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COA No. 70968-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

R.D.M. (d.o.b. 11/1/97),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY, JUVENILE DIVISION

The Honorable Eric Z. Lucas

REPLY BRIEF

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A. SUMMARY OF APPEAL

The juvenile court excluded R.D.M.'s highly qualified expert who would have testified regarding suggestive child interview techniques employed by State's interviewer Gina Coslett in questioning the 3-year-old complainant.

The court abused its discretion because it based the exclusion of Dr. Rybicki's testimony on its dissatisfaction that certain portions of the doctor's wide-ranging *written report* on the case improperly reached legal conclusions that R.D.M., was innocent, but the defense either was never offering these portions of the report or withdrew them from its proffer of the doctor's testimony.

Further, the fact that the court deemed Dr. Rybicki not believable is an argument of a party about the *weight* of certain evidence, but it is not a basis to exclude testimony. The trier of fact attaches weight and assesses credibility. Additionally, Dr. Rybicki's extensive qualifications also rendered him qualified to testify on the topic of suggestibility in child sex abuse complainant interviews.

Importantly, in this juvenile appeal, the question then becomes whether the error was harmful in the context of a rational trier of fact, rather than asking whether this particular juvenile court

would have reached a different outcome if it had considered the doctor's testimony as part of the substantive trial.

The trial court also abused its discretion when it excluded multiple defense witnesses who would have impeached the child's mother with her widely varying descriptions of the child's allegations, allowing the State to argue that R.D.M.'s guilt was proved because the child's allegations had been extremely consistent.

B. REPLY ARGUMENT

In responding to R.D.M.'s arguments that the juvenile court abused its discretion in refusing to allow the defense expert to testify, the Respondent makes several contentions and arguments.

1. <u>The State attacks parts of Dr. Rybicki's assessment that were either not proffered by the defense or were withdrawn</u>. The State relies on its condemnation of certain portions of Dr. Rybicki's written report that – appellant agrees -- certainly should not find and did not find their way into his testimony. However, the defense made absolutely clear below, that it was not proffering Dr. Rybicki to testify on those particular matters.

The Respondent describes various portions of the written report of Dr. Rybicki that defense counsel indicated that court could review as *part* of its determination whether it would allow the doctor to testify. BOR, at pp. 5-6. The juvenile court found that the doctor's report portion stating that there was 'no physical evidence or a confession' was a comment on the complainant's credibility, and that the doctor's report portion stating that it would be 'inappropriate to give R.D.M. the life-long label of being a sex offender' was a comment on the ultimate question of guilt or innocence. CP 3-4.

As did the juvenile court, the Respondent focuses on the impropriety of the foregoing as comments on credibility and the objectionability of conclusions on the ultimate issue. BOR, at pp. 5-6, 11-12, 16-19; CP 3-5 (juvenile court's findings). Below, the juvenile court had repeatedly asked defense counsel to explain why page 3 of Dr. Rybicki's report had promised it would not offer any conclusions on credibility or guilt, but then appeared to do so in later pages of the report. The court deemed this broken promise to indicate that the doctor was attempting to mislead the court in the guise of science, and simply did not consider when ruling, that defense counsel had repeatedly stated that none of this was being

proffered in any form written or testimonial. 9/24/13RP at 60-65; CP 3-4.

The Respondent engages in the same analysis, by setting forth the undisputedly correct black-letter law holding that comments on credibility and comments on the ultimate issue are improper, and then stating that the court below did not err if it was "at least debatable that testimony was a comment on the evidence." BOR, at pp. 16-17. But the testimony in question *was not being proffered*.

Appellant respectfully states that it does appear as if the juvenile court based its exclusion ruling on its highly negative reaction to the portions of the written report that it found to be improper comments, and reasoned that any witness who would dare to make such remarks could not possibly offer any believable testimony:

> Even if everything in his CV is absolutely true, the credibility issue disqualifies him, and the motion is denied.

9/24/13RP at 97-98. But the believability of a witness is for the trier of fact to decide, as a matter of weight and probity, after the evidence is properly admitted. The State does not appear to defend the fact that the juvenile court specifically said it was

excluding the doctor's expert testimony because he was not believable – a matter for the trier of fact.[1]

The question was whether Dr. Rybicki should have been allowed to offer expert testimony on the suggestiveness of the Coslett interview – while not at issue were the objectionable portions of his written report, which defense counsel made clear were not being offered as part of the expert's proposed testimony, and were simply not a part of the defense offer of proof in presenting the doctor's testimony.

The Respondent's argument therefore attacks a straw man. Respondent then takes this argument a step further, and specifically argues that because the defense allowed the court to read all of Dr. Rybicki's written report on the case the night before the *voir dire* testimony of the doctor, the defense cannot now complain if the court excluded the *entirety* of his proffered testimony, because the defense thereby invited the error. BOR, at p. 19. But the invited error doctrine is that a party cannot set up an error at trial, and then complain of the same on appeal. State v.

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[1] Certainly, the prosecution would have been able to impeach Dr. Rybicki's testimony, if it so desired, by suggesting bias or pre-judgment – asking him if it was true that he actually thought R.D.M. was innocent, or should not be deemed a sex offender, and asking him whether this was coloring his assessment of the Coslett interview. These matters go to weight.

Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); see also State v. Korum, 157 Wn.2d 614, 646-47, 141 P.3d 13 (2006) (defendant invited any error of admitting evidence about prior guilty pleas by raising topic itself) (cited by Respondent). Here, defense counsel noted repeatedly to no avail to the juvenile court that R.D.M. was not proffering any part of the report, or any testimony, that was objectionable by the court's assessment. 9/24/13RP at 61, 62, 63, 67. The invited error doctrine does not apply to these circumstances.[2]

2. Dr. Rybicki's extensive qualifications were more than adequate for him to testify as an expert on child interview techniques. The State cites no case that stands for its implicit, if not explicit, contention that a proffered expert's qualifications must somehow exactly 'mirror' the opposing party's expert's sub-specialty of practice, or show him to work in the same precise field.

In responding to R.D.M.'s arguments, the Respondent echoes the juvenile court's assessment of Dr. Rybicki's qualifications in manner that fails to correctly apply the rule that an

[2] The Respondent elsewhere cannot but concede, correctly, that although the doctor's written report covered several different areas including a psychological evaluation of R.D.M. and conclusions regarding the case as a whole, the defense ultimately was only proffered Dr. Rybicki to testify regarding the State's interview techniques in questioning C.M. BOR, at p. 5.

expert may testify if he is an expert in the pertinent area and his testimony would be of assistance to a trier of fact. The Respondent repeatedly urges that Dr. Rybicki's training does not mirror Gina Coslett's, re-stating the juvenile court's reasoning that Dr. Rybicki was not capable of testifying under ER 702 because he was not a formal peer-reviewer of interviewers who conduct the exact type of child interview that Gina Coslett performed for the State. BOR, at pp. 6, 8-10, 13-15.

There is no such standard or requirement. See, e.g., State v. Weaville, 162 Wn. App. 801, 824-25, 256 P.3d 426 (2011) (toxicologist was qualified to testify at rape trial as expert on effects of MDMA drug, despite lack of degree in pharmacology, where educated in chemistry and forensic science, profession required her to study effects of drugs, and witness was familiar with effects of the drug through literature review and training). And, even if there had been some differences in an area of focus of Dr. Rybicki's expertise compared to Gina Coslett, that fact goes to the weight of his testimony rather than to his qualifications to testify generally, once his basic requisite qualifications were established. State v. Flett, 40 Wn. App. 277, 285, 699 P.2d 774 (1985).

But in any event, Dr. Rybicki was highly qualified to testify regarding the presence and effect of suggestive questioning in Coslett's interview of the 3-year-old child complainant. He himself had done 45 child interviews, and had reviewed 35 other interviews of children, including forensic and criminal investigation interviews. 9/24/13RP at 72-73. One need only look to a handful sampling of his *curriculum vitae* to see that Dr. Rybicki was highly qualified to speak to proper interviewing techniques for children. He is a clinical psychologist whose doctoral dissertation concerned an aspect of child abuse. He had been trained and worked in the criminal prosecution assessment of cases with allegations of criminal assault, he was a member and fellow of the American College of Forensic Examiners, a member of the California Sexual Assault Investigators Association when he practiced in that state, and a member of the Professional Association of Custody Evaluators. Appendix A to AOB, and CP 43-84.

Additionally, as to Dr. Rybicki's qualifications, Respondent slants the record. Respondent asserts that Dr. Rybicki was not aware of, and had not seen, the 2012 updates to the Harborview protocol for child interviews. BOR, at p. 8. In fact, Dr. Rybicki had received training in 2004 in the Harborview Method which sets forth

best practices for child sex abuse interviews, and had reviewed the Harborview protocol's most recent official iteration in 2011. 9/24/13RP at 72-73. It was he who provided the information that the only formal updates to the Harborview protocol where those changes made in 2011, which he was aware of, paragraph by paragraph. 9/24/13RP at 71-74 (Coslett herself noted that the 2012 protocol had not been officially published, and she herself did not state what the changes were compared to 2011. 9/23/13RP at 95.). The doctor was certainly aware that there were some changes made in 2012, but it appeared these were unofficial and pending. 9/24/13RP at 73-74.

Certainly, if the prosecution felt that Dr. Rybicki was not able to compare the changes to the protocol in 2012 to those made in 2011 and that this rendered his expert opinion unpersuasive, that was a matter to be argued to, and decided by, the trier of fact. No case provides that one expert must have attended the same exact classes or have the same exact training background as the other party's expert, as a test for admissibility.[3]

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[3] Importantly, Dr. Rybicki made clear that the literature available for reading is often outdated, and that conferences and discussions with other professionals in the field is the better way to stay current on investigative techniques in child sex abuse investigations, both of which he attended or was involved in. 9/24/13RP at 73.

Ultimately, even if there had been some differences in an area of focus of Dr. Rybicki's expertise compared to Gina Coslett, that fact goes to the weight of his testimony rather than to his qualifications to testify generally. State v. Flett, 40 Wn. App. at 285.

The Respondent also states that only a certain percentage of Dr. Rybicki's training and experience is in the area of *criminal* case interviewing in sexual offenses cases, while a comparatively greater percentage of his experience is dealing with these matters in the context of family law. BOR, at pp. 6-10. Yet Dr. Rybicki's resume is so extensive that even if a much smaller percentage of his training and experience (compared to Coslett's percentage) related to child sexual abuse interviews in criminal matters, that percentage would still be comparable to the training and experience of Gina Coslett in these areas, and more than adequate to render him an expert.

For example, his case experience includes providing specialized evaluation and critique of child sex abuse interviews, along with other responsibilities, in over a hundred sex abuse cases, focusing on victim interviews in approximately a third of them. CP 91-93, 104, 109 (Rybicki *curriculum vitae* at pp. 8, 19,

24). Dr. Rybicki, at the time of trial, was actually writing a book on "Foundations of Forensic Psychology." CP 109 (Rybicki *curriculum vitae* at p. 24) ("Books, Monographs, and Book Chapters").

Notably, when a child is interviewed for purposes of learning of, substantiating, or documenting allegations of sexual abuse of that child, common sense makes obvious that such interviews may be subject to the same concerns and critiques about *suggestive questioning* by the interviewer as creating sources of error and taint. See 9/24/13RP at 71-72 (Rybicki testimony on offer of proof). This is irrespective of whether the abuse allegations are part of a family law or custody case, a civil parental rights case, or a criminal case; the fact that Dr. Rybicki had worked with the Los Angeles Police Department on child abuse issues, but had also taught graduate courses in the forensic investigation of child abuse for civil agencies such as the Illinois Department of Child and Family Services, did not render him unqualified simply because he correctly represented that his *curriculum vitae* showed that the lion's share of his work was in the latter contexts. 9/24/13RP at 69-

70, 95 (testimony of Rybicki on offer of proof, and argument of counsel).[4]

Finally, Respondent contends that Dr. Rybicki's testimony on offer of proof showed he did not understand the purpose of a CAC interview, which is the type of interview that Gina Coslett performs for the State in child cases. BOR, at p. 14. This is contrary to the record. Dr. Rybicki explained with scholarly precision the differences between the various types of interviews for sexual abuse investigation, and further explained the several different methodologies in the field, beyond the mere single methodology described by Gina Coslett. 9/24/13RP at 72-75 (Rybicki testimony on offer of proof).[5] The fact that he characterized, not without lack of basis, CAC-type child interviews by facilities such as Dawson's Place as being for practical purposes a prelude to criminal

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[4] The Respondent includes a number of qualitiative descriptions regarding what critiques the doctor would or would not have offered regarding the questioning of C.M. by not only the State's interviewer, but also other adults including her mother. BOR, at pp. 28-29. Although many of the citations supporting these statements are to the trial prosecutor's and the court's argument and ruling, R.D.M. agrees that the doctor's expertise and proffered testimony would have included the suggestibility of statements made by the mother about what C.M. said. These are the highly variable statements that were not allowed to be impeached by R.D.M., raising the second issue in this appeal. See Part 4, infra.

prosecution, and referred to them as "substantiation" interviews in the terminology of his profession, in no way renders him unqualified as an expert on forensic interviews of child abuse complainant. 9/24/13RP at 72.

3. Reversible error. The error in excluding Dr. Rybicki's testimony was, of itself, reversible error in the context of the case. AOB, at p. 36 (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)), and pp. 37-44 (arguing for reversal in the context of the case's evidence and issues).[6] The Respondent State of Washington erroneously suggests that this appellate court should employ the reasoning that the juvenile court was plainly not impressed, much less persuaded by Dr. Rybicki or his offer of proof – and, therefore, how can it be said that admitting the testimony would result in a different outcome where the same court is the trier of fact? BOR, at pp. 19-20.

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[5] Dr. Rybicki explained that these methods are the Cognitive Interview Method, the Modified Cognitive Interview Method, the Best Practice Method from Britain, the NICHD Method, and lastly the Michigan State Method, which the doctor explained is similar to the Harborview Method. 9/24/13RP at 73-75.

[6] R.D.M. also argues that the error of excluding Dr. Rybicki's testimony violated his right to present a defense, and, also in combination with the impeachment error, (see infra), constituted cumulative error that violated his right to a fair trial. AOB, at pp. 36-44.

This is an untenable proposition. The question on appellate review, whether the reversible error analysis is evidentiary or constitutional, is judged in the context of the case's evidence but by considering the effect of the error on a rational trier of fact.

Thus in this juvenile appeal, the question then becomes whether the error was harmful in the context of materiality to a rational trier of fact, rather than asking whether the evidence, if admitted as substantive, would have changed the particular court's decision. State v. Coristine, 177 Wn.2d 370, 389, 300 P.3d 400 (2013) (stating that in determining reversible error, the court will consider any plausible effects "that the error might have had on a rational jury"); State v. Guloy, 104 Wn.2d 412, 425–26, 705 P.2d 1182 (1985) (rejecting test whether the error could have played a part in the actual jury's determination of guilt and deciding that harmlessness instead depends on overwhelming evidence test); see also State v. Evans, 96 Wn.2d 1, 6–10, 633 P.2d 83 (1981) (Brachtenbach, C.J., concurring) (discussing the two tests); State v. Fallentine, 149 Wn. App. 614, 624-25, 215 P.3d 945 (2009) (test for reversible non-constitutional evidentiary error is whether within reasonable probabilities a rational jury would reach same conclusion). A rational trier of fact more likely than not would have

reached a different conclusion in this case if it had heard Dr. Rybicki's testimony.[7]

Next, it is only one aspect of R.D.M.'s arguments regarding reversible error, but the Respondent erroneously contends that the parties' closing arguments do not reflect any impairment of the defense case caused as a result of the exclusion of Dr. Rybicki's testimony. BOR, at pp. 31 and n. 3. However, the juvenile court, after refusing to hear Dr. Rybicki's critique of the Coslett interview for suggestive questioning, received closing argument from the State that touted its view that the complainant was offering reliable spontaneous and non-scripted testimony as she recalled the matter – the very issue Dr. Rybicki would have testified on. 9/25/13RP at 14-15 (State's closing argument). And during the defense closing argument, the juvenile court sharply challenged counsel by requesting him to explain how Coslett's questions could possibly be described as leading or suggestive – the precise topic Dr. Rybicki would have testified on. 9/25/13RP at 30-34. When defense counsel attempted to point out how there was suggestive questioning, and to satisfy the court's request that such explanation

[7] R.D.M. is also properly asking that the case be remanded for re-trial before a different juvenile court. AOB, at pp. 44-45.

not be abstract and instead refer to the record, counsel did then refer to the transcript of the Coslett interview. 9/25/13RP at 30-32. But the court interjected and then specifically disputed counsel's offer of a reasonable definition of what qualifies as an overly suggestive or leading question – i.e., exactly what the defense expert would have testified about. 9/25/13RP at 32-33.

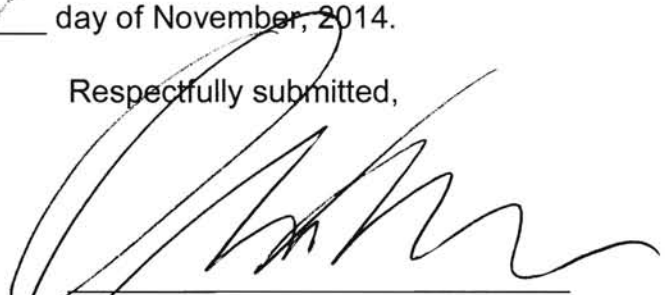
For this and all the reasoning and discussion of the evidence in R.D.M.'s Opening Brief, this Court should reverse the judgment of the juvenile court.

C. CONCLUSION

Based on the foregoing on his Appellant's Opening Brief, R.D.M. respectfully requests this Court reverse the judgment of conviction of the juvenile court.

DATED this 7 day of November, 2014.

Respectfully submitted,



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

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Respondent,	)	
	)	NO. 70968-2-I
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R.D.M.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MARY KATHLEEN WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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