

NO. 7145-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

J.M. (DOB 4/18/2000),

Appellant.

2015 MAR -5 AM 10:16
COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUES

Did the trial court abuse its discretion when it admitted the child victim's statements to his mother and a child interview specialist when the statements met the Ryan factors, initial disclosure was spontaneous and all other statements were made in response to open-ended and non-leading questions?

II. STATEMENT OF THE CASE

In the summer of 2012, little K.R. (born in November 2006) lived in Everett with his mother A.H. and other family members. 1RP 15, 33. K.R.'s cousin, J.M. (born April 2000), also lived in Everett with his own parents. 1RP 16.

For a week or two at the end of July 2012, K.R. stayed overnight at J.M.'s house. 1RP 18, 36. K.R. remembered a lot of things about his visit, that J.M. had many things in his room including a Play Station, various collections, and other games; that a dog named Yoda lived outside; and that he played in the garage and with a girl who was J.M.'s sister or cousin. Id.

K.P. also remembered that J.M. made him suck on his penis. 1RP 19. It happened in J.M.'s room after J.M. shut and locked the door and pulled down his pants. 1RP 19. It tasted gross and made K.R. feel weird. 1RP 21.

J.M. made K.R. "suck his pee pee" four times, always in J.M.'s room, always that summer. 1RP 22. Afterwards, J.M. would pull up his pants, unlock and open the door, and let K.R. leave. 1RP 23. J.M. told K.R. not to tell or he would spank him and not let him play games. 1RP 21, 22, 41.

Within a few days of his homecoming, K.R.'s mother A.H. noticed that K.R. was acting out of character and seemed emotional. 1RP 37. One day as they got ready to go swimming, A.H. noticed that K.R. was crying and asked him what was going on. 1RP 38-39. K.R. told her that J.M. had made him suck his pee pee. 1RP 39.

A.H. asked follow up questions such as how did it start, where was your grandma, and where was your brother. 1RP 39. K.R. answered her questions and provided other details. 1RP 39.

A.H. called the police and eventually took K.R. to Dawson Place where he was twice interviewed by child interview specialist, Gina Coslett. 1RP 42, 59.

During an August 22, 2012, interview, K.R. disclosed no abuse to Coslett. 1RP 59, Exhibit 1. K.R. said he did not remember anything happening. Ex. 1, p. 7. Asked if he did not

remember or if didn't want to talk about it, K.R. said he did not want to talk about it because it was hard. Id.

Less than a month later, K.R. went back to Dawson Place. 1RP 59, Exhibit 2. This time, K.R. was ready to talk. K.R. said he was there to talk about J.M. and how J.M. made him suck his pee pee in his room more than one time. Id. at 4. K.R. said J.M.'s pee pee was big and made his mouth feel gross. Id. at 8. It always happened in J.M.'s room when KR was five. Id. at 10. It happened in the summer. Id. at 14. JM told him not to tell. Id. at 9.

The trial court found K.R. competent, admitted his statements to his mother and the child interview specialist, and found J.M. guilty. CP 1-5. J.M. now appeals, claiming the court erred when it found that K.R. disclosed to his mother and a child interview specialist and that his statements were spontaneous. CP 2, Findings of Fact 1(B)(3) and (4).

III. ARGUMENT

A. K.R.'S STATEMENTS TO HIS MOTHER AND TO THE CHILD INTERVIEW SPECIALIST WERE PROPERLY ADMITTED UNDER THE CHILD HEARSAY EXCEPTION.

A statement made by a child under 10 that describes an act or attempted act of sexual contact is admissible if the court finds the time, content, and circumstances of the statement provide

sufficient indicia of reliability and the child testifies. RCW 9A.44.120(1), (2)(a). Nine factors are relevant when determining whether the statement is reliable:

(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contains any express assertion about a 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 are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984). Not every factor must be met. State v. Justiniano, 48 Wn. App. 572, 580, 740 P.2d 872 (1987). It is sufficient if the factors are substantially met. State v. Woods, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (2005); State v. Swan, 114 Wn.2d 613, 628, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

A trial court has considerable discretion when evaluating reliability. Swan, 114 Wn.2d at 628. That is because “[t]he trial court is in the best position to make the determination of reliability

as it is the only court to see the child and the other witnesses.” Pham 75 Wn. App. at 631. A court’s decision admitting child hearsay should not be reversed absent a showing of manifest abuse of discretion. Woods, 154 Wn.2d at 623; State v. Jackson, 42 Wn. App. 393, 396, 711 P.2d 1086 (1985).

In the present case, J.M. complains that the statements made were in response to leading questions and that repeated questioning of K.R.’s by his mother and the child interview specialist rendered K.R.’s statements unreliable. The argument is unsupported by law and belied by the record.

1. K.R.’S Statements To His Mother Were Spontaneous, Made Shortly After The Abuse.

A child’s responses to non-leading questions, that is, questions that are not suggestive, are spontaneous for purposes of the Ryan factors. State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987). Whether a question is leading depends on the amount of detail encompassed in the question. If the question supplies the declarant with so many details that it suggests an answer the declarant can adopt by simply saying yes or no, it is leading. State v. Scott, 20 Wn.2d 696, 698, 149 P.2d 152 (1944).

Even questions that include some detail may still produce spontaneous answers. Henderson, 48 Wn. App. at 550. Asking a child why it hurt when her father touched her vagina was not a leading question. Id. The victim's answer, that it hurt because her father put his finger in it, was volunteered and spontaneous. Id.

Henderson broadened the definition of "spontaneous" to include examination of the context in which the child makes the statement. State v. Young, 62 Wn. App. 895, 898 and 901, 802 P.2d 829, 817 P.2d 412 (1991) (social worker's question whether victim's father hurt her with a stick, whether she had seen him naked, and whether father put his penis near her face considered non-leading); State v. McKinney, 50 Wn. App. 56, 59, 63, 747 P.2d 1113 (1987), review denied, 110 Wn.2d 1016 (1988) (mother's question to daughter whether anyone had touched her in her private part was not leading). Even if a situation may be unspontaneous, the statements made there may be spontaneous for child hearsay purposes. State v. Madison, 53 Wn. App. 754, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). In Madison, a foster mother, suspecting abuse, looked at a book on reproduction with the child victim. She asked the child if anyone had touched her. The child answered that Uncle Steve had and

added details. Even though the setting was not spontaneous, the court found the answers spontaneous because of the details they provided and upheld the trial court's trial hearsay decision. Id. at 759.

In the present case, K.R.'s mother's questions were not leading. K.R.'s disclosure came out of the blue when A.H. saw him crying and asked what was going on. Afterwards, A.H. still asked non-leading and open-ended questions: How did it how did it start? Where was your grandma? Where was your brother? 1RP 40. The questions were not leading.

J.M. also complains that the relationship and timing of K.R.'s disclosure to his mother shows that the statements are unreliable. He has not, though, challenged Findings of Fact I(B)(5), that there was nothing unusual about the timing of the disclosures, especially to his mother. CP 2.

Nor does Ryan support his claim. Ryan does not stand for the proposition that any disclosure to a parent is suspect. In 103 Wn.2d at 176-77. The law is otherwise. A child's disclosure to a person in a position of trust, such as a family member, enhances the statement's reliability. State v. Kennealy, 151 Wn. App. 861, 884, 214 P.2d 200 (2009), citing Swan, 114 Wn.2d at 650.

In Ryan, two mothers knew of the “strong likelihood the defendant had committed indecent liberties upon their children *before* the mothers questions the children,” and were predisposed to question them to confirm what they had heard. 103 Wn.2d at 176 (italics in original). That, plus the lack of any guarantee of reliability, rendered the statements inadmissible. Id. at 176-77.

In the present case, K.R. disclosed first to his mother, a person in a position of trust, before his mother had any idea that he had been molested. She was not seeking confirmation as had no knowledge to confirm.

The trial court’s decision on admitting K.R.’s statements to A.H. Its decision should be upheld.

2. KR’s Statements To The Child Interview Specialist Were Spontaneous And Reliable.

J.M. relies on one New Jersey case to support his claim that K.R.’s statements to a child interview specialist are inadmissible because they were tainted by repeated questioning. See State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (1994). As J.M. later admits, Michaels is almost completely different from the present case.

Michaels discussed the various ways in which an interview with a child could be suggestive and therefore lead to unreliable answers. “If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.” Id. at 309. Factors that mold a child's recollection include the interviewer's preconceived notions about the abuse, use of leading questions, lack of control over outside influences, use of incessant repeated questions, vilification of the suspect, bribes, and rewards. Id. at 309-10.

The child interview specialist in the present case used none of those techniques. She had no preconceived notions; she used non-leading questions; there were no outside influences; she did not use incessant or repeated questions; she did not disparage J.M., she offered no bribes and no rewards.

While questioning occurred on more than one occasion, there was no leading questioning. That is very different from the “incessant repeated questions” that were problematic in the New Jersey case.

K.R.'s statements to the child interview specialist were made during two interviews, both of which were videotaped, neither of

which used coercive or suggestive techniques. As discussed, supra, a child's statements made in response to non-leading open-ended questions are spontaneous. See also Kennealy, 151 Wn. App. at 883-84.

The record amply supports the trial court's findings that K.R.'s statements to the child interview specialist were admissible. Its decision should be upheld.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions.

Respectfully submitted on March 4, 2015.

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