

**FILED
Court of Appeals
Division II
State of Washington
12/14/2017 9:07 AM**

NO. 50347-6-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RONALD L. COOK, SR.,

Appellant.

RESPONDENT'S BRIEF

**JASON LAURINE/WSBA 36871
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington, represented by Jason Laurine, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. FACTS

On December 15, 2016, a jury found Ron Cook guilty of one count of first degree child molestation for acts that occurred while he babysat four year old, A.H., while her parents went on a date. 1 RP 118. Cook, a convicted sex offender, rubbed A.H.'s "pee pee" over her underwear while they watched the movie Aristocats. 1 RP 126-135. On February 14, 2017, he was sentenced to life in prison as a persistent offender. 1 RP 138.

On December 6, 2016, the court held a hearing to determine the admissibility of statements made by A.H. to several individuals. The court heard testimony from Lisa Graham, M.D., forensic examiner, Kristen Mendez, Lisa Stout, Marie Duncan, Kevin Hibberd, Tasha Hibberd, and the victim, A.H. After the completion of testimony, the court found the evidence presented provided sufficient indicia of reliability and ruled all statements made by A.H. were admissible at trial. 1 RP 112.

Doctor Graham testified that during a standard examination of A.H., she noticed the child had an open hymen. 1 RP 11. An open hymen is commonly associated with someone who is sexually active, and not something one would normally observe during a pediatric examination. 1 RP 11-12. While examining A.H.'s genitalia and after noticing the open hymen, Dr. Graham asked if anyone had put anything in there. A.H. answered "yes." 1 RP 12. A.H. Dr. Graham documented that A.H. told her a friend of her father's named "Juan" who was living in the house touched her private area with his finger. 1 RP 13. It is understandable that Dr. Graham confused "Ron" for "Juan" because A.H. had difficulty pronouncing her R's and had a speech impediment. 1 RP 26.

Next, Kristen Mendez testified about disclosures A.H. made during her forensic interview. 1 RP 18. She described A.H. as quite articulate and able to provide fairly detailed information for a child her age. 1 RP 26-7. The interview was recorded and played for the court. RP 28-47. In that interview, A.H. said her friend Ron touched her on her "pee pee" (vagina) with his hand while they were watching "Aristocats." 1 RP 33-9. A.H. demonstrated how Ron's hand rubbed her vagina, while his other hand was moving. 1 RP 39-41. The rubbing occurred over her underwear, a fact which A.H. corrected Mendez. 1 RP 42.

The trial court next heard testimony from A.H.'s foster mother, Lisa Stout. 1 RP 50. She described A.H. as very sweet, outgoing, intelligent and truthful. RP 51. She accompanied took A.H. to the doctor when A.H. first came into her care. She was present when A.H. informed Dr. Graham that her father's friend, Juan, had touched her with his finger. 1 RP 51, 56. She attributed the confusion between "Juan" and "Ron" to the fact A.H. speaks with a lisp. 1 RP 51, 56. Ultimately, A.H. did not hesitate when describing the incident with Ron. 1 RP 56.

Next, A.H. testified, demonstrating her ability to relate facts, correct inconsistencies and misunderstandings. 1 RP 59-62. After identifying Ron cook, she told the court he touched her "pee pee" while they were watching Aristocats. 1 RP 63. She described what she was wore, that Ron touched her on top of her underwear, and that the touching did not feel good. 1 RP 64-5. She further described where it happened, and the people she told. 1 RP 65-70.

Marie Duncan described how she observed A.H. exhibiting sexualized behaviors. A.H. simulated sex and the associated sounds, placing her toys on each other, moaning "oh God, oh God, oh baby put it right there it feels good." 1 RP 72. Marie was also present when A.H. told her father that she had learned that behavior from Ron. 1 RP 73-4. Marie was also

present when A.H. told her father four times that Ron touched her “no-no spots,” and then when A.H. demonstrated how Ron rubbed those parts. 1 RP 75.

Kevin Hibberd then testified about the incident Marie Duncan described. 1 RP 78-84. Kevin described to the court how he asked A.H. several times over the course of forty-five minutes whether she had been touched and who touched her. 1 RP 80-1. Each time she told him yes and that it was Ron. 1 RP 81. Each time, A.H. demonstrated how Ron touched her, by wiping her vagina. 1 RP 81.

Finally, Tasha Hibberd testified that her daughter is smart, “knows what’s going on,” is observant, very bright and intelligent, and that she tells the truth. 1 RP 86. She also testified that A.H. cannot pronounce her R’s, and that is why “Ron” sounds like “Juan.” 1 RP 87.

The trial court found the timing and circumstances of the disclosures presented sufficient indicia of reliability, and that the statements A.H. made were admissible at trial. 1 RP 112. In making its ruling, the court examined each of the nine Ryan factors, commonly used to determine reliability of child hearsay statements, and found that these were substantially met. 1 RP 109-112.

III. ARGUMENT

RCW 9A.44.120 requires that the time, content, and circumstances of the statements provide sufficient indicia of reliability. *State v. Ryan*, 103 Wash.2d 165, 170, 691 P.2d 197 (1984). Many of the concerns for reliability are assuaged simply by the fact the statute requires the child to testify. RCW 9A.44.120 (2)(a); *Ryan*, 103 Wash.2d at 170.

The *Ryan* court used two sets of factors when considering the reliability of statements made by the declarant. These factors were first set out in *State v. Parris*, 98 Wash.2d 140, 654 P.2d 77 (1982) and *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210 219, 27 L.Ed.2d 213 (1970). Be that as it may, the *Ryan* court was clear that the standard to review the admissibility of any statement is the same as other exceptions to the hearsay rule and set out in RCW 9A.44.120—examining for indicia of reliability found in the time, content, and circumstances of the statements.

The factors considered in *Ryan* are as follows:

- 1) Whether the declarant, at the time of making the statement, had an apparent motive to lie;
- 2) Whether the declarant's general character suggests trustworthiness;
- 3) Whether more than one person heard the statement;
- 4) The spontaneity of the statement;
- 5) Whether the trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;

- 6) Whether the statement contains express assertions of past fact;
- 7) Whether the declarant's lack of knowledge could be established by cross-examination;
- 8) The remoteness of the possibility that the declarant's recollection is faulty; and
- 9) Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

Courts have interpreted the *Ryan* court's use of the *Parris* and *Dutton* factors as the guide to determining admissibility. *Ryan* may have reviewed those factors, but it did so without formally setting them as the test for admissibility with the desire that "adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act." 103 Wash.2d at 174, 691 P.2d 197. Be that as it may, trial courts should consider the factors as a whole, with no single factor being more critical than any other. *State v. Young*, 62 Wash.App. 895, 902, 802 P.2d 829 (1991). Statements need only substantially meet the factors. *State v. Woods*, 154 Wash.2d 613, 623, 114 P.3d 1174 (2005). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the premise asserted. *State v. Halstein*, 122 Wash.2d 109, 129, 857 P.2d 270 (1993).

Ultimately, the purpose of a 9A.44.120 hearing is to determine the reliability of the out of court statements. In that regard, the trial court is in the best position to make that determination because only it has the opportunity to see and evaluate the child and other witnesses. *State v. Pham*, 75 Wn.App. 626, 631, 879 P.2d 321 (1994). Trial courts are vested with considerable discretion in evaluating the indicia of reliability, and any decision to admit evidence under RCW 9A.44.120 should be reviewed for an abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

In its decision, the trial court found adequate indicia of reliability existed at the time the statements were made. Following a thorough and exhaustive application of the *Ryan* factors to the testimony elicited during the 9A.44.120 hearing, the court ruled:

“considering all those [factors], what it comes down to is does it meet that initial and low-level standard of indicia of reliability sufficient to place before the trier of fact? I see nothing in this that would argue against that.” 1 RP 112.

Further, the court found the statements:

“were made under circumstances where the answers were not forced on or suggested to the child.

And that really is the fifth element, whether or not the trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness. The relationship between the child and the various witnesses were of

many different natures. The circumstances surrounding the statements were all different, but the statements were remarkably similar.” December 6, 2016, 1 RP 111.

In the present case, defense cross-examination of the witnesses could and did not expose any untrustworthiness or inaccuracies in their respective memories or observations. Still, Cook argues rampant inconsistencies existed and that no reasonable judge could have found sufficient indicia of reliability existed, without highlighting a single inconsistency within the record. Cook does suggest A.H. informed several people different ways he touched her, either under or over her underwear. But the record does not reflect this claim. There is a moment during the forensic interview where Ms. Mendez confused how the touching occurred and A.H. corrected that confusion, stating that Cook touched her over her underwear. 1 RP 42. When a four year old corrects an adult on the facts, it indicates more a child who is secure in the facts and telling the truth than a child who is lying or fabricating a story. *See State v. Frey*, 43 Wn.App. 605, 610, 718 P.2d 846 (1986)(a young child is unlikely to fabricate a graphic account of sexual activity because it is beyond the realm of her experience).

Cook then complains that these contradictions could have been exposed had he been able to more adequately cross-examine A.H. However, Cook had an opportunity to cross-examine A.H. during both the admissibility hearing and at trial. Indeed, defense counsel opted against

cross-examining A.H during the hearsay hearing, 1 RP 70, but did cross-examine her at trial. 2 RP 90-100. Unlike Cook's description of that testimony, A.H. was engaged and answered defense counsel's questions. She described how and where Cook touched her through a demonstration on her doll, Sofia. 2 RP 91-5. And while this testimony was during trial, she described the surrounding circumstances of the molestation as she did to all other witnesses, and as she described it during the hearsay hearing.

Cook further argues that the statements were not spontaneous because some of the statements were in response to questioning. However, statements made in response to questioning are spontaneous so long as the questions are not leading or suggestive. *State v. Kennealy*, 151 Wn.App. 861, 883, 214 P.3d 200 (2009).

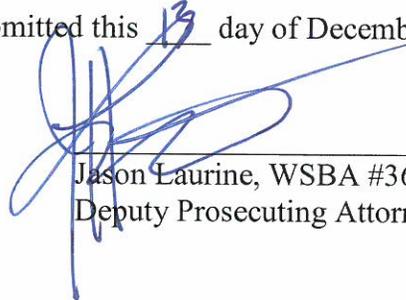
With the possible exception of the statements made to the father, who questioned A.H. several times over a 45 minute period, the court held all statements were obtained through non-leading and non-suggestive questioning. 1 RP 109, 110-11. As the trial court considered when making its decision, the *Ryan* spontaneity requirement is broad and is met so long as the questioning is not suggestive. *Kennealy*, 151 Wn.App. at 883. The court found the statements were "made under circumstances where the answers were not forced on or suggested to the child." 1 RP 111.

All circumstances suggested these statements were reliable and that A.H. did not fabricate the story that Cook molested her while he was babysitting her for her parents.

IV. CONCLUSION

The trial court did not abuse its discretion when it ruled the hearsay statements were admissible at trial because it found significant indicia of reliability existed and that nothing argued against that determination. Consequently, this Court should deny the appeal.

Respectfully submitted this 13 day of December, 2017.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on December 14th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

December 14, 2017 - 9:07 AM

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

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