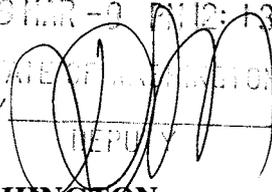


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY:  DEPUTY

NO. 37949-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FARON WILLIAM ROPER,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it allowed a five-year-old witness to testify because she was not competent and did not voluntarily take an oath to testify truthfully.

2. The trial court erred when it admitted hearsay statements under RCW 9A.44.120 because the state failed to meet the requirements under the statute.

3. The trial court's failure to give a jury unanimity instruction violated the defendant's rights under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court err when it allows an incompetent witness to testify, particularly when that witness did not voluntarily take an oath to testify truthfully?

2. The trial court erred when it admitted hearsay statements under RCW 9A.44.120 because the state failed to meet the requirements under the statute.

3. Does a trial court's failure to give a jury unanimity instruction violate a defendant's rights under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when the state presents evidence of multiple acts that could constitute each charged crime?

STATEMENT OF THE CASE

Factual History

In 2007, Angela Hall lived at 2613 NE 151st Avenue in Vancouver with her five children: Pablo, S.H., Jaslin, Jocolby and Marcus. RP 34-35¹ S.H. was five-years-old during this period and the oldest of the girls. Angela's boyfriend Chris Dawson also lived with her and the children. *Id.* The defendant Faron Roper, who was Chris Dawson's uncle, stayed overnight with the family on many occasions, sometimes sleeping on the couch and sometimes sleeping on the floor of the family room. RP 35-39. While he often stayed with the family, he actually lived at another location in Vancouver as a roommate with a woman by the name of Donna. RP 25-29. According to Angela Hall, the defendant was very attached to her children, particularly S.H., played games with them frequently. RP 40-41. On many occasions some or all of the children, including S.H., would spend time in activities with the defendant, including visits to other locations such as the

¹The record in this case includes nine volumes of verbatim reports, that include: (1) four volumes of pretrial hearings, each numbered individually, (2) one volume of the combined *Ryan* and CrR 3.5 hearing held on 3/28/08, numbered individually numbered, (3) three volumes of the jury trial held on 4/21/08, 4/22/08, and 4/23/08, consecutively numbered, and (4) one volume of the sentencing hearing held on June 30, 2008, also individually numbered. The pretrial hearings and sentencing hearing are referred to herein as "RP [date] [page #]." The *Ryan* hearing is referred to herein as "RPR [page #]". Finally, the trial volumes are referred to herein as "RP [page #]."

apartment the defendant shared with Donna. RP 38-45. By July of 2007, Angela Hall was involved in a sexual relationship with the defendant which they kept secret from her boyfriend Chris. RP 56-57.

On July 20, 2007, the defendant took S.H. with him to go to a storage unit and then over to Donna's home. RP 46-48. When they returned, Angela noticed that S.H. was upset. RP 51-53. Upon seeing this, Angela asked why she was upset, S.H. stated that she was mad because she got in trouble at Donna's house for playing with some blinds that she was not supposed to touch. *Id.* According to Angela, S.H. then stated that she had a secret that she wasn't supposed to tell anyone. *Id.* When asked what the secret was, S.H. stated that she and the defendant were "boyfriend and girlfriend" and that she didn't like the defendant because he "kissed her privates." *Id.* Upon hearing this, Donna called the police, who sent out a uniformed officer to take an initial report. RP 54-55.

Donna later spoke with S.H. about her claims of abuse and took her to the Clark County Sheriff's office for an interview with Deputy Cynthia Bull, who had training and experience in interviewing children concerning allegations of sexual abuse. RP 144-151. Between her mother and Deputy Bull, S.H. claimed that the defendant had sexually abused her on many occasions that year, including the following specific claims: (1) that on one occasion in the bedroom while she was swinging on the top bunk, the

defendant had pulled her dress up and kissed her on her “front private,” (2) that on one occasion he kissed her on her privates while in the family room, (3) that he did the same on one occasion while they were at Donna’s house, (4) that he kissed her on her “private” once while the defendant was on the couch while spending the night, and (5) that on one occasion he put his finger in her “front private” but it hurt so he stopped. RP 51-53, 72-74, 153-157.

According to Angela, Chris, and Deputy Bull, they each had subsequent conversations with the defendant in which he admitted having sexual contact with S.H. RP 56-57, 98-101, 159-167. Chris stated that the defendant admitted to having sexual contact with S.H. between 17 and 19 times, including incidents while he was on the couch while staying the night, while he was in S.H.’s bedroom, while playing on a bed and pretending that it was a tent, and on one occasion during the night when he had oral contact with her vagina and it tasted like urine because she had wet herself. RP 98-101. Angela stated that he had admitted sexual contact. RP 56-57. Deputy Bull stated that during an interview following his arrest, the defendant admitted to numerous incidents of oral-genital contact with S.H., including incidents in her bedroom, in the family room, one time while S.H. was swinging on her bunkbed, and one incident in which he asked her to touch his penis but she declined. RP 159-167.

Procedural History

By amended information filed on April 22, 2008, the Clark County Prosecutor charged the defendant Faron William Roper with four counts of rape of a child in the first degree. CP 48-49. Each count alleged that the conduct occurred between February 1, 2007, and July, 20, 2007, with no distinguishing allegations of fact other than the claim that each count occurred “separate from” the other counts. *Id.* Other than the claim that the crimes occurred “on an occasion separate from” the other counts, the language in all four counts was identical. *Id.*

Prior to trial, the court called the case for a “*Ryan*” hearing under RCW 9A.44.120. RPR 1. During that hearing, the state first called S.H. to testify. *Id.* Once on the witness stand, the court first asked S.H. if she promised to tell the truth. RPR 4. She responded with “I’m shy.” RPR 5. When the court asked the question again, she said “sure.” *Id.* At this point, the prosecutor started asking her questions. *Id.* Although she could give her last name, she couldn’t spell it. RPR 6. In addition, while she could say that she was five-years-old, she didn’t know when her birthday was. RPR 7. She also stated that she lived in Vancouver, but she then stated that this was not in Washington. RPR 7-8. Although she stated that she got toys for her last birthday, she couldn’t remember what any of them were. RPR 9.

After these preliminary questions, S.H. stated that she was in the

courtroom because "Faron" had "was doing something in a bad spot." RPR 11. When asked what a "bad spot" was, she said "your privates." *Id.* At this point, the prosecutor pointed to Deputy Bull and asked S.H. whether or not she had ever met or spoken with her. RPR 12-13. S.H. responded "no." RPR 13. When asked if she had ever spoken to anyone other than her mother about what had happened with "Faron," she replied that she had not. RPR 13. After a few more questions, she reversed herself and stated that she had talked to someone else about what "Faron" had done to her. RP 14-15.

Following this testimony, the state called Angela Hall and Deputy Bull, who testified to the statements they claimed S.H. made to them. RP 24-43, 44-63. After this hearing, the defense argued that S.H. was not competent and that the state had failed to meet the requirements of RCW 9A.44.120 to allow Angel Hall and Deputy Bull to testify to the statements S.H. made to them. RPR 165-168. However, the court ruled that S.H. was competent to testify, and that both Angela Hall and Deputy Bull would be allowed to testify to the statements that S.H. had made to them. RPR 165-168.

At the end of the *Ryan* hearing, the court held a hearing under CrR 3.5 to determine the admissibility of statements the police claim the defendant made to them during custodial interrogation following his arrest. RPR 44. For the purposes of this hearing, the state called Deputy Bull, Clark County Sheriff's Deputy Dave Nelson, and Vancouver Police Officer Sam Abdala.

RPR 65, 90, 102. According to Deputy Bull, on September 18, 2007, she had Deputy Nelson make a traffic stop on the defendant's vehicle as the defendant drove up to the home where he lived. RPR 65. She then ordered the defendant out of his vehicle, told him he was under arrest, and read him his *Miranda* warnings. RPR 65-68. After reading these rights to the defendant, Deputy Bull had Deputy Nelson take the defendant down to the West precinct station and wait with him in an interview room. RP 95-96. During this trip, Deputy Nelson told the defendant to be truthful in his statements to them. RP 100.

A little less than an hour later, Deputy Bull arrived at the station and entered the interview room. RPR 78-81. Once in the room, she asked if she could audiotape their interview and if Deputy Nelson could remain. RP 81-83. The defendant responded in the negative to both requests. *Id.* Deputy Bull did not reread the defendant his *Miranda* rights, and started her interrogation once Deputy Nelson left the room. *Id.* According to the defendant, three times during this interview he invoked his right to an attorney and Deputy Bull failed to respond to any of these requests. RPR 118-121. Deputy Bull denied this claim. RPR 126-127. Following this testimony, the court found that the defendant had not invoked his right to an attorney and that his statements were admissible in the state's case-in-chief. RPR 147-148.

About one month after the *Ryan* - CrR 3.5 hearing, the court called the case for trial before a jury. RP 1-20. As its first witness, the state called S.H. to testify. RP 21-33. As with the *Ryan* hearing, when the court attempted to put her under oath at trial, she again responded with the statement: "I'm shy." RP 20. However, on this occasion, the court did not wait for a reply when it attempted to put S.H. under oath a second time. *Id.* Rather, the court ordered her to say "yes." *Id.* This colloquy went as follows:

THE COURT: Okay. [S.], will you come up here. [S], can you raise your right hand. The other one - the other hand, there you go.

Do you promise to tell the truth, the whole truth, and nothing but the truth?

THE WITNESS: I'm shy.

THE COURT: I know you are shy, but you promise to tell the truth, don't you? Say, "yes."

THE WITNESS: Yes.

RP 20.

At this point, the prosecutor began her questioning RP 21. As with the *Ryan* hearing, the witness again could not spell her last name. *Id.* When asked how old she was, she responded that she was "five and a half," that her birthday was tomorrow, and that tomorrow she was going to be "six and a half." RP 22. In fact, S.H. gave this testimony on April 21st, and she was born on May 19th. RP 56. Following these preliminary questions, S.H.

identified the defendant in court and claimed that he had kissed her on her “front private.” RP 27-28. When asked how many times this happened, she responded “some – lots.” RP 28. She also denied that the defendant had ever put anything in her “privates.” RP 29

On cross-examination, the defense asked S.H. when the defendant had put his mouth on her privates. She responded as follows:

A. Six days ago or four –

Q. Six days ago.

A. – fourteen. I don’t know. I don’t remember.

Q. How long have you know Faron?

A. 24 days.

RP 29-30.

After a few more questions, defense counsel again asked S.H. when the defendant had put his mouth on her privates, who was present, when it was that she first told someone that it had happened, and when her birthday was. RP 30-31. This colloquy went as follows:

Q. Okay. And you don’t remember when this happened, how long ago?

A. 40 days ago.

Q. 40 days ago.

A. 42 days.

Q. Okay. When he put his mouth on your private, what – who was at the house?

A. My mom, my brother, my – and my dad.

Q. Okay. And who is your dad?

A. Christopher.

Q. Okay. Christopher. Okay. And – so those people were at the house when he did this?

A. Yes.

Q. Okay. And did anybody see him do this?

A. No.

Q. Okay. And did you tell anybody he did this?

A. Yes.

Q. When did you tell them.

A. 16 days ago.

Q. 16 days ago. Okay. Can I ask you – you said tomorrow is your birthday; is that what you said?

A. I think.

Q. Is –

A. I think it's going to be tomorrow – is going to be my birthday.

Q. How about May 19th, is that your birthday?

A. Actually, yes.

Q. Okay. So it's not tomorrow then?

A. Yes.

RP 30-31.

Following this testimony, the state called six other witnesses, including Angela Hall, Christopher Dawson, and Deputy Cynthia Bull. RP 34, 82, 88, 117, 144, 209. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. The state then rested its case, after which the defendant took the stand on his own behalf. RP 219-276. He denied ever touching S.H. with his mouth or tongue or in any sexual manner, and he denied ever telling Deputy Bull, his nephew Christopher, or Angela Hall that he had done so. RP 219-258. After his testimony, the defense rested its case. RP 277.

Following the reception of evidence in this case, the court instructed the jury on the four charged counts. RP 50-64. In spite of the fact that the state had alleged the existence of more than four specific acts of abuse, the court did not give the jury a *Petrich* unanimity instruction. *Id.* After receiving these instructions, the jury heard argument from counsel. RP 296-324. In its opening, the prosecutor argued that the jury should find the defendant guilty of the four charged counts because Christopher Dawson had testified that the defendant had admitted abusing S.H. 17 or 18 times. RP 311. In rebuttal, the state argued that the jury should find the defendant guilty on all four charged counts, because the state had proven at least five specific

instances of abuse, if not more. RP 327. This rebuttal argument went as follows:

Now, that's five incidents. All you have to do is find that there were four. Clearly, there were more. We heard that it happened in the family room. I don't know which one happened in the family room or if another one happened in the family room. We heard it happened in her bedroom. Maybe that was the bunk bed incident, maybe that was a different one. We also heard it happened at Donna's house. That could have been a different one. That could have been one of those incidents that happened at Donna's house, but we heard it from the defendant, from [S.H.], from Chris, that happened in those three places. Everyone was very specific that it happened in those three places.

RP 327.

After argument, the jury retired for deliberation in this case, and eventually returned verdicts of "guilty" on all four counts. CP 65-68. Following the mandatory pre-sentence investigation report, the court sentenced the defendant to life in prison without the possibility of release on each count, based upon the fact that the defendant had one prior qualifying conviction for a sex offense under the persistent offender act. CP 101-114. The defendant thereafter filed timely notice of appeal. CP 115. To the date of this brief, it appears that the state has never prepared or presented findings of fact and conclusions of law on either the *Ryan* hearing or the CrR 3.5 hearing.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ALLOWED A FIVE-YEAR-OLD WITNESS TO TESTIFY BECAUSE SHE WAS NOT COMPETENT AND DID NOT VOLUNTARILY TAKE AN OATH TO TESTIFY TRUTHFULLY.

Under RCW 5.60.050, no witness may be allowed to testify in any proceeding before any court unless that witness is competent at the time of his or her testimony. This statute states as follows:

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050.

In Washington, adult witnesses are presumed competent to testify. *State v. Smith*, 97 Wn.2d 801, 802-03, 650 P.2d 201 (1982). However, as the decision in *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967), explains, child witnesses are not presumed competent, and prior to the admission of their testimony, the court must be satisfied on the following criteria:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d at 692. See also CrR 6.12(c)(2); see also *State v. Karpenski*, 94 Wn.App. 80, 100-101, 971 P.2d 553 (1999) (emphasizing that a child must be shown to have the ability to meet all of the Allen criteria at the time of his or her testimony).

The responsibility for determining the competency of a witness lies with the trial court, who “saw the witness, noticed her manner and considered her capacity and intelligence.” *State v. Johnson*, 28 Wn.App. 459, 461, 624 P.2d 213 (1981), *aff’d*, 96 Wn.2d 926, 639 P.2d 1332 (1982). The determination whether a witness is competent to testify lies within the sound discretion of the trial court and will only be reversed on appeal upon a showing of an abuse of that discretion. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). An abuse of discretion occurs when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In reviewing the trial court’s decision on the competency of a child witness, the court of appeals should examine the entire record on appeal. *State v. Avila*, 78 Wn.App. 731, 737, 899 P.2d 11 (1995).

In the case at bar, as part of the *Ryan* hearing, the trial court did make a determination on the competency of S.H. to testify. However, a review of the entire record of this case, including the testimony of S.H. at both the *Ryan* hearing and the trial, in light of the other evidence presented, indicates that

the trial court abused its discretion because S.H. did not have the mental capacity at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it (the second *Allen* criteria), and she did not have a memory sufficient to retain an independent recollection of the occurrence (the third *Allen* criteria). The following presents this argument.

During the testimony of S.H. at the *Ryan* hearing in this case, the court first asked S.H. if she promised to tell the truth. RPR 4. Her reply of "I'm shy" was obviously non-responsive. RPR 5. When the court asked the question again, she simply said "sure." *Id.* At this point, the prosecutor started asking her questions. *Id.* Although she could give her last name, she couldn't spell it. RPR 6. In addition, while she could say that she was five-years-old, she didn't know when her birthday was. RPR 7. She also stated that she lived in Vancouver, but she then stated that this was not in Washington. RPR 7-8. Although she stated that she got toys for her last birthday, she couldn't remember what any of them were. RPR 9. In addition on one point during her testimony the prosecutor pointed to Deputy Bull and asked S.H. whether or not she had ever met or spoke with her. RPR 12-13. S.H. responded "no." RPR 13. When asked if she had ever spoken to anyone other than her mother about what had happened with "Faron," she replied that she had not. RPR 13. In fact, Deputy Bull had performed an extensive interview with S.H. After a few more questions, S.H. reversed herself at the

suggestion of the prosecutor that she had talked to someone else about what "Faron" had done to her. RP 14-15.

This inability to retain and express simply facts about her life and the case was also revealed during the testimony of S.H. at trial, which occurred about one month after the *Ryan* hearing. When the judge again attempted to put S.H. under oath, she again answered with the non-responsive, "I'm shy." RP 20. However, on this occasion, the court did not wait for a reply when it attempted to put S.H. under oath a second time. *Id.* Rather, the court ordered her to say "yes." *Id.* This colloquy went as follows:

THE COURT: Okay. [S.], will you come up here. [S], can you raise your right hand. The other one - the other hand, there you go.

Do you promise to tell the truth, the whole truth, and nothing but the truth?

THE WITNESS: I'm shy.

THE COURT: I know you are shy, but you promise to tell the truth, don't you? Say, "yes."

THE WITNESS: Yes.

RP 20.

At this point, the prosecutor began her questioning RP 21. As with the *Ryan* hearing, the S.H. could not spell her last name, which is "Hall." *Id.* When asked how old she was, she responded that she was "five and a half," that her birthday was tomorrow, and that tomorrow she was going to be "six

and a half.” RP 22. In fact, S.H. gave this testimony on April 21st, and she was born on May 19th. RP 56. These responses demonstrated the inability to understand and accurately report even the most fundamental facts about her life. In addition, when asked specific questions about the claimed incidents, and asked how many times this happened, she responded with the quixotic “some – lots.” RP 28. She also denied that the defendant had ever put anything in her “privates” even though she had specifically claimed to Deputy Bull in a prior interview that the defendant had penetrated her vagina with his finger on one occasion to the point that it hurt her and that he had never tried it a second time. RP 29. These answers particularly demonstrated that S.H. did not have the mental capacity at the time of the alleged occurrences to receive an accurate impression of it and that she did not have a memory sufficient to retain an independent recollection of the occurrences.

The conclusion that S.H. did not meet the second and third *Allen* criteria is strongly reinforced by her responses to defense counsels questions on cross-examination concerning the timing of the alleged events. On cross-examination, the defense asked S.H. when the defendant had put his mouth on her privates. She responded as follows:

A. Six days ago or four –

Q. Six days ago.

A. – fourteen. I don’t know. I don’t remember.

Q. How long have you know Faron?

A. 24 days.

RP 29-30.

These answers were grossly inaccurate. After a few more questions, defense counsel again asked S.H. when the defendant had put his mouth on her privates, who was present, when it was that she first told someone that it had happened, and when her birthday was. RP 30-31. S.H. responded to all of these questions with obviously inaccurate answers. This colloquy went as follows:

Q. Okay. And you don't remember when this happened, how long ago?

A. 40 days ago.

Q. 40 days ago.

A. 42 days.

Q. Okay. When he put his mouth on your private, what – who was at the house?

A. My mom, my brother, my – and my dad.

Q. Okay. And who is your dad?

A. Christopher.

Q. Okay. Christopher. Okay. And – so those people were at the house when he did this?

A. Yes.

Q. Okay. And did anybody see him do this?

A. No.

Q. Okay. And did you tell anybody he did this?

A. Yes.

Q. When did you tell them.

A. 16 days ago.

Q. 16 days ago. Okay. Can I ask you – you said tomorrow is your birthday; is that what you said?

A. I think.

Q. Is –

A. I think it's going to be tomorrow – is going to be my birthday.

Q. How about May 19th, is that your birthday?

A. Actually, yes.

Q. Okay. So it's not tomorrow then?

A. Yes.

RP 30-31.

The answers to these questions also demonstrate that S.H. did not have the mental capacity at the time of the alleged occurrences to receive an accurate impression of it and that she did not have a memory sufficient to retain an independent recollection of the occurrences. The last question and answer is particularly problematic because it demonstrates that (1) when

given open ended questions in which she was required to actually provide accurate information, S.H. was unable to do so, and (2) when given a leading question about the same answer, S.H. would immediately adopt the suggested answer. Thus, in the case at bar, the trial court abused its discretion when it found S.H. competent to testify because the record as a whole demonstrates that she did not meet either the second *Allen* criteria or the third *Allen* criteria.

II. THE TRIAL COURT ERRED WHEN IT ADMITTED HEARSAY STATEMENTS UNDER RCW 9A.44.120 BECAUSE THE STATE FAILED TO MEET THE REQUIREMENTS UNDER THE STATUTE.

Under RCW 9A.44.120, notwithstanding the hearsay rule, an out of court statement made by a child under the age of ten describing any act of sexual abuse may be substantively admitted into evidence under certain circumstances. This statute states:

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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9A.44.120.

In *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), the court set nine factors for the court to consider when determining whether or not “the time, content, and circumstances of the statement provide sufficient indicia of reliability.” These factors are as follows:

(1) whether the child had an apparent motive to lie, (2) the child’s general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child’s lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child’s recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant’s involvement.

Ryan, 103 Wn.2d at 175-76.

While the state need not prove the existence of every factor listed, the evidence must prove that the factors are “substantially met.” *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).

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A review of the facts of this case reveal that the state failed to prove that these factors were substantially met. Specifically, the evidence shows problems with factors 1, 2, 3, 4, 7, 8, and 9. The following examines the facts of this case in light of these criteria.

Under the first factor, the court is supposed to consider whether or not the child had a motive to lie. In this case, the record reveals that the child had a strong motive to lie in that she made her allegations in response to being punished for inappropriate conduct, and while having to admit that conduct to her mother. Under the second factor, the court is supposed to consider the general character of the child. In this case the state presented no evidence on this point and the court certainly did not find that the child possessed a good character sufficient to indicate the reliability of her statements. Under the third and fourth factors, the court is supposed to consider whether more than one person heard the statements and the spontaneity of the statements. In the case at bar, only one person heard the initial statements, and that person had a motive to harm the defendant in order to cover up her illicit relationship with him. In addition, the child did not make the statements in a spontaneous fashion. Rather, she made the statements in response to questioning by her mother.

Under the seventh, eighth, and ninth factors, the trial court is supposed to consider whether the child's lack of knowledge could be

established through cross-examination, consider the remoteness of the possibility of the child's recollection being faulty, and whether or not the surrounding circumstances suggested the child misrepresented the defendant's involvement. In the case at bar, the cross-examination at both the *Ryan* hearing and the trial demonstrated that the child's recollection of the alleged events was faulty and inaccurate. She had no accurate sense of the timing of any of the alleged events, and she denied the existence of certain allegations that she had apparently previously claimed occurred. Thus, in the case at bar, an examination of the facts reveals that the majority of the *Ryan* factors indicated that the time, content, and circumstances of the child's statements provided little indicia of reliability. Consequently, the trial court erred when it allowed Angela Hall and Deputy Bull to testify to the statements that S.H. made to them.

III. THE TRIAL COURT'S FAILURE TO GIVE A JURY UNANIMITY INSTRUCTION VIOLATED THE DEFENDANT'S RIGHTS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, the Defendant in a criminal action may only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190,

607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)).

Failure to follow one of these options is constitutional error and may be raised for a first time on appeal, even though the defense fails to request either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988). Furthermore, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411 (quoting *State v. Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)). Once again quoting the court in *Kitchen*, “[t]his approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *Kitchen*, 110 Wn.2d at 411, (citing *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

For example, in *State v. Petrich*, *supra*, the defendant was charged with one count of indecent liberties and one count of second degree statutory rape. At trial, numerous incidents of sexual contact were described in

varying detail. The jury convicted him on both counts, and he appealed, arguing that the court's failure to ensure a unanimous verdict required the reversal of the convictions and a retrial. The Washington Supreme Court agreed and reversed, stating as follows:

In petitioner's case, the evidence indicated multiple instances of conduct which could have been the basis for each charge. The victim described some incidents with detail and specificity. Others were simply acknowledged, with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place. The State was not required to elect, nor was jury unanimity ensured with a clarifying instruction. The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. We cannot so hold on this record. Petitioner is entitled to a new trial.

State v. Petrich, 101 Wn.2d at 573 (citation omitted).

In the case at bar, the state charged the defendant by amended information four counts of rape of a child in the first degree. Each count alleged that the conduct occurred between February 1, 2007, and July, 20, 2007, with no distinguishing allegations of fact other than the claim that each count occurred "separate from" the other counts. Other than the claim that the crimes occurred "on an occasion separate from" the other counts, the language in all four counts was identical. At trial, the prosecutor presented evidence of between 17 and 18 instances of abuse along with at least five or six specific incidents that the prosecutor argued to the jury would constitute the four charged crimes. In rebuttal, the prosecutor argued that the jury

should find the defendant guilty on all four charged counts, because the state had proven at least five specific instances of abuse, if not more. RP 327.

This rebuttal argument went as follows:

Now, that's five incidents. All you have to do is find that there were four. Clearly, there were more. We heard that it happened in the family room. I don't know which one happened in the family room or if another one happened in the family room. We heard it happened in her bedroom. Maybe that was the bunk bed incident, maybe that was a different one. We also heard it happened at Donna's house. That could have been a different one. That could have been one of those incidents that happened at Donna's house, but we heard it from the defendant, from [S.H.], from Chris, that happened in those three places. Everyone was very specific that it happened in those three places.

RP 327.

As the court explained in *Petrich, supra*, if the state presents evidence of more acts than it charges in the information, the trial court's failure to give a unanimity instruction denies the defendant his right to a unanimous jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. In the case at bar, this is precisely what happened. The state presented evidence of 17 or 18 acts of molestation with at least five or six specific acts, any one of which would constitute the four charged crimes. Thus, the court's failure to give a *Petrich* instruction violated the defendant's right to a unanimous jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

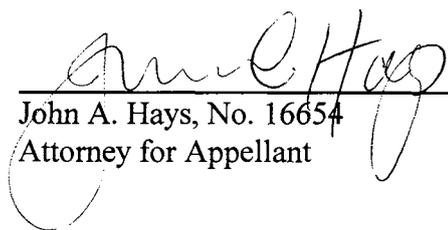
The denial of the right to jury unanimity is an error of constitutional magnitude. Thus, the defendant is entitled to a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). In this case the state cannot meet this burden because the evidence on each count is far from overwhelming. For example, the state presented evidence that S.H. told Deputy Bull that on one occasion the defendant had penetrated her with his finger and that it had hurt. However, when testifying at trial, S.H. denied that this incident had occurred and denied that she had ever told anyone that the defendant had penetrated her. Thus, while some jurors might have found this act to constitute one of the charged counts some others might well have not. Thus, the state cannot prove that the error was harmless. As a result, the defendant is entitled to a new trial.

CONCLUSION

The defendant in this case is entitled to a new trial because (1) the court erroneously allowed an incompetent witness to testify, (2) the court erred when it admitted statements under RCW 9A.44.120, and when it failed to give the jury a unanimity instruction.

DATED this 6th day of March, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to 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 where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RCW 9A.44.120

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:

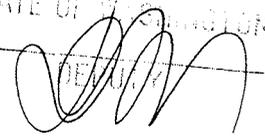
(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

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

**STATE OF WASHINGTON,
Respondent,**

NO. 37949-0-II

vs.

AFFIRMATION OF SERVICE

**FARON W. ROPER,
Appellant.**

STATE OF WASHINGTON)
County of Clark) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **March 6th, 2009** , I personally placed in the mail the following documents

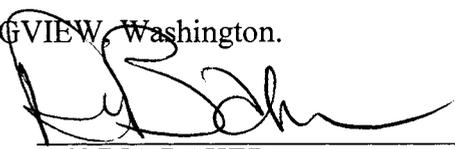
- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

to the following:

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WALLA WALLA, WA 99362

Dated this 6th day of MARCH, 2009 at LONGVIEW, Washington.


DONNA BAKER
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

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