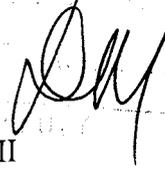


No. 36552-9-II

BY



COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

S.A.D.,

Appellant.

Pierce County Superior Court

Cause No. 06-8-01500-0

The Honorable Judge John A. McCarthy

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. S.A.D. was denied his constitutional right to a jury trial.
2. The trial court erred by admitting child hearsay in violation of RCW 9A.44.120.
3. The trial court erred by finding the child's statements to his mother reliable.
4. The trial court erred by finding the child's statements to his mother spontaneous.
5. The trial court erred by finding the child's statements during the forensic interview reliable.
6. The trial court erred by finding the child's statements during the forensic interview spontaneous.
7. The trial court erred by finding that the timing of the child's statements during the forensic interview favored admission.
8. The trial court erred by entering Finding of Fact V which reads:

C.M. testified that he slept on the top bunk bed and so did the respondent. Other children may have also slept on the top bunk. C.M. testified that while on the bed and underneath the covers, the respondent told him that he wanted to play a game of "husband and wife." The respondent then put his hand down the back of C.M.'s pajama pants and touched C.M.'s buttocks. The respondent also kissed C.M. on the lips. Using his legs, the respondent then straddled C.M.'s stomach area while both were wearing their pajamas. The respondent then rubbed his genitals on C.M.'s stomach in a back-and-forth motion.

CP 5.
9. The trial court erred by entering Finding of Fact X which reads:

C.M.'s testimony was credible and competent for the following reasons: 1. C.M. did not have a motive to lie; 2. C.M.'s version of the incident has remained consistent regarding the identity of the perpetrator, the location of the incident, and the details of the incident; 3. C.M.'s description of the incident was what would be

expected of a child his age, maturity, and sexual knowledge; 4. C.M. appeared appropriately reluctant and hesitant when discussing the event; and 5. Prior to the incident, C.M. did not otherwise demonstrate a particular degree of sexual sophistication or knowledge.

CP 6.

10. The trial court erred by entering Finding of Fact XII which reads:

The respondent testified at trial that he did not touch C.M. in any way. The respondent's testimony is not credible.

CP 7.

11. The trial court erred by entering Conclusion of Law III which reads:

That S.A.D. is guilty beyond a reasonable doubt of the crime of CHILD MOLESTATION IN THE FIRST DEGREE in that, in Pierce County, Washington, on or about December 9, 2005, he: 1. Touched C.M.'s bare buttocks under C.M.'s pajamas with his hand for purposes of sexual gratification, and 2. Using his legs, he straddled C.M.'s stomach area and rubbed his clothed genitals on C.M.'s stomach for purposes of sexual gratification. C.M. and the respondent are not married. C.M. is less than 12 years old and the respondent is more than 36 months older than C.M.

CP 7-8.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

S.A.D. was charged with Child Molestation in the First Degree, a Class A felony designated a violent offense. Because of the seriousness of his charge, he was ineligible for all the juvenile system's rehabilitative programs except for SSODA (the juvenile counterpart of the adult SSOSA program). By statute, he was tried by a judge sitting without a jury.

1. Do juvenile offenders charged with sex offenses have the right to a jury trial under Article I, Section 21 of the Washington State Constitution? Assignment of Error No. 1.

2. Do juvenile offenders charged with sex offenses have the right to a jury trial under Article I, Section 22 of the Washington State Constitution? Assignment of Error No. 1.

At trial, the prosecution offered two sets of child hearsay statements. The child made the first set of statements to his mother more than a month after the alleged incident. In the interim, the child and his mother had had numerous conversations about sex, including review of a book about where babies come from. The court found the child's statements to his mother reliable because the child had no apparent motive to lie and the statements were spontaneous.

The second set of statements was made during a forensic interview more than five months after the alleged incident, nearly four months after the initial statements. At the time of the forensic interview, the child had discussed the incident with his mother numerous times. The trial court found the second set of statements reliable because the child had no apparent motive to lie, the statements were made in response to open-ended questions and were spontaneous, and the timing of the statements suggested reliability.

3. Did the trial court err by admitting child hearsay without an adequate showing of reliability? Assignment of Error Nos. 2-7.

4. Did the trial court err by finding the child's statements to his mother spontaneous? Assignment of Error Nos. 2-4.

5. Did the trial court err by finding the child's statements during the forensic interview spontaneous? Assignment of Error Nos. 2, 5, 6, 7.

6. Did the trial court err by finding that the timing of the child's statements during the forensic interview favored admission? Assignment of Error Nos. 2, 5, 6, 7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On December 9, 2005, 12-year-old S.A.D. and 7-year-old C.M. attended a birthday party together. CP 5. A group of about 6 boys (including S.A.D. and C.M.) spent the night, playing video games and watching a movie. RP (1/4/07) 28, 45.

According to C.M.'s mother, C.M. brought up sex on a daily basis for about three weeks after the party, and then four to five times a day after that. RP (1/4/07) 72, 74; RP (1/5/07) 5, 6. About a month after the party, she reviewed with C.M. a book about how babies were made. RP (1/5/07) 6. More than a month-and-a-half after the party, C.M. told his mother that S.A.D. had asked C.M. to play "husband and wife," had kissed him on the mouth, had rubbed his penis on C.M.'s stomach and had put his hand down C.M.'s underwear and touched his bottom. RP (1/5/07) 9. She called Child Protective Services and made a report on January 26, 2006. RP (1/5/07) 13. According to the CPS intake worker, the mother reported that S.A.D. took off C.M.'s underwear and touched his penis to C.M.'s bottom. RP (1/17/07) 248. After reporting the matter, the mother continued to discuss the matter with C.M. up to two or three times per day. RP (1/5/07) 15.

A forensic interview of C.M. was conducted on May 17, 2006. RP (1/10/07) 126-128, 136. During the videorecorded interview, C.M. again made allegations against S.A.D. Supp CP.

S.A.D. was charged with Child Molestation in the First Degree in Juvenile court and the case proceeded to a trial in front of a judge sitting without a jury. After mid-trial child hearsay hearings, the court ruled both sets of C.M.'s statements admissible. In finding C.M.'s statements to his mother admissible, the court found that there were indicia of reliability, that the child had no apparent motive to lie, and that the statements were spontaneous. RP (1/5/07) 18-19.

In ruling the forensic interview admissible, the court found that C.M. had no motive to lie, that he had made similar statements to his mother, that his statements were made in response to open-ended questions, that his statements were spontaneous, and that the timing of the statements suggested their reliability. RP (1/16/07) 159-161. The court did not enter written findings relating to its child hearsay rulings.

The court convicted S.A.D. and sentenced him to confinement in JRA. CP 4-8, Supp. CP. This timely appeal followed. CP 9-16.

ARGUMENT

I. THE PROHIBITION AGAINST JURY TRIALS FOR JUVENILES CHARGED WITH SEX OFFENSES VIOLATES ARTICLE I, SECTION 21 AND ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION.¹

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

A. Analysis under *State v. Gunwall* favors an independent application of the state constitution and requires jury trials for juveniles charged with sex offenses.

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Absent controlling precedent, a party asserting that the state constitution provides more protection than the

¹ The Supreme Court has accepted review on a similar case, to decide whether or not juveniles charged with violent and serious violent offenses must be afforded jury trials. See *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), review granted at 160 Wn.2d 1021 (2007). Oral argument was held on October 23, 2007.

federal constitution must analyze the issue under *Gunwall*. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). Since this issue does not fall squarely within any controlling precedent, the *Gunwall* factors must be examined. Analysis under *Gunwall* supports an independent application of Wash. Const. Article I, Section 21 and Article I, Section 22 and mandates reversal of the conviction.

1. The language of the state constitution requires jury trials for juveniles charged with sex offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolate’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection, and the provisions reference to “criminal prosecutions” does not distinguish between adult and juvenile prosecutions.

Thus juveniles who are “accused” in “criminal prosecutions... shall have the right to. . . trial by an impartial jury” (under the plain language of Article I, Section 22), and a juvenile’s right to a jury trial as it existed in 1889 “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. The current statutory scheme, requiring bench trials in juvenile court, even for juveniles charged with sex offenses, directly violates both provisions of the constitution. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions favor an independent application of the state constitution in this case.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate”, has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace, supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. The Court held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the federal

constitution. *Pasco v. Mace*, at 99-100. This difference in language between also favors an independent application of the state constitution.

3. State constitutional history, state common law history, and pre-existing state law require jury trials for juveniles charged with sex offenses.

Under the third and fourth *Gunwall* factors, this court must look to state common law history, state constitutional history, and other pre-existing state law. Wash. Const. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, *supra*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135 at 151, 75 P.3d 934 (2003). In 1889, all juveniles in Washington were entitled to trial by jury. Code of 1881, ch. 87, Section 1078. Despite the formation of a separate juvenile court in 1905, juveniles retained the right to a jury trial until 1937. Laws of 1905, Ch. 18, Section 2; Laws of 1937, Chapter 65, Section 1.

Cases analyzing the constitutionality of the juvenile system have weighed the extent to which juvenile court differs from adult court. In essence, nonjury trials have been permitted because juveniles were not convicted of crimes.

In *Estes v. Hopp*, 73 Wn.2d 263, 268, 438 P.2d 205 (1968), the Washington Supreme Court described the juvenile system as rehabilitative

and nonadversarial, and noted that a primary benefit was the system's private and informal character. *Estes v. Hopp* at 268. Almost a decade later, in *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 772 (1977), the Supreme Court noted a shift from rehabilitation toward punishment, and warned that jury trials would be required once "juvenile proceedings [became] akin to an adult criminal prosecution." *Lawley* at 656. In *State v. Schaaf, supra*, the Court examined amendments to the act and concluded that "Juvenile proceedings remain rehabilitative in nature and distinguishable from adult criminal prosecutions." *Schaaf*, 109 Wn.2d at 4. Two decades after *Lawley*, the Court again suggested that juveniles would be entitled to a jury trial once juvenile proceedings "substantively" resembled adult criminal trials or when juveniles were "encumbered with the far more onerous ramifications of... adult conviction." *Monroe v. Soliz*, 132 Wn.2d 414 at 427, 939 P.2d 205 (1997).

More recently, the Court of Appeals has reexamined the issue and reached the same conclusions, relying on the reasoning of *Schaaf* and *Monroe v. Soliz*. See, e.g., *State v. Tai N.*, 127 Wn. App. 733, 113 P.3d 19 (2005).; *State v. J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999); *State v. Meade*, 129 Wn. App. 918, 120 P.3d 975 (2005).

Significant changes have occurred in Washington's system since the Supreme Court last examined the issue, particularly with regard to sex

offenses. Amendments to the statutes and new court decisions have eliminated many of the distinctions between juvenile sex offenders and adults charged with crimes; the emphasis has shifted from rehabilitation to punishment, and the conditions referenced in *Lawley* and *Soliz* have come into play. For juvenile sex offenders, the present incarnation of the juvenile system resembles the adult system, just as it did when the constitution was adopted in 1889.

Some of the changes apply to all juveniles; others are targeted specifically at juvenile sex offenders. First, under RCW 13.04.011(1), “[a]djudication’ has the same meaning as ‘conviction’ in RCW 9.94A.030, and the terms must be construed identically and used interchangeably.” Because of this, a former distinguishing benefit of the juvenile system has vanished. The distinction is not merely linguistic: it is permissible to deny jury trials only if juvenile proceedings are civil rather than criminal. The *Schaaf* court believed the distinction to be vital. *Schaaf* at 7-8.

Second, amendments to the Juvenile Justice Act have lengthened the minimum period of JRA commitment, added a “clearly too lenient” aggravating factor, and eliminated flexibility in imposing restitution. *See* RCW 13.40.

Third, the goals of the juvenile system and the adult system have converged, and now both systems strike a similar balance between

punishment and rehabilitation. Every rehabilitative aspect of the juvenile system has an adult counterpart. In the case of sex crimes, juvenile sex offenders may be eligible for SSODA; adult sex offenders may be eligible for SSOSA. Both programs favor treatment over incarceration. *Compare* RCW 13.40.160(3) with RCW 9.94A.670.

Fourth, juveniles adjudicated in the juvenile system are increasingly housed in adult prison. Provisions have been added to RCW 13.40.280 easing the transfer process when assaults on staff or other youth are alleged—the burden now shifts to the juvenile to show he or she should *not* be transferred to adult prison. RCW 13.40.280(4). Thus a juvenile can be incarcerated in adult prison until the age of 21, without benefit of a jury trial.

Fifth, confidentiality and privacy have disappeared from juvenile proceedings, and juvenile offenders are now stigmatized in the same manner as adults. Proceedings and records are open to the public (RCW 13.40.140(6); RCW 13.50.050(2)); furthermore, juvenile records can generally not be destroyed,² and can only be sealed under circumstances equivalent to SRA provisions allowing adult felonies to be vacated. RCW

² The sole exception is where the entire criminal record consists of only one referral for diversion. RCW 13.50.050.

13.50.050; RCW 9.94A.640. Juvenile conviction records can be disseminated without restriction, RCW 10.97.050, and listed on background checks, RCW 43.43.830(4). Juveniles convicted of Class A sex offenses must generally register as sex offenders for life, juveniles convicted of Class B sex offenses must generally register for at least 15 years, and juveniles convicted of Class C sex offenses must generally register for at least 10 years.³ RCW 9A.44.130; RCW 9A.44.140. The current scheme also requires community and school notification whenever juveniles convicted of sex offenses leave JRA custody. RCW 13.40.215.

Sixth, the juvenile courts invade a juvenile offender's privacy by collecting personal data, including fingerprints, DNA, and blood for HIV testing. RCW 70.24.340, RCW 43.43.754.

Seventh, juvenile sex convictions play a significant role in adult sentencing. The SRA's definition of "criminal history" now specifically includes juvenile adjudications and no longer draws any distinction between

³ There are three exceptions to these rules: First, adults and juveniles who stay out of trouble for ten years may petition for relief of the registration requirement. Second, juveniles who were 15 or older at the time of the offense may petition for relief, which will be granted "only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of" the registration statute. RCW 9A.44.140. Juveniles who were under age 15 may petition and be granted relief if they haven't been adjudicated of any additional sex or kidnapping offenses within the 24 months following the conviction and can prove by a preponderance of the evidence that future registration will not serve the purposes of the registration statute. RCW 9A.44.140.

juvenile and adult convictions. All juvenile adjudications (including misdemeanors) are to be included in an adult's criminal history, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.030(12). In 1997, the Legislature dispensed with special treatment for juvenile felony adjudications in calculation of an adult offender score.⁴ Under the current system, all juvenile felonies count in the calculation of the adult offender score, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.525. Juvenile convictions "wash out" of the offender score in the same manner as adult offenses. RCW 9.94A.525. Multiple prior juvenile convictions are now scored under the "same criminal conduct" analysis used to weigh multiple adult prior convictions, rather than the more lenient method previously in effect. RCW 9.94A.525.

Juvenile felony convictions for sex offenses score as multiple points when calculating the sentence for an adult sex offense. RCW 9.94A.525. Adults with juvenile sex offenses are now ineligible for special programs available under the SRA, including the adult SSOSA program. *See, e.g.*, RCW 9.94A.670 (SSOSA); RCW 9.94A.690(1)(a)(ii)

⁴ The only exceptions are for nonviolent offenses and for drug convictions scored against current drug offenses. RCW 9.94A.

(work ethic camp), RCW 9.94A.660 (DOSAs), RCW 9.94A.650 (first time offender waiver).

Schaaf and other cases addressing the issue of juvenile jury trials have all compared the two systems as a whole; they have not focused on the way the juvenile justice system treats the individual defendant in a given case. This is not the correct comparison. Instead, the focus should be on the deprivation of the appellant's constitutional rights. The appellant's particular circumstances, including the offenses charged, should be compared with the offenses that trigger an adult defendant's constitutional right to a jury trial.⁵ It is of little import that some theoretical juvenile charged with minor offenses might have rehabilitative options available; instead, the actual concrete facts of an individual juvenile's case must be evaluated to see if the jury right applies.

For juveniles charged with sex offenses, juvenile court is a formal, adversarial system with serious long-term consequences. Refusal to allow juvenile cases to be tried to a jury reflects indifference to individual rights, and is antithetical to our state constitution's strong jury protections. The framers of our state constitution would not have tolerated this result.

⁵ The Washington Supreme Court has decided that the right to a jury trial attaches to any offense, no matter how petty, that constitutes a crime rather than an infraction. *Pasco v. Mace*, at 99.

The context in which our state constitution was adopted and the development of the law in Washington since territorial days require jury trials for juveniles charged with sex offenses. *Gunwall* factors 3 and 4 favor an independent application of Article I, Sections 21 and 22. In order to give the proper interpretation to these constitutional provisions, juveniles charged with sex offenses must be restored the right to trial by jury.

4. Differences in structure between the federal and state constitutions favor an independent application of the state constitution.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power.” *State v. Young*, at 180. The *Schaaf* Court did not have the benefit of this decision.

5. The right to a jury trial is a matter of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial for juveniles charged with sex offenses is a matter of state concern; there is no need for national uniformity on the issue. *Schaaf*, 109 Wn.2d at 16. Indeed, several states provide jury trials to all juveniles on independent state

constitutional grounds. *See e.g. State v. Eric M.*, 122 N.M. 436, 925 P.2d 1198, 1199-1200 (N.M. 1996); *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 789 (Tenn. 1980); *RLR v. State*, 487 P.2d 27, 35 (Alaska 1971).⁶ *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution provides greater protection to juveniles charged with sex offenses than does the federal constitution, and requires that the critical facts be submitted to a jury. The failure to provide a jury trial mandates reversal of S.A.D.'s conviction.

B. The Supreme Court's decisions in *Pasco v. Mace* and *State v. Schaaf* require jury trials for juveniles charged with sex offenses.

Although charged in juvenile court, S.A.D. has effectively been treated as an adult and should have been granted a jury trial. The failure to do so violated Article I, Section 21 and Article I, Section 22 of the state constitution.

First, as noted above, the Supreme Court has held that "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a

⁶ Other states provide for jury trials by statute. *See, e.g.*, Massachusetts General Laws Chapter 119 Section 55A.

crime.” *Pasco v. Mace*, at 99-100. Critical to the Court’s decision in *Pasco v. Mace* was the distinction between infractions and crimes. Infractions, which the court considered “regulatory, rather than criminal in nature,” were held exempt from the jury requirement. On the other hand, “those offenses which carry a criminal stigma and particularly those for which a possible term of imprisonment is prescribed” were required to be tried to a jury. *Pasco v. Mace*, at 100.

The Court found this same distinction significant when it decided *Schaaf*. According to the *Schaaf* Court, “[t]he penalty, rather than the criminal act committed, is the factor that distinguishes the juvenile code from the adult criminal justice system.” *Schaaf*, at 7-8. In particular, the *Schaaf* Court took note of a statute providing that a juvenile adjudication is not a “conviction of crime.” *Schaaf*, at 12, citing RCW 13.04.240. The other factors most relevant to the *Schaaf* Court included (1) the availability of diversion, (2) the incarceration in juvenile (as opposed to adult) facilities, (3) the “broad power” to provide for treatment, guidance, or rehabilitation, (4) the fact that (as of 1987) the juvenile system had not “utterly abandoned the rehabilitative ideal” and did not “embrace a purely punitive or retributive philosophy,” (5) the persistence of “some degree of flexibility and informality” in juvenile proceedings, (6) the fact that juveniles were not (at that time) automatically fingerprinted and

photographed, (7) the court's ability to consider mitigating factors at sentencing, (8) then-existing limits on the use of juvenile records, and (9) the ability (at that time) to seal and/or expunge juvenile records. *Schaaf*, at 7-13.

Applying *Schaaf* and *Pasco v. Mace* to this case, S.A.D. should have been provided a jury trial. He was tried for an offense that cannot be described as petty, either in terms of the act alleged or the penalty imposed. His charge made him ineligible for all of the special rehabilitative programs available to other juveniles: despite the complete absence of any criminal history, he could not participate in Diversion or Youth Court (RCW 13.40.070, RCW 13.40.580 *et seq.*), Deferred Disposition (RCW 13.40.127), the Suspended Disposition Alternative ("Option B," RCW 13.40.0357), the Chemical Dependency Disposition Alternative ("Option C," RCW 13.40.0357, RCW 13.40.160(4), and RCW 13.40.165), the Mental Health Disposition Alternative (RCW 13.40.160(5) and RCW 13.40.167), or the Juvenile Offender Basic Training Camp program ("boot camp," RCW 13.40.320).

Although minor offenses may still be dealt with in an informal, flexible manner geared toward rehabilitation rather than punishment (as the Court described in *Schaaf, supra*, at 8), the juvenile system's treatment of S.A.D. was more circumscribed. The standard range sentence imposed

by the trial court exceeded the five days (with four suspended) at issue in *Pasco v. Mace*.⁷

Unlike the respondents in *Schaaf*, S.A.D. has been fingerprinted and photographed pursuant to RCW 10.64.110 and RCW 43.43.735, has provided a DNA sample as required by RCW 43.43.754, and has been tested for HIV pursuant to RCW 70.24.340. Supp. CP.

While RCW 13.04.240 still declares that juvenile adjudications are not criminal convictions (as it did in 1987), the statute does not have any legal effect on S.A.D. or his convictions, either within or outside of RCW Title 13. Furthermore, any effect it might have had is negated by RCW 9.94A.030(12), which defines “conviction” to mean “an adjudication of guilt pursuant to Titles 10 or 13 RCW [including] a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.”

In addition, S.A.D.’s records relating to this offense will never be sealed or destroyed, and there are no limits placed on their use. RCW 13.50.050. Moreover, this offense will be treated as an adult conviction if S.A.D. ever gets in trouble as an adult. For example:

⁷ The trial court was statutorily permitted to consider mitigating factors; however, this does not distinguish S.A.D.’s case from charges brought against adults. *Compare* RCW 13.40.150 with RCW 9.94A.535.

- He will be disqualified from participation in Drug Court and Mental Health Court. RCW 2.28.170; RCW 2.28.180.
- He will be ineligible for the First Time Offender Waiver, the Drug Offender Sentencing Alternative, and the Work Ethic Camp program. RCW 9.94A.650; RCW 9.94A.660; RCW 9.94A.690.
- The offense will always be included in S.A.D.'s offender score; it will never "wash out." RCW 9.94A.525(2).
- If he is convicted of a serious violent offense as an adult, this offense will contribute 2 points to his adult offender score, just as if it were an adult conviction. RCW 9.94A.525(9).
- If he is convicted of a violent offense as an adult, this juvenile conviction will contribute 2 points to his adult offender score, just as if it were an adult conviction. RCW 9.94A.525(8).
- If he is convicted of a nonviolent offense (other than a drug offense), this juvenile conviction will contribute 1 point to his offender score, just as if it were an adult conviction. RCW 9.94A.525(7).⁸
- If given community custody as part of an adult sentence, he will be subject to increased supervision by the Department of Corrections, even if his risk category as an adult is otherwise considered low. RCW 9.94A.501.

⁸ The conviction will also impact his offender score if he is convicted of drug offenses as an adult. Under RCW 9.94A.525(12), each prior drug offense will multiply when scored against a new drug offense. Without this juvenile conviction, the multiplication would not occur, and prior drug offenses would only count as single points in his criminal history. RCW 9.94A.525(12).

In the absence of key rehabilitative options, the juvenile system's treatment of S.A.D. did not differ from the adult system's treatment of adults charged with petty crimes. Indeed, adults charged with misdemeanors and gross misdemeanors have a greater range of rehabilitative options available than S.A.D., but are still guaranteed jury trials under the state and federal constitutions.

Thus, although the juvenile system as a whole has not "utterly abandoned the rehabilitative ideal" and does not "embrace a purely punitive or retributive philosophy," the balance struck for juvenile offenders charged with sex offenders is identical to that struck for adult offenders. This is especially true given that the adult criminal system has taken steps toward a more rehabilitative model. *See, e.g.*, RCW 2.28.170 (authorizing Drug Courts, enacted 1999); 2.28.180 (authorizing Mental Health Courts, enacted 2005); RCW 9.94A.660 (authorizing DOSA, enacted 1995); RCW 9.94A.690 (authorizing Work Ethic Camp, enacted 1993); RCW 9.94A.670 (authorizing Special Sex Offender Sentencing Alternative, enacted 1990). With two exceptions (the length of confinement and the place of confinement), the factors enumerated in *Schaaf* entitle S.A.D. to a jury trial under the Washington State Constitution. *See also Pasco v. Mace, supra*. Those exceptions are addressed next.

- C. The length and conditions of an offender's confinement should have no bearing on the right to a jury trial under the Washington State Constitution.

Under *Schaaf*, it may be tempting to compare the length of S.A.D.'s confinement with the amount of time he would have received if convicted as an adult, or to contrast the rehabilitative aspects of juvenile sentencing with the punitive consequences in the adult system. See *Schaaf*, at 7-8. These may be the correct comparisons for analyzing an equal protection claim; however, they should not be relevant under Article I, Section 21 and Article I, Section 22. Instead, S.A.D.'s case must be examined for those characteristics that require application of the state constitutional right. If those characteristics are present, the right applies, regardless of whether or not there is a rational basis for treating S.A.D. differently from an adult charged with the same offenses. *Pasco v. Mace*, *supra*.

Phrased in this light, the question becomes could an adult be constitutionally treated the way S.A.D. was treated in this case? The answer is clearly "no," even if the adult criminal code were amended so that it more closely resembles the juvenile code. For example, even if the legislature renamed the criminal code the "rehabilitative code," declared that convictions under the rehabilitative code were not criminal convictions, shortened adult sentences to make them commensurate with

the sentences imposed in juvenile court, permitted judges greater flexibility in fashioning rehabilitative sentences, and sent offenders to serve their sentences in “re-education camps” rather than prisons, Article I, Section 21 and Article I, Section 22 would still require the state to afford adult offenders their constitutional right to a jury trial. *See Pasco v. Mace, supra*. Thus it should be irrelevant that S.A.D.’s sentence was less than the corresponding adult sentence, or that he may receive more appropriate treatment at the hands of the Juvenile Rehabilitation Administration than he would from the Department of Corrections.

For the same reason that every adult charged with a petty offense is entitled to a jury trial, our constitution should be interpreted to require jury trials for juveniles charged with sex offenses. S.A.D. convicted of Child Molestation in the First Degree – faces at least as much “criminal stigma” as the defendant in *Pasco v. Mace*. He has already served far more time in custody than did Mr. Mace, who was sentenced to five days in jail with four days suspended. *Pasco v. Mace*, at 88. Because he was denied his constitutional right to a jury trial, S.A.D.’s conviction must be reversed, and his case must be remanded to the juvenile court for a jury trial. *Pasco v. Mace, supra*.

This does not mean that we must “regress to territorial days and adopt a system where juveniles are treated like adult criminals and are

afforded no special protections.” *Schaaf*, at 15. It is possible to treat children as children-- offering rehabilitative opportunities, imposing shorter sentences, and confining them in juvenile facilities-- while respecting their constitutional rights. The right to remain silent, the right to counsel, and the right to confront adverse witnesses do not require a regression to the “bad old days;” there is no reason why restoring the right to a jury trial should do so either.

- D. S.A.D. was denied his constitutional right to a jury trial because the court found him guilty of a sex offense without obtaining a valid waiver of the right.

Waiver of the right to a jury trial must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001). Because the constitutional right to a jury trial is one of the most fundamental of constitutional rights, it cannot be waived “without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400 at 418 n. 24, 108 S.Ct. 646 (1988). In the absence of a valid waiver, a conviction obtained without a jury trial must be reversed. *Treat, supra*.

In this case, S.A.D. did not waive his constitutional right to a jury trial. Accordingly, the conviction was obtained in violation of his right to

Woods, supra, at 624. Under the terms of the statute, the burden is on the state to establish the reliability of a child's hearsay statement before it can be admitted under the statute. RCW 9A.44.120.

A trial court's findings are reviewed for substantial evidence.

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to convince a rational, fair-minded person. *Rogers Potato, at 391.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1 at 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259 at 265, 39 P.3d 1010 (2002).

In this case, two child hearsay hearings were held midtrial. RP (1/5/07) 3-20; 127-145, 157-161. The court did not enter written findings and conclusions. In its oral ruling admitting the first statement (made to the child's mother), the court found the hearsay reliable because (1) there was no motive to lie and (2) the statements were spontaneous. RP (1/5/07) 19. In its oral ruling admitting the second statement, the court found the hearsay reliable because (1) there was no motive to lie, (2) the interviewer used open-ended questions and the statements were spontaneous, (3) and the timing suggested reliability. RP (1/5/07) 159-161.

- A. The trial court made no finding on *Ryan* factor two, and no evidence was introduced to show the child's general character.

The trial court made no finding on the declarant's general character in either oral ruling. The state presented no evidence of the child's good character or his reputation. The prosecution's failure to offer such testimony means that the second *Ryan* factor weighs against admission.

- B. The court made no findings on *Ryan* **Error! Bookmark not defined.** factor three, and only the mother heard the child's first statements.

Under *Ryan* factor three, a hearsay statement is more reliable if more than one person heard the statement. This is so because a single listener may misunderstand or misremember a statement, while a second listener provides corroboration. *United States v. Thomas*, 571 F.2d 285 at 290 (5th Cir., 1978).⁹

Here, as in *Ryan*, only the mother heard the first statement.¹⁰ RP (1/5/07) 9. See *Ryan* at 176 (“[T]he initial statements of the children were made to one person, although subsequent repetitions were heard by

⁹*U.S. v. Thomas* is the original source for the third *Ryan* factor. It was cited in *United States v. Alvarez*, 584 F.2d 694, 702 (5th Cir., 1978), which was the first case to list the first five *Ryan* factors, also known as the “Parris factors.” The Supreme Court cited *Alvarez* as its source for these five factors in *State v. Parris*, 98 Wn.2d 140 at 146, 654 P.2d 77 (1982).

¹⁰ The child's statements to the forensic interviewer were recorded. *Ryan* factor number three is thus of limited concern for those statements.

others.”) Although the statements were ultimately repeated to others, this does not render them reliable. *See Ryan, supra* (child’s repetition of initial statement to others still unreliable). *Ryan* factor three weighs against admission of the first statement.

C. The evidence does not support the trial court’s findings that the child’s statements were spontaneous (*Ryan* factor four).

The trial court found that both sets of statements spontaneous. RP (1/5/07) 18-19; (1/16/07) 158, 159-161. The evidence does not support this finding. The child’s statements to his mother came after over a month of conversation about sexual matters, including review of a book about where babies come from. Similarly, the statements to the forensic interviewer came about after 5 additional months of conversation with the mother, and were drawn out through questions posed as part of a structured interview.

Because it is not supported by substantial evidence, the court’s finding that the statements were spontaneous must be vacated. The child’s hearsay statements were not spontaneous, and the fourth *Ryan* factor weighs against admission.

D. The court made no findings on the timing of the first statements and the relationship between the child and his mother (*Ryan* factor five); the evidence does not support the court's finding on the timing of the second statements.

The court made no finding on the timing of the first statements, or regarding the relationship between the child and his mother. RP (1/5/07) 18-19. As noted above, they were made over a month after the alleged incident. They followed numerous conversations about sex, review of a child-friendly book explaining where babies come from. Furthermore, the relationship between declarant and listener – the mother-child relationship—favors exclusion of the statement. *See, e.g., Ryan*, at 176 (A mother's "relationship to [her] children is understandably of a character which makes [her] objectivity questionable.")

Regarding the second statements (during the forensic interview), the court found the timing favored admission, but did not explain why.¹¹ RP (1/16/07) 158-161. In fact, the timing of the second statements make them suspect. They occurred 6 months after the alleged incident, they followed numerous conversations between child and mother, including conversations and review of a book about where babies come from. RP (1/4/07) 72, 74; RP (1/5/07) 5-6, 9, 13, 15.

¹¹ The court made no finding on the relationship between the child and the interviewer.

Accordingly, Ryan factor five does not support admission of the statements. The trial court's finding that the timing of the second statement favored admission must be vacated.

E. The court failed to address *Ryan* factors six, eight, and nine, none of which support admission of the statements.

The trial court failed to address *Ryan* factors six, eight, and nine.¹²

Accordingly, this Court must presume that the state failed to sustain its burden with regard to these factors. *Armenta, supra; Byrd, supra.*

Factor six supports suppression of the hearsay, because the child's statements were all express assertions of past facts. Factor eight favors suppression, because the child's recollection may have been faulty. The statements were made after a period of time had passed, during which the child was exposed to additional material about sex and sexuality. Furthermore, since the incident was alleged to have occurred late at night, the child's statements may have merged dreams, conversations about sex, and images drawn from the movie. Factor nine favors suppression as well, since there is some possibility the child may have misrepresented S.A.D.'s involvement.

¹² As noted above, factor seven is inapplicable where the child testifies at trial. *Woods, supra.*

F. Summary: the *Ryan* factors do not establish reliability, and require exclusion under RCW 9A.44.120.

With regard to the child's statements to his mother, the court made findings on only two of the eight applicable *Ryan* factors. The evidence does not support one of those findings (that the statements were spontaneous). With six of the eight applicable *Ryan* factors favoring exclusion, the child's statements to his mother should not have been admitted at trial.

With regard to the child's statements during the forensic interview, the trial court made findings on only three of the eight applicable *Ryan* factors. The evidence does not support two of those findings (that the statements were spontaneous and that the timing indicated reliability). With six of the eight applicable *Ryan* factors favoring exclusion, the child's statements during the forensic interview should not have been admitted at trial.

CONCLUSION

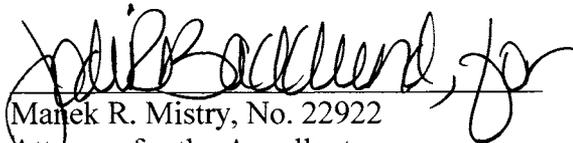
Juveniles charged with sex offenses face serious, long-term consequences upon conviction. The juvenile system treats sex offenders with more severity than the adult criminal system treats adults charged with crimes. Because of this, juvenile sex offenders must be afforded the

right to a jury trial. Because the juvenile court failed to obtain a waiver, S.A.D.'s conviction must be reversed and the case dismissed.

In this case, the trial court failed to find facts justifying admission of child hearsay. S.A.D.'s conviction must be reversed, the evidence excluded, and the case remanded for a new trial.

Respectfully submitted on December 13, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 12, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 12, 2007.



Joe R. Backlund, No. 22917
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