

No. 50347-6-II

**Court of Appeals, Div. II,  
of the State of Washington**

---

State of Washington,

Respondent,

v.

Ronald L. Cook, Sr.,

Appellant.

---

**Brief of Appellant**

---

Kevin Hochhalter  
Attorney for Appellant

Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008  
kevin@olympicappeals.com  
WSBA # 43124

## **Table of Contents**

1. Introduction.....	1
2. Assignments of Error.....	1
3. Statement of the Case.....	2
4. Argument.....	7
4.1 The trial court abused its discretion in admitting child hearsay statements under RCW 9A.44.120.....	7
5. Conclusion .....	10

## **Table of Authorities**

### **Table of Cases**

<i>State v. Grogan</i> , 147 Wn. App. 511, 195 P.3d 1017 (2008) .....	8, 9
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984) .....	8, 9

### **Statutes/Rules**

RCW 9A.44.120.....	7
--------------------	---

## **1. Introduction**

Ronald Cook was convicted of first degree molestation of a child based almost entirely upon hearsay statements made by the alleged victim, a four-year old child. In a pre-trial hearing on the admissibility of the hearsay statements, the testimony demonstrated that at least four of the nine *Ryan* factors were not met. The trial court abused its discretion in admitting the hearsay statements. The improperly admitted statements were highly prejudicial to Cook. This Court should reverse and remand for a new trial.

## **2. Assignments of Error**

1. The trial court abused its discretion in admitting child hearsay statements and video of the child's interview, under RCW 9A.44.120.
2. The trial court erred in entering its findings of fact and conclusions of law admitting the hearsay statements.

### **Issues Relating to Assignments of Error**

1. Hearsay statements of a child declarant describing any act of sexual contact made by a person with the child are admissible under RCW 9A.44.120 if the statements bear sufficient indicia of reliability. Here, statements made by A.H. to different witnesses contradicted each other. Did the trial court abuse its discretion in admitting A.H.'s hearsay statements? (assignments of error 1 and 2)

### **3. Statement of the Case**

Ronald Cook volunteered to help his friend by babysitting the friend's daughter, A.H., while the friend and his wife went out for a drink, because the parents were unable to find a babysitter. 2 RP 152-53; 3 RP 52. The child was four years old. 2 RP 155.

While the parents were gone, Cook and A.H. watched a video of *The Aristocats*. 3 RP 42. A.H. was wearing a t-shirt and sweat pants. 2 RP 153; 3 RP 42-43. During the movie, A.H. was fidgeting on the couch. 3 RP 43-44. Cook asked if she had to go to the bathroom. 3 RP 44. She did, so Cook told her to go. *Id.* She was gone for a while, returning without pants and instead wearing one of her father's t-shirts as a nightgown. *Id.*

Cook asked A.H. if she had wet her clothes. *Id.* A.H. did not respond. *Id.* Suspecting that she had, Cook asked A.H. if she changed her underwear. *Id.* Again, A.H. did not respond. *Id.* Cook felt the front of A.H.'s underwear with his fingers, discovered they were wet, and told A.H. to go change. *Id.* A.H. went back to her room to change her underwear and then returned to watch the rest of the movie. 3 RP 45.

Some days or weeks later, another babysitter observed A.H. engaged in sexualized play with her dolls. 2 RP 144. She told A.H.'s parents, and the father asked A.H. if anyone had ever touched her, "on your pee pee or on your butt." 2 RP 156-57. A.H.

replied that Cook had. 2 RP 157. Over the course of 45 minutes, the father asked a total of five times, and all five times, A.H. said that Cook brushed her “pee pee,” and demonstrated the brushing motion with her hand. 2 RP 157.

Cook was charged with child molestation in the first degree. CP 3. Prior to trial, the court held a child hearsay hearing under RCW 9A.44.120. A.H.’s statements to different witnesses were inconsistent in her description of the touching.

Lisa Graham, A.H.’s treating physician, observed that A.H. had an open hymen, raising concerns for sexual abuse. 1 RP 11-12. The doctor asked A.H. if anyone had touched that area in a way that made her uncomfortable. 1 RP 13. A.H. told her that “Juan” touched her private area with his finger. *Id.* The doctor asked if he inserted his finger, and A.H. said, “yes.” *Id.*

Kristen Mendez conducted a child forensic interview with A.H. 1 RP 25. A recording of the interview was played for the court. 1 RP 28. During the interview, A.H. told Ms. Mendez that Cook touched her “pee pee” while they were watching a movie. 1 RP 33, 37. A.H. said that she didn’t tell anyone about it, “Not even my dad and mom.” 1 RP 36-37. A.H. said that nothing went inside of her “area” when Cook touched her. 1 RP 38. A.H. said that Cook touched on her underwear, not inside. 1 RP 42.

A.H. testified in the hearing that Cook touched her “pee pee” on top of her shirt. 1 RP 64.

A.H.'s father testified at the hearing that after hearing about the sexualized play, he asked A.H. if anybody had touched her "on your pee pee or on your butt." 1 RP 80. He asked her five times over the course of 45 minutes. *Id.* Each time she said that Cook did, and demonstrated that he wiped up on her with his hand. 1 RP 81.

The trial court found A.H. competent to testify and found that her statements to other witnesses had sufficient indicia of reliability to make them admissible at trial. 1 RP 112-13; CP 5-7.

At trial, each of these witnesses recounted the statements made to them by A.H. However, when A.H. testified, she struggled to answer the state's questions. *See* 2 RP 79-85. The prosecutor asked leading questions to coach A.H.'s answers. *See id.* Cook objected to the leading questions, but the trial court allowed the prosecutor to continue:

Q How long do you think he watched you for?

A Two minutes.

Q Two minutes, or was it two hours?

A Two hours.

...

Q Do you recall what Ron was wearing that night?  
What does he wear?

A I don't know.

Q Do you know if he was wearing straps?

MR. BLONDIN: Objection; leading.

THE COURT: The objection is noted; overruled at this point.

2 RP 80-81.

Q Okay. Did something happen that night that you didn't like?

A I don't know.

Q Did Ron do something to you?

A I don't know.

...

Q Did he do something to you?

A I don't know.

Q Did Ron touch you?

MR. BLONDIN: Objection; leading.

THE COURT: Overruled.

2 RP 81-82.

A.H. could only successfully testify by answering "yes" or "no" to the prosecutor's leading questions:

Q Where on your body did he touch you?

A Just on my shirt.

Q Just on your shirt? Anywhere else?

A Huh-uh.

Q Do you recall telling a number of people that he may have touched you elsewhere?

A (No audible response.)

Q You don't recall telling people that he touched you at your no-nos?

A There was nobody else.

Q Okay. You didn't tell anyone else. Did you tell anyone about him touching you where you go pee?

A Only my dad.

...

Q Ron did touch you where you go pee?

A (Witness nods head.)

Q Is that a "yes"?

A Yes.

2 RP 84-85.

A.H. testified that Cook touched her on top of her shirt.

2 RP 87. She testified that Cook's hand wasn't moving, he just placed it there. 2 RP 94.

The trial court instructed the jury on the state's burden of proving each element of the crime beyond a reasonable doubt.

3 RP 67-68. "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." 3 RP 68.

In the state’s rebuttal closing argument, the prosecutor expanded on the meaning of this standard: “And after hearing all the testimony if you believe that he was guilty of molesting Arrianna Hibberd, you don’t even have to listen to me. You don’t even have to listen to Mr. Blondin. At the last if you feel, yeah, he did it, he did it. That’s it. That’s what the abiding belief is. **If you think he did it, he did it. That’s what beyond a reasonable doubt means.**” 3 RP 93 (emphasis added).

#### **4. Argument**

##### **4.1 The trial court abused its discretion in admitting child hearsay statements under RCW 9A.44.120.**

The Child Hearsay Statute, RCW 9A.44.120, allows certain hearsay statements to be admitted at trial even when the statements would not meet the ordinary hearsay exceptions under the Rules of Evidence. “A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another ... is admissible in evidence in ... criminal proceedings.” RCW 9A.44.120. The court must hold a hearing outside the presence of the jury to determine whether the circumstances of the statement provide sufficient indicia of reliability, and the child must testify at the trial. *Id.*

A trial court's decision to admit evidence under RCW 9A.44.120 is reviewed for an abuse of discretion. *State v. Grogan*, 147 Wn. App. 511, 520, 195 P.3d 1017 (2008).

The statute does not define "sufficient indicia of reliability," but the courts have provided guidance in the form of a list of factors that should be considered. These factors were set forth in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). The *Ryan* court explained, "Any statement offered as an exception to the hearsay rule must be made under circumstances comparable in their inherent trustworthiness to serve as a substitute for cross-examination." *Ryan*, 103 Wn.2d at 175.

The court described and applied nine factors for determining whether the statements have sufficient indicia of reliability: "(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) the statement contains no express assertion about past fact, (7) cross-examination could not show the declarant's lack of knowledge, (8) the possibility of the declarant's faulty recollection is remote, and (9) the circumstances surrounding the statement ([such as] spontaneous and against interest) are such that there is no reason to suppose the declarant

misrepresented defendant's involvement." *Ryan*, 103 Wn.2d at 175-76. Not all factors must be satisfied, but the factors must be substantially met. *Grogan*, 147 Wn. App. at 521.

Here, there were not sufficient indicia of reliability. Although a court might reasonably find that many of the factors were met, the fact that A.H.'s statements to different witnesses contradicted each other creates a significant cloud over the reliability of the statements.

A.H. alternatively told others that Cook touched her over her underwear, or that she had no underwear, or that he touched her over her underwear and over her shirt. She told different people at different times that Cook placed his hand on her, or that he rubbed, or that he inserted his finger into her vagina, or that he made a wiping motion with his hand. Sometimes she mentions having gone to the bathroom, other times she doesn't. At trial, she wasn't even able to answer questions without being coached to the answers the state wanted to elicit.

In addition to being, generally, an indication of unreliability, these contradictions place factors 7 and 8 in opposition to admissibility. There is a strong chance that A.H.'s recollection was faulty at the time of many of her hearsay statements, a fact that could have been revealed through cross-examination if A.H. hadn't frozen on the stand.

Additionally, the statements were not spontaneous. They were initially made when questioned by her father about things A.H. said during some unusually sexualized play with her dolls. This puts factors 4 and 5 in opposition to admissibility, and creates a possible motive to lie, putting factor 1 in question. Finally, factor 6 is in opposition to admissibility because A.H.'s statements all involved assertions of past fact.

Given the rampant inconsistencies in A.H.'s statements, no reasonable judge could have found that there were sufficient indicia of reliability. The trial court erred in entering its findings of fact and conclusions of law and abused its discretion in admitting A.H.'s hearsay statements.

The unreliable hearsay statements were highly prejudicial to Cook. They formed almost the entire basis of the State's case. This Court should reverse and remand for a new trial.

## **5. Conclusion**

Child hearsay statements are only admissible if there are sufficient indicia of reliability of the statements. A.H.'s statements to various witnesses at different times contradicted each other. The trial court abused its discretion in finding the statements reliable. This Court should reverse and remand for a new trial.

Respectfully submitted this 23<sup>rd</sup> day of October, 2017.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
[kevin@olympicappeals.com](mailto:kevin@olympicappeals.com)  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 23, 2017, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

Court of Appeals, Div. II  
950 Broadway, #300  
Tacoma, WA 998402

Ryan Paul Jurvakainen  
Cowlitz County Prosecuting Attorney's Office  
312 SW 1st Avenue  
Kelso, WA 98626-1739  
appeals@co.cowlitz.wa.us  
jurvakainen.ryan@co.cowlitz.wa.us

DATED this 23<sup>rd</sup> day of October, 2017.

/s/ Kevin Hochhalter  
Kevin Hochhalter, WSBA #43124  
Attorney for Appellant  
[kevin@olympicappeals.com](mailto:kevin@olympicappeals.com)  
Olympic Appeals PLLC  
4570 Avery Ln SE #C-217  
Lacey, WA 98503  
360-763-8008

# OLYMPIC APPEALS PLLC

October 23, 2017 - 4:38 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50347-6  
**Appellate Court Case Title:** State of Washington, Respondent v Ronald L. Cook, Sr., Appellant  
**Superior Court Case Number:** 16-1-01267-9

### The following documents have been uploaded:

- 4-503476\_Briefs\_20171023163633D2269887\_4590.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Appellant Brief 2017-10-23.pdf*

### A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us
- appeals@co.cowlitz.wa.us

### Comments:

---

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com

Address:

4570 AVERY LN SE STE C-217

LACEY, WA, 98503-5608

Phone: 360-763-8008

**Note: The Filing Id is 20171023163633D2269887**