10, 2008, Andrea R. and D.R. met with counselor Bonnie Paasch and Spanish interpreter Yvonne Gonzales. RP (5/19/11) 29. Andrea R. (who does not speak English) explained through interpreter Gonzales that something had happened at home. RP (5/19/11) 30. Andrea R. was very upset, and she said that the situation was "very bad." RP (5/19/11) 52. Andrea R. told D.R. to tell Paasch and Gonzales what was happening; D.R. said (in English) that "Mario had taken his privates out and he asked her to touch them." RP (5/19/11) 31, 53. D.R. said that "you don't ask little girls to do that kind of thing," and "[i]t's not right." RP (5/19/11) 31, 53. Paasch confirmed that "Mario" was D.R.'s stepfather, the defendant. RP (5/19/11) 31. Just before D.R. was excused to go back to class, she also said that the defendant had put his hands down her pants. RP (5/19/11) 35-36.

Paasch did not press D.R. for details about what the defendant had done because she knew that she would have to report D.R.'s disclosure to the police and that D.R. would have to be interviewed again. RP (5/19/11) 33. Paasch informed

Andrea R. and D.R. that she was calling the police; both were upset and afraid that the children would be taken away from Andrea R. RP (5/19/11) 34-35. Paasch called the police, and Port of Seattle Police Detective Luis Perez responded. RP (5/19/11) 37, 64-66. Perez took statements from Paasch and Gonzales, and Gonzales assisted Andrea R. in giving a statement as well. RP (5/19/11) 38, 55-58.

The next day, Detective Perez drove Andrea R., D.R., and her older sister M.R. to the Maleng Regional Justice Center so that D.R. and M.R. could be interviewed in more detail. RP (5/19/22) 66, 70. D.R. was interviewed by child interview specialist Carolyn Webster, and a DVD of that interview was played for the jury in accordance with the trial court's pretrial rulings. RP (5/19/11) 84, 109-13; Ex. 10, 11.

During the interview, D.R. described several different types of sexual activity involving the defendant. D.R. first told Webster that the defendant had showed her his front private part and asked her if she "wanted some." Ex. 10; Ex. 11, p. 11. She said he unzipped his zipper, took out his "dick thing," and shook it. Ex. 10; Ex. 11, p. 18. D.R. demonstrated in pantomime exactly what the defendant did. Ex. 10; Ex. 11, p. 19.

D.R. also told Webster that the defendant would put her on the couch on her back, get on top of her, and move his "ass" up and down "trying to do sex to me." Ex. 10; Ex. 11, p. 20-21. D.R. also described how the defendant would put his finger in the "little hole thing" in her front private part. Ex. 10; Ex. 11, p. 24. She described one particular incident that occurred when she was playing the piano; the defendant unzipped her pants and put his finger inside her, and it hurt. Ex. 10; Ex. 11, p. 24-25. She said the defendant moved his finger around, and she demonstrated this for Webster with her own finger. Ex. 10; Ex. 11, p. 26.

D.R. also told Webster that the defendant had been putting his "peanut" in her "ass" for several years. Ex. 10; Ex. 11, p. 28. D.R. described how she would bend over on the back of the couch, the defendant would pull her pants down, and then "he put the peanut in it." Ex. 10; Ex. 11, p. 32. She said that sometimes the defendant's "juice" would go "through [her] front private part" and she would have to clean herself in the bathroom. Ex. 10; Ex. 11, p. 36. D.R. said the "juice" was "white" and that the defendant's "peanut" "gets like sweaty or something." Ex. 10; Ex. 11, p. 36. She said it made her "ass" feel "bad." Ex. 10; Ex. 11, p. 36. D.R.

said this also happened in her bedroom, in her brother's room, and in the defendant's bathroom. Ex. 10; Ex. 11, p. 37.

D.R. said the defendant would also suck her "boob." She pulled her shirt down to show Webster what she meant. Ex. 10; Ex. 11, p. 27. D.R. said it tickled and squished, and she did not like it. Ex. 10; Ex. 11, p. 38. D.R. also explained that the defendant had sucked on her front private part; she said that he pulled her pants down and said "mmm it tastes good." Ex. 10; Ex. 11, p. 38. D.R. demonstrated what the defendant was doing with his tongue when he sucked her front private part. Ex. 10; Ex. 11, p. 39.

D.R. explained that the defendant also made her suck and kiss his "dick." Ex. 10; Ex. 11, p. 41. She showed Webster how the defendant put his "dick" in her mouth and moved her head up and down with his hands. Ex. 10; Ex. 11, p. 41-43. She said the defendant told her to "[g]ive it a kiss and suck it." Ex. 10; Ex. 11, p. 42. D.R. said it was "gross," and she washed her mouth out with water afterwards. Ex. 10; Ex. 11, p. 42-43.

Later that day, M.R. was interviewed by a deputy prosecutor with Detective Perez present. M.R. explained that the defendant started touching her inappropriately when she was 12 years old. Ex. 20, p. 5. She said that the defendant had touched her front

private part, her "bottom," and her breasts. Ex. 20, p. 6-9. She said he sometimes grabbed her crotch as she was walking by. Ex. 20, p. 11. She said he put his hand inside her shirt and touched her breast. Ex. 20, p. 12. She explained that he did not put his hand inside her front private part, but he rubbed it with the palm of his hand. Ex. 20, p. 13-14. She said this happened more than five times. Ex. 20, p. 17.

On December 29, 2008, D.R. and M.R. went to Harborview to be examined by pediatrician Dr. Naomi Sugar. Before she examined the girls, Dr. Sugar spoke with Andrea R., who said that D.R. told her the defendant showed her his private part, and that M.R. said he was touching her. RP (5/23/11) 49-51. Dr. Sugar then met with M.R. M.R. told Dr. Sugar that "Mario" started touching her when she was 12. He had "grabbed [her] breasts and [she] said stop. He didn't stop. He didn't care." RP (5/23/11) 53-54. M.R. also told Dr. Sugar that the defendant touched "the front part" with his hand and sometimes he tried to grab her and kiss her on the mouth. RP (5/23/11) 54. M.R. was afraid to take off her clothes, so Dr. Sugar did not perform a genital exam. RP (5/23/11) 55.

Dr. Sugar then met with D.R., who said that her "dad" was in jail because he was "sexually harassing" her and "he put his nuts in [her] ass." RP (5/23/11) 60. When Dr. Sugar asked D.R. what that meant, D.R. said, "His front private part, he put that into my butt." She said his private part was "in the middle, inside." D.R. said she felt wetness "from his thing," and the wetness went "kind of through" her. She also said she had bleeding "one time from [her] front private part," but she did not know how that had happened. RP (5/23/11) 61. D.R. allowed Dr. Sugar to examine her genitals and anus, and the findings were normal. Dr. Sugar explained that the examinations are normal in almost all cases, even if abuse has occurred. RP (5/23/11) 67-69.

Andrea R., D.R., M.R. and R.R. were uncooperative witnesses at trial. Andrea R. claimed that she could not remember any of the following: 1) D.R. telling her that the defendant had showed her his private part; 2) meeting with Paasch and Gonzales at the school, 3) giving a statement to the police; and 4) telling Dr. Sugar anything about what the girls had said. RP (5/23/11) 20-22, 28. Andrea R. admitted that she still wanted to have a relationship with the defendant. RP (5/23/11) 29.

D.R. claimed to remember nothing about what the defendant had done to her or any of the statements she had made to Paasch, Gonzales, Webster, or Dr. Sugar. RP (5/23/11) 91-99. However, D.R. admitted that if she told Webster on the video that the defendant had performed sexual acts with her, she "would not say things like that if it didn't happen."² RP (5/24/11) 9.

M.R. also testified that she did not remember anything about what the defendant had done, and that she did not remember going to the doctor or giving a statement to a deputy prosecutor and Detective Perez. RP (5/24/11) 24-26. M.R. acknowledged that it was her voice on the recording, and that she had told the prosecutor and the detective that everything she said was the truth.³ RP (5/24/11) 27-28. However, she also said she may have made things up because she and her mother were "mad." RP (5/24/11) 29-30.

R.R. initially testified that he had seen something inappropriate occur between the defendant and D.R. He explained

² Based on this admission and the content of the DVD itself, the trial court admitted D.R.'s statement to Webster as a recorded recollection under ER 803(a)(5) as well as under the child hearsay statute. RP (5/24/11) 40, 71-77, 82-83.

³ The trial court also admitted M.R.'s recorded statement as a recorded recollection. RP (5/24/11) 34-35, 37-38, 71-78, 83-84.

that he was in his room fixing his bicycle, and when he opened the door he saw the defendant sitting down in the living room with his penis hanging out of his pants, and D.R. standing in front of him with her pants pulled down. RP (5/24/11) 48-49. But after giving this initial testimony, R.R. began to recant and testified that he was not sure what he saw. RP (5/24/11) 52. R.R. eventually stated that he did not want to answer any more questions, and he claimed that he was pressured to sign his initial statement to the detective describing what he had seen. RP (5/24/11) 68-69.

Additional procedural and substantive facts will be discussed further below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING THE DEFENDANT'S MOTIONS FOR A NEW TRIAL.

The defendant first argues that the trial court should have granted a new trial based on the post-trial recantations of D.R., M.R., and R.R. Appellant's Opening Brief, at 20-24. This claim should be rejected. The trial court exercised sound discretion in ruling that these recantations were unreliable, and that they would

not have affected the result of the trial. Accordingly, this Court should affirm.

In order to obtain a new trial under CrR 7.5 or relief from judgment under CrR 7.8 based on newly-discovered evidence, the defendant must prove that the evidence 1) will probably change the result of the trial, 2) was discovered after the 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 784, 800, 911 P.2d 1004 (1996). "A new trial may be denied if any one of these factors is absent." Id. A trial court's decision whether to grant a new trial is reviewed for abuse of discretion. See Id. at 803. A trial court abuses its discretion only if its decision is manifestly unreasonable or is based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

As a preliminary matter, one of the bases for the trial court's rulings was that the recantations did not constitute newly-discovered evidence because these witnesses had already recanted their original statements at trial. RP (7/20/11) 19; RP (8/19/11) 23-26, 29. As a matter of simple logic, this ruling is correct; a recantation by a witness who has already recanted is not,

by definition, "newly-discovered." In any event, to the extent that the witnesses' post-trial recantations could be characterized as "newly-discovered" because they were different from the recantations during trial (*i.e.*, "nothing happened" versus "I don't remember"), the trial court's rulings should be affirmed because the recantations were obviously unreliable.

When newly-discovered evidence takes the form of a witness's recantation, "the trial court must first determine whether the recantation is reliable before considering a defendant's motion for new trial based upon the recantation." Macon, 128 Wn.2d at 804. In other words, the reliability of the recantation (or lack thereof) is a threshold determination for the trial court. If the trial court finds that the recantation is not reliable, "then it is not material, and it does not provide a basis for granting a new trial." State v. Eder, 78 Wn. App. 352, 361, 899 P.2d 810 (1995), rev. denied, 129 Wn.2d 1013 (1996). This is the case even if the recanting witness's testimony is the sole basis for the conviction. Macon, 128 Wn.2d at 804; State v. Ieng, 87 Wn. App. 873, 879, 942 P.2d 1091 (1997), rev. denied, 134 Wn.2d 1014 (1998). The defendant must show that the recantation is reliable by a preponderance of the evidence. Eder, 78 Wn. App. at 357.

Post-trial recantations are inherently suspect, and the trial court is clearly in the best position to evaluate whether they provide sufficient grounds for a new trial. As the Washington Supreme Court held nearly 80 years ago in a case quite similar to this one,

The trial judge is in a peculiarly advantageous position, under the prevailing circumstances, to pass upon the showing made for a new trial. He has the benefit of observing the witnesses at the time of the trial, is able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives, that prompted the recantation. He is, therefore, best qualified to determine what credence or consideration should be given to the retraction, and his opinion is accordingly entitled to great weight. If the rule were otherwise, the right of a new trial would depend on the vagaries and vacillations of witnesses rather than upon a soundly exercised discretion of the trial court.

The untrustworthy character of recanting testimony is well known by those experienced in the trial of criminal cases, and when such testimony is offered, it calls for a rigid scrutiny. When the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not be lightly set aside by an appellate court.

State v. Wynn, 178 Wn. 287, 288-89, 34 P.2d 900 (1934).

This Court's decision in Eder is also instructive. In Eder, the 12-year-old victim reported to her aunt that her stepfather, the defendant, had raped her. The victim testified about the rape at trial. Eder, 78 Wn. App. at 355. After the defendant was convicted,

the victim's mother (who was married to the defendant) continued to tell the victim that she did not believe her, and she would not allow the victim to move back home again unless the victim changed her testimony. Id. at 356. The victim's grandmother and other family members also disbelieved the victim. Id. at 356-57. Eventually, the victim recanted, and she testified at a post-trial hearing that she lied about being raped because she was afraid that the defendant would continue to beat her. Id. at 355-56.

At the conclusion of the hearing, the trial court found that the victim's family had pressured her to recant, and that the recantation was not credible. Id. at 357. The trial court denied the defendant's motion for a new trial because he had failed to show that the recantation was truthful, and thus, it was not material. Id. at 357-58. On appeal, this Court observed that "[t]his case exemplifies the coercive pressure and manipulation that would be the certain result" if the law required a new trial in these circumstances. Id. at 362. Accordingly, this Court applied the governing principle that was later endorsed by the Washington Supreme Court in Macon, *i.e.*, that a trial court exercises sound discretion in denying a motion for a new trial if it determines as a

threshold matter that the victim's recantation is unreliable. Id. at 360-62. This principle is applicable in this case as well.

In this case, the defendant made a motion for a new trial under CrR 7.5 based on recantations by D.R. and M.R., and he later made a motion for relief from judgment under CrR 7.8 based on a recantation by R.R. CP 331-47, 400-33. As an offer of proof, the defendant provided transcripts of defense counsel's interviews with each witness. During these interviews, the witnesses stated that nothing had happened and that their original statements were fabricated. CP 337-47, 405-33.

However, as the State noted in its responsive briefing, the evidence showed that the witnesses were contacted repeatedly by the defendant's brother and sister-in-law, who eventually succeeded in bringing them to defense counsel's office in order to recant. CP 139-42, 353-54. The defendant's sister-in-law confirmed that she had had multiple telephone conversations and visits with Andrea R. and the children before they finally agreed to give statements claiming that nothing had happened. CP 289-92. The sister-in-law also admitted that the defense attorney had told her that there was no point in re-interviewing the witnesses unless they were going to say something different from what they said at

trial. CP 426-27. Also, although R.R. initially refused to meet with defense counsel, he also eventually came in for an interview in the company of the sister-in-law. CP 347.

The defendant's brother and sister-in-law were not the only sources of familial pressure for D.R., M.R. and R.R. Indeed, it was painfully obvious that Andrea R. was not supportive of the victims, as demonstrated by her unbelievable trial testimony that she could not remember anything about the girls' disclosures of abuse, including the meeting at the school and talking to the doctor. RP (5/23/11) 20-22. Andrea R. also admitted at trial that she still wanted to be in a relationship with the defendant. RP (5/23/11) 29. The post-trial evidence confirmed that Andrea R. did not believe that the defendant had done anything wrong, and that she believed the girls had lied. CP 397. Andrea R. admitted that she wanted the defendant to come home to help support the family financially and to help with raising the children. CP 397. She candidly told a Department of Corrections employee that she wanted the defendant "to move back in the home with her and her children as soon as possible." CP 397.

Given this record, the trial court acted well within its considerable discretion in finding that these recantations were not

credible or reliable. As was the case in Eder, the trial court found that D.R., M.R. and R.R. were pressured by family members, and thus, the recantations were the product of coercion. RP (7/20/11) 21; RP (8/16/11) 29. Also as in Eder, their mother was completely unsupportive. RP (7/20/11) 20. Accordingly, the trial court reasonably concluded that the circumstances surrounding these recantations rendered them unreliable. Therefore, the defendant failed to meet the threshold requirement of showing that the recantations were reliable, and this Court should affirm on this basis alone.

But further, as the trial court also ruled, the recantations would not have changed the outcome of the trial. RP (7/20/11) 20. As the trial court explained, the jury evaluated the testimony and demeanor of these witnesses when they claimed at trial that they did not remember what happened, and contrasted that trial testimony with the girls' original statements describing the defendant's abuse. RP (7/20/11) 20. As the trial court found, given the state of the evidence, the jury would still have found the defendant guilty based on the girls' original statements in light of the unreliable post-trial recantations. RP (7/20/11) 20-21. Put another way, as the trial prosecutor stated in his briefing, "the

defendant was not convicted *because of* the victims' testimony, "he was convicted *in spite of* their testimony." CP 141. Accordingly, their recantations would not have made a difference to the outcome of the trial. This Court should affirm on this basis as well.

In sum, the trial court exercised sound discretion in denying the defendant's motions for a new trial. The trial court's rulings are based on the tenable grounds that the recantations were unreliable and would not have made a difference in the outcome of the trial. The defendant has not shown a manifest abuse of discretion in this case, and thus, his claim fails.

Nonetheless, the defendant argues that a new trial should have been granted because there was no independent corroboration of D.R.'s and M.R.'s original allegations of abuse. Appellant's Opening Brief, at 21. Although there is case law from Division Two of this Court suggesting that corroboration is a necessary consideration for the trial court in ruling on a motion for new trial when a witness recants,⁴ this Court and the Washington Supreme Court disagree.

⁴ See State v. York, 41 Wn. App. 538, 543, 704 P.2d 1252 (1985); State v. Landon, 69 Wn. App. 83, 90, 848 P.2d 724 (1993).

In Eder, this Court disagreed with Division Two's analysis in York and held as follows:

The rules to be derived from this discussion are as follows: If the recantation testimony is credible, but independent corroborating evidence supported the conviction, the trial court may grant a new trial or not, in its discretion. If the recantation testimony is credible and no independent corroborating evidence supported the conviction, the court *must* grant a new trial If the recantation testimony is not credible, then it is not material, and it does not provide a basis for granting a new trial.

Eder, 78 Wn. App. at 361 (emphasis in original). This Court's analysis was later endorsed by the Washington Supreme Court's decision in Macon, wherein the court expressly held that determining whether a witness's recantation is reliable is a threshold requirement for considering a motion for a new trial, corroboration or lack thereof notwithstanding. See Macon, 128 Wn.2d at 804. After Macon, as this Court observed in leng, "whether or not independent corroborating evidence exists to support the original testimony of the recanting witness is not a controlling factor." leng, 87 Wn. App. at 879.

The trial court in this case ruled in accordance with Macon, Eder, and leng that the defendant was not entitled to a new trial because the recantations were unreliable. Therefore, the existence

of corroboration for the original allegations is of no moment to the outcome of this case. And corroboration or lack thereof is of no moment in this case for another reason as well: the defendant's convictions were not based on the witnesses' testimony in the first place, because the witnesses recanted *at trial*, albeit in a less emphatic way (*i.e.*, "I don't remember" versus "I lied"). The defendant's convictions were based on the victims' admissible hearsay statements, which were unaffected by either their partial recantations at trial or their more emphatic recantations after the trial.

In sum, the defendant cannot show that the trial court's rulings denying his motions for a fair trial are manifestly unreasonable in light of the record and the evidence before the court. Accordingly, this Court should affirm.

**2. THE TRIAL COURT PROPERLY ADMITTED D.R.'S
OUT-OF-COURT STATEMENTS UNDER THE
CHILD HEARSAY STATUTE.**

The defendant next claims that the trial court erred in admitting D.R.'s out-of-court statements under the child hearsay statute. More specifically, he argues that there were insufficient indicia that D.R.'s statements were reliable, that the trial court erred

in finding that D.R. was unavailable, and that the trial court did not balance the probative value against the danger of unfair prejudice under ER 403. He contends that the error was not harmless, and that reversal is required. Appellant's Opening Brief, at 25-30.

These arguments should be rejected. The record establishes that the trial court properly considered the factors necessary to determine the reliability of the statements and ruled accordingly. The trial court also correctly found that D.R. was unavailable under ER 804(a)(3). And although the trial court did not expressly perform an ER 403 balancing test on the record, the record amply demonstrates that D.R.'s statements were highly probative evidence and, because they were admissible, there was no unfair prejudice. In sum, the trial court exercised its discretion appropriately in admitting this evidence, and thus, this Court should affirm.

Under RCW 9A.44.120, out-of-court statements regarding sexual or physical abuse made by a child under 10 are admissible if the trial court determines that the statements are sufficiently reliable, and either a) the child testifies at trial, or b) if the child is unavailable, the trial court finds that the statements are corroborated. A trial court's ruling that a child's statements are

admissible under the statute should not be reversed unless the record reveals a manifest abuse of the trial court's discretion. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1176 (2005). The trial court is vested with broad discretion in determining that child hearsay is reliable and admissible. Id. at 625. A trial court abuses its discretion only if no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

The trial court's determination as to whether child hearsay statements are reliable is governed by consideration of the nine factors enumerated in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). These factors are: 1) whether the child had an apparent motive to lie; 2) the child's general character; 3) whether more than one person heard the statements; 4) whether the statements were spontaneous; 5) whether trustworthiness is suggested by the timing of the statements and the relationship between the child and the witness; 6) whether the statement contained express assertions of past fact; 7) whether the child's lack of knowledge could be established through cross-examination; 8) whether the possibility of the child's recollection being faulty is remote; and 9) whether the surrounding circumstances suggest that the child misrepresented

the defendant's involvement. Ryan, 103 Wn.2d at 175-76. "Not every factor need be satisfied; it is enough that the factors are 'substantially met.'"⁵ Woods, 154 Wn.2d at 623-24 (quoting State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990)).

In this case, the trial court weighed all of the Ryan factors based on the stipulated offer of proof regarding D.R.'s statements to Bonnie Paasch, Yvonne Gonzalez, Carolyn Webster, and Dr. Sugar. See Ex. 1, 3, 10, 11, 14. Under the first factor, the trial court found there was no apparent motive for D.R. to lie. RP (5/9/11) 25. This finding is supported by the evidence, which showed that D.R. became very upset when Bonnie Paasch told her the police would be called as a result of what she had reported. Ex. 3. This is not a response one would expect from a girl who was allegedly trying to get the defendant out of her house, as the defense suggested. As to the second factor, the trial court correctly found that there was no evidence presented that D.R. "is anything

⁵ Moreover, this Court has observed that factors 6 and 7 are cautionary, and are not helpful to the trial court's analysis. See State v. Borland, 57 Wn. App. 7, 16-20, 786 P.2d 810 (1990), *overruled on other grounds*, State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997); State v. Stange, 53 Wn. App. 638, 643-47, 769 P.2d 873 (1989).

other than of good general character." RP (5/9/11) 25. This factor was undisputed.

Under the third factor, the trial court correctly observed that D.R. had made statements to four people, at least three of whom were acting in a professional capacity in which they had experience dealing with children who disclose abuse. RP (5/9/11) 25-26. This factor was undisputed as well. As to the fourth factor, the trial court correctly found that all of D.R.'s hearsay statements were made spontaneously. As the trial court observed, all of D.R.'s statements were made within a relatively short time after making the initial disclosure to her mother, and she was questioned by trained professionals who did not ask leading or suggestive questions.⁶ RP (5/9/11) 26. This finding is fully supported by the evidence, which shows that D.R. described the abuse in her own words. Ex. 1, 3, 10, 11, 14. And under the fifth factor, the trial court properly found that the timing of the statements and the relationship between D.R. and the witnesses indicated that the statements were reliable. Again, D.R.'s statements were made within a short time

⁶ Washington case law recognizes that this is an appropriate consideration in finding that the child's statements were spontaneous. See Swan, 114 Wn.2d at 649-50.

frame after the initial disclosure to her mother, and all of the witnesses were professionals who had training and experience working with children. RP (5/9/11) 26-27.

As to the sixth factor, the trial court correctly observed that this factor need not be satisfied for the statements to be admissible. RP (5/9/11) 27.⁷ Under the seventh factor, the trial court found that all of the witnesses would be subjected to cross-examination, which "would be effective in testing the knowledge of the declarant." RP (5/9/11) 27. Under the eighth factor, the trial court found that although the defense had noted some discrepancies in the time frames that D.R. had described,⁸ D.R.'s statements were largely consistent, and therefore the possibility that her memory was faulty was remote. RP (5/9/11) 27. The evidence supports this finding as well. Although D.R.'s statement to Carolyn Webster was certainly more detailed than her other disclosures, the disclosures were not inconsistent. Ex. 1, 3, 10, 11, 14. Under the ninth factor, the trial court correctly noted that D.R. was able to differentiate what had

⁷ Indeed, the trial court's confusion regarding this factor has been echoed by this Court. See Borland, 57 Wn. App. at 16-20; Stange, 53 Wn. App. at 643-47.

⁸ Washington case law holds that a child's inability to describe with precision exactly when the abuse occurred does not render the child's memory unreliable. Woods, 154 Wn.2d at 624 (citing State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991)).

occurred with the defendant and an isolated incident that had occurred with a relative. RP (5/9/11) 27; Ex. 10, 11. Therefore, as the trial court found, there was no reason to suppose that D.R. had misrepresented the defendant's involvement. In addition, the trial court found that there was corroborative evidence of the statements, including R.R.'s testimony and D.R.'s precocious sexual knowledge.⁹ RP (5/9/11) 28-34; RP (5/25/11) 8-13.

In sum, the trial court weighed all of the Ryan factors, and properly exercised its discretion in ruling that those factors weighed in favor of finding D.R.'s child hearsay statements sufficiently reliable to be admitted at trial. In addition, the trial court properly found that the statements were corroborated. The evidence presented to the trial court supports the trial court's findings in this regard, and the defendant cannot show a manifest abuse of discretion.

Nonetheless, the defendant argues that there were insufficient indicia of reliability because the post-trial recantations made by D.R., M.R., and R.R. show that D.R. had a motive to lie

⁹ Washington case law recognizes that a child's precocious knowledge of sexual activity is corroborative of child hearsay. See, e.g., State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765 (2003); Swan, 114 Wn.2d at 623. D.R.'s graphic physical demonstrations of sexual acts and her descriptions of ejaculation and its aftermath certainly qualify as precocious knowledge. Ex. 10, 11.

and that she fabricated the allegations against the defendant. Appellant's Opening Brief, at 26-27. But the defendant cites no authority for the proposition that recantations made *after* trial render a trial court's *pretrial* ruling on the admissibility of child hearsay erroneous. As such, this argument should not be considered. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by citations to authority or persuasive reasoning will not be considered on appeal). Furthermore, as discussed at length above, the trial court found that the post-trial recantations were not credible in any event. RP (7/20/11) 20-21; RP (8/19/11) 29. This argument is without merit.

The defendant also contends that the trial court erred in finding that D.R. was unavailable as a witness due to her persistent claims of a lack of memory during her testimony. Appellant's Opening Brief, at 27-28. This argument is both incorrect and of no moment to the issue presented.

A child witness is "available" for purposes of the Confrontation Clause if the child testifies and is subject to cross-examination, even if the child claims that she cannot remember the alleged abuse or the hearsay statements that she made. State v.

Price, 158 Wn.2d 630, 643-50, 146 P.3d 1183 (2006). However, a hearsay declarant is "unavailable" for purposes of the hearsay rules if she "[t]estifies to a lack of memory of the subject matter of the declarant's statement." ER 804(a)(3). These two concepts are distinct. Price, 158 Wn.2d at 639-40 n.5.

In this case, the trial court found that D.R. was unavailable due to her claimed lack of memory. RP (5/25/11) 12-13. The trial court made this finding in the context of ruling that D.R.'s interview with Carolyn Webster was admissible both under the child hearsay statute and as a recorded recollection under ER 803(a)(5), and in rejecting the defendant's argument that D.R.'s hearsay statements were not sufficiently corroborated for admissibility under the child hearsay statute due to R.R.'s recantation during his trial testimony. RP (5/25/11) 8-13. In other words, the record shows that the trial court found that D.R. was "unavailable" under the hearsay rules, not the Confrontation Clause. As such, the trial court's ruling was correct. Moreover, the defendant does not explain how the trial court's finding of unavailability impacts the trial court's application of the Ryan factors in finding D.R.'s child hearsay statements reliable. Accordingly, this argument is of no moment to the issue presented.

Lastly, the defendant argues that the trial court did not weigh the probative value of D.R.'s child hearsay statements against the danger of unfair prejudice under ER 403, and that this constitutes error as well. Appellant's Opening Brief, at 28-29. Although the trial court did not expressly perform this balancing on the record, the record amply demonstrates that the trial court did not abuse its discretion because the evidence was highly probative and not unfairly prejudicial.

Child hearsay is admissible even when the child is available and competent to testify and even though the evidence is overlapping or repetitive. State v. Dunn, 125 Wn. App. 582, 588-89, 105 P.3d 1022 (2005). Such evidence is subject to exclusion under ER 403 only if its probative value is substantially outweighed by the danger of unfair prejudice caused by the needless presentation of cumulative evidence. State v. Bedker, 74 Wn. App. 87, 93, 871 P.2d 673, rev. denied, 125 Wn.2d 1004 (1994). In this case, only four witnesses testified to D.R.'s hearsay statements, and three of those witnesses gave general and relatively brief accounts of what D.R. had disclosed; D.R.'s interview with Carolyn Webster was the only hearsay evidence that was comprehensive. And although there was some overlap

between the testimony of the hearsay witnesses and the DVD of the interview with Webster, all of the hearsay had significant probative value. The statements were made in different contexts to people with very different roles in the case. Consequently, each witness provided different facts and perspectives that assisted the jury in evaluating the allegations against the defendant. Accordingly, the trial court did not abuse its discretion or run afoul of ER 403 in admitting the evidence.

In sum, the trial court exercised sound discretion in ruling that D.R.'s hearsay statements were admissible. The trial court properly considered the evidence, weighed the Ryan factors, and concluded that D.R.'s hearsay statements were reliable, corroborated, and probative. The defendant has failed to show that the trial court erred, and thus, this Court should affirm.

3. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS IDENTIFYING THE PERPETRATOR UNDER ER 803(a)(4) BECAUSE THESE STATEMENTS WERE RELEVANT TO DIAGNOSIS AND TREATMENT.

The defendant next claims that the trial court erred in allowing Dr. Sugar to testify about M.R.'s and D.R.'s statements identifying the defendant as their abuser under ER 803(a)(4). He

argues that only statements regarding causation of injury are admissible under this rule, and that statements attributing fault are not. Appellant's Opening Brief, at 31-32. This claim should be rejected. In cases such as this one, where the identity of the perpetrator is relevant to diagnosis or treatment, statements identifying the perpetrator are admissible under the hearsay rule. This Court should affirm.

Evidentiary rulings are matters addressed to the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 913-14. A trial court abuses its discretion in deciding whether evidence is admissible only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). As noted previously, a reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

Under ER 803(a)(4), hearsay is admissible if the statements in question are "reasonably pertinent" to medical diagnosis or treatment. In accordance with this rule, statements regarding the identity of the perpetrator are admissible in child sexual abuse cases when the perpetrator is a member of the victim's household.

State v. Butler, 53 Wn. App. 214, 217-23, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989); State v. Ashcraft, 71 Wn. App. 444, 456-57, 859 P.2d 60 (1993); State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995). Such statements are admissible because the fact that the abuser has continuing access to the child is "reasonably pertinent" information for treating the child for both physical and psychological injury. Butler, 53 Wn. App. at 221. Moreover, this information is relevant to treatment because the medical provider has an obligation to ensure that an abused child is not returned to a household where she will be subjected to continuing abuse and injury in the future. Id.

In this case, M.R. and D.R. told Dr. Sugar that they were being sexually abused by "Mario" or "dad," whom Dr. Sugar confirmed was their mother's live-in partner. RP (5/23/11) 53, 60. Therefore, in accordance with the cases on point cited above, the trial court exercised sound discretion in admitting M.R.'s and D.R.'s statements to Dr. Sugar identifying the defendant as their abuser under ER 803(a)(4). See RP (5/9/11) 42-43. The defendant's arguments to the contrary are without merit.

4. THE DEFENDANT'S CHALLENGE TO PLAYING THE RECORDING OF M.R.'S INTERVIEW AS A RECORDED RECOLLECTION IS NOT PRESERVED FOR REVIEW.

Lastly, the defendant claims that the trial court erred in allowing a recording of M.R.'s statement to Detective Perez and a deputy prosecutor to be played for the jury as a recorded recollection. More specifically, the defendant argues that it was error for the trial court to admit the recording as an exhibit rather than requiring that the statement be read into evidence as the language of ER 803(a)(5) dictates. Appellant's Opening Brief, at 32-34. This claim should be rejected. Although the defendant objected to the admission of M.R.'s statement as a recorded recollection on grounds that the requisite foundation had not been laid, the defendant did not object to the procedure utilized when the recording was published to the jury. The procedure utilized in publishing the statement is not an issue of constitutional magnitude. Accordingly, this issue has not been preserved for appeal, and this Court should not consider it.

This Court will not consider a claim for the first time on appeal unless it concerns a manifest error affecting a constitutional right. RAP 2.5. A defendant claiming such error has the burden of

showing that the alleged error actually affected his constitutional rights; it is "this showing of *actual prejudice* that makes the error 'manifest,' allowing appellate review." State v. McNeal, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (emphasis in original) (quoting State v. McFarland, 127 Wn.2d 322, 333, 988 P.2d 1251 (1995)).

In this case, the defendant objected at trial to the admission of M.R.'s statement as a recorded recollection on grounds that an insufficient foundation had been laid to establish that the statement was reliable. RP (5/24/11) 79-82. After the trial court ruled that the statement was admissible as a recorded recollection, the defendant did *not* object to the procedure utilized for publishing the statement to the jury, even though redactions to both the recording and the transcript were discussed extensively. RP (5/25/11 - a.m.); RP (5/25/11 - p.m.) 2-3.

The defendant now asserts for the first time on appeal that the trial court utilized an erroneous procedure for publishing a recorded recollection to the jury, *i.e.*, that admitting the recording itself rather than reading a transcript of the recording into evidence ran afoul of the language of ER 803(a)(5). But the defendant does not explain how this constitutes manifest constitutional error under RAP 2.5. Indeed, it is difficult to envision how this procedural

aspect of the hearsay rule could implicate the constitution. As such, this claim has not been preserved for appeal, and this Court should decline to consider it in accordance with RAP 2.5.¹⁰

In any event, any possible error is harmless. A nonconstitutional error merits reversal only if the defendant shows a reasonable probability that the error affected the outcome of the trial. State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). In this case, if the trial court had followed the procedure the defendant suggests, the transcript of M.R.'s statement would have been read to the jury. Therefore, the jury would have considered the same information as was contained in the recording that they heard, but in a different form. Accordingly, there is no reasonable probability that the outcome of the trial would have been different if a transcript had been read to the jury, and thus, any error is harmless.

Nonetheless, the defendant contends that this alleged error was harmful because M.R.'s recorded statement "is the only exhibit that would arguably . . . support a conviction for Count 6."

¹⁰ In addition, case law from this Court suggests that playing a recorded statement for the jury is not improper. See State v. Alvarado, 89 Wn. App. 543, 547, 949 P.2d 831, rev. denied, 135 Wn.2d 1014 (1998) (noting that a witness's recorded statements to the police were admitted as recorded recollections and the recordings were played for the jury, both during trial and during deliberations).

Appellant's Opening Brief, at 34. This is incorrect. Dr. Sugar's testimony, which was admissible under ER 803(a)(4), also established that the defendant molested M.R. when she was 12 years old by grabbing her breasts and touching her crotch. RP (5/23/11) 53-54. The defendant's claim is without merit.

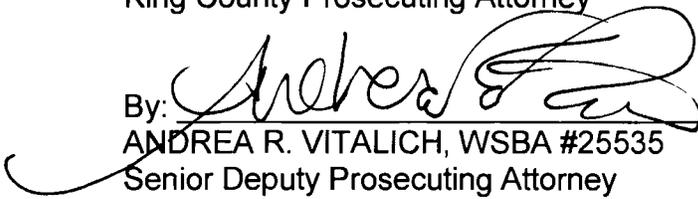
D. CONCLUSION

The trial court exercised sound discretion in denying the defendant's motions for a new trial, in admitting D.R.'s statements under the child hearsay statute, in admitting statements pertinent to medical diagnosis or treatment, and in publishing a recorded recollection to the jury. For all of the reasons set forth above, this Court should reject the defendant's claims and affirm the defendant's convictions.

DATED this 12th day of March, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jesse Cantor, the attorney for the appellant, at Mazzone and Cantor, LLP, 1604 Hewitt Avenue, Suite 515, Everett, WA 98201-4075, containing a copy of the Brief of Respondent, in STATE V. EDUARDO CAZADORES-VALDEZ, Cause No. 67595-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/12/12

Date