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Clark County No. 16-8-00510-7

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FLEMING,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT (JUVENILE DIVISION)  
OF THE STATE OF WASHINGTON,  
CLARK COUNTY

---

The Honorable Daniel L. Stahnke, Juvenile Court Judge

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in finding a six-year old competent to testify and in admitting her testimony and the hearsay statements she made to others about alleged child molestation under RCW 9.94A.120.
2. Without the improperly admitted testimony and hearsay statements from the accuser there was constitutionally insufficient evidence to support the adjudication of guilt.
3. Appellant assigns error to the juvenile court's Findings of Fact and Conclusions of Law for the child hearsay hearing, as follows:
  10. There is no evidence that G.K.J. has any motivation to lie about the sexual contact with the Respondent.
  - ...
  12. Three independent people heard G.K.J.'s description of what occurred. . . [and] [t]he statements G.K.J. made to these three individuals were highly consistent.
  - ...
  17. There was no evidence to suggest that G.K.J. misrepresented the Respondent's involvement.

CP 65-66.

4. Appellant also assigns error to the juvenile court's Conclusions of Law, including the finding of guilt and the following:
  3. The statements made by G.K.J. to Danielle Johnson are sufficiently reliable to warrant admission under State v. Ryan.
  4. The statements made by G.K.J. to Kim Holland are sufficiently reliable to warrant admission under State v. Ryan.
  5. The statements made by G.K.J. to Dr. Kim Copeland are sufficiently reliable to warrant admission under State v. Ryan.

....

7. The statements made by G.K.J. to her mother, Danielle Johnson, about the alleged offense are admissible at trial under RCW 9A.44.120.
8. The statements made by G.K.J. to the forensic interviewer, Kim Holland, about the alleged offense are admissible at trial under RCW 9A.44.120.
9. The statements made by G.K.J. to Dr. Kim Copeland about the alleged offense are admissible at trial under RCW 9A.44.120.

CP 65-66.

B. QUESTIONS PRESENTED

1. Did the juvenile court err and abuse its discretion in finding a six-year-old competent to testify in a court of law and in admitting her hearsay claims to others where she was not competent and there was not sufficient proof of reliability of her statements or independent sufficient corroboration?
2. Did the juvenile court err and abuse its discretion in admitting evidence under RCW 9A.44.120, without individually considering the circumstances of each of the different situations in which the hearsay statements were made as required?
3. Was there insufficient evidence to support the juvenile court's finding that there was no evidence the six-year-old had a "motive to lie" where the child herself admitted she was afraid she would get in trouble for not being where she was supposed to be and that after she made her claims, she avoided getting into trouble?
4. Was there insufficient evidence to support the finding that statements of a child to her mom, a doctor at a child abuse center and a forensic interviewer were "highly consistent" where the statements were markedly inconsistent in significant facts about how the alleged molestation occurred?
5. Was there insufficient evidence to support the finding that there was "no evidence to suggest" the child had misrepresented or misapprehended the respondent's

acts where the evidence showed significant confusion over specific details?

6. Where the only evidence against a juvenile is the testimony and statements of an incompetent six-year-old child and those statements were insufficiently reliable to be admitted in a court of law, must the adjudication of guilt be reversed?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant W.F. was 13 years old when he was accused by corrected information of first-degree child molestation. CP 6; RCW 9A.44.083. After proceedings on October 14 and 20, November 9 and 23, and December 21, 2016, January 4, January 18, and March 13, 2017, the fact-finding hearing was held before the Honorable Daniel L. Stahnke on March 15, 2017. RP 1, 43, 164, 259.<sup>1</sup> Judge Stahnke adjudicated W.F. guilty and, after a continuance and hearing on March 29, 2017, the disposition hearing was held on April 11, 2017. See CP 76-79. Judge Stahnke ordered a standard-range disposition. CP 76-79. W.F. appealed and this pleading follows. See CP 95.

2. Testimony at the fact-finding hearing

It was alleged that 13-year-old W touched the “private part” of a neighbor girl, six-year-old G, one late afternoon when they were in

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<sup>1</sup>The verbatim report of proceedings consists of four volumes which are chronologically paginated and will be referred to as “RP.” The proceedings involve several different judges and commissioners in pretrial proceedings, as follows: Proceedings of October 14, 2016, before Commissioner Jennifer Snider, October 20, 2016, before Commissioner Dayann Liebman, November 9 and December 21, 2016, before Judge Suzan L. Clark, January 4, 2017, before Commissioner Liebman, January 18, 2017, before Judge Clark, March 13, 2017, before Commissioner Liebman.

W's back yard. RP 4, CP 6. W was charged in the juvenile division of the superior court with first-degree child molestation as a result. CP 6.

At the later fact-finding hearing, G described the incident. RP 172-84. She said that, when she was at W's house, "he touched me inappropriate and he kept on pulling my pants down." RP 177. She repeated similar language, including the touching being "inappropriate," several times. RP 177, 178, 186.

The six-year-old would later admit that she had practiced what to say with her mom. RP 183.

G testified that W was climbing a tree in his front yard when G and her brother, B, first approached. RP 178, 184-85. B left but G stayed and played for a little while before going to check in with her mom. RP 178-79, 184-85. After that, G said, she returned to W's yard. RP 178, 184-85. It was at that point that G claimed W improperly touched her where she went "pee," under her clothes. RP 178, 184-85.

G described the incident as starting when W told her if she wanted to play on his phone, she had to go into the back yard where there were places to sit. RP 184-85. Once back there, she said, she played on the phone for awhile. RP 179. After that was when the touching occurred, after which, G said, he "pantse" her - pulling down her pants but not her underwear. RP 179-81. She told him to stop and W's mom arrived home at that point. RP 181. W's mom then told the kids that W had to go back inside the house, so G had to leave. RP 181.

Upon further questioning, G gave a few more details. RP 187-88. According to G, both kids were lying on the grass apart from each other when the improper touching occurred. RP 187-88. G did not remember if W said anything. RP 187-88. She was clear, however, that he touched her on her skin. RP 187-88.

When he touched her, G said, he was not acting unusual or anything and seemed. RP 187-88.

At the fact-finding, G said that she got up from the grass and wanted to go tell her mom but that “[h]e wouldn’t let me.” RP 187-88. She did not give further details about that claim. RP 187-88.

G was clear that W touched her only once but “pantsed” her more. RP 189. She testified:

I’m not sure if it was nine, but I’m sure he probably did it more than nine times, but I thought that it was nine times, but I’m not sure if it was nine times.

RP 189.

G could not, however, give a good description of what exactly she said had occurred. RP 189. She did not know where his hands were on her pants. RP 189. She also could not say if he was grabbing the bottom of her pants and pulling them down that way or was pulling them down from her waist. RP 189.

According to G, after the touching, she left W’s property and went home. RP 189. Once there, G said, she told her mom. RP 189. The six-year-old then described her mom gathering up the whole family and driving down the street to W’s home although she was unsure of who came along. RP 190. G related her mom getting out of

the car and said she heard her mom talking to W's mom and with W, but could not recall what was said. RP 190-91.

In contrast, G's mom, Danielle Johnson, said that G had checked in about 6:45 and it was only about 5 minutes later that Johnson realized G's brother, B, was not with her and G was thus out alone. RP 136, 128-29. Johnson testified that she then got everyone in the car and drove down the street to where she thought G would be. RP 129. Johnson said under oath that she was driving by W's house and saw G run down the driveway, a look on her face that made Johnson think there might be something wrong. RP 129-30.

Only about 10 minutes had passed since G and B had checked in with Johnson and G had then gone back out. RP 129-30.

At some point during that 10 minutes, Johnson also recalled that G had called Johnson on her cell phone, a few times. RP 139-40. Johnson admitted G did not have her own phone and said she was not sure how the calls were being made but there were a number of missed calls. RP 139-40.

G, however, denied having used the phone to call her mom when she was playing on W's phone in his backyard that day. RP 184-85.

G's mom admitted that she spoke to G "in depth" later about G's claims. RP 130-31, 138-39. She conceded that she questioned her daughter and asked her to give "the details." RP 130-31, 142. And although she initially denied it, at the fact-finding Johnson would ultimately concede to talking to G multiple times about the claims,

including that night and after police were involved. RP 132, 134-35.

G ultimately agreed that her mom had talked with her about the allegations after they occurred, but could not say how many times. RP 183. G also said she and her mom had practiced what to say. RP 183. The six-year old could not recall how many times they practiced or what her mom had told her during those practices. RP 183-84.

Although Johnson said G was a very truthful child, G admitted that, instead, there had in fact been times when she had not told the truth. RP 182. When that happened, the six-year-old acknowledged, she would be punished - sometimes grounded or sometimes kept inside for awhile. RP 182.

G admitted that, at the time she left W's yard, she was worried about being in trouble with her mom. RP 182. G was afraid her mom might be mad at her. RP 182-83.

Once G told her mom about what W had done to G, however, G's mom was not mad at G. RP 182-83. Instead, Johnson got made at W.

Johnson related at the fact-finding what G told her about the alleged touching. According to G's mom, G said she was in the backyard and hanging "from a tree branch above a stump of some nature" when W pulled down her pants. RP 131. G said she pulled them back up herself and told him to stop. RP 131. According to Johnson, G then told her mom that W pulled G's pants back down once again and, this time, touched "the skin on her pee-pee-spot." RP

131.

Johnson was going out anyways, that night, to pick up her foster kids, and had told G when she checked in that she only had about 10 minutes more to play. RP 137-39. Only about 10 minutes had passed when Johnson picked up G in the driveway at W's house. RP 129-30.

Instead of at home, Johnson remembered G telling her what she said had happened when Johnson was clicking G's seat belt around her in W's driveway. RP 129. Johnson did not ask for details, she said, because G told her W touched her "pee pee spot" and Johnson did not want to go into it further with the other kids in the car.

Johnson said she then walked up the driveway, called for W and demanded of him, "did you touch G[] inappropriately?" RP 129-30. W and his mom were both outside, Johnson said, with W on the ground doing something with a bucket. RP 139-40. When W did not respond, his mom threatened that if he did not "start talking," she was "going to make a phone call." RP 130. She pulled out her phone a few moments later and Johnson then left, declaring she was going to call police. RP 130-31.

Johnson drove to the school to pick up her foster kids. RP 130-31. While at the school, Johnson pulled the six-year-old G out of the car and, Johnson admitted, spoke to the child "in depth" about G's claims. RP 130-31, 138. After she called police, Johnson first claimed not to have questioned G further. RP 131-32. Ultimately, G's mom

admitted repeatedly talking to the child, at the time, more later that night, in the garage when police were there and at other points. RP 132-37, 142. Johnson herself spoke at length with police and was there when the officers questioned her. RP 142-43.

Johnson took G to the forensic interview and physical exam a day or so later. RP 133. On the way, Johnson reminded her daughter that the reason they were going was because of W. RP 133.

Dr. Kim Copeland conducted the “intake” exam on the six-year old, which meant she checked G for medical issues and to get vital statistics before talking to G’s mom about medical history. RP 92-93, 95. The physical exam of G was normal “other than a few healing abrasions” on G’s arms about which there was no discussion at the hearing. RP 96-97, 100.

Copeland recorded her interview with G and that recording was played for the court. RP 108. In her interview with Copeland, G said she had gone to W’s house “because he let[]s me play on his phone.” RP 115. She also said, “he has a soccer ball and I like to play soccer.” RP 115.

G told Copeland they went in his back yard and “[t]hen he pantsing me and touched my skin on my potty parts, and then he pantsing me again.” RP 115. G told the doctor that her body did not feel different in any way when the touching occurred. RP 121.

Later, however, in the forensic interview conducted by Kim Holland, a forensic interviewer, G would say that the touching “hurt[ed].” RP 79-80. That interview, which was also recorded, was

played at the fact-finding hearing, after Holland's testimony. RP 67-68. In that testimony, Holland detailed her training and experience. RP 54, 67-68. She also talked about how she would conduct child interviews in general. RP 63.

Holland said she would ask children if they had told the truth when they said certain things. RP 63. The interviewer admitted, however, that she did not use any method to first ensure a child understood "what the truth is." RP 63.

Holland conceded she did not give children she interviewed any examples of the difference between a truth and a lie, even though Holland was "trying to get the truth." RP 64. According to the interviewer, "research doesn't support" making such efforts. RP 64-65.

Holland also made it clear, however, that she did not think it was her "role" to determine if a child was telling the truth or not, but just to interview them. RP 65-66.

In initial part of the interview, Holland asked G what G liked to do. RP 67. G responded that she liked to go to the park. *Id.* The following exchange then occurred:

HOLLAND: Yeah. Tell me about going to the park.

G[]: The reason I like going to the park is because it has swings and slides and monkey bars.

HOLLAND: Oh. It has swings, slides, and monkey bars. **So of those things, what's your favorite to do?**

G[]: **Go to school.**

RP 67-68 (emphasis added).

With the conversation now turned to school, G then said the day before the interview she had gotten to paint some planets and made a project with clipping and “these little silver thingies.” RP 68. The child detailed how this project was done a little and the following exchange then occurred:

HOLLAND: Oh, that’s how you clip them together. Oh, okay. And where did - - **what did you do with them after you clipped them together?**

G[]: **We went to recess, and we played, and we had lunch.**

RP 68-69 (emphasis added). Later, when asking about basic information of with whom G was living, the following exchange occurred:

HOLLAND: Three cousins. So the[]re [are] 6 kids in your house? Oh, wow. Okay. **And tell me what you and your cousins like to do?**

G[]: **Mostly me and my cousin, Tory.**

RP 72 (emphasis added).

Holland told the child who she was, reassured G that the kids Holland interviewed were not in trouble and then pointed to the camera. RP 68-69. At that point, Holland instructed G about how to answer Holland’s questions if she did not know the answer:

I ask a lot of questions, G[]. Okay? And if you don’t know the answer to my question, that’s okay. **I just want you to say, “I don’t know” or “I don’t remember.” I don’t want you to try to guess. Okay?** So if you don’t know, it’s okay to just tell me, “I don’t know.” All right?

So let’s practice that one. G[], what did I eat for breakfast today?

G[]: Cereal?

HOLLAND: Do you know that I had cereal?

G[]: I don't know.

HOLLAND: You don't know. **So don't guess if you don't know. Okay?**

**So** let's try it again. What is my favorite color?

G[]: Pink.

HOLLAND: **No. So you don't know my favorite color. Okay? So if you don't now the answer to the question, you should just tell me, "I don't know." Okay, let's try that one more time.**

What is - - what did I eat for dinner last night?  
You don't know, good. So it's okay to say "I don't know."  
Okay?

RP 70-71 (emphasis added).

A moment later, the interviewer told the child, "[i]f I make a mistake or if I get something wrong, please tell me. Okay?" RP 71. Holland then declared, "[s]o, you're 46 years old." RP 71. G responded, "[n]o," after which the interviewer asked her age, repeated it, said "[t]hank you for correcting" and it was "okay to do that." RP 72. She then asked if the child did not know what a question meant she should said "I don't know what you mean." RP 71. The interviewer finally said the "last thing" and the "most important thing about today" was that "we only tell the truth," asking, "[d]o you promise to tell me the truth?" RP 71. There was no verbal response transcribed but some form of assent was apparently given. RP 71.

On the tape, when asked if she knew why she was there to talk to the interviewer, the six-year old said, "[b]ecause somebody did something really inappropriate to me." RP 73.

G told the interviewer that, earlier on the same day as the incident G had been with a friend down by W's house when he came outside and "started bothering" them. RP 81. In fact, G described W as trying to be "mean." RP 81. G told Holland W was throwing rocks at G and her friend and even hitting them. RP 81. G said she and her friend hid and she said she was about to go tell her mom at that point. RP 81-82.

Regarding the incident, Holland asked G, "how did you get into his back yard?" RP 74. The child responded by describing the "little thingie" on the gate which was broken "[s]o like when you're in the gate, you can unlock[.]" RP 75. G then said they went into the backyard because it has chairs and he was going to let her play on his phone, which was his idea. RP 75.

G told Holland they played on W's phone for a few minutes and when they finished, he put it in his pocket. RP 77. At that point, G said, she and W began running around and playing "tag" on the grass. RP 77. G also recalled that they played "hide-and-go-seek," and "freeze tag." RP 77.

At the fact-finding hearing, however, she denied playing any games other than those she played on the phone. RP 179.

The interviewer then reminded the child, "[a]nd then you said that he touched your potty part. And so tell me what you were doing right before he touched your potty part." RP 77. The child responded, "[j]ust sitting in the grass," and "crisscross applesauce." RP 77.

G then said the two of them were sitting and “just talking about school.” RP 78. They were on the grass because at this point they were playing house and she was the mom. RP 78-80. W started off by playing the teenager, G said, but changed to a parent. RP 80.

The six-year-old described what happened as W went from one role to another, saying “[h]e just grew and he grew[,]” RP 80.

G said W then “laid” G down on top of W’s tummy. RP 78. He tickled her and, she said, at some point touched her potty part with his finger “just like pressing down.” RP 78. The touching was inside her clothes and underwear, the child thought, and it “hurt.” RP 79-80.

G told Holland that G asked, asked, “[c]an I please get up” after which W said “[o]kay,” and let her up. RP 81. As she was walking away, however, G told the interviewer, “he pantsing me.” RP 81.

At the fact-finding, G’s mom admitted that, in all the times they spoke about the incident, G never told her anything about W throwing rocks at G and her friend earlier in the day. RP 144. Johnson also confirmed that G never told her mom anything about W having a soccer ball at his house that she liked to play with or that they had played “house” at the time the alleged touching occurred. RP 144.

G herself testified that she had not said anything to anyone about a soccer ball . RP 182, 184. She was sure she never said anything about playing games with W. RP 182, 184. She maintained she really did not really recall the interviews she had done. RP 182.

At the fact-finding, G continued to maintain there was a tree stump in the backyard at W's house. RP 192. When shown a photo of that backyard, she conceded it did not show any such stump. RP 192-93.

W's mom, DeeDee Campbell, testified that she came home from work that day and found W and G on the side yard, with G playing on W's phone. RP 148-49. Campbell chided W for having someone over when she was not there and told G she should go home. RP 152. Campbell also told G that G's mom would not like her being there without adult supervision. RP 152. At that point, G handed W back his phone and went to leave. RP 152.

Campbell noted that there was no stump or tree in the backyard of their house. RP 157-58. She also confirmed that there were no chairs in the backyard at the time. RP 158.

Campbell and W were in the front yard when G's mom drove up and asked W if he had "pantsed" her daughter. RP 160-61. Campbell agreed that her son did not answer G's mom. RP 161. She explained that she tried to get him to answer but his refusal was not a new behavior. RP 161.

W testified on his own behalf. RP 229. That day, he said, G came over when he was up in the very top of the tree in the front of his house. RP 229. He saw her walking up the driveway and started climbing down. RP 229. She hollered over the gate asking if she could come in, then asked what he was doing. RP 229. After he told her he was just relaxing in the tree, she asked if she could play on his

phone. RP 229. He said he did not really care, gave her the phone and told her not to send text messages but that she could call her mom if she wanted. RP 229.

W went back up the tree and saw G, on the phone, kind of wander into the back yard. RP 230. After a few minutes, he heard a sound like a clang, climbed down from the tree to try to see what was going on and was about to turn the corner when she appeared around it. RP 230. G had his phone and handed it to him, then started to head home. RP 231. His mom told him to pick up the mess and he started putting the toys away. RP 232. Just a moment later, G's mom pulled up and started asking him those questions. RP 233.

W said he did not answer because he never really liked G's mom and also was "completely confused on what [sic] why she was saying that." RP 232. He thought at one point he tried to say, "I don't know what she's talking about." RP 233. W said he did not touch G inside her clothing at all and never tried to pull down her pants. RP 233.

D. ARGUMENT

THE JUVENILE COURT ABUSED ITS DISCRETION IN FINDING G COMPETENT AND IN ADMITTING HER STATEMENTS UNDER RCW 9A.44.120; WITHOUT THOSE STATEMENTS THE CONVICTION MUST BE DISMISSED

The only evidence against W was the testimony and claims of six-year-old G, both on the stand at trial and to others, before trial and repeated by them on the stand. This Court should reverse and dismiss the adjudication of guilt against W, a juvenile, because the

juvenile court erred in finding G competent to testify and in admitting her statements to others at the hearing, under RCW 9A.44.120.

Under that statute, the testimony and hearsay statements of a child accuser below the age of 10 may be admitted at court if certain requirements are met. RCW 9A.44.120; see State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). First, the trial court must find the statements “reliable.” Ryan, 103 Wn.2d at 175-76. Second, if the statements are deemed “reliable,” either a) the child must testify and be subject to cross-examination, or b) the trial court must properly find her legally “unavailable.” Id.

A child is legally “unavailable” if, *inter alia*, she is not competent to testify. Id. Thus, competency is an important consideration in cases like this. See State v. Bishop, 63 Wn. App. 15, 21, 816 P.2d 738 (1991).

Where a child is not competent, her statements may only be admitted if the juvenile court first finds that (1) the circumstances under which they were made provided “sufficient indicia of reliability” and (2) there is sufficient corroborative evidence of the alleged abuse. State v. Swan, 114 Wn.2d 613, 621-22, 790 P.2d 610, cert. denied, 498 U.S. 1046 (1990).

In this case, the juvenile court erred in finding the six-year-old kindergartener competent to testify in a court of law. Further, the court erred in finding the statements “reliable.”

First, G was not competent. To determine competency, the

trial court asks if the child “appears incapable of receiving just impressions of the facts . . . or of relating them truly.” See State v. Waldon, 148 Wn. App. 952, 966-67, 202 P.3d 325 (2009); RCW 5.60.050. More specifically, the trial court applies factors which require the court to determine whether the child has:

- (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 690, 692, 424 P.2d 1021 (1967).

Each of these five factors must be met before a finding of competency may be made. Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102-103, 713 P.2d 79 (1986). Put another way, because each is essential to ensuring true competency sufficient for the rigors of a court of law, there is no “partial” compliance with the five factors. Id.

As a result, if even one of the elements is missing, the child is not competent and it is error to admit the testimony in court. See Matter of Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998). While appellate courts generally defer to a lower court’s judgment on issues such as credibility and do so even more in

determinations of competency, on this issue it is settled. See State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011); State v. C.J., 148 Wn.2d 672, 770, 63 P.3d 765 (2003). This is because it is crucial that only competent witnesses stand as accusers - especially where, as here, the only evidence supporting a conviction is the witness' word. See State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995).

In determining whether to find an abuse of discretion in finding competency, this Court looks at the entire record below. Brousseau, 172 Wn.2d at 340. Looking at that record in this case shows the juvenile court's error in finding G competent. There is no question that G had some general knowledge such as of the date of her birthday and that she had a bouncy house and tiki torches at her last birthday party. RP 172-74. Further, her mother said she was generally a "truthful" child, although G herself admitted to lying in the past.

But there was insufficient evidence that G understood the obligation to speak the truth when testifying, the first Allen factor. At the fact-finding, the following exchange occurred:

[PROSECUTOR]: All right. So, G[], there's going to be a few rules while we're talking, okay?

A: Okay.

Q: Okay. So the first rule is that we always tell the truth.

A: Uh-huh.

Q: Right? Okay?

A: Yes.

Q: And so do you know the difference between the truth and a lie?

A: Yes.

Q: Okay. So if I were to say, G[], my jacket it red. Would that be true or a lie?

A: A lie.

Q: Okay. If I were to say, G[], my jacket is black. Would that be true or a lie?

A: True.

Q: Okay. And you promise to tell only the truth?

A: Yes.

RP 174-75.

This was not sufficient evidence to satisfy the five-factor test. Specifically, the state failed to establish that the child had “an understanding of the obligation to speak the truth on the witness stand.” G was asked to “promise” to tell the truth, but was never asked her understanding of what it meant to “promise.” RP 174-76. She was never asked - or even told - why it was important to tell the truth in court. Nor did the prosecutor establish that the child understood how important it was that promises - such as the promise to tell the truth on the stand - should be kept.

This is insufficient to prove the essential required factor that the child had the required understanding of the obligation to tell the truth on the stand. Compare, State v. Sardinia, 42 Wn. App. 533, 713 P.3d 122 (1986) (child knew the difference between a truth and a lie and knew would be in trouble with mom if told a lie); C.L., 148 Wn.2d

at 770 (child knew the difference between a truth and a lie and knew that telling a lie would get you spanked).

Notably, while the Allen factors do not include consideration of age, other laws recognize that children do not have the same capacity to understand consequences or know right from wrong as an adult. See RCW 9A.04.050 (children under eight categorically “incapable of committing crime; eight to 12 presumed incapable unless state proves “they have sufficient capacity to understand the act or neglect, and to know that it was wrong”). And our understanding of the cognitive abilities of children has dramatically changed since the competency statutes was rewritten in 1985. See, e.g., J.D.B. v. North Carolina, 564 U.S. 261, 231 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

In response, the prosecution may attempt to convince the Court to treat the issue as one of “weight, not admissibility.” Such an argument should fail. In some cases where the child was otherwise competent, the fact her testimony was “not entirely consistent” on minor details was an issue of credibility, not competence. See State v. Woodward, 32 Wn. App. 204, 208, 646 P.2d 135, review denied, 979 Wn.2d 1034 (1982). But in such cases, the inconsistencies are not about the actual alleged criminal act. In Woodward, for example, the child was able to identify a lie, knew she would get in trouble if she told one, and showed she had sufficient memory to retain an independent recollection of events. Id. Further, the “inconsistencies” were not about *how the crime occurred*. Id.; see also, State v. Woods,

154 Wn.2d 613, 620, 114 P.3d 1174 (2005) (where the child said her bedroom was upstairs even though the house only had one story but was “quite consistent concerning the acts of sexual molestation”).

There is a real difference between a witness who is competent but gives some inconsistent details about unimportant things and a witness who gives a *different version of events* surrounding the actual alleged crime. Because she was not competent to testify, the juvenile court erred in allowing that testimony to occur.

Further, because G was not properly found competent to testify, her statements to others were not admissible under RCW 9A.44.120. Where a child is not competent, her out-of-court statements alleging sexual abuse are only admissible if the court first finds that (1) the circumstances under which the child made the statements provided “sufficient indicia of reliability” and (2) there is sufficient corroborative evidence of the alleged abuse. Swan, 114 Wn.2d at 621-22.

Here, there was no corroborative evidence of the alleged abuse. The only evidence of alleged improper touching was from G or her statements to others.

Further, the trial court erred in finding “sufficient indicia of reliability,” as required. In general, such a decision is reviewed for abuse of discretion. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009), review denied, 168 Wn.2d 1012 (2010). A court abuses its discretion when it makes a decision which is “manifestly unreasonable” or based on “untenable” grounds or reasons. Id.

Further, a court abuses its discretion if it misapplies a legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 1 P.3d 638 (2003).

To determine whether the “reliability” requirement of RCW 9A.44.120 is met, the trial court must consider the following:

- (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 it is 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. There is only “[a]dequate indicia of reliability” to support admission of a child’s out-of-court accusation if the factors as a whole have been substantially met. Swan, 114 Wn.2d at 652.

That standard was not met here. As a threshold matter, the court used an incorrect standard by failing to examine each of the separate statements separately. In admitting the statements G made to her mother (Johnson), Holland (the state interviewer) and to Dr. Copeland (who did the physical of G), the juvenile court entered

written Findings and Conclusions. CP 63-66. In those written findings, the judge found, *inter alia*, that there was “no evidence” G had “any motivation to lie” about the claims, that the statements she made to the “[t]hree independent people” were “highly consistent,” and that there was “no evidence to suggest” that she misrepresented the situation. CP 65-66. The judge then concluded that the statements to each person were “sufficiently reliable to warrant admission under State v. Ryan.” CP 66.

But “[a]dequate indicia of reliability must be found in reference to circumstances surrounding the making” of each of the statements individually. See State v. Stevens, 58 Wn. App. 478, 486, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990). Where there is a preconceived notion of guilt, there are serious issues regarding suggestibility. See Idaho v. Wright, 497 U.S. 805, 813, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990) (noting issues when person interviewing child has preconceived notions of guilt).

Further, the juvenile court’s findings do not withstand review. Findings and conclusions are intended to provide the appellate court with an aid on review, and such findings are reviewed for “substantial evidence.” See State v. Agee, 89 Wn.2d 416, 573 P.2d 355 (1977); State v. Nelson, 89 Wn. App. 179, 948 P.2d 1314 (1997). A finding is supported by substantial evidence if the record “contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988).

There was not such evidence to support the juvenile court's findings 10, 12 and 17. First, the finding that there was "no evidence" G had any motive to lie is directly contradicted by the evidence of that very fact. G admitted at the fact-finding that she was *worried about being in trouble* when she was leaving W's yard. RP 182. The six-year-old was concerned that her mom might be mad at her - a concern which was resolved when the child told her mother that W had improperly touched her. RP 183. In fact, W admitted, that resulted in her mom *not* getting mad at G but being mad at W, instead. RP 182-83. The finding to the contrary was unsupported by substantial evidence.

There was also not substantial evidence to support finding 12, that the statements G made to the three different people were "highly consistent." CP 65. To her mother, G claimed she was in the backyard, hanging from a tree branch above a stump when W pulled down her pants a few times and, after she protested, pulled them down a final time and touched "the skin on her pee-pee-spot." RP 131. To Dr. Copeland, G said she went to W's house to play on his phone and because he had a soccer ball, he was "panting" her and then touched her skin, then pantsed her after that, so that the touch did not occur while hanging from a branch or on the last time he pulled down her pants. RP 121. But G's mom confirmed that G never told her anything about having gone over there because W having a soccer ball she liked. RP 144.

With Copeland, G said that when W touched her potty area it

did not feel different. RP 121. But to Holland, G said the touching “hurted.” RP 79-80. With Holland, G suddenly started saying that she had an earlier interaction with W, and he was being “mean” and throwing rocks. RP 81. Also with Holland, she said that she stopped playing on the phone and they then ran around the backk yard, played “tag” and “hide-and-go-seeK” on the grass. RP 77. With Holland, the touching occurred when they were sitting in the grass playing house, after W started as a teenager but then changed to a parent. RP 77-80. Instead of while she was hanging from a tree, with Holland, the touch happened when W “laid” G down on top of him, on his “tummy,” tickled her, then somehow reached under her underwear and touched her “potty part.” RP 79-80. G told Holland she then asked to get up and he let her, then pantsed her again. RP 80-81. But G’s mom, who talked to the child repeatedly, admitted that G never said anything about laying down, him pulling her onto him, or playing “house.” RP 144. Thus, the claims were not “highly consistent” - they were consistent only in the playing on the phone in the backyard and that some improper touch by W on G occurred. The claims were markedly different regarding the actual touching - whether it was while she was lying on his stomach, hanging in a tree or otherwise. The juvenile court’s finding is not supported by substantial evidence in the record.

This is also true of finding 17, which claims no evidence that G misrepresented what happened. The different claims about how the alleged abuse itself occurred, where it occurred, whether he pulled

her onto his tummy or somehow managed to touch her while pulling down her pants as she was hanging from a tree, the timing of only about 10-15 minutes total when the entire incident supposedly occurred, the other serious holes in the claims - all of these are evidence that G might have misrepresented what happened.

There is another problem with admitting testimony here. The difficulty with relying on cross-examination to reveal problems with testimony from a child witness is that a child who has formed a false memory will sincerely believe it and thus not seem deceptive. See State v. Kirschbaum, 195 Wis.2d 11, 535 N.W.2d 462 (App. 1995); State v. Sargent, 144 N.H.103, 105, 738 A.2d 351 (1999) (discussing false memory implantation from improper interviewing techniques). With most witnesses, cross-examination serves as an effective means of showing the fallacy or error in their testimony, but with children subjected to suggestion that will not suffice. See John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 707 (1987). Such a child “may sincerely take her memories to reflect facts, and not recall the procedures which suggested them when asked on the stand.” Id.

Thus, depending upon how a child is questioned about an event, that questioning may actually “distort substantially the children’s recollections of actual events and thus compromise the reliability of the children’s statements and testimony based on their recollections.” Id. And even 20 years ago there was already a “fairly wide consensus” among experts and others that suggestiveness can

occur especially when the interviewer is a “trusted authority figure” and we have no way to know if the questions asked were, in fact, leading or non-leading. See State v. Michaels, 642 A.2d 344 (1992)

Notably, one of the tactics deemed likely to create false responses in a child is the use of repetitive questioning, which adds “a manipulative element” by signaling that the first answer was not correct. See Debra A. Poole and Lawrence T. White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults*, 27 *Develop. Psych.* 975 (1991). Another is the “explicit vilification or criticism of the person” accused, as well as the response of a loved one. See Michaels, 642 A.2d at 310. Put another way, “[a] child who is telling something he believes to be true will show **no indicia of unreliability**, even if the story is not factually correct.” Laurie Shanks, *Child Sexual Abuse: Moving Toward Aa Balanced and Rational Approach to the Cases Everyone Abhors*, 34 *Am. J. Trial Advoc.* 517, 545 (2011) (emphasis added).

Notably, transmitting a suggestion can occur without any specific plan to engage in “coaching,” simply based on tone of voice, use of praise, confirmation or other normal parental techniques. See Michaels, 642 A.2d 310-11. If a loved one assumes a child is seeking to disclose abuse, uses leading questions and is a trusted authority figure, that can be enough. Id

The juvenile court erred in finding six-year-old G competent, allowing her to testify at the fact-finding and admitting her statements to others at trial. Without that evidence, there is no

evidence against W.F. This Court should so hold and should reverse and dismiss with prejudice the adjudication of guilt.

E. CONCLUSION

For the reasons stated herein, the adjudication of guilt should be reversed and dismissed.

DATED this 21st day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Echo Glen Children's Center, 33010 SE 99<sup>th</sup> St., Snoqualamie, WA. 98065, WA. 98684 and to opposing counsel as follows:

Clark County Prosecuting Attorney  
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DATED this 21<sup>st</sup> day of November, 2017.

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