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No. 50347-6-II

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

State of Washington,

Respondent,

v.

Ronald L. Cook, Sr.,

Appellant.

Reply Brief of Appellant

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Table of Contents

1. Reply Argument	1
2. Conclusion	5

Table of Authorities

Cases

<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984)	1, 3
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Statutes

RCW 9A.44.120.....	1
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1. Reply Argument

Cook's opening brief raised a single issue: whether the trial court abused its discretion in admitting hearsay statements from A.H. when her statements to different witnesses contradicted each other and when A.H. was unable to testify at trial except by answering "yes" or "no" to the State's leading questions.

The trial court admitted the statements under the Child Hearsay statute, RCW 9A.44.120. The key inquiry in determining whether child hearsay statements are admissible is whether the statements and their surrounding circumstances bear sufficient indicia of reliability, "comparable in their inherent trustworthiness to serve as a substitute for cross-examination." *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984). Courts are guided by the nine *Ryan* factors. *Id.* at 175-76.

Cook's brief argued that the numerous contradictions between A.H.'s various statements were, in themselves, a troubling indication of unreliability that the trial court appears to have ignored. Br. of App. at 9. Those contradictions were highlighted in Cook's Statement of the Case, Br. of App. at 2-6, and summarized in his argument, Br. of App. at 9. For the Court's convenience, Cook will repeat his summary here, with

citations to the record (most of which were set forth in Cook's Statement of the Case):

“A.H. alternatively told others that Cook touched her over her underwear [1 RP 42], or that she had no underwear [1 RP 37], or that he touched her over her underwear and over her shirt [1 RP 64; 2 RP 94]. She told different people at different times that Cook placed his hand on her [2 RP 94], or that he rubbed [1 RP 38-39; *see* 2 RP 112], or that he inserted his finger into her vagina [1 RP 13], or that he made a wiping motion with his hand [1 RP 81; 2 RP 157]. Sometimes she mentions having gone to the bathroom [1 RP 43], 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 [2 RP 80-85].”

The State tries to explain away these contradictions by pointing to the Mendez interview, in which A.H. first stated that she had no underwear (1 RP 37) but later explained that she did, and that Cook touched her over her underwear (1 RP 42). But this one instance of correction does not account for all of the other inconsistencies. Contrary to what she told Mendez, A.H. testified in the pre-trial hearing and at trial that Cook touched her over her shirt (she had been wearing an oversized t-shirt and no pants at the time of the incident), not just over her underwear. 1 RP 64; 2 RP 112.

It also fails to explain the varied ways in which A.H. described the touching. She told Dr. Graham that Cook inserted his finger into her vagina (which would also necessarily have been under her underwear, not over it, and certainly not over her shirt). 1 RP 13. She told Mendez that Cook rubbed her crotch (over her underwear). 1 RP 38-39. She demonstrated to her father that Cook made an upward wiping motion. 1 RP 38-39; *see* 2 RP 112. Yet, at trial, she testified that Cook's hand did not move at all, he just put it there. 2 RP 94.

Far from indicating A.H. was secure in the facts, these contradictions demonstrate an ever-changing story of what happened. It demonstrates the **unreliability** of A.H.'s hearsay statements.

Cook also argued that many of the *Ryan* factors oppose admissibility in this case. The State does not respond to many of these arguments.

A.H. may have had motive to lie to her father in response to his interrogation about her sexualized play with her dolls (factor 1). This was the first time she told anyone that Cook had touched her. If she had been untruthful to her father, she would have a continued motive to lie to others when they asked her about the incident.

Again, the first statements A.H. ever made on the subject were not spontaneous (factor 4). As the State appears to concede,

her father's interrogation did not fit the requirement that questioning be non-leading and non-suggestive. *See* Br. of Resp. at 9. Any subsequent statements made to other witnesses by A.H. are tainted by the potential effect of the father's initial interrogation.

The statements were all unquestionably express assertions about past fact (factor 6).

Cross-examination could not show A.H.'s lack of knowledge or defective memory (factor 7). She was simply too young. She had great difficulty responding to questions at trial.

It was very likely that A.H.'s recollection was faulty (factor 8). The variations in her story as told to different witnesses and then on the stand demonstrate a high probability that she was either untruthful or had a faulty memory on one or more occasions.

To be clear, Cook is not accusing A.H. of fabricating the entire incident. (After all, Cook admitted to the physical act of feeling if A.H.'s panties were wet. 3 RP 44. But he denies doing it for sexual gratification. 3 RP 46.) Cook is merely pointing out that her hearsay statements to the various witnesses do not carry the indicia of reliability required to allow the statements to be admitted at trial. The trial court abused its discretion in admitting the statements. Cook deserves a new trial, with the hearsay statements excluded.

2. 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 27th day of January, 2018.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 27, 2018, 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.

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