

NO. 40835-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

C.C.,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY, JUVENILE  
DIVISION

The Honorable James E. Warne, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court's prejudgment of the complaining witness's credibility violated the appearance of fairness doctrine and appellant's due process rights to a fair and impartial judge.

2. The court erred in admitting child hearsay statements without finding the Ryan<sup>1</sup> factors were substantially met. CP 19-21; RP 349-355.<sup>2</sup>

Issues Pertaining to Assignments of Error

1. Due process requires an impartial judge and also the appearance of fairness. Even without actual bias, the appearance of fairness doctrine is violated when the court's conduct would cause a disinterested person to question the court's fairness and impartiality. Here, the trial court commented that all spontaneous disclosures of abuse by small children should be considered truthful. Did these comments, showing the court's prejudgment and personal attitude toward the State's witness violate the appearance of fairness doctrine?

2. When child hearsay statements are admitted under RCW 9A.44.120, the court must first find the factors enumerated in State v. Ryan are substantially met. Here, the court's factual findings only mention three of the nine factors, the court's oral rulings indicated its

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<sup>1</sup> State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984)

<sup>2</sup> The court's Findings of Fact and Conclusions of Law and the oral ruling are attached to this brief as Appendices A and B, respectively.

disregard of the Ryan factors and the court made no finding, oral or written that the Ryan factors were substantially met. Did the court err in admitting child hearsay?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Cowlitz County prosecutor charged appellant C.C., born January 30, 1993, with first-degree child molestation. CP 1. He was found guilty after an adjudicatory hearing. CP 27. The court imposed a standard range disposition. CP 29-30. Notice of appeal was timely filed. CP 38.

2. Substantive Facts

Nine-year-old Jane Doe<sup>3</sup> and her father John Doe<sup>4</sup> needed a place to stay. Living in Cathlamet with no vehicle while working the graveyard shift at Walmart in Longview was simply impracticable. RP 13, 129, 131.

Although their home had no extra bedrooms, C.C.'s family invited Jane and her father to live with them in Longview during the week. RP 131, 171. C.C.'s stepfather J.C. is John Doe's cousin. RP 131. C.C. was in one bedroom, his mother and stepfather were in the second, and the third was home to Uncle Joe, who was recovering from a stroke. RP 132-33. Initially,

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<sup>3</sup> This brief adopts the trial court's pseudonym for the child. See CP 19-21.

<sup>4</sup> To maintain the child's privacy, this brief adopts this corresponding pseudonym for the child's father.

Jane slept in Uncle Joe's room on the floor, while her father slept on a couch in the living room while not at work. RP 132-33.

This arrangement lasted from November or December 2008 until February 2009. RP 144-45. Not surprisingly, tensions arose. John Doe's portable DVD player cords, worth several hundred dollars, went missing. RP 152-53, 175. Doe began to believe C.C.'s mother, who was being paid \$1,200 per month to care for uncle Joe, was not caring for him as well as would be expected. RP 176-77. Doe also felt there was too much violence and arguing between C.C. and his mother and stepfather. RP 178. Finally, after Doe attempted to intervene in a fight between C.C. and his stepfather, C.C. assaulted Doe. RP 151, 322. So he and Jane moved out to stay with his best friend. RP 153-54. In April 2009, Doe called the police and shortly thereafter, C.C. was charged with child molestation. RP 162; CP 1.

The court combined the factfinding hearing with a hearing to determine admissibility of Jane Doe's hearsay statements. CP 19. With C.C. in another courtroom watching the proceedings via closed-circuit television, Jane Doe testified C.C. came in while she was sleeping in Uncle Joe's room and touched her chest and bottom with his hand, over her clothes. RP 76, 84, 89-90. She testified the touch was soft and made her feel tingly inside. RP 87. She testified it happened between five and ten times in December, with the longest contact lasting about nine seconds. RP 89-91.

Jane explained she was too embarrassed to tell her father when he asked her about inappropriate touch, but she did tell Halk when she asked. RP 96-97, 98-99. Later she recalled telling a “nice lady with long hair,” her father, her grandmother and her uncle Jason. RP 100-102. She said she told the truth to everyone and no one told her what to say. RP 101-04.

In retrospect, John Doe recalled Jane’s behavior changing during the time they stayed with C.C.’s family. He recalled that one day she wanted to sleep next to him instead of in Uncle Joe’s room. RP 160. He also recalled her not wanting to be around C.C. anymore. RP 161.

a. Child Hearsay Statements

In April 2009 John Doe woke his daughter at seven or eight a.m. to ask her about his concerns. RP 154-55. At first, he testified that he asked Jane if C.C. had done anything to her, naming him in his original question. RP 156. He then changed his testimony and said he first asked whether anyone had done anything to her, before giving her multiple choices such as C.C., C.C.’s father, and Jane’s Uncle Jason. RP 156. When she would not answer his questions, Doe asked Patricia Halk, his best friend’s wife, to talk to Jane. RP 158-59.

Halk testified her husband woke her at three or four a.m. one morning and asked her if C.C. had ever been left alone with her daughter. RP 201-02. She said, “No,” but before going back to sleep, she asked what

happened. RP 202, 218. Her husband told her about John Doe's concerns. RP. 218-19. Later that morning, her husband relayed John Doe's request that she talk to Jane. RP 202. He told her Doe was asking if C.C. touched Jane and Jane would not answer. RP 203. He specifically mentioned concerns that something had happened between Jane and C.C. RP 219.

Jane appeared upset and nervous. RP 204. Halk asked her whether anyone had ever touched her "wrong." RP 204. Jane told her, "No." RP 204. Halk then attempted to persuade Jane to talk about it. Halk testified, "I told her that when I was a kid, I had been touched. I never told her anything like how I was touched, but I told her that, you know, most – 'It would be good if something did happen to talk about it.'" RP 204. She told Jane she was touched by someone close to her, and she wished she had told because a year later the same guy touched two other little girls. RP 220. She told Jane that if she told, it would stop other children from being hurt. RP 208.

About this point in the conversation, Jane's father came in the room. RP 207-08. He said he had just spoken with his cousin's wife, who said Jane told her daughter C.C. had "messed with her." RP 207-09. Doe told Jane, "I need you to talk so we can do something about this." RP 209. He told her he loved her and she would not be in trouble. RP 209. John Doe denied interrupting his daughter's conversation with Halk. RP 186.

After Doe left the room, Halk asked Jane if anyone touched her, and Jane told her C.C. had done so. RP 205, 210. She next asked where C.C. touched Jane, and Jane said, "He touched my chest." RP 205. When she asked how C.C. touched her, Jane used the word "caressed" and demonstrated by squeezing Halk's hand. RP 206. Halk also asked Jane if anyone else touched her or if there was anything else she wanted to tell her. RP 211. Jane said, "No, that's everything." RP 211. Halk then thanked Jane for telling her and said, "You have done a really good job, and you are not in trouble." RP 207.

After that conversation, Doe called the police. RP 162. The police had more questions for Jane, which Doe relayed to Halk to relay to the child. RP 212. The police asked if it was over or under the shirt, and Jane told Halk it was under. RP 212-13. They asked if it was just once or more than once. RP 213. The first time, Jane said it was only once. RP 224. Halk testified she wanted to make sure, so she asked again and told Jane, "If something like this had happened to [Halk's daughter, Jane's friend] would you want her to tell?" RP 224. When Jane said yes, Halk asked "Okay, so was it just once?" RP 224. Only then did Jane tell Halk it was six or seven times. RP 213, 224. Halk again told Jane, "she was going to help other kids from getting touched." RP 214. Halk testified she never used leading

questions or gave Jane any ideas. RP 216. John Doe did not recall relaying questions from the police to his daughter via Halk. RP 162.

After speaking to police, John Doe brought his daughter to an interview with Investigator Olga Lozano. RP 163. He told Jane Lozano need to talk to her about “stuff” but did not specify what. RP 163. Lozano testified she asked Jane if she knew why she was there, and Jane replied it was to talk about what someone had done to her. RP 275-76. When Lozano asked who, Jane identified C.C. RP 276. Jane told Lozano he touched her chest and bottom with his hand. RP 279-80. She said it happened in December, in Uncle Joe’s room. RP 277-28, 280. She said it happened seven times on her chest and five or six times on her bottom. RP 281-82. She said she would be asleep and would awaken to find C.C. touching her, putting his hand under her shirt and training bra and rubbing her chest. RP 282. She said he would stroke and squeeze her bottom over her clothes. RP 282-83. Lozano testified Jane told her she told C.C. to stop, but he wouldn’t, so she tried to take his hand away. RP 283.

John Doe also testified to statements Jane made to him at some point after her interview with Lozano. RP 163. He testified one day while he was cooking dinner, Jane discussed why other children would not talk about what happened to them and told her dad, “I did a good job for saying [C.C.] went under my shirt, huh dad?” RP 164-65. She also told him C.C. grabbed her

butt once. RP 165. On another occasion, Doe testified Jane asked him, “Why does [C.C.] have to touch people in the wrong places?” RP 166. When he asked what she meant, Jane answered, “Well, like when he grabbed my butt” and also mentioned him going up her shirt. RP 167. He denied ever telling Jane what to say or giving her details. RP 169.

Jane’s grandmother testified Jane said she was sleeping in Uncle Joe’s room when C.C. came in and put his hands under her shirt. RP 232. Finally, Jane’s Uncle Jason testified he asked Jane about what happened. RP 239. He asked Jane, “I heard [C.C.] touched you someplace. Wanna talk about it?” RP 239. After a big sigh, Jane made several disclosures that were not admitted. RP 239.

b. Court’s Ruling

C.C. argued Jane’s hearsay statements to others should not be admitted because they were not spontaneous and were tainted by improper interview techniques and repeated questioning. RP 261, 347-49. The court’s oral ruling on the child hearsay issue emphasized the court’s ambivalence about the Ryan factors. The court began by noting that the statute was not particularly helpful in determining admissibility because it gave no definition of the requisite reliability. RP 350. Next, the court found reasons to ignore virtually all of the Ryan factors.

First, the court found it “strange” that Ryan equates reliability with the absence of a motive to lie because that factor is not found in any of the other hearsay exceptions under the rules of evidence. RP 350-51. Regarding the second factor, the court concluded, “The general character of the declarant, it doesn’t provide much guidance. It’s a child. I don’t – how much do we know about the character of children?” RP 351. Moving on to the third factor, the court reasoned, “More than one person heard the statements, I’m not sure what that means. . . . The only way that makes any sense to me is if it was said to more than one person at different times and it remained consistent.” RP 351.

The court then noted, “Obviously, we are going to analyze it in terms of Ryan.” RP 351. In proceeding to the fourth factor, the court found it to be dispositive:

I will tell you what is compelling to me. It has more to do with No. 4, whether the statements were made spontaneously than anything else, but it’s even a little different than that. When children – children make spontaneous statements about how they were hurt – how they were hurt, there is generally a pretty good basis for it.

RP 352. The court explained it assumes a spontaneous statement by a child that he or she was hurt is generally true:

A child has the ability to understand it’s been hurt and it has the ability to make an accusation, has an ability to seek protection, when they are three years old, five years old, ten years old. Those sort of statements have some inherent

reliability because they are not the kind of thing that ordinarily aren't untrue in a premeditated sort of way. Maybe they got hurt after they started something, but they generally know if they have been hurt and how they got hurt.

RP 352.

The court noted the statements were spontaneous and made without any apparent motive to lie. RP 352-53. The court rejected the suggestion that Jane lied to please her father by getting C.C. in trouble, and returned to the idea that children who are hurt tell the truth. RP 353.

Here's how it happened, somebody hurt me. I think under those circumstances, they meet what was the intent of the statute. As I say, I'm not sure the statute is very clear. I don't think that Ryan is a lot of help. I do think we ought to have a rule, though, that when small children say they were hurt in a spontaneous sort of way, the common experience is they are telling the truth.

RP 353. The court concluded all Jane's statements were consistent. RP 354. It concluded the statements to Halk and John Doe were spontaneous. RP 354. Although the statements to Lozano were not spontaneous, the court found Lozano used appropriate interview techniques. RP 354. The court found Jane had no motive to lie. RP 354. Ultimately, the court found Jane's statements to Halk, Lozano, her father, and her grandmother were admissible, but excluded the statements to Uncle Jason as prompted by suggestive questioning. RP 354-55. After closing argument, the court found Jane's testimony credible and determined C.C. molested her beyond a reasonable doubt. RP 368-69.

C. ARGUMENT

1. C.C.'S DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BECAUSE THE TRIAL JUDGE HAD PREJUDGED THE CREDIBILITY OF THE STATE'S WITNESS.

Due Process guarantees the right to a fair trial before an impartial trier of fact, operating without bias towards either side. U.S. Const. amends. V, XIV; Const. art. 1, §§ 3, 22. The trial judge in this case was not impartial because he made comments indicating he was predisposed to believe any and all children complaining of abuse. RP 352, 353.

An unbiased judge and the appearance of fairness are hallmarks of due process. Caperton v. A.T. Massey Coal Co., \_\_\_ U.S. \_\_\_, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009); In re Murchison, 349 U.S. 133, 136, 55 S. Ct. 623, 99 L. Ed. 942 (1955); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). Where the “probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerated,” due process under the federal constitution is violated. Caperton, \_\_\_ U.S. at \_\_\_, 129 S. Ct. at 2259. “[I]t is fundamental that a trial before a biased and prejudiced judge would constitute a denial of due process under the Fourteenth Amendment to the Federal constitution and Art. 1, § 3, of our state constitution.” State ex rel. McFerran, 32 Wn.2d 544, 550, 202 P.2d 927 (1949).

The law goes farther than requiring an impartial judge. State v. Romano, 34 Wn. App. 567, 568, 662 P.2d 406 (1983); State v. Madry, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972). An impartial judgment must also be accomplished in such a manner that no one could raise a reasonable question as to impartiality or fairness. Romano, 34 Wn. App. at 569; Madry, 8 Wn. App. at 70. Therefore, even if there is no actual bias, justice must satisfy the appearance of fairness. Romano, 34 Wn. App. at 568; Madry, 8 Wn. App. at 68. The requirement of a neutral and unbiased judge “preserves both the appearance and reality of fairness. . .by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.” Marshall v. Jerrico, Inc., 446 U.S. 238, 252, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) (emphasis added).

The critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person. Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Human Rights Comm’n, 87 Wn.2d 802, 810, 557 P.2d 307 (1976). A violation of the appearance of fairness doctrine is established when there is some evidence of the judge’s “actual or potential bias.” State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992); State v.

Perala, 132 Wn. App. 98, 113, 130 P.3d 852 (2006) (citing Post, 118 Wn.2d at 619).

a. The Court's Prejudgment of the Complaining Witness's Credibility Violated the Appearance of Fairness Doctrine.

Many types of bias or personal interest may violate the appearance of fairness doctrine. This case concerns a prejudgment bias. A finder of fact may be biased due to "prejudgment concerning issues of fact about parties in a particular case." Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (quoting Buell v. City of Bremerton, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972)). Similarly, "partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party" violates due process. Id. When a judge's handling of the trial suggests an alignment with one of the parties, any resulting judgment in favor of that party is rendered invalid. Anderson v. Sheppard, 856 F.2d 741, 745 (6th Cir. 1988). The judge's comments indicate pre-judgment occurred in this case.

The judge commented that "When children . . . make spontaneous statements about how they were hurt . . . there is generally a pretty good basis for it," and "I do think we ought to have a rule, though, that when small children say they were hurt in a spontaneous sort of way, the common experience is they are telling the truth." RP 352, 353. These comments

indicated the court had prejudged the child witness' credibility, the main issue of fact on which the conviction rests. Even if this Court assumes the judge was not actually biased, the appearance of fairness doctrine was violated because the comments would cause a reasonable person to question the judge's impartiality in assessing the truthfulness of a child witness.

Other jurisdictions have dealt with judges in bench trials who made comments indicating bias against defense witnesses or bias in favor of prosecution witnesses. California courts have explained that "expressions of opinion by a trial judge based on actual observation of the witnesses and evidence" are permissible and do not offend due process. People v. Guerra, 37 Cal. 4th 1067, 1111, 129 P.3d 321, 40 Cal. Rptr. 3d 118 (2006). On the other hand, opinions revealing a judge's "preconceived ideas" can show actual bias and violate the appearance of fairness. Hall v. Harker, 69 Cal. App. 4th 836, 843, 82 Cal. Rptr. 2d 44 (1999) (bias against attorney), disapproved on other grounds in People v. Freeman, 47 Cal. 4th 993, 222 P.3d 177, 103 Cal. Rptr. 3d 723 (2010).

Judges' opinions on credibility also run afoul of the appearance of fairness doctrine when based on evidence outside the record such as the witness's reputation outside of court. Burgess v. State, 89 Md. App. 522, 548-549, 598 A.2d 830 (1991); Turman v. United States, 555 A.2d 1037 (D.C. 1989). In Turman, the court reversed Turman's conviction because

the court had announced it had a good opinion of the State's witness's credibility, in part based on credibility determinations from previous cases in which that witness had appeared. 555 A.2d at 1038-39. The court held these comments, without reassurance that the decision would be based solely on the evidence in the case at bar, created an appearance of partiality that tainted the trial. Id. at 1039.

In People v. Kennedy, 191 Ill. App. 3d 86, 547 N.E.2d 623 (1989), the court did not believe the defense's alibi witnesses. Id. at 90. Normally, such a credibility determination is within the purview of the judge at a bench trial. Id. at 91. However, in explaining his ruling, the court declared the defense witnesses to be criminals, welfare mothers, fornicators, mothers of children born out of wedlock. Id. at 90. The court determined that under these facts, the judge displayed a bias against the defense witnesses, based on unproven facts unrelated to their testimony or demeanor at the trial. Id. at 91. The court determined that bias violated the defendant's right to due process of law and the appearance and reality of an impartial fact-finder. Id.

As in Kennedy, due process was violated in this case because the court's assessment of Jane Doe's credibility was not based on the evidence but on a preconceived bias to believe children who spontaneously complain of abuse. Like in Turman, there was no reassurance that the court's credibility determination was based solely on the evidence. C.C.'s

conviction should be reversed because his trial lacked the appearance of fairness required by due process.

b. Prejudgment of Critical Issues Is Manifest Constitutional Error.

Few tenets are so fundamentally ingrained in Washington jurisprudence as the due process right to an unbiased judge, and a judge who appears unbiased. The appearance of fairness is a basic element of due process. Caperton, \_\_\_ U.S. at \_\_\_, 129 S. Ct. at 2259. The remedy for its violation is vacation of an apparently unfair order and remand for a new hearing before an unbiased judge. Romano, 34 Wn. App. at 570; Madry, 8 Wn. App. at 71. For that reason, this issue is a manifest constitutional error permitting review for the first time on appeal. See RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7-9, 17 P.3d 591 (2001) (claim that guilty plea was involuntary due to misunderstanding about the standard range was manifest constitutional error that could be raised for the first time on appeal).

Manifest constitutional error requires that the error be both constitutional and cause actual prejudice. Walsh, 143 Wn.2d at 8. The existence of actual prejudice is gauged by applying a constitutional harmless error analysis. State v. King, 167 Wn.2d 324, 333 n.2, 219 P.3d 642 (2009). The reviewing court must be satisfied the error is harmless beyond a reasonable doubt. Id. (citing Chapman v. California, 386 U.S. 18, 87 S. Ct.

824, 17 L. Ed. 2d 705 (1967)). Here, the entire case boiled down to the credibility of the complaining witness. The court's comments indicating prejudgment of that factual issue had a practical effect on the court's determination of the decisive issue in the case. Moreover, the error is never harmless when judicial bias has been exhibited at any stage of a proceeding. Anderson, 856 F.2d at 746.

A judge must "exercise self-restraint and preserve an atmosphere of impartiality." Anderson, 856 F.2d at 745. In contrast to this standard, the trial court's comments in this case implied there was no need for a trial. If, as the court suggested, "we ought to have a rule" that spontaneous statements of abuse by small children are always true, there is no need for an individualized determination of the factual issues of witness credibility and guilt or innocence. But the fact of an accusation is not enough. C.C. was entitled to a fact-finder who would individually assess the credibility of the various witnesses, instead of assume Jane Doe's veracity. His right to due process of law and a fair trial by an impartial tribunal was violated. He should receive a new trial.

2. THE COURT ERRED IN ADMITTING CHILD HEARSAY WITHOUT WEIGHING THE RYAN FACTORS.

Normally, a child's hearsay statements regarding alleged abuse are inadmissible in court unless they meet one of the established exceptions such

as “excited utterance” or a statement made for the purpose of medical diagnosis. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). The Legislature added a new hearsay exception when it enacted RCW 9A.44.120. Under this statute, if a child witness testifies at a criminal trial, the child’s out-of-court statements are admissible if the court finds “the time, content, and circumstances of the statement provide sufficient indicia of reliability.” RCW 9A.44.120.

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court set forth a number of factors for determining the admissibility of a child’s statements under RCW 9A.44.120:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statement contained assertions about past fact;
- (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement;
- (8) how likely is it that the statement was founded on faulty recollection; and
- (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant’s involvement.

Ryan, 103 Wn.2d at 175-76. Although each of the Ryan factors need not favor admission of child hearsay, the factors as a whole must be substantially met before admission will be affirmed on appeal. State v. Swan, 114 Wn.2d 613, 652, 790 P. 2d 610 (1990).

A court's decision to admit child hearsay statements is reversible on appeal when the court abuses its discretion in weighing the Ryan factors. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). A court abuses its discretion when its decision is manifestly unreasonable, or when discretion is exercised on untenable grounds, or for untenable reasons, such as application of the wrong legal standard. State v. Dixon, 159 Wn.2d. 65, 75-76, 147 P.3d 991 (2006) (quoting State v. Rohrich , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

In this case, the court abused its discretion because it did not apply the Ryan factors or find that they were substantially met. The written findings only mention three of the nine Ryan factors (no motive to lie, spontaneity, and heard by more than one person). CP 19-21. "A reviewing court may look to the trial court's oral ruling to interpret written findings and conclusions." State v. Hescocock, 98 Wn. App. 600, 989 P.2d 1251 (1999) (citing State v. Bynum, 76 Wn. App. 262, 266, 884 P.2d 10 (1994)). The court's oral ruling indicates it disregarded the Ryan factors in determining the admissibility of Jane Doe's statements. RP 352-53. The court abused its discretion because in failing to apply the Ryan factors, it failed to apply the appropriate standard of law.

a. The Court Failed to Consider Each of the Ryan Factors and Failed to Find They Were Substantially Satisfied.

Appellate courts have largely upheld trial courts' discretion to admit child hearsay under the Ryan factors. However, in those cases, the lower courts considered and applied the Ryan factors and found that they were substantially satisfied, even if every single factor did not weigh in favor of admissibility.

A valid exercise of the court's discretion to determine admissibility under Ryan requires, at a minimum, consideration of each of the Ryan factors. For example, in Swan the trial court's rulings "demonstrated careful consideration of the Ryan factors." Swan, 114 Wn.2d at 648. In State v. Grogan, 147 Wn. App. 511, 195 P.3d 1017 (2008), "the trial court made specific findings on each Ryan factor" and "orally considered each Ryan factor. Grogan, 147 Wn. App. at 515, 521. In State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), the trial court "considered each of the Ryan factors in turn" and determined the statements were reliable. Borboa, 157 Wn.2d at 122. In State v. Swanson, 62 Wn. App. 186, 813 P.2d 614 (1991), the court considered each Ryan factor in its memorandum decision. Swanson, 62 Wn. App. at 193.

Additionally, courts have been found to have validly exercised discretion under Ryan when, although the court may not have expressly

found every factor, it expressly found that the Ryan factors substantially weighed in favor of reliability and admissibility. In State v. Keneally, 151 Wn. App. 861, 214 P.3d 200 (2009), the defendant argued that the trial court did not explicitly mention each Ryan factor. The Court of Appeals rejected this argument because the trial court “expressly stated that the Ryan factors were met.” Keneally, 151 Wn. App. at 880. Similarly, in State v. Quigg, 72 Wn. App. 828, 835, 866 P.2d 655 (1994), the defendant argued the court had ignored the Ryan factors. However, on appeal, the court noted that the trial court had expressly found five of the nine factors were satisfied and weighed them on the record. Quigg, 72 Wn. App. at 835-36.

In stark contrast to each of these cases, the trial court here did not expressly or explicitly find, either orally or in writing, that the Ryan factors were substantially met. CP 19-21; RP 349-55. Nor did the court expressly consider each of the Ryan factors or balance those favoring admission against those favoring exclusion. The written findings mention only three of the nine, and the court’s oral ruling indicates an attempt to create his own rule of law that children who spontaneously disclose abuse are always telling the truth. RP 353.

b. The Court Failed to Consider Several of the Essential Ryan Factors.

The court did not merely disregard those factors that have been found unhelpful, particularly when the child also testifies. For example, courts have found that the possibility that cross-examination would show lack of knowledge is irrelevant if the child testifies. Keneally, 151 Wn. App. at 880; State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Factor nine (no reason to suppose that the declarant misrepresented the defendant's involvement) has been held to be redundant of the issues contained in the first five factors. In re Dependency of S.S., 61 Wn. App. 488, 499, 814 P.2d 204 (1991). Factor six, whether the statement is an assertion of past facts has also been found not helpful and can be ignored "so long as other factors indicating reliability are considered." State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991). But the court did not merely disregard these three factors.

Instead, the court skipped over factors crucial to determining reliability. The court made no finding regarding factor two, the declarant's general character. CP 19-21. Nor did the court consider how Jane Doe's relationship to the various witnesses or the timing of her statements may have impacted reliability. It did not consider the possibility that the witnesses were predisposed to confirm what they had already been told and

how that might affect the reliability of the statements. See Ryan, 103 Wn.2d at 176 (statements to children's mothers less reliable because the mothers were "arguably predisposed to confirm what they had been told"). Nor did the court consider that Jane Doe was told that she should talk in order to protect other children, precisely the type of context that can undermine reliability. State v. Carol M.D., 89 Wn. App. 77, 92, 948 P.2d 837 (1997) (quoting State v. Michaels, 264 N.J. Super. 579, 625 A.2d 489, 517 (1993), aff'd, 136 N.J. 299, 642 A.2d 1372 (1994)). Nor did the court make any finding regarding factor five, the possibility of faulty recollection. CP 19-21.

The court essentially picked out one of the Ryan factors and decided the case on that basis. The court explained, "I will tell you what is compelling to me. It has more to do with No. 4, whether the statements were made spontaneously than anything else." RP 352. The court continued, "When children . . . make spontaneous statements about how they were hurt. . . there is generally a pretty good basis for it." RP 352. Perhaps realizing how far it was straying from the appropriate legal standard, the court stated, "obviously we are going to analyze it in terms of Ryan," but then concluded, "I don't think that Ryan is a lot of help. I do think we ought to have a rule, though, when small children say they were hurt in a spontaneous sort of way, the common experience is they are telling the truth." RP 353.

c. The Court Erred in Creating Its Own Legal Standard.

This case is more like State v. Jackson, where the court ignored the Ryan factors in favor of its own standard. State v. Jackson, 46 Wn. App. 360, 730 P.2d 1361 (1986). In that case, the court admitted the child's statements because it found the child's memory was fragile and she had a limited ability to express herself. Id. at 368. The court did not expressly find the child's statements reliable and did not apply the Ryan factors. Id. at 368-69. The court held reversal was required. Id. at 369. The same outcome is mandated here.

Just as the child's inability to testify was not a substitute for reliability under the Ryan factors in Jackson, the court's determination that spontaneous disclosures of abuse are generally truthful is not a substitute for the Ryan factors. Ryan requires consideration of the possibility of faulty recollection. 103 Wn.2d at 175-76. The possibility of faulty recollection or tainted memory, for example, makes it possible for a child to believe he or she is telling the truth, while in fact relating a false memory. Cf. A.E.P., 135 Wn.2d at 230-31 (possibility child's memory is corrupted or tainted by suggestive interviewing relevant to fifth, eighth, and ninth Ryan factors). No one factor alone can assure the court of the necessary reliability. Experts who attempt to testify to generalizations like the one the court relied on in this case are excluded as not meeting the requirement of general acceptance

in the scientific community and as invading the province of the jury. E.g. State v. Dunn, 125 Wn. App. 582, 584, 105 P.3d 1022 (2005) (excluding physician's assistant's opinion that "if the child relates events within a given level of specificity, then the child has probably been abused").

The court's failure to consider each of the Ryan factors and to make a finding that the factors substantially weighed in favor of admissibility was an abuse of discretion that requires a new trial. An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010); State v. Jenkins, 53 Wn. App. 228, 231, 766 P.2d 499 (1989). No prejudice exists if the inadmissible evidence is "of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Sanford, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Most of the trial was taken up with presentation of Jane Doe's hearsay statements. Thus, the hearsay evidence was far from trivial or minor. Erroneous admission of this testimony prejudiced C.C. and requires a new trial.

D. CONCLUSION

For the foregoing reasons, C.C. requests this Court reverse his adjudication of guilt and remand for a new adjudicatory hearing before a different judge.

DATED this 3<sup>rd</sup> day of November, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068  
Office ID No. 91051

Attorney for Appellant

# **Appendix A**

2010 MAY 20 P 4: 31

COWLITZ COUNTY  
RONI A. BOOTH, CLERK

BY mm

**SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY**  
**JUVENILE DIVISION**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 09-8-00273-1
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
COREY CHRISTOPHER CENTER,	)	ON RYAN HEARING and FACT FINDING
DOB 1/30/1993	)	
Respondent.	)	
	)	

On April 23, 2010 and April 30, 2010, the Honorable James Warne, Superior Court Judge, presided over the combined Ryan Hearing pursuant to RCW 9A.44.120, and Fact Finding. The court heard testimony of witnesses, considered the evidence presented, and found the following beyond a reasonable doubt:

**Findings of Fact**

1. Jane Doe testified the Respondent touched her breasts and butt over her clothing numerous times. Jane Doe had an independent memory sufficient to recall the events.
2. Jane Doe was able to understand and answer questions about the touching outside the Respondent's presence, although it was still difficult for her talk about the experience.
3. Jane Doe's testimony was credible.

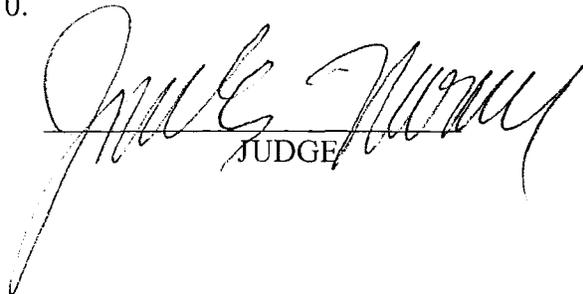
- 1 4. Jane Doe understands the difference between telling a truth and telling a lie and  
2 understands there are negative consequences for lying.
- 3 5. Jane Doe testified this touching occurred during the month of December in 2008.  
4 Jane Doe had a recollection of events surrounding this time frame and was able to  
5 accurately talk about what the family did for Christmas that year.
- 6 6. Jane Doe made statements to her father, grandmother and father's friend Patty Halk  
7 about how she was ~~hurt~~ <sup>touch</sup> and what happened. 
- 8 7. The statements Jane Doe made to her father Kirsten Styer, Patricia Halk, and  
9 grandmother Edna Kellim were spontaneous and were consistent as to the type of  
10 touching and where the Respondent touched her.
- 11 8. Jane Doe had no apparent motive to lie.
- 12 9. There was no evidence Jane Doe told in an effort to please her father or anyone else.  
13 She told what happened for herself.
- 14 10. There was no evidence Jane Doe wanted to get the Respondent in trouble.
- 15 11. Jane Doe's statement to her uncle Jason Kellim was not spontaneous and was given  
16 only after Jason Kellim questioned Jane Doe.
- 17 12. ~~More than one person heard the statements Jane Doe made to Investigator Olga~~  
18 ~~Lozano.~~ 
- 19 13. Investigator Lozano's questioning of Jane Doe was appropriate under the child  
20 interview guidelines. She did not use leading questions.
- 21 14. Jane Doe answered Lozano's questions, sometimes providing additional information  
22 beyond that called for in the question.
- 23  
24  
25

- 1 15. Jane Doe told her father, grandmother, Ms. Halk, and Investigator Lozano, the  
2 Respondent touched her breasts under her clothing. Jane showed and described to  
3 Ms. Halk the Respondent caressed her breasts. Jane demonstrated to Investigator  
4 Lozano a swiping hand motion.  
5  
6 16. The Respondent had sexual contact with Jane Doe.  
7  
8 17. Jane Doe was less than 12 years of age at the time of the sexual contact.  
9  
10 18. Jane Doe was not married to the Respondent.  
11  
12 19. The Respondent was more than 36 months older than Jane Doe.  
13  
14 20. All the acts occurred in Cowlitz County, State of Washington.

#### 11 **Conclusions of Law**

- 12 1. Jane Doe is a competent witness.  
13  
14 2. The statements made to Kirsten Styer are reliable and admissible at trial.  
15  
16 3. The statements made to Patricia Halk are reliable and admissible at trial.  
17  
18 4. The statements made to Edna Kellim are reliable and admissible at trial.  
19  
20 5. The statements made to Investigator Olga Lozano are reliable and admissible at trial.  
21  
22 6. The statements made to Jason Kellim are not reliable and not admissible at trial.  
23  
24 7. The Respondent is guilty of Child Molestation in the First Degree, contrary to RCW  
25 9A.44.083.

21 **DATED** this 20 day of May, 2010.

22  
23  
24  
25  
  
JUDGE

1 Presented by:



2 AMIE HUNT, WSB # 31375

3 Attorney for the State

4  
5 Approved as to form:

6  
7 \_\_\_\_\_  
8 JO VERNON, WSBA#

9 Attorney for Respondent

10  
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# **Appendix B**

1 thought it was up to them to pay for them. He even came to  
2 their house after they moved wanting the money again. And  
3 so when he hears this rumor, I think he wants to get back  
4 at them. He never liked Corey, and he liked Corey even  
5 less after Corey got into a physical alter- -- and hit him  
6 with a flashlight, which I can understand him not liking  
7 Corey after someone hit him with a flashlight.

8 And the circumstances surrounding are such that there is  
9 no reason to suppose the declarant misrepresented the  
10 defendant's involvement, that's kind of a subtle question.  
11 What kind of involvement are they talking about? She  
12 obviously didn't tell the same story on the stand that she  
13 told -- that the hearsay people are alleging that she told.  
14 We are saying nothing happened. We are saying that this --  
15 enough time has passed that she has forgotten what she has  
16 basically been programmed to say. The taint is wearing  
17 off. I think if you ask her six months from now what  
18 happened, she would say nothing happened, because nothing  
19 did happen. And I think the hearsay -- the child hearsay,  
20 it's unreliable. It doesn't pass the Ryan test.

21 THE COURT: Okay. Thank you.

22 Let's start with the statute, 9A-44-120, "The admission  
23 of hearsay statements made by children under 10 describing  
24 any act of sexual contact may be admissible if the Court  
25 finds that the time, content, and circumstances of the

1 statement provide sufficient indicia of reliability."

2 This statute is not very helpful. "Hearsay statements  
3 of a child under 10 concerning acts of sexual conduct can  
4 be admitted by a Court where there are sufficient indicia  
5 of reliability." The statute gives us no guidance. The  
6 statute gives us no guidance as to what "sufficient indicia  
7 of reliability" are. None.

8 Well, 803 gives us some, some, but not necessarily all  
9 and not necessarily controlling; "Some circumstances or  
10 hearsay statements provide sufficient indicia of  
11 reliability," and there's a whole list: Present sense  
12 impressions, excited utterances, statements of mental  
13 state, statements for purposes of medical diagnosis,  
14 business records, market reports, learned treatises.

15 And there's a reason for each one of these exceptions.  
16 There's nothing in the statute that tells us what the  
17 reason is or what the policy is that will provide  
18 sufficient indicia of reliability. So then you go to State  
19 versus Ryan, and in Ryan the Court confronts that problem  
20 and says, well, I think it means this: There's no apparent  
21 motive to lie.

22 That's a pretty strange indicia of reliability. It  
23 would not satisfy any of the requirements of ER 804  
24 otherwise. I mean, we don't ask in determining hearsay the  
25 admissibility of other hearsay where there's an apparent

1 motive to lie. We make the inquiry, is there something  
2 about the statement itself that is inherently reliable,  
3 inherently reliable? The fact that it's not inherently a  
4 lie doesn't make it inherently reliable, but that's one of  
5 the Ryan factors.

6 The general character of the declarant, it doesn't  
7 provide much guidance. It's a child. I don't -- how much  
8 character -- do we know about the character of children?

9 More than one person heard the statements, I'm not sure  
10 what that means. Does that mean more than one person heard  
11 the statement when it was made? In other words, there were  
12 10 people in the room at the same time, or it was said at  
13 10 different times to 10 different people? The only way  
14 that makes any sense to me is if it was said to more than  
15 one person at different times and it remained consistent.  
16 That's the only way that makes any statement (sic). Or the  
17 statement was made spontaneously is, in fact -- is, in  
18 fact, the only one ER 804 exception. It has a background,  
19 a historical background and justification. Spontaneous  
20 statements, excited utterances, generally speaking are  
21 considered to be reliable because they are spontaneous.  
22 They are excited. There's not an opportunity for  
23 fabrication.

24 So I don't think Ryan -- obviously we are going to  
25 analyze it in terms of Ryan. There have been other

1 attempts to improve this. Tests have been added and tests  
2 have been taken away all for the purpose of improving this  
3 analysis.

4 I will tell you what is compelling to me. It has more  
5 to do with No. 4, whether the statements were made  
6 spontaneously than anything else, but it's even a little  
7 different than that. When children -- children make  
8 spontaneous statements about how they were hurt -- how they  
9 were hurt, there is generally a pretty good basis for it.  
10 A little kid runs into his house and says to his mommy,  
11 "Johnny hurt me."

12 A child has the ability to understand it's been hurt,  
13 and it has the ability to make an accusation, has an  
14 ability to seek protection, when they are three years old,  
15 five years old, 10 years old. Those sort of statements  
16 have some inherent reliability because they are not the  
17 kind of thing that ordinarily aren't untrue in a  
18 premeditated sort of way. Maybe they got hurt after they  
19 started something, but they generally know if they have  
20 been hurt and how they got hurt.

21 In this case -- in this case, the statements by this  
22 young girl that she was violated in a spontaneous sort of  
23 way to her father, to -- where are my notes -- Patricia  
24 Halk, to her grandmother; those three statements, very  
25 spontaneous, without any apparent motive to lie. There

1           wasn't anything going on at the time that would suggest a  
2           motivation to lie.

3           The argument is made by Ms. Vernon that she was trying  
4           to please her father in some way by getting the respondent,  
5           the defendant here, in trouble. I didn't have any sense of  
6           that. It's an argument, but it doesn't have that sense  
7           that she was involved in any way personally with that  
8           issue. It wasn't shown on cross-examination. Just -- it  
9           got heard. It got heard. Here's how it happened, somebody  
10          hurt me. I think under those circumstances they meet what  
11          was the intent of the statute. As I say, I'm not sure the  
12          statute is very clear. I don't think that Ryan is a lot of  
13          help. I do think we ought to have a rule, though, when  
14          small children say they were hurt in a spontaneous sort of  
15          way, the common experience is they are telling the truth.

16          But I think the statements are admissible. What weight  
17          I am going to give them is a totally different matter, but  
18          I think they are admissible. So I am going to consider  
19          them.

20          Now, we are going to take a 15-minute recess. When we  
21          come back, we may have more testimony.

22          MS. HUNTER: Your Honor, the State would ask a point of  
23          clarification. You said that the statements made to the  
24          father, Patricia Halk, and grandmother were admissible; but  
25          you did not address those made to the uncle or --

1 THE COURT: Well, the uncle wasn't the -- he says I  
2 brought it up, because I had heard the rumors and I brought  
3 it up.

4 The statements made to Ms. Lozano, Ms. Lozano brought it  
5 up. I mean, and that was what she was there for. It's a  
6 slightly different situation. They are consistent. I am  
7 taking into consideration that all of the statements are  
8 consistent. Ms. Lozano's conversations with Katelyn were  
9 certainly appropriate under the guidelines. They weren't  
10 spontaneous. They were appropriate. I don't think there  
11 was a motive to lie.

12 And the one case that discussed interviews by a law  
13 enforcement officer said, as I recall, interviews by a law  
14 enforcement officer may be even more reliable than other  
15 conversations. It doesn't tell us why. It doesn't tell us  
16 that we are supposed to find that. It just says maybe it  
17 is. It was not inappropriate. It wasn't spontaneous. The  
18 thing was, as I have explained it and the thing that was  
19 fairly compelling to me at least to get over the threshold  
20 of reliability, is they were spontaneous. The others are  
21 consistent. I don't think -- I don't think I'm going to  
22 consider the statements to her uncle at all. Okay.

23 MS. HUNTER: Does that mean you are for Ms. Lozano?

24 THE COURT: Well, you should be aware it goes to weight.  
25 It does go to weight.

1 MS. HUNTER: Right. But one of the things I'm required  
2 to do depending on the outcome of the case is to put out  
3 findings of fact, and so I just want to understand that you  
4 are finding it is reliable under the hearsay statute and  
5 you will consider it.

6 THE COURT: I will consider it.

7 Okay. We are going to take a 15-minute recess.

8 (Recess taken.)

9 THE COURT: All right.

10 MS. VERNON: The defense rests.

11 THE COURT: Defense rests.

12 MS. VERNON: So the only thing was rebuttal witnesses.

13 MS. HUNTER: Actually, Your Honor, the State is not  
14 going to present a rebuttal.

15 THE COURT: Okay. Argument.

16 MS. HUNTER: Yes, Your Honor. The defendant is charged  
17 with child molestation in the first degree, which, of  
18 course requires the State -- that the defendant had sexual  
19 contact with another under the age of 12, that the victim  
20 was not married to the accused, the accused was at least  
21 three years older than the victim, in Cowlitz County,  
22 Washington.

23 Your Honor, there's only one issue. It's whether it  
24 happened or not. We automatically know based on the  
25 allegations that it happened in Cowlitz County. We are

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 40835-0-II
	)	
C.C.,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SUSAN BAUR  
HALL OF JUSTICE  
COWLITZ COUNTY PROSECUTOR'S OFFICE  
312 SW 1<sup>ST</sup> AVENUE  
KELSO, WA 98626
  
- [X] C.C.  
NASELLE YOUTH CAMP  
11 YOUTH CAMP LANE  
NASELLE, WA 98638

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2010.

x Patrick Mayovsky

BY: [Signature] 10/29/10 10:29 AM