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No. 50750-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WHITFIELD, JR  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christopher Lanese, Judge  
Cause No. 16-8-00110-5

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 13

    1. Sufficient evidence was presented at trial to support the trial court’s conclusion that Whitfield was guilty of Rape of a Child in the First Degree ..... 13

    2. The court properly considered the factors enumerated in *State v. Ryan*, to conclude that statements made by E.G.A. and T.N.A. were admissible under the child hearsay statute, RCW 9A.44.120..... 17

    3. The trial court’s findings of fact and conclusions of law in regard to the admissibility of child hearsay were supported by the record and any portions that may not have been supported by the record were harmless..... 24

D. CONCLUSION..... 32

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>In re Estate of Bailey</u> , 178 Wash. 173, 176, 34 P.2d 448 (1934) .....	26
<u>State v. Borboa</u> , 157 Wn.2d 108, 121, 135 P.3d 469 (2006) .....	18, 19
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	13
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996) .....	25, 26
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980) .....	13
<u>State v. Leavitt</u> , 111 Wn.2d 66, 75, 758 P.2d 982 (1988) .....	23
<u>State v. Ryan</u> , 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) .....	17, 18
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 p.2d 1068 (1992) .....	13
<u>State v. Swan</u> , 114 Wn.2d 613, 648, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046, 111 S.Ct. 752 (1991) .....	17, 18, 20, 21, 22, 24

### **Decisions Of The Court Of Appeals**

<u>State v. A.M.</u> , 163 Wn.App 414, 260 P.3d 229 (2011) .....	16
<u>State v. Caldera</u> , 66 Wn.App. 548, 551, 832 P.2d 139 (1992) .....	26

<u>State v. Galisia</u> , 63 Wn. App. 833, 838, 822 P.2d 303 (1992).....	13
<u>State v. Henderson</u> , 48 Wn.App. 543, 550, 740 P.2d 329, <i>review denied</i> , 109 Wn.2d 1008 (1987) .....	22
<u>State v. Kennealy</u> , 151 Wn.App. 861, 884, 214 P.3d 200 (2009).....	22
<u>State v. McKinney</u> , 50 Wn.App. 56, 62, 747 P.2d 1113 (1987).....	24
<u>State v. Walton</u> , 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).....	14
<u>State v. Young</u> , 62 Wn.App. 895, 901, 802 P.2d 829, (1991).....	22

**U.S. Supreme Court Decisions**

<u>Lockhart v. Nelson</u> , 488 U.S. 33, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).....	26
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**Statutes and Rules**

ER 803(a)(4) .....	29
RCW 9A.44.073 .....	14
RCW 9A.44.010(1)(a) .....	14
RCW 9A.44.010(1)(b) .....	14
RCW 9A.44.120 .....	1, 2, 17, 24, 32

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient facts supported Whitfield's conviction on the charge of rape of a child in the first degree.
2. Whether the trial court properly considered the factors set forth in State v. Ryan in support of its determination that the statements of T.N.A. and E.G.A. made to Sue Villa and Steven Aguilar were sufficiently reliable for admissibility under RCW 9A.44.120.
3. Whether the trial court's findings of fact and conclusions of law in regard to the child hearsay hearing were supported by the record, and if any portions were not, were they material to the court's conclusion that the statements were admissible.

B. STATEMENT OF THE CASE.

The appellant, Anthony Whitfield, Jr., was charged in Thurston County Juvenile Court with Rape of a Child in the First Degree and Child Molestation in the First Degree. CP 5. The State moved to admit statements made by child victim's E.G.A. and T.N.A. CP 17. The court found that the statements were admissible pursuant to RCW 9A.44.120. CP 50-53. Following a bench trial, Whitfield was adjudicated guilty. CP 77. The court entered a standard range of 30-40 weeks on each count. CP 77-89. This appeal follows.

1. Facts pertaining to child hearsay hearing.

During the hearing pursuant to RCW 9A.44.120, the State presented evidence from Sue Villa, a child specialist forensic interviewer from Monarch Children's Justice and Advocacy Center. 7 RP 6.<sup>1</sup> E.G.A., T.N.A. and their father Steven Aguilar also testified at the hearing. 7 RP 78, 91, 103. Villa has completed training in child forensic interviewing pursuant to protocols set forth by the National Institute of Child and Human Development. 7 RP 8. Villa interviewed both E.G.A. and T.N.A. 7 RP 11. The interviews occurred on March 11, 2016. 7 RP 13.

During her interview with E.G.A., Villa asked if E.G.A. knew why he had come to talk to her and he indicated that somebody had been rude to him. 7 RP 16. E.G.A. identified the person as Anthony. 7 RP 16. Villa testified:

"[E.G.A.] said, 'Can I tell you something that's very, very appropriate?' and I said, 'Okay, let's hear it.' And he said, 'Any - -Anthony just stuck his, stuck my finger in his butt - - in my butt, actually.' And so then I repeated, and then I said, 'Stuck his finger in your butt?' And he said, 'Yeah.' And I said, when did he do that?' And his said 'Uh, like a month ago.' And I said, okay, where were you when he did that?' And he said, 'At Halabeoji's.' And I didn't know what Halabeoji was."

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<sup>1</sup> The transcripts received were divided into seven volumes. The bench trial is contained in volumes one and two, for purposes of this brief the bench trial will be cited to as 1 RP and 2 RP. The child hearsay hearing that occurred on August 13, 2017, is contained in volume 7, and for purposes of this brief it will be cited to as 7 RP.

7 RP 17. E.G.A. later indicated that Halabeoji is his grandpa. 7 RP 17. E.G.A. indicated that the incident with Whitfield happened one time. 7 RP 18. E.G.A. said that the incident happened “in the back of the couch.” 7 RP 19. When Villa asked E.G.A. if he liked Whitfield sticking his finger in E.G.A.’s butt, E.G.A. said, “no.” and indicated, “it hurts a lot when I’m in bed.” 7 RP 20.

Villa testified that she tries “very hard not to” ask questions directly in a leading way. 7 RP 27. When asked about E.G.A using the word “appropriate,” Villa indicated, “To me, with a five-year-old, it indicates they’re learning language, and they’re trying to figure out what words mean. And ‘appropriate’ is a pretty big word for a five year old. ‘Inappropriate,’ ‘appropriate,’ he is still learning what that means.” 7 RP 46.

When interviewed by Villa, T.N.A. agreed to talk about only things that are true and real. 7 RP 50. When asked, “Why are you here to see me,” T.N.A. responded, “Uh, to talk about the crime that that kid Anthony did.” 7 RP 50. T.N.A. told Villa:

“Yeah, and even like he also did the same thing with me, but like, one time - - this was really wrong. Like, one time when I was behind the couch, like - - ...watching T.V. from there, he grabbed me by the legs and, like, bent me down and started humping (glitch)...pants up though.”

7 RP 51. Villa then asked “Oh, what does that mean when he humps you?” and T.N.A. responded “Oh, its pretty wrong.” 7 RP 51. T.N.A. later described further, “And then he grabbed me and bent me down...and then he, like tackled me to the ground. Then I was laying on my back.” To which Villa asked, “like that?” and T.N.A. continued, “And he was like, like over there, and he lifted his legs and started humping me.” 7 RP 52. T.N.A. stated that Whitfield was standing up on his knees when this happened. 7 RP 52.

T.N.A. also described an incident that happened “like two years ago when [he] was in the first grade.” 7 RP 53. T.N.A. described Whitfield tackling him behind a tree and touching his privates. 7 RP 53, 55. When asked how often Whitfield touched him, T.N.A. stated “He did it like every day I came to my grandma,” and said “now he does it behind the couch.” 7 RP 57.

E.G.A. and T.N.A both identified Whitfield as the person who had touched them during their live testimony at the child hearsay hearing. 7 RP 81, 95. E.G.A. testified that he had told his dad that, “[Whitfield] touched his private.” 7 RP 82. He described the touch as the back of his body. 7 RP 82. He also said that he told Villa and T.N.A. what happened. 7 RP 85. On cross examination,

E.G.A. confirmed that he told his dad and T.N.A. what happened. 7 RP 87.

T.N.A. testified that he remembered Whitfield touching him and that "it's still pretty gross." 7 RP 96. When asked where Whitfield touched him behind the trees, T.N.A. said, "It's embarrassing to say, but –" and pointed to his front private area and his rear end. 7 RP 97-98. T.N.A said that the touching was under his clothes and spelled out the word "B-U-T-T" when asked what part of his body he had pointed out in his rear end. 7 RP 98.

When asked about the front part of his body, T.N.A. said "well, to more appropriate, I say genital." 7 RP 98. He later confirmed that genital includes his penis. 7 RP 98-99.

Steven Aguilar testified that he was sitting on the couch watching T.V. and E.G.A and T.N.A had been taking showers. 7 RP 105. T.N.A had already showered and E.G.A got out of the shower, and then he "just kind of announced to everybody that his butt hurt." 7 RP 105. Aguilar asked E.G.A. "what do you mean your butt hurt," and E.G.A said that "it hurts because Anthony was touching it." 7 RP 105. When asked where Whitfield touched his butt, E.G.A pointed to his rectum and said, "In the middle." 7 RP

105. Aguilar testified that he “visually inspected it...and it was red, so [he] put Vaseline on it.” 7 RP 110.

After E.G.A.’s disclosure, Aguilar asked T.N.A., “has he ever done this to you before,” and T.N.A. responded, “yeah, he did it last week,” and then told E.G.A. “if he does it again, just tell me and I will punch him in the face.” 7 RP 106. Aguilar testified that he told Detective Eikum everything that [the boys] told him. 7 RP 107. A transcript of the statement that Aguilar provided to Eikum was admitted as State’s Exhibit 1, at the child hearsay hearing. 7 RP 108.

Aguilar’s statement to Detective Eikum included in Exhibit 1 contained greater detail regarding T.N.A.’s statements to him than Aguilar’s testimony at trial.<sup>2</sup> Aguilar told law enforcement that T.N.A. said “from like First Grade he was doing stuff - - touching genitals.” He also indicated, “[T.N.A.] said he would take him behind a tree where they would find snakes and he would put his

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<sup>2</sup> While drafting this brief, the State noticed that the Exhibits admitted were not included in the Clerk’s Papers. At the time of this writing, the State has submitted a Supplemental Designation of Clerk’s Papers to the Thurston County Superior Court Clerk asking for Exhibits 1, 2, and 3 from the child hearsay hearing to be made a part of the record. Exhibit 1 is the transcript of the taped statement Aguilar gave to Det. Eikum, admitted at 7 RP 108; Exhibit 2 is the transcript of E.G.A.’s interview with Sue Villa, admitted at 7 RP 22, and Exhibit 3 is T.N.A.’s interview with Sue Villa, admitted at 7 RP 59. As the State has not received the Supplemental Clerk’s Papers from the clerk at this point, each will be cited to as exhibit with the page number as it appears in the transcripts.

hands down his pants and grope him and then uh, he said also he – he attempted to poke [another child], but I think she was clothed at the time.” Exhibit 1, at 1-2. Aguilar also told law enforcement that he had mostly been letting the boys bring it up on their own. Exhibit 1, at 2. During the hearing he testified

“I didn’t try to dig anything out of them, because when I talked to 911, they told me not to because it might hinder the investigation, so I didn’t....And then the boys - - or [T.N.A.] mainly throughout the week would kind of disclose a little here, a little more, a little more, as he felt comfortable. But I never asked him anything. I never interrogated him or anything like that.”

7 RP 106.

2. Facts elicited at trial.

Steven Aguilar is the father of E.G.A. and T.N.A. 1 RP 107-108. On March 5, 2016, Aguilar was watching T.V. in their residence when E.G.A. got out of the shower and “kind of announced to everybody that his butt hurt because Anthony had been touching it.” 1 RP 109. Aguilar then asked E.G.A. what he meant and whether it was underneath his clothes and E.G.A. said, “yeah.” 1 RP 112. When Aguilar asked E.G.A. asked where the touching occurred, E.G.A. said, “in the middle” and pointed to his rectum. 1 RP 112. E.G.A. said that it hurt when he farted so

Aguilar visually examined it and noticed that it was just red. 1 RP 112. Aguilar treated it with Vaseline and it seemed to be ok the next day. 1 RP 112. When asked by defense counsel, "So you testified that you looked at [E.G.A.'s] anal area, and it looked red, and the next day, he seemed fine?" Aguilar responded, "uh-huh, yes." 1 RP 115.

Following E.G.A.'s disclosure to Aguilar, Aguilar asked T.N.A. "Has he ever done that to you before," and T.N.A. said, "yeah, last week," and looked at E.G.A. and said, "you should have told me, I would have punched him in the face, because that's what I do to - - that's what I do to him." 1 RP 112. E.G.A. told Aguilar that the incident between he and Whitfield happened earlier that day behind the couch at Aguilar's mother-in-law's house. 1 RP 113.

Following the disclosure of both boys, Aguilar contacted the police department and an investigation was conducted by Tumwater Police Department Detective Tim Eikum. 1 RP 19, 112. During the week following the initial disclosure, T.N.A. disclosed more and more information regarding the abuse to his father. 1 RP 113. "He said that Anthony touched his genitalia and then Anthony exposed himself to [T.N.A.] as well as had [T.N.A.] touch his genitalia." 1 RP 113. T.N.A. said that Whitfield would "take him

behind the tree to look for snakes and that's where it would happen." He also told Aguilar that it happened behind the couch at Aguilar's "mother-in-law's place." 1 RP 114.

T.N.A. initially told his father that it happened last week, but then he disclosed it had been happening for years prior to the initial disclosure. 1 RP 114. T.N.A. told Aguilar that the touching occurred under his clothes.

During the investigation, E.G.A and T.N.A. were referred to Monarch Children's Justice and Advocacy Center to be interviewed by Child Forensic Interviewer Sue Villa. 1 RP 40, 47. E.G.A. told Villa that "Anthony stuck my finger in his butt – in my butt, actually." Villa then asked, "stuck his finger in your butt," and E.G.A said "yeah." 1 RP 53. E.G.A later stated, "it hurts a lot when I am in bed." 1 RP 55.

T.N.A. told Villa that "one time when [he] was behind the couch watching...watching T.V. from there, [Whitfield] grabbed [him] by the legs and, like, bent [him] down and started humping." 1 RP 60. T.N.A. said that Whitfield, "tackled [him] to the ground, and then [T.N.A.] was laying on his back," and Whitfield, "lifted up - - up his legs and started humping [T.N.A.]." 1 RP 61. T.N.A told

Villa that during that incident, Whitfield's pants were not down. 1 RP 60-61.

T.N.A. then described an incident that occurred "two years ago, when [T.N.A.] was, like, in first grade." 1 RP 62. T.N.A. told Villa that Whitfield tackled him behind a tree. 1 RP 62. T.N.A. said that his pants were down and Whitfield "started touching my butt and nuts and everything." 1 RP 63. T.N.A. later said that Whitfield had been touching his privates and described his privates as where he pees and poops from. 1 RP 63. He confirmed that Whitfield had touched his penis. 1 RP 64. T.N.A. stated that the events with Whitfield had happened, "for two years - - then I was finally like, that's enough. I'm just going to tell," and stated that the abuse had happened "a lot." 1 RP 65. T.N.A. also said that Whitfield had T.N.A. touch Whitfield, stating, "Like touch me in the nuts or something." 1 RP 67.

T.N.A. testified at trial and identified Whitfield as the person who touched him in a way that he didn't like. 1 RP 128-129. T.N.A. said that it was gross, and said that Whitfield had touched him under his clothes on his front and back. 1 RP 129. When asked what about the parts of his body where he was touched, T.N.A.

spelled out “P-E-N-I-S” and later “B-A-L-L-S.” He also said that the back of his body he was referring to was his bottom. 1 RP 130.

T.N.A. testified that the touching happened “maybe a couple years.” 1 RP 131. T.N.A. testified that he told Villa the truth about what happened. 1 RP 133.

E.G.A also identified Whitfield in court at the trial. 1 RP 159. E.G.A. testified regarding what he told his dad happened with Whitfield, stating, “He touched my privates and stuff.” 1 RP 159. When asked “what do you mean,” E.G.A pointed down towards his back. 1 RP 159. He confirmed that he was pointing at his bottom and he uses that body part to poop. 1 RP 60. He said that Whitfield touched him on his bottom “inside” of his clothes and “inside of his bottom. 1 RP 160. When asked if it hurt, E.G.A. said, “yeah, like later on.” 1 RP 160. E.G.A said that he told his dad, his brother and Sue Villa what happened, and confirmed that he told Villa the truth. 1 RP 161-162.

E.G.A. testified that the incident where Whitfield stuck his finger in E.G.A.’s bottom happened at his “grandma’s apartment.” 1 RP 163-164. He indicated that the incident occurred the same day that he told his dad. 1 RP 166.

Detective Eikum made contact with Whitfield at Whitfield's residence in the Deschutes Cove apartments. 1 RP 31. Eikum asked Whitfield if he had every played with T.N.A. or E.G.A. Eikum did not remember Whitfield responding to that question. 1 RP 33. Eikum then placed Whitfield under arrest. While waiting for transport, Whitfield asked "Can I get community service since I have to do this for school anyway?" 1 RP 33. Eikum testified that he responded "that's out of my control." 1 RP 33. Whitfield then stated, "Why did I have to be so stupid?" and "I screwed up my life." 1 RP 34.

Whitfield testified on his own behalf and offered testimony from his mother Hope Martinez, defense investigator Patrick Williams, neighbors Amber Herrera and J.H., Tona Miller, who is the apartment complex manager, and mental health counselor Qing Xin Lee. Lee indicated that Whitfield commonly makes self-demeaning statements. 2 RP 228-229. Whitfield admitted that he knew T.N.A. and E.G.A. and stated, "I used to go over to their house a lot." 2 RP 297. Whitfield denied sexual contact with either T.N.A. or E.G.A., but indicated that he had once hit T.N.A. in the chest and that he had bear hugged E.G.A. and hurt him. 2 RP 303, 307, 313-315.

### C. ARGUMENT.

1. Sufficient evidence was presented at trial to support the trial court's conclusion that Whitfield was guilty of Rape of a Child in the First Degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In order for the trial court to adjudicate Whitfield guilty of rape of a child in the first degree, the State needed to prove that Whitfield did have sexual intercourse with E.G.A., who was less than 12 years old, and was not married to Whitfield, and that Whitfield was at least twenty-four months older than E.G.A.. CP 5; RCW 9A.44.073. It was uncontested at trial that E.G.A. was less than 12 years old, not married, and Whitfield was at least twenty-four months older than him. Steven Aguilar testified that E.G.A.'s date of birth is "6-9-2010." 1 RP 108. Whitfield testified that E.G.A. was five years old and he was fourteen years old when he played with E.G.A. at E.G.A.'s grandparents' house. 2 RP 319.

Whitfield argues that there was insufficient evidence to demonstrate sexual intercourse. Sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight, and also means penetration of the vagina or anus however slight, by an object." RCW 9A.44.010(1)(a) and (b). E.G.A. testified at trial and indicated that Whitfield, "touched my privates and stuff." 1 RP 159. When asked what he meant, he pointed down towards his back and towards his bottom. 1 RP 159-160. He testified that his

bottom is where he poops from. 1 RP 160. He further testified that Whitfield touched him inside of his clothes and “inside” his bottom, and that it hurt, “like later after on.” 1 RP 160.

E.G.A.’s father, Steven Aguilar, testified that on March 5, 2016, E.G.A. got out of the shower and “kind of announced to everybody that his butt hurt because Anthony had been touching it.” 1 RP 109. Aguilar then asked E.G.A. what he meant and whether it was underneath his clothes and E.G.A. said, “yeah.” 1 RP 112. When Aguilar asked E.G.A. where the touching occurred, E.G.A. said, “in the middle” and pointed to his rectum. 1 RP 112. E.G.A. said that it hurt when he farted so Aguilar visually examined it and noticed that it was just red. 1 RP 112. Aguilar treated it with Vaseline and it seemed to be ok the next day. 1 RP 112. When asked by defense counsel, “So you testified that you looked at [E.G.A.’s] anal area, and it looked red, and the next day, he seemed fine?” Aguilar responded, “uh-huh, yes.” 1 RP 115.

When Sue Villa interviewed E.G.A., E.G.A. disclosed, “Anthony just stuck my finger in his butt - - in my butt - - actually,” to which Villa responded, “Stuck his finger in your butt?” and E.G.A. responded, “Yeah.” 1 RP 53. E.G.A. later told Villa, “it hurts a lot when I’m in bed.” 1 RP 55. In a light most favorable to the State, a

rational trier of fact could clearly find that Whitfield's finger penetrated, however slight, E.G.A.'s anus.

Whitfield relies heavily on State v. A.M., 163 Wn.App 414, 260 P.3d 229 (2011). A.M. is factually distinguishable from the facts in this case. The victim in that case testified that A.M. "stuck his wiener in my poop-butt" and "it felt bad." Id. at 417. The prosecutor asked for specifics and the victim said, "it just touched the outside part where it's almost inside" and later said it was "outside but up – it was – almost inside." Id. at 418. In the trial court's ruling, the court said, "I am not saying that – that [AM] penetrated the anus and I don't believe he – we didn't have any discussion about that. I believe it is sufficient that he did penetrate the buttocks" Id. at 418. Division I of this Court held that "penetration of the buttocks, but not the anus, does not meet the ordinary meaning of sexual intercourse." Id. at 421.

In contrast, the trial court in this case specifically found "the State has proven beyond a reasonable doubt that Anthony Whitfield, Jr., did put his finger in the anus of E.G.A. which falls within the definition of sexual intercourse." CP 105. This finding was supported by the testimony of E.G.A., Sue Villa and Steven Aguilar. When the evidence presented is viewed in a light most

favorable to the State, the evidence was sufficient to support the trial court's finding that Whitfield committed rape of a child in the first degree.

Whitfield argues that the evidence is insufficient because E.G.A. only used the word butt; however, this argument fails to acknowledge that a child E.G.A.'s age is not likely to refer to his anatomy with the word anus. E.G.A. pointed to his rectum when discussing the matter with his father, said the touching occurred in the middle and Aguilar observed redness in the anus. The evidence was sufficient.

2. The court properly considered the factors enumerated in *State v. Ryan*, to conclude that statements made by E.G.A. and T.N.A. were admissible under the child hearsay statute, RCW 9A.44.120.

The child hearsay statute, RCW 9A.44.120, provides that hearsay statements of children under ten describing sexual conduct are admissible if the trial court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability and either (1) the child testifies or (2) the child is unavailable and there is corroborative evidence of the act. The standard for appellate review of a trial court's admission of child hearsay statements is abuse of discretion. *State v. Swan*, 114

Wn.2d 613, 648, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752 (1991). In determining whether sufficient indicia of reliability exist, the trial court should consider the nine factors set out in State v. Ryan:

(1) whether an apparent motive to lie exists, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) whether the declarant made the statements spontaneously, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contains an express assertion about past facts, (7) cross-examination could not show the declarant's lack of knowledge, (8) the possibility that the declarant's recollection is faulty is remote, and (9) the circumstances surrounding the statement suggest that there is no reason to suppose the declarant misrepresented the defendant's involvement.

103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Not every factor need be satisfied; it is enough that the factors are "substantially met." Swan, 114 Wn.2d at 652. In this case, enough factors were satisfied to support the trial court's conclusion that the statements of E.G.A. and T.N.A. had sufficient indicia of reliability.

The determination of whether a statement is admissible under RCW 9A.44.120 is within the sound discretion of the trial court. State v. Borboa, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court abuses its discretion only when its decision is

manifestly unreasonable or based on untenable reasons or grounds.” Id.

Whitfield argues that E.G.A. and T.N.A. had a motive to lie because the boys somehow perceived that Whitfield was violent and had given them “owies,” and speculated that T.N.A. thought he may be in trouble for the incident that occurred behind the tree because he was worried it may involve the cops. 7 RP 41-42, 43-44, 52, 64, 58. However, the context of the initial disclosure makes it exceedingly unlikely that the boys were motivated to lie about sexual abuse in a concerted effort to get Whitfield in trouble. At the time of the statements, E.G.A. was “almost six” and T.N.A. was nine. 7 RP 21, 93,<sup>3</sup> CP 51. When E.G.A. initially disclosed the abuse to Aguilar, he got out of the shower and “just kind of announced to everybody that his - - his butt hurt.” 7 RP 105. Aguilar then asked T.N.A. if Whitfield had done that to him before and T.N.A. responded, “yeah he did it last week” and looked at his brother and said, “if he does it again, just tell me, and I’ll punch him in the face.” 7 RP 106.

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<sup>3</sup> T.N.A. testified that at the time of the hearing on August 3, 2017, he was ten years old and his birthday was in one month. Simple math demonstrates that at the time of the statements in March of 2016, T.N.A. was nine years old.

The circumstances do not bear an indication of a motive to lie. The age of the children and the timing of the initial statements do not demonstrate any desire to get Whitfield in trouble. E.G.A. was simply reporting to his father that his butt hurt. Moreover, the trial court observed the demeanor of both E.G.A. and T.N.A. when they testified at the child hearsay hearing and specifically noted that “Neither child presented as angry with the Respondent.” CP 52. T.N.A. told Sue Villa that he wished, “[Whitfield] would stop doing it – for life.” 7 RP 58. The facts demonstrated that E.G.A. and T.N.A. were motivated by a desire to stop the abuse, not a motivation to lie.

When assessing a child’s general character, pursuant to the *Ryan* factors, Washington Courts look to whether the child has a reputation for truthfulness. State v. Swan, 114 Wn.2d at 648. When Ms. Villa interviewed E.G.A., they discussed the difference between a truth and a lie and Villa formed the opinion that E.G.A. understood the difference between the truth and a lie and knew that you get in trouble when you lie. 7 RP 15-16. When T.N.A. spoke with Villa, he agreed to talk only about things that are “true and real.” 7 RP 50. Villa noted that T.N.A.’s demeanor was “calm and

cooperative, trying to provide information to the best of his ability.”  
7 RP 59.

Whitfield argues that because the initial disclosure by E.G.A. and T.N.A. was to their father, the nature of the father son relationship makes Aguilar’s objectivity questionable. This assertion is not supported by case law. More than one person heard the E.G.A. and T.N.A.’s statements. E.G.A. and T.N.A. gave similar versions of the events that were relayed to Steven Aguilar to Sue Villa when they were forensically interviewed. When more than one person hears a similar story of abuse from a child, the hearsay statement is more reliable. State v. Swan, 114 Wn.2d at 651.

In addition to making similar statements to both Aguilar and Villa, both children testified at the child hearsay hearing and made similar statements in open court. E.G.A identified Whitfield in court and testified, “he touched my privates.” 7 RP 82. T.N.A. testified that he remembered Whitfield touching him, and stated, “it’s still pretty gross.” 7 RP 96. When asked where Whitfield touched his body, T.N.A. pointed with both hands toward his rear end and his front private area. 7 RP 97. He stated the touching was under his

clothes and later described the areas of his body that were touched as “B-U-T-T” and “genitals.” 7 RP 98.

“Washington law . . . recognizes that a child's answers are spontaneous so long as the questions are not leading or suggestive.” State v. Young, 62 Wn.App. 895, 901, 802 P.2d 829 (, 1991); *citing* State v. Henderson, 48 Wn.App. 543, 550, 740 P.2d 329, *review denied*, 109 Wn.2d 1008 (1987) (Broadened the definition of spontaneous to include “the entire context in which the child [made] the statement”). As stated above, the statements made by E.G.A. and T.N.A. to their father were clearly spontaneous and not the product of leading or suggestive questions. In the forensic interviews, Ms. Villa used open ended questions and the children’s words. While she would clarify their statements, it was the children who first indicated that abuse had occurred and that “Anthony” was the abuser.

In looking at the timing of the declaration and the relationship of the children to the witness, case law suggest that “when the witness is in a position of trust with a child, this factor is likely to enhance the reliability of the child’s statement.” State v. Kennealy, 151 Wn.App. 861, 884, 214 P.3d 200 (2009), *citing*, State v. Swan, 114 Wn.2d at 650. Here, the statements were made to the two

young boys' father and to a trained child forensic interviewer, both of whom would be in a position of trust, which would be more likely to enhance the reliability of a child's statement.

"Child hearsay statements about sexual abuse will usually contain statements about past fact." State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988). In this case, the statements made by E.G.A. and T.N.A. both discussed past sexual contact with Whitfield.

During the child hearsay hearing, cross examination by defense counsel did not demonstrate that either E.G.A. or T.N.A. lacked knowledge of the events. As stated above, E.G.A identified Whitfield in court and testified, "he touched my privates." 7 RP 82. T.N.A. testified that he remembered Whitfield touching him, and stated, "it's still pretty gross." 7 RP 96. When asked where Whitfield touched his body, T.N.A. pointed with both hands toward his rear end and his front private area. 7 RP 97. He stated the touching was under his clothes and later described the areas of his body that were touched as "B-U-T-T" and "genitals." 7 RP 98. On cross examination, E.G.A. testified that he told T.N.A. and his father about "all of this." 7 RP 87. While both children indicated that they did not remember in response to several questions, there was no

demonstration that they lacked knowledge of the events at the time the hearsay statements were made. State v. McKinney, 50 Wn.App. 56, 62, 747 P.2d 1113 (1987).

Further, both E.G.A and T.N.A. made similar statements to more than one person regarding the sexual contact that they had with Whitfield. “When a child makes a statement soon after an event and then makes consistent statements to other people shortly thereafter, there is little possibility that the child’s recollection was faulty.” Swan, 114 Wn.2d at 651. The same day that E.G.A. disclosed, Aguilar noticed redness on his rectum. 7 RP 112.

Finally, there is no indication that either E.G.A. or T.N.A. may have misrepresented Whitfield’s involvement. Both identified him court, and both specifically said that he was the one who touched them. Looked at all of the factors for reliability, it is clear that the trial court did not abuse its discretion when it found that the statements that E.G.A. and T.N.A. made were admissible pursuant to RCW 9A.44.120.

3. The trial court’s findings of fact and conclusions of law in regard to the admissibility of child hearsay were supported by the record and any portions that may not have been supported by the record were harmless.

As stated above, the trial court properly considered the nine

factors recognized by the law of this State which govern the admissibility of child hearsay statements pursuant to RCW 9A.44.120. The trial court entered 27 findings of fact in regard to the hearing that was held. CP 50-52. Whitfield argues that six of the 27 findings were not supported by the record, and somehow, the remedy for that error is to vacate the convictions and remand for dismissal with prejudice.

Whitfield relies heavily on State v. Crediford, 130 Wn.2d 747, 927 P.2d 1129 (1996). This reliance is misplaced. In Crediford, the Washington State Supreme Court considered whether “sparse facts” in a stipulation presented at a bench trial supported the trial court’s conclusion that the defendant had a blood alcohol content sufficient for a conviction for driving under the influence. Id. at 761. Because the stipulation indicated only that the officer had probable cause and that the officer obtained a BAC reading of .16 within two hours after driving, but no information about whether Crediford was in custody under observation during that two hour period, the Supreme Court held, “as a matter of law that the state failed to prove, beyond a reasonable doubt” an element of the offense. Id. Where there is a failure of proof as to elements of an offense, the Double Jeopardy Clause entitles a defendant to dismissal. Id.

Unlike Crediford, Whitfield's sufficiency claim argues that there was insufficient evidence presented to support the trial court's findings in regard to an evidentiary ruling. When sufficient evidence for a conviction was presented, but some error occurred in determining admissibility of evidence, the type of governmental oppression at which the Double Jeopardy Clause is aimed is not implicated. Lockhart v. Nelson, 488 U.S. 33, 40-41, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988).

An erroneous finding of fact not materially affecting the conclusions of law is not prejudicial. In re Estate of Bailey, 178 Wash. 173, 176, 34 P.2d 448 (1934); *see also*, State v. Caldera, 66 Wn.App. 548, 551, 832 P.2d 139 (1992). In this case, the trial court properly considered all nine *Ryan* factors. If any of the findings are not supported by the record, they are harmless because they did not materially affect the conclusions that the statements were sufficiently reliable for admissibility.

Whitfield first challenges finding of fact 2, which states, "The reporting party, Steve Aguilar, stated that his sons E.G.A. and T.N.A. reported that respondent, Anthony Whitfield has put a finger in E.G.A.'s rectum while the boys were playing at their grandparent's house." CP 50. This finding was supported by the

record and the rationale inferences therefrom. Aguilar was specifically asked during the hearing, "On March 5<sup>th</sup>, 2016, did [E.G.A. and T.N.A.] provide you with information about Anthony Whitfield." 7 RP 105. He stated "Yes, they did," and then stated:

"Well, I was sitting on the couch watching TV, and the boys are taking showers. And [T.N.A.] had already showered, and then [E.G.A.] got out of the shower, and then he just kind of announced to everybody that his - - his butt hurt."

7 RP 105. Aguilar then testified that E.G.A. stated that it hurt "because Anthony was touching it," and when asked where, E.G.A. stated, "in the middle" and pointed to his rectum. 7 RP 105. Then Aguilar asked [T.N.A.] "has he ever done this to you before?" and [T.N.A.] said, "Yeah, he did it last week." Then, [T.N.A.] stated to [E.G.A.], "if he does it again, just tell me, and I'll punch him in the face. 7 RP 105-106. While the trial court's finding of fact and conclusion of law may not be verbatim the testimony, the finding of fact is supported by the evidence presented and the rational inferences therefrom.

Whitfield next argues that the trial court's finding of fact number 4, "During E.G.A.'s forensic interview he disclosed that the respondent had put his finger up E.G.A.'s butt. E.G.A. stated that this had happened at his grandparent's house behind the couch,"

was unsupported by the record. CP 51. During the testimony of

Sue Villa, Villa testified:

“[E.G.A.] said, ‘Can I tell you something that’s very, very appropriate?’ And I said, ‘Okay, let’s hear it.’ And he said, ‘Any - - Anthony just stuck his - - stuck my finger in his butt - - in my butt, actually.’ And so then I repeated and, and then I said, ‘ Stuck his finger in your butt?’ And he said, ‘yeah.’ And I said when did he do that?’ And he said, ‘Uh, like a month ago.’ And I said, okay, where were you when he did that?’ And he said, ‘At Halabeoji’s.”

7 RP 17. It was later revealed that Halabeoji was [E.G.A.]’s grandpa. 7 RP 17. The finding of fact was supported by the testimony presented by Villa.

Next, Whitfield argues that finding of fact number 12, “Steven Aguilar observed and treated an injury to E.G.A.’s rectum at the time of the disclosure,” was likewise unsupported. CP 51. Steven Aguilar testified that he “visually inspected it...and it was red, so [he] put Vaseline on it.” 7 RP 110. This testimony supports the finding that Aguilar observed an injury and treated it.

Finding of fact number 13, in the Order on Admissibility of Child Hearsay Statements, “Ms. Villa’s forensic interview was not conducted primarily for the purpose of a criminal investigation but also for the purpose of providing medical attention,” is at least partially supported by the record and the rational inferences

therefrom. During Villa's testimony at the hearing, on cross examination, Villa testified, "the forensic interviewer's goal is to be an objective, unbiased party." 7 RP 23. She later stated, "It's not just for law enforcement; it's for the purpose of gathering the truth." 7 RP 25. The State concedes that Villa did not testify that part of the interview is for providing medical attention. However, whether or not a purpose of the forensic interview was to assess whether medical care was needed does not go to any issue material the trial court's conclusion that the statements were sufficiently reliable for admission. The Court did not allow the statements to come in as statements to a medical provider under ER 803(a)(4).

Next, Whitfield takes issue with the trial court's finding, number 16, which states, "There is no evidence that the young children comprehended that the forensic interviews could be used at trial." CP 51. While Whitfield assigns error to this finding, there does not appear to be an analysis of the record in Whitfield's Opening Brief regarding the record of this finding. While [T.N.A.] did say that he was at the forensic interview to talk about the crime that Anthony committed, there was no indication in any of the testimony that either child comprehended that a trial might occur. 7 RP 50. This finding seems to go to whether or not the statements

were testimonial in nature. While the record supports the finding, the finding itself is not material to the conclusions of law because both boys testified at trial.

Finally, Whitfield argues that there was insufficient evidence to support finding number 23, "T.N.A.'s statement though in response to his father's question was also spontaneous in that the details were provided by the child and not suggested by his father." CP 52. T.N.A.'s initial statement to his father was in response to the question, "has he ever done this to you before?" after E.G.A. had announced that Whitfield had touched his butt. 7 RP 105-106. T.N.A. responded, "Yeah, he did it last week." 7 RP 106. On cross examination, Aguilar testified, "When [E.G.A] disclosed to me, I asked [T.N.A.], I said, 'Has he ever touched you?' and [T.N.A. said, "yes." 7 RP 111. Defense counsel later asked Aguilar, "Do you recall [T.N.A.] saying that this had been going on since he was in first grade?" To which Aguilar responded, "yeah, he said it had been going on for as long as he could remember." 7 RP 112. The transcript of Aguilar's statement to law enforcement regarding the disclosures was also admitted into evidence during the hearing and supported the trial court's finding. 7 RP 108, Exhibit 1.

Aguilar told law enforcement that T.N.A. said “from like First Grade he was doing stuff - - touching genitals.” He also indicated, “[T.N.A.] said he would take him behind a tree where they would find snakes and he would put his hands down his pants and grope him and then uh, he said also he – he attempted to poke [another child], but I think she was clothed at the time.” Exhibit 1 at 1-2. Aguilar also told law enforcement that he had mostly been letting the boys bring it up on their own. Exhibit 1 at 2. During the hearing he testified

“I didn’t try to dig anything out of them, because when I talked to 911, they told me not to because it might hinder the investigation, so I didn’t.....And then the boys - - or [T.N.A.] mainly throughout the week would kind of disclose a little here, a little more, a little more, as he felt comfortable. But I never asked him anything. I never interrogated him or anything like that.”

7 RP 106. Finding of fact number 23 was supported by the record.

As discussed at length above, the trial court properly applied the *Ryan* factors to the facts of the case. The conclusion that the statements made to Steven Aguilar and Sue Villa by [E.G.A.] and [T.N.A.] were sufficiently reliable to be admissible under RCW 9A.44.120 was supported by the record. To the extent that any specific finding of fact may not be supported in the record, the error

is clearly harmless given the overwhelming evidence presented to support the trial court's proper conclusion. In short, the trial court did not abuse its discretion in admitting the child hearsay statements.

D. CONCLUSION.

Sufficient evidence was admitted at trial to support the finding that Whitfield committed rape of a child in the first degree. The trial court properly considered the *Ryan* factors and the evidence elicited at the child hearsay hearing demonstrated that the children's statements were sufficiently reliable for admissibility under RCW 9A.44.120. The majority of the findings of fact entered in regard to the child hearsay hearing were supported by the record. Any that may not have been were harmless in light of the Court's proper consideration of the factors necessary for admission and the reliability of the statements. The State asks that this Court affirm Whitfield's convictions.

Respectfully submitted this 4 day of April, 2018.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4<sup>th</sup> day of April, 2018, at Olympia, Washington.

  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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