

NO. 36582-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEY A. DUNLAP, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda Lee

No. 07-8-00103-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to show the trial court abused its discretion in admitting child hearsay statements when the court made a clear ruling as to all of the *Ryan* factors, the factors were substantially met and defendant failed to preserve all but one claim in the court below?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant,¹ Stevey Dunlap, with four counts of rape against eight-year-old victim F.S. Two counts were penile-anal rape and two were oral-penile rape. CP 1-4. On February 7, 2007, the State amended counts I & II as to the date of offense only, alleging all offense occurred after defendant's twelfth birthday. CP 5-7, 43-48, RP Arraignment 2/7/07, 2-3. A bench trial commenced on May 17, 2007, in front of the Honorable Linda Lee. 1RP 3. The court ruled on pre-trial motions and allowed evidence of defendant's lustful disposition toward F.S., and found F.S. competent to testify. 2RP 36-7, 130-1, CP 10-11.

¹ The State will refer to appellant Stevey Dunlap as defendant even though he is a respondent in juvenile court. This is to avoid confusion with the State being the respondent in this court.

The State filed a second amended information on May 23, 2007, that expanded the time period of offenses by a month and a half. CP 8-9, 4RP 203-5. The court admitted the child hearsay statements offered by the State. CP12-14, 5RP 322-8.

The court found defendant guilty of all four counts of rape of a child in the first degree. 7RP 528. Sentencing followed on June 14, 2007. 8RP 539-544. The court sentenced defendant to 15-36 weeks “times three” to run consecutive for a total of 45-108 weeks. CP 21-27, 8RP 544. Defendant was given credit for 136 days served. CP 21-27, 8RP 544. Defendant filed this timely appeal. CP 30-37.

2. Facts

Victim F.S., who was eight years old at the time of trial, met defendant in the middle of victim’s kindergarten year. 2RP 134-5, 3RP 141. F.S. and defendant met through victim’s great-grandmother, Barbara Hudson. 2RP 38, 3RP 141-2. Ms. Hudson baby-sat both F.S. and defendant. 2RP 38. F.S. calls his great-grandma Gigi. 2RP 166. One of Ms. Hudson’s sons, Kevin, dates and lives with defendant’s grandmother, Carol Taylor. 2RP 38. Ms. Hudson’s other son is victim’s grandfather. 2RP 39. F.S. and defendant have a cousin relationship. 3RP 140.

In September of 2006, F.S. disclosed to his mother, Cherie Carter-Stuart, that defendant had had sexual contact with him. 3RP 148. F.S. came into his mother’s room and asked if she remembered what had

happened to his friend C.M.² 3RP 50. F.S. started to cry and said the same thing had happened to him, that defendant had put his “dinky in my butt.” 3RP 150. F.S. then asked his mom if he was gay. 3RP 150. F.S. apologized to his mother for not telling her and said he didn’t tell because he thought he would “get in just as much trouble.” 3RP 151. F.S later told his mother he thought he would get in trouble because he “did it back” to defendant. 3RP 152.

F.S. stated that defendant raped him. 2RP 135. When asked what rape means, F.S. stated that defendant stuck his “private in my butt hole.” 2RP 138, 4RP 242, 245. F.S. later indicated that his mom had told him what rape means after he told her what had happened. 2RP 173. F.S. indicated that the first time defendant stuck his “private” in the victim’s “butt hole” was at Gigi’s house. 2RP 138. F.S. was on his stomach and defendant was standing. 2RP 141, CP 43-48. F.S. indicated that it hurt and he told defendant to stop. 2RP 142, CP 43-48. The second encounter also happened at Gigi’s. 2RP 144. This incident also involved defendant sucking on victim’s penis. CP 43-48. During the incidents at Gigi’s, the

² In March of 2006, a classmate of victim’s, C.M., made an allegation against defendant. That incident was dealt with in Pierce County Superior Court Cause #06-8-01500-0. In March of 2006, Ms. Carter-Stuart asked victim if defendant had ever kissed him and victim said no. 3RP 159-60.

door to the room where the incident happened was open and Gigi was not in the room. 2RP 161, 170-1.

A third encounter happened at Carol's house. 2RP 152-3. Defendant made F.S. stick his "pee pee" into defendant's "butt hole." F.S. also indicated that defendant licked his "butt hole." 2RP 159-60. After the night at Carol's, F.S. said his stomach hurt and he had problems going to the bathroom "number two." 4RP 223, 247. Defendant also made F.S. lick and suck on defendant's penis. CP 43-48. During the incident at Carol's, the door was open and the adult in the house, Kevin, was in another room. 2RP 182.

F.S. finally disclosed to his mother because he was brave enough. 2RP 162. The disclosure was months after the last incident at Carol's. 2RP 183. After victim disclosed to his mother, she took him to the doctor to make sure he didn't "have any diseases." 2RP 155-6. Medical examiner, Lynn Jorgeson, examined F.S. on September 25, 2006, at the Mary Bridge Child Abuse Intervention Department. 4RP 229-30, 237-8. Child interviewer, Kim Brune, interviewed F.S. on November 2, 2006. 4RP 280, 286-7. The interview with Ms. Brune was recorded on a DVD. 4RP 285-6.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE CHILD HEARSAY STATEMENTS AS THE COURT RULED ON ALL SEVEN **RYAN** FACTORS; ONLY ONE GROUND FOR APPEAL WAS PRESERVED IN THE COURT BELOW.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, *review denied*, 120 Wn.2d 1022 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

The court's ruling on the admission of the child hearsay statements is reviewed under the abuse of discretion standard. Defendant only preserved two claims for appeal in regards to the child hearsay statements, and is only appealing on one of those claims. After reviewing the trial court's ruling, there was no abuse of discretion in admitting the child hearsay statements.

- a. Defendant's claim that victim has a motive to lie is the only claim properly preserved for appeal.

A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104

Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The court has "steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal." *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Stevens*, 58 Wn. App. 478, 485-6, 794 P.2d 38 (1990); *State v. Theftford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); *State v. Hettich*, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). If the specific basis for the objection at trial is not the basis the defendant argues at the appellate level, then the defendant has lost their opportunity for review. *Guloy* at 422. If the declarant and the recipient of the hearsay are both available to testify and subject to cross-examination then both the confrontation clause and due process clause are met. *Stevens* at 486. As such, the admission of child hearsay statements does not reach constitutional magnitude, and cannot be raised for the first time on appeal, when both the declarant and the recipient testify. *See* RAP 2.5.

At the trial level, defense counsel made two objections to the admission of the child hearsay statements. 4RP 310-313. First, defense argued a violation of the confrontation clause under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). Second, defense argued that F.S. had a motive to lie. 4RP 310- 313.

These were the only objections made. Defense counsel made no objection at the time the statement, including the DVD, was admitted but did refer back to his earlier argument. 5RP 328. Defendant is not appealing the admission of the child hearsay statements based on the confrontation clause.

There was no objection at the trial level to the statements being consistent, to the victim's recollection being faulty, or that the victim misrepresented defendant's involvement. The court's ruling did not focus on these claims as they were not objected to below. The court specifically addressed the objections made at the trial level in its ruling. 5RP 322, 326. Since the other claims were not raised at the trial level, the court did not get the chance to elaborate its ruling to address those concerns. Case law dictates that on a non-constitutional issue, the grounds for appeal have to be the same as grounds objected to below. This allows the trial court to have an opportunity to address the objections. Since the declarant and the three recipients of the hearsay statements testified, the child hearsay statements in this case are a non-constitutional issue. As such, the only objection preserved for appeal is whether or not the victim, F.S. had a motive to lie.

- b. The court did not abuse its discretion in admitting the child hearsay statements as it made a detailed findings on each of the *Ryan* factors.

RCW 9A.44.120, commonly referred to as the “child hearsay statute,” provides for the admission of out-of-court statements of a child victim of sexual abuse under certain circumstances. The statute provides:

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, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, 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.

RCW 9A.44.120 (emphasis added). Essentially, the child hearsay statute requires a trial court to answer three questions in making its determination

of the admissibility of child hearsay statements: (1) is the child victim's statement reliable; (2) is the child available to testify; and (3) if the child is unavailable, is there corroborative evidence of the act.

The child hearsay statute requires the court to hold a pre-trial hearing in which it determines the admissibility of a child victim's statements. During that hearing, the court must first determine if the statement being offered is reliable. That determination is based on a set of reliability factors approved by the Washington Supreme Court in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984):

1. Whether the child has an apparent motive to lie;
2. The general character of the declarant, including veracity;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. Timing of declaration and relationship between declarant and witness;
6. Whether the statement contains express assertions about past facts;
7. Whether cross-examination could show the declarant's lack of knowledge;
8. Is there only a remote possibility the declarant's recollection is faulty; and
9. The overall circumstances surrounding the statement.

Ryan, 103 Wn.2d at 175-76 (taking the first five of those factors from *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982), and the last four from *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970)).

In the years since the *Ryan* case was decided, two of the factors have been eliminated from consideration in the context of child hearsay. Factor six about assertions of past facts does not apply to child hearsay

statements because every statement a child makes concerning sexual abuse will be a statement relating a past fact. See *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); *State v. Stange*, 53 Wn. App. 638, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989). Factor seven concerning cross-examination also does not apply to child hearsay statements because “cross-examination could in every case possibly show error in the child hearsay statement.” *Stange*, 53 Wn. App. at 647. See also *Idaho v. Wright*, 497 U.S. 805, 820-824, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990).

The trial court made a complete finding as to the admissibility of the child hearsay statement. 5RP 322-8. Since F.S. testified, the court had to then turn its attention to the reliability of the statements made by F.S. to his mother, Lynn Jorgeson and Kim Brune. 5RP 322. The trial court walked through the seven *Ryan* factors before ruling the child hearsay statements to be admissible. 5RP 322-8. After going through each of the factors, and addressing the defense arguments where applicable, the court ruled that the statements made to Cherie Carter-Stuart, Kim Brune and Lynn Jorgeson were admissible. 5RP 322-8, CP 12-14.

The first factor the court looked at, and the only ground preserved for appeal, was whether F.S. had a motive to lie. 5RP 322. Defense counsel had argued that F.S. stated defendant always gets away with things and that he, F.S., always gets blamed. 2RP 149-50, 4RP 312-3, 5RP 322. Defense argued that was a reason for F.S. to lie. 4RP 313. However, testimony indicated that F.S. and defendant liked to play

together and there was no disagreement between the two. 3RP 161, 5RP 326. The court found that there was no testimony of any specific event around the time of the disclosure that would prompt F.S. to lie. 5RP 322. Further, the court found that the statement defense referred to was isolated and not sufficient to show a motive to lie. 5RP 322.

On appeal, defendant focuses on the victim's "turbulent life". Appellant's Brief, 8-9. Victim's parents separated in 2004, before any of these incidents occurred. 2RP 194. F.S. disclosed to his mother in September of 2006. 3RP 148. The divorce proceedings involving victim's parents started in January 2007. 2RP 195. Victim's dad had been deployed to Iraq in 2004, and then again in 2006. 2RP 194-5, 198. On the stand, F.S. was not asked any questions about his parent's divorce, nor did he mention it at all. Victim's mom testified that he had been cranky at times but that he was doing well. 3RP 146-7. The record contains no evidence that his parent's divorce or his dad's deployment had anything to do with the statements made by F.S..

According to his mother, F.S. had lied at some point about eating candy when his tongue was blue, and jumping on a bed, but it is not clear from the record when those instances occurred. 3RP 146-7. F.S. was taught not to lie and he was disciplined with a "naughty mat" at times. 3RP 144-6. Overall, F.S. was usually truthful and there were no complaints of F.S. lying. 3RP 147-8. There is simply nothing that indicates that F.S. had a motive to lie.

The fact that F.S. used some adult words does not indicate taint by adults such that the statements become unreliable. Ms. Jorgeson, a medical examiner for 19 years at Mary Bridge Children's hospital, testified that by the time she sees the children; they have usually picked up "lingo" and will indicate that they were raped or had sex. 4RP 229-30, 235. In addition, Ms. Jorgeson testified that is common for boys not to tell because they are embarrassed about being gay. 4RP 254, 267. Ms. Jorgeson testified that despite the victim's young age, even the young kids know about being gay and sexually transmitted diseases. 4RP 254. That F.S. used the word rape and was concerned about being gay or having a disease is not out of the ordinary. In fact, from the record, it appears that he picked up this "lingo" after he made the disclosure to his mother. There is no evidence of any taint or motive to lie.

Further, the court reviewed and made findings on the remaining *Ryan* factors. 5RP 322-8. There was no objection to these findings in the trial court.

In reviewing the character of the declarant, F.S., the court found that F.S. understood the difference between the truth and a lie. 5RP 323. There was also no evidence of a history or pattern of dishonesty. 3RP 147-8, 5RP 323.

As to the third factor, only one person heard the initial disclosure, and that was the victim's mother. 5RP 323. However, F.S. made separate disclosures to Lynn Jorgeson and Kim Brune. 5RP 323. The statements

made by F.S. to all three parties were consistent. 2RP 138-9, 3RP 150, 4RP 242, 245, 308, 5RP 323.

The court found that the statements to Lynn Jorgeson and Kim Brune were not spontaneous. 5RP 323-4. The statements to the victim's mother were found to be spontaneous as F.S. came to her without any prompting. 3RP 148, 5RP 324. In fact, the conversation where Cherie had talked to F.S. about this friend C.M had occurred six months earlier. 5RP 324. The court found that six months was a very long time and did not take away from the spontaneity of victim's disclosure to his mother. 5RP 324.

When looking at the timing of the statement and the relationship between F.S. and defendant, the court found that the relationship between the two was good. 5RP 325. There was nothing to indicate that the relationship between F.S. and defendant was "strained or animus." 5RP 325. The disclosure was delayed but that is not unusual. 5RP 325, 4RP 251-2. There was no evidence presented of any event that would damage "the reliability between the time of the alleged abuse and the disclosure." 5RP 325.

The court also found the possibility of victim's recollection being faulty was remote. 5RP 325. The court echoed its ruling in finding F.S. competent to testify. 5RP 325. The court found F.S to be "an articulate young child, with detailed recall, that has proved to be consistent with events and times described by the adult witnesses." 2RP 130, 5RP 325.

The court continued the finding by noting that F.S. was “more consistent and accurate in his recall than some of the adults that testified in this trial.” 5RP 325. The court also noted that while F.S. may have not been able to keep numerical years straight, he was consistent as to where he was in his life in regards to who he lived with and what grade he was in. 2RP 130-1.

Finally, the court found that there was no evidence F.S. had misrepresented defendant’s involvements in the incidents. 5RP 325-6. F.S. was consistent that defendant was the perpetrator. 5RP 326. Again, the court found that F.S. and defendant enjoyed playing together and saw each other as cousins. 5RP 326. There was no evidence that the victim’s disclosure was planned or coerced. 5RP 326.

- c. The court did not abuse its discretion in admitting the child hearsay statements as the *Ryan* factors were substantially met.

Not every factor on the list must be met before a statement is reliable. “[I]t is clear that not every factor listed in *Ryan* needs to be satisfied before a court will find a child’s hearsay statement reliable under the child victim hearsay statute.” See *Swan, supra* at 652. Hence, there is no “magic number” of the remaining seven factors that must be present before the court finds the child’s statements are reliable. The court must only find the factors have been “substantially met.” See, e.g., *State v. McKinney*, 50 Wn. App. 56, 61-62, 747 P.2d 1113 (1987).

The court made a detailed ruling on each of the *Ryan* factors. 5RP 322-8, CP 12-14. The evidence presented supports the findings. There was no objection to the findings or to any of factors except for the victim's motive to lie. No magic number of factors must be met as long as the factors are substantially met. The factors were substantially met in this case, and the findings support the court's ruling that the child hearsay statements to Cherie Carter-Stuart, Lynn Jorgeson, and Kim Brune were admissible. 5RP 328, CP 12-14.

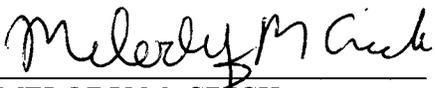
The statements made by F.S. to his mother, the medical examiner, and child interviewer were all properly admitted. There is no evidence that the court abused its discretion in admitting the statements. As such, the court was entitled to rely on the statements as evidence. Based on evidence admitted as child hearsay statements, as well as trial testimony, the court found defendant guilty of all four crimes charged. CP 43-48.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests the Court affirm the convictions below.

DATED: May 6, 2008.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature