

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

NO. 34800-4-II

STATE OF WASHINGTON,

Respondent,

vs.

Benjamin C.,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 05-8-303-5

BRIEF OF RESPONDENT

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DIVISION II
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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court correctly admitted L.V.'s hearsay statements
2. The trial court correctly admitted L.V.'s July 3, 2005 statement to her mother.
3. The trial court correctly admitted L.V.'s July 3, 2005 statement to her father.
4. The trial court correctly admitted L.V.'s July 13, 2005, statement to her therapist.
5. The trial court correctly admitted L.V.'s drawing depicting the sexual assault.
6. The trial court correctly admitted L.V.'s second drawing depicting the sexual assault.
7. The trial court correctly admitted L.V.'s January 5, 2006, statement to her mother.
8. The trial court's Finding of Fact No. 4 was appropriate.
9. The trial court's Finding of Fact No. 5 was appropriate.
10. The trial court's Finding of Fact No. 6 was appropriate.
11. The trial court's Finding of Fact No. 7 was appropriate.
12. The trial court's Finding of Fact No. 8 was appropriate.
13. The trial court's Finding of Fact No. 9 was appropriate.
14. The trial court's Finding of Fact No. 10 was appropriate.
15. The trial court's Finding of Fact No. 12 was appropriate.
16. The trial court's Finding of Fact No. 13 was appropriate.
17. The trial court's Finding of Fact No. 14 was appropriate.

18. The trial court's Finding of Fact No. 15 was appropriate.
19. The trial court's Finding of Fact No. 16 was appropriate.
20. The trial court's Finding of Fact No. 17 was appropriate.
21. The trial court did not violate the appearance of fairness doctrine.
22. RCW 13.40.21(2) is not unconstitutional as applied to juveniles charged with sex offenses.
23. Benjamin C. was not denied his constitutional right to a jury trial, because juveniles are not entitled to a trial by jury.

II. STATEMENT OF FACTS

Benjamin C.'s statement of facts appear for the most part accurate with the following exceptions.

On page three of Benjamin C.'s statement of facts that Ms. Valentine denies and then later admits that she had asked L.V. numerous questions. Benjamin C. incorrectly identifies the RP (2/8/06) 44 and RP (2/8/06) 50-53 as supporting evidence. Ms. Valentine admits that L.V. continually questioned her about why Benjamin C. did what he did but never admits that she asked L.V. numerous questions. In fact on RP (2/8/06) 44-45 indicate that she denies asking her daughter about the incident, and definitely denies ever asking L.V. to tell her what happened in the nursery.

Benjamin C. also refers to RP (2/8/06) 50-53 as testimony of Mrs. Valentine. The pages referred to by Benjamin C. of the RP refer to Mr. Valentine's testimony. Mr. Valentine also denies questioning L.V. about what happened, but engaging her in conversation when L.V. asks her father, "why Ben did this, he was my friend, why did he do this." RP (2/8/06) 52.

Benjamin C. also indicated in the statement of facts on page four that Ms. Shea was unable to say when the second drawing was created. RP (2/8/06) 62. Actually Ms. Shea was able to tell the court that the

picture had been drawn approximately three weeks prior. RP (2/8/06)

62.

Benjamin C. also contends through the statement of facts, page eight, that L.V.'s touching of his penis was a mistake, inadvertent, accidental. Through the testimony elicited during the fact finding hearing Benjamin C. had L.V. close her eyes and took her hand and put her hand on his penis on the way to grabbing the snake. RP (2/23/06) 136-147. Benjamin C. contends prior to conviction that L.V. touching his penis was inadvertent and in the statement of facts, page eight, tries to indicate that was found to be the true through the psycho sexual evaluation. However in review of the Supp. CP – Psycho Sexual Evaluation page 1, Benjamin C. admits he forced the victim to touch his penis and did become erect when she touched him. Additionally Benjamin C.'s own words to the polygrapher, "I took L.V.'s wrist and directed it inside my pants while I held my pants and underpants open. I pushed her hand down to where she touch my penis," Supp. CP – Psycho Sexual Evaluation page 4.

Above were corrections to Benjamin C.'s statement of facts. In addition to the corrections noted above the State adds the following additional information to the Statement of Facts. On 2/1/06, an evidentiary hearing was held regarding L.V.'s ability to testify in front of

Benjamin C. During that hearing, Ms. Shea testified, regarding her qualifications to be L.V.'s therapist, her qualifications as a therapist, and her methodology with regards to treatment of sexual abuse victims. RP (2/1/06) 3-35.

III. ARGUMENTS

1. **The Trial Court did not err by admitting L.V.'s Hearsay Statements under RCW 9A.44.120.**

Statements within the statutory child abuse exception should not be reversed absent a showing of manifest abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005). The trial court is given broad discretion in determining the competency of witnesses to testify and in determining the reliability of a child victim's hearsay. *Woods* at 625. Substantial evidence exists if a rational, fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. *Fred Hutchinson Cancer Research Ctr v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

The Child Hearsay Statute, RCW 9A.44.120, read as follows:

Admissibility of Child's Statement--Conditions.

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another or describing any attempted act of sexual contact with or on the child by another, not otherwise

admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness:

PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Proper factors for the Court to consider when determining such indicia of reliability were set forth in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). These factors, commonly called the *Ryan* factors, are actually a combination of five factors drawn from *State v. Parris*, 98 Wn.2d 140, 146, 645 P.2d 77 (1982) and four factors drawn from *Dutton v. Evans*, 400 U.S. 74, 88-89, 27 L.Ed 2d 213, 91 S.Ct. 216 (1970). Factors one through five are from *Parris*; factors six through nine are from *Dutton*. The divergent origin of the factors explains their presentation in *Ryan* in a non-parallel list. The nine *Ryan* factors are as follow. Again, these factors apply to the reliability of the statement which the child made to the reporting witness.

1. Whether there is an apparent motive to lie. [on the child's part.]
2. The general character of the [child] declarant.
3. Whether more than one person heard the [child's] statements.
4. Whether the [child's] statements were made spontaneously.
5. The timing of the declaration and the relationship between the [child] declarant and the witness.
6. The statement contains no express assertion about past fact.
7. Cross examination could not show the [child] declarant's lack of knowledge.
8. The possibility of the [child] declarant's faulty recollection is remote.
9. The circumstances surrounding the [child's] statement are such that there is no reason to suppose the [child] declarant misrepresented defendant's involvement.

Of these nine *Ryan* factors, number six has been found to have little significance as a reliability indicator, and numbers six through nine have been found to have a reduced impact upon reliability analysis. As clarified in *State v. Borland*, 57 Wn. App. 7, 786 P.2d 810, review denied, 114 Wn.2d 1026 (1990). According to *State v. Strange*, 53 Wn. App. 638, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989), factor number six should not apply at all.

Significantly, to find any statement reliable, this Court need merely determine that the *Ryan* factors have been *substantially* met.

This Court need not be convinced that all nine factors have been met. *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 112 L.Ed.2d 772, 111 S.Ct 752 (1991); *State v. Swanson*, 62 Wn. App. 186, 193, 813 P.2d 614, review denied, 118 Wn.2d 1002 (1991).

How the court is to assess the child hearsay statements was addressed in *State v. Stevens*, 58 Wn. 2d 478, 794 P.2d 38 (1990). The Court must focus on the individual statements, looking at the circumstances surrounding the actual making of the statements. *Id.* As the *Ryan* court clarified,

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. 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. *State v. Ryan*, 103 Wn.2d at 174.

Ryan factor four, spontaneity, does not require a showing that the child declarant blurted out the statement. The child's statement may qualify as spontaneous under factor four even when made in response to questions. *State v. McKinney*, 50 Wn. App. 56, 747 P.2d 1113 (1987). The *McKinney* court found that when a child's statements were made in response to questions which were neither leading nor suggestive, those statements were spontaneous. The case of *State v. Borland*, 57 Wn. App. 7, 15, 786 P.2d 810 (1990), also addressed spontaneity and found that questioning does not destroy spontaneity.

Appellant proceeds to separate the factors out and asks this Court to address separately. Not every factor need be satisfied; it is enough that the factors are substantially met. *Swan* at 652. The Supreme Court has acknowledged it is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner and considers his or her capacity and intelligence. *Woods* at 617.

***Ryan* Factor No. 1: Declarant's apparent motive to lie.**

When reviewing factor one of the *Ryan* factors Benjamin C. asserts the trial court reasoning for finding factor one was erroneous. State contends that Benjamin C. is wrong. A trial court may infer the child's ability to accurately perceive events from the child witnesses overall demeanor, and the manner of her answers. Benjamin C. argues that there was no such testimony that L.V. viewed Benjamin C. as her friend. That is incorrect. As the trial attorney who has handled the case from the charging decision to this appeal, it is noted in the RP (2/8/06) 11, that L.V. believed that Benjamin C. was her friend. The record appears a little confusing on that part; but reading it and from my memory of what occurred L.V. was earnest in feelings that Benjamin C. was her friend.

Secondly, Benjamin C. points to the fact that L.V. divulged what happened to her in the nursery to her mother but was fearful prior to telling her mother what had happened. RP (2/8/06) 33, 36, 45. As Benjamin C. indicated it was an unfounded fear but it was how she began the conversation with her mother the evening following the molestation. The suggestion that this provided a six year old a likely reason to exaggerate is not supported by the testimony of L.V. in response to the Court's questions, the State's questions during the hearing or on cross examination. RP (2/8/06) 4-25. Therefore, the

Court's Finding No. 12 in Supp. CP – Order on the Child Hearsay Hearing/Finding was supported by substantial evidence and therefore appropriate. As the Court in *Woods* indicated we must rely on the trial judge who sees the witness, notices the witness's manner and considers his or her capacity and intelligence. Finding that *Ryan* factor No. 1 was met and should be affirmed. There was no manifest abuse of discretion by the Court in finding *Ryan* factor No. 1 was satisfied.

***Ryan* Factor No. 2: Declarant's general character.**

Benjamin C. argues that there was insufficient evidence presented for the Court to make the ruling in Court's Finding No. 8 and 13 in Supp. CP – Order on the Child Hearsay Hearing/Finding.

The Court's finding No. 8 and No. 13 were based on the information provided by L.V. during questioning by the Court, the state and the defense. RP (2/8/06) 4-25. The question of L.V.'s tendency towards fantasy an exaggeration are specifically addressed by the questions that defense counsel asked L.V. RP (2/8/06) 21-23. Defense counsel asked L.V. about Santa and how she knows who Santa was because, she met him at a Christmas festival, but when asked by defense counsel asked about the Easter Bunny she actually clarifies for the defense counsel that she did not know who the Easter Bunny was because she had never met him, same with the Tooth Fairy, she did not know who the tooth fairy was but based his existence on the fact that there was money left behind after she put the tooth under her pillow. The response to these questions along with the observations of the Court of how thoughtful L.V. was in her responses provided substantial evidence for the Court to make No. 8 and No. 13 findings.

There is nothing that requires that the finding to be made based on affirmative testimony regarding her general character as indicated by Ben C., we must rely on the trial judge who sees the witness, notices the witness's manner and considers his or her capacity and intelligence. *Woods* at 617.

Therefore, the Court's Finding No. 8 and No. 13 in Supp. CP – Order on the Child Hearsay Hearing/Finding was supported by substantial evidence and therefore appropriate. The finding that *Ryan* factor No. 2 was met should be affirmed. There was no manifest abuse of discretion by the Court in finding *Ryan* factor No. 2 was satisfied.

***Ryan* Factor No. 3: Whether more than one person heard the child's statements.**

Benjamin C. indicates that Court did not address *Ryan* factor No. 3. That is not correct reviewing Supp. CP No. 10, No. 11, No. 14 in the Order on the Child Hearsay Hearing/Finding. The Court specifically address' the three individuals that L.V. provided the information to regarding what Benjamin C. had done to her in the nursery. The suggestion that L.V. needed to tell all three of these people at the same time to make her statements reliable and admissible is ludicrous. The Court listened to the testimony of L.V.'s mother, father and counselor (RP 2/8/06 30-64) and found that the child's statements were reliable and admissible.

Therefore, the Court's Finding No. 10, No. 11 and No. 14 in Supp. CP – Order on the Child Hearsay Hearing/Finding was supported by substantial evidence and therefore appropriate. The finding that *Ryan* factor No. 3 was met should be affirmed there was no manifest abuse of discretion by the Court in finding *Ryan* factor No. 3 was satisfied.

Ryan Factor No. 4: Whether the Child Statements were made spontaneously.

Spontaneity does not require a showing that the child declarant blurted out the statement. The child's statement may qualify as spontaneous under factor four even when made in response to questions. *State v. McKinney*, 50 Wn.App. 56, 747 P.2d 1113 (1987). Benjamin C. draws into question to the methodology used by the counselor but Ms. Shea's methodology and qualifications were addressed with the Court. RP (2/1/06) 2-35. Defense Counsel was given the opportunity to question and cross examine the counselor as to all concerns regarding methodology and qualifications.

From the testimony of her mother, L.V. brought up the issue while she was taking her bath. L.V.'s mother had no idea what was to come when the conversation began and the declarations were definitely spontaneous.

Therefore, the Court's Finding No. 15 in Supp. CP – Order on the Child Hearsay Hearing/Finding was supported by substantial evidence and therefore appropriate. The finding that *Ryan* factor No. 4 was met should be affirmed there was no manifest abuse of discretion by the Court in finding *Ryan* factor No. 4 was satisfied.

Ryan Factor No. 5: The timing of the declaration and the relationship between the child declarant and the witness.

The Court was correct when it found that L.V.'s statements were made the day of the alleged incident. Finding No. 16 in Supp. CP – Order on the Child Hearsay Hearing/Finding is accurate. Benjamin C.

tries to argue that the parents' testimony was based on composite recollection. That is a fabrication by Ben C.

The parent's testimony was based on information received by them when L.V. told her parents what happened. It is clear from the testimony from the hearing that L.V. continued to process her thoughts and feelings about what happened by discussing it with her parents. As testified by her parents, it was discussed when L.V. wanted to talk about it, this happened to occur almost every night in the beginning and then tapered off. L.V. was very upset and wanted to know, why Ben would do such a thing. RP 2/8/06 40-42. The suggestion that because a child victim is continuing to process and discuss her victimization with a parent makes the statements unreliable is ridiculous. Is Benjamin C. suggesting that any discussion after the initial reporting causes the initial reporting to be unreliable? To suggest this is diminish the fact that child sex abuse victims need to be able to discuss what has occurred to them to allow closure. The simple asking of the continued question of why this happened to the victim does not in and of itself cause the initial testimony to be unreliable. The discussion that occurred as indicated by the mother was simply her trying to find out why it happened to her, also she was fearful she did something wrong. RP (2/8/06) 44-45.

Public policy would indicate that we would hope that a victim of a sexual assault could process the crime that occurred against them and move on with their lives to allow them to lead a normal healthy life. To suggest that this process in some way prevents statements that they provided to be less reliable is counter intuitive. In admitting Child Hearsay Statements the court must focus on the individual statements, looking at the circumstances surrounding the actual making of the statements. *Stevens*.

There is nothing in the testimony from the Child Hearsay hearing that indicates that the continued discussion ever covered anything more than what has been indicated in the RP (2/8/06) 44-45.

As for the relationship component it is natural to believe that a six year old will turn to a parent when reporting something of this nature.

Therefore, the Court's Finding No. 16 in Supp. CP – Order on the Child Hearsay Hearing/Finding was supported by substantial evidence and therefore appropriate. The finding that *Ryan* factor No. 5 was met should be affirmed there was no manifest abuse of discretion by the Court in finding *Ryan* factor No. 5 was satisfied.

***Ryan* Factor No. 6: The statement contains no express assertion about past fact.**

Whether or not a hearsay statement of a child sex crime victim contains an express assertion of past fact is not significant in evaluating the reliability of the statement and its possible admission under RCW 9A.44.120. *State v. Stange*, 53 Wn.App. 638, 769 P.2d 873 (1989), review denied, 113 Wn.2d 1007 (1989).

***Ryan* Factor No. 7: Cross Examination could not show the child declarant's lack of knowledge.**

Not required when child testifies as trial. *Woods* at 624.

***Ryan* Factor No. 8: The possibility of the child declarant's faulty recollection is remote.**

L.V. testified at the Child Hearsay Hearing where her memory and recollection of other factor's such as what she did for her birthday which had occurred prior to the sexual assault. What she got for

Christmas which occurred two months prior to the hearing. Her testimony address issues of faulty recollection and none was noted or argued by defense counsel as at issue. RP (2/8/06) 4-25. Factor No. 8 does not support suppression of the hearsay statements.

***Ryan* Factor No. 9: The circumstances surrounding the child's statements are such that there is no reason to suppose the child declarant misrepresented defendant's involvement.**

The Court must focus on the individual statements, looking at the circumstances surrounding the actual making of the statements. *State v. Stevens*, 58 Wn.2d 478, 794 P.2d 38 (1990). There is nothing to support suppression. This ties in with *Ryan* Factor No. 1, motive to lie. There is nothing to suggest that defendant was not involved and in fact Benjamin C. admits that he took her wrist, asked her close her eyes and put her hand on his penis and got an erection. Supp. CP – Report/Psycho/Sexual Evaluation.

Nothing to support suppression based on factor 9.

In conclusion statements admissible within the statutory child abuse exception should not be reversed absent a showing of manifest abuse of discretion. *Woods* at 620. The trial court is given broad discretion in determining the competency of witnesses to testify and in determining the reliability of a child victim's hearsay. *Woods* at 625. The Supreme Court has acknowledged it is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner and considers his or her capacity and intelligence. *Woods* at 617. Substantial evidence exists if a rational,

fair-minded person would be convinced by it. Even if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. *Fred Hutchinson Cancer Research Ctr v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). Not every factor need be satisfied; it is enough that the factors are substantially met. *Swan* at 652.

The factors have been substantially met and withstand the standard of review of manifest abuse of discretion. Therefore Benjamin C.'s argument that the child hearsay statements should have been suppressed and because of that the conviction must be reversed and remanded is incorrect and the child hearsay statement's were properly admitted. Therefore, the trial court's findings should be affirmed.

II. The Trial Judge did not violate the appearance of fairness doctrine.

At no point does the trial court make a determination of the credibility of L.V. The trial court simply makes a very detailed account of the testimony which support the finding of reliability and support the findings that the child hearsay statements were admissible. In fact the trial court indicates in the findings that ...Those differences affect the weight the Court may give to such testimony at trial, but does not affect admissibility or make the statements unreliable. Supp. CP Order on Child Hearsay Hearing/Finding.

This statement clearly shows that the court recognizes it is not making a determination of guilt but is solely making the finding regarding admissibility and reliability.

As indicated by Benjamin C. to prevail on a violation of the appearance of fairness doctrine, a claimant must only provide some evidence of the judge's actual or potential bias. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 85 (1999). Benjamin C. needs to provide some evidence and there has been none provided. Benjamin C. puts the argument out there and then does nothing to support the proposition that the appearance of fairness doctrine was violated.

Benjamin C. seems to argue that because the trial court found that the child hearsay statements were admissible was enough to support a finding because the same judge sat on the fact finding hearing. If this is the evidence supporting his contention that the appearance of fairness doctrine was violated it would lend itself to any case where an evidentiary hearing did not go the way of the respondent/defendant.

The trial court did not violate the appearance of fairness doctrine, Benjamin C. was not denied his due process rights and therefore the conviction must be affirmed.

III. RCW 13.04.021(2) which prohibits jury trials for juveniles is not unconstitutional when applied to juveniles charged with sex offenses.

- a. The sixth amendment to the federal constitution is not violated by RCW 13.04.021(2).**

RCW 13.04.21(2), which provides that cases in juvenile court are tried without a jury, does not violate the jury trial right guaranteed by the sixth amendment and Washington State Constitutional article 1 § 21 and 22 or the right to equal protection of the laws guaranteed by the Fourteenth Amendment. *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987). Sixth amendment to the United States Constitution provides that “in all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...” *Schaaf* at 5. Juvenile proceedings are not equated with criminal prosecutions, therefore the Sixth amendment does not apply to juvenile proceedings. *State v. Lawley*, 91 Wn.2d 654, 658, 591 P.2d 772 (1979).

Rational basis standard applies to a juvenile's challenge to denial of a jury trial. *Schaaf* at 21. The Supreme Court found that the statutory denial of jury trials to juvenile justice proceedings is rationally related to the State's desire to maintain the unique nature of the juvenile justice system. *Schaaf* at 29.

Benjamin C. suggests that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), requires the court to revisit the idea that juvenile respondents are not entitled to a trial

by jury. *Crawford* and *Blakely* do not discuss the subject of a juvenile's right to a jury trial.

Crawford examines in great detail the historical foundation of a constitutional provision at issue in order to determine its meaning. Historically juvenile adjudicatory proceedings have never been equated with a "criminal prosecution" for purposes of the sixth amendment. *McKeiver v. Pennsylvania*, 403 US 528, 541, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). Notwithstanding the adoption in 1997 of amendments to the juvenile justice code that tended to make it more punitive, it is recognized that the juvenile justice proceedings are uniquely geared toward rehabilitation. Even with the 1997 amendment to juvenile justice act the Court has found "the juvenile justice provisions as amended still retain significant differences from the adult criminal system and still afford juveniles special protections not offered to adults". *State v. J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999).

As juveniles have no right to a jury trial in proceedings under the JJA, *Blakely's* rule designed to protect the sixth amendment jury trial right does not apply. The *Blakely* Court showed no intention, to overrule its well-established holding that the right to a jury does not attach to the traditional juvenile justice system. *State v. Meade*, 129 Wn.App. 918, 120 P.3d 975 (2005), (citing) *McKeiver v. Pa.*, 403 U.S. 528, 543, 91

S.Ct. 1976, 29 L.Ed.2d 647 (1971). *Blakely* did not alter long standing rules regarding when the right of a jury attaches; it merely broadened and delineated the scope of that right once it does attach. *Meade* at 926, (citing) *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir.), cert. denied, 537 U.S.961, 154 L.Ed.2d 315, 123 S.Ct. 388 (2002). Because the right to a jury trial does not attach to juvenile proceedings then *Blakely*, clearing does not apply.

The Sixth Amendment to the federal constitution is not violated by RCW 13.40.021(2). There has consistently been a long line of cases that have found juveniles are not entitled to a jury, including cases that have been decided post *Crawford* and *Blakely*. *In re the Dependency of: A.K.*, 130 Wn.App. 862, 884, 125 P.3d 220 (2005), *State v. Meade*, 129 Wn.App. 918; *State v. Tai N.*, 127 Wn.App. 733, 113 P.3d 19 (2005), *State v. J.H.*, 96 Wn.App. 167; *State v. Schaaf*, 109 Wn.2d 1; *State v. Lawley*, 91 Wn.2d 654; *McKeiver v. Pennsylvania*, 403 US 528, 541.

Benjamin C. was not denied a right to a jury trial because such a right does not exist for juvenile proceedings, therefore Benjamin C. conviction must be affirmed.

- b. **Washington State Constitution is not violated by RCW 13.40.021(2).**

Washington Constitution Article I

Section 21 Trial by Jury.

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Section 22 Rights of the Accused

In criminal prosecutions the accused shall have the right to appear and defend in person, or by appellant, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein

guaranteed. [AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

The sixth amendment to the United States Constitution provides that “in all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...” *Schaaf* at 5. Juvenile proceedings are not equated with criminal prosecutions; therefore the Sixth amendment does not apply to juvenile proceedings. *Lawley*, 91 Wn.2d 654. In *Lawley*, the Court found that *McKeiver* was controlling as to the federal constitution and decline to adopt a more stringent rule under the Washington State Constitution. *Lawley* at 659. The reason for the declination was the provisions of both the Federal and State constitutions provide a right to a trial by jury for criminal prosecutions. According to *Lawley*, philosophy and methodology of addressing the personal and societal problems of juvenile offenders has changed but not converted the procedure into a criminal offense atmosphere comparable with adult criminal offenses. *Lawley* at 659. Juvenile offenses are not akin to criminal prosecutions therefore, Washington State Constitution is not violated by RCW 13.40.021(2).

Benjamin C. argues that absent controlling precedent, a party asserting that the State Constitution provides more protection than Federal Constitution must analyze the issue under *Gunwall*. *State v.*

Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). *Schaaf* is controlling precedent,

After full consideration of all aspects of the matter, new, and previously raised, we conclude that we should remain with the majority of the states which deny jury trials in juvenile cases. Our examination of the Gunwall factors leaves us convinced that juvenile offenders are not entitled to jury trials under our state constitution. This particularly true with respect to preexisting state law factor, and the statutory insistence of long standing that there be a unique juvenile justice system in this state. Weighed with our consideration of this long-standing precedent is our previous discussion of the current state of the law governing juvenile offenders, under which juvenile proceedings are still distinguishable from adult criminal prosecution, both in terms of procedure and result. We conclude that jury trials are not necessary to fully protect a juvenile offender's rights.

Schaaf at 16.

Our Supreme Court in *Schaaf*, has previously made a *Gunwall* analysis of this issue and set binding precedent that jury trials are not necessary to fully protect juvenile offender's rights.

In *J.H.*, notwithstanding the adoption in 1997 of amendments to the juvenile justice code tending to make it more punitive, we recognized the "unique rehabilitative nature of juvenile proceedings" as a continuing rationale for having judges, not juries, decide cases involving juvenile offenders. We conclude that "the juvenile justice provisions as amended

still retain significant differences from the adult criminal justice system and still afford juveniles special protections not offered adults.” *State v. J.H.* at 186-87. “In short, recent decisions do not compel a change to well-established precedent holding that non-jury trials of juvenile offenders are constitutionally sound.” *Tai N.* at 740.

There is controlling precedent in *Schaaf* that has been affirmed time and time again, including recent decisions which discuss and reject the changes in the treatment of juveniles and the argument that those changes now make the juvenile system akin to the adult system. *In re the Dependency of: A.K.*, 130 Wn.App. 862, 884; *State v. Meade*, 129 Wn.App. 918; *State v. Tai N.*, 127 Wn.App. 733; *State v. J.H.*, 96 Wn.App. At 186-87. The Washington State Constitution is not violated by RCW 13.04.021(2).

Benjamin C. was not denied a right to a jury trial because such a right does not exist for juvenile proceedings, therefore Benjamin C. conviction must be affirmed.

- c. **Penalties and procedures in the juvenile justice system remain significantly different from those under the adult criminal system, regardless of the level or type of crime committed, and focus to a great degree on the needs of the offender and on the goal of rehabilitation, rather than on punishment.**

The continued existence of difference in the juvenile justice system versus the adult criminal system compels a conclusion that a jury trial does not apply to juvenile proceedings, regardless of the seriousness of the offense. *State v. J.H.* at 167. Appellant argues that there should be differentiation between sex crimes and all other crimes.

Benjamin C. argues that sex offenses require a jury trial because the appellant is not entitled to all the special rehabilitative programs available under the juvenile justice system. Appellant may not have been eligible for some of the alternative dispositions offered by the juvenile justice act but that does mean appellant is not offered rehabilitation programs. Actually in this case Benjamin C. proceeded to trial where he was convicted and then the state paid for a psycho sexual evaluation which asserted he was amenable to treatment even though he denied the allegation until the conviction. Benjamin C. was given the SSODA, Special Sex Offender Disposition alternative pursuant to RCW 13.40.160.

The state contends that this is very much a departure from how sex offenses are treated in the adult court. In the adult court the procedure for allowing an adult a SSOSA, Special Sex Offender Sentencing Alternative pursuant to RCW 9.94A.670, is they plead guilty and then are evaluated for amenability to treatment. Rarely will there be a case

that an adult is convicted at trial of a sex offense and then offered a SSOSA. Not true in juvenile cases, this is a strong departure from the adult system. This alone supports the contention that the juvenile system is much more concerned with rehabilitation than the punitive aspect. If Benjamin C. was an adult, took the case to trial, and was convicted he would have been foreclosed from the sentencing alternative.

Additionally the Legislature when setting a standard range for a sentence, do so with the purpose as set forth by RCW 13.40.010(2), "It is the intent of the legislature that a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders...". Benjamin C. was convicted of sex offense and sentenced to a SSODA, Special Sex Offender's Disposition Alternative.

The seriousness of the offenses has been taken into account by the Legislature when setting sentencing ranges with the purpose behind it to respond the needs of the youthful offenders. The courts in a long line of case have found that because juvenile proceedings are uniquely rehabilitative in nature juveniles are not entitled to jury trials. *In re the Dependency of: A.K.*, 130 Wn.App. 862; *State v. Meade*, 129 Wn.App. 918; *State v. Tai N.*, 127 Wn.App. 733; *State v. J.H.*, 96 Wn.App. 167; *State v. Schaaf*, 109 Wn.2d 1; *State v. Lawley*, 91 Wn.2d 654; *McKeiver*

v. Pennsylvania, 403 US 528, 541. The level of seriousness of the offense does not change the purpose of the juvenile justice act.

The seriousness and type of offense does not change that the purpose of the juvenile justice is rehabilitative in nature. Benjamin C.'s sex offense does not mandate a change in legal precedent; juveniles are not entitled to a trial by jury. Therefore, Benjamin C.'s conviction must be affirmed.

IV. CONCLUSION

Conclusion Summary

In conclusion the trial court did not error in admitting L.V. child hearsay statements because they were supported by substantial evidence and there has not been a showing that the trial court's decision was a manifest abuse of discretion. Therefore trial court's findings should not be disturbed on appeal.

For Benjamin C. to support an allegation of a violation of the appearance of fairness doctrine there has to be some evidence to support an actual or potential bias. No such evidence has been presented to the Court therefore this argument should fail and the court should deny Benjamin C.'s assertion that his right was violated.

Benjamin C. is not entitled to a jury trial. The arguments raised by Benjamin C. are contrary to established precedent and should fail.

The errors brought before this court by Benjamin C. hold no merit and the appeal should be denied.

DATED this 17th day of January, 2007.

DEBORAH S. KELLY, Prosecuting Attorney

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Tracey L. Lassus
Deputy Prosecuting Attorney
Attorney for Respondent

WBA #31315

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

BENJAMIN C., Appellant

NO. 34800-4-II

AFFIDAVIT OF SERVICE BY MAIL

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: ss.
County of Clallam)

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The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 17 day of January, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent , addressed as follows:

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Backlund & Mistry
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Tracey L. Lassus
Tracey L. Lassus

SUBSCRIBED AND SWORN TO before me this 17 day of January, 2007.

Teresa Martin
Teresa Martin
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10-1-08