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DIVISION ONE

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NO. 30521-0- III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RAMON GONZALEZ, Appellant,

SECOND AMENDED BRIEF OF APPELLANT

Mitch Harrison
Attorney for Appellant
101 Warren Avenue North
Seattle, Washington 98109
Tel (253) 335 – 2965
Fax (888) 598-1715

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I. ASSIGNMENTS OF ERROR

1. The Trial Court erred in entering finding of fact 1.7 when the court's finding that "B.P. identified the defendant through State's Exhibit 5" is not supported by substantial evidence in the record.
2. The Trial Court erred in entering finding of fact 1.10 when B.P. never gave an oral description of the perpetrator and the physical description of the perpetrator did not identify that man as Mr. Gonzalez.
3. The Trial Court erred because B.P.'s hearsay statements were not reliable under the factors enumerated in *State v. Ryan*.
4. If the court holds that Mr. Gonzalez's counsel stipulated to the admissibility of the child hearsay at trial, then his counsel was ineffective for doing so when the evidence was certainly insufficient to convict him without the child hearsay.
5. The Trial Court erred by finding Mr. Gonzalez guilty because State did not present sufficient evidence identifying Mr. Gonzalez as the person who molested B.P.
6. Regardless of whether an objection was made, the introduction of the child hearsay in this case violated Mr. Gonzalez's right to confrontation under the "reliability" prong
7. Any combination of the above errors denied Mr. Gonzalez his right to a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Trial Court erred in entering finding of fact 1.7 when the court's finding that "B.P. identified the defendant through State's Exhibit 5" is not supported by substantial evidence in the record.
2. Whether the Trial Court erred in entering finding of fact 1.10 when B.P. never gave an oral description of the perpetrator and the physical description of the perpetrator did not identify that man as Mr. Gonzalez.
3. Whether the Trial Court erred because B.P.'s hearsay statements were not reliable under the factors enumerated in *State v. Ryan*;

4. Whether Mr. Gonzalez's counsel was ineffective for stipulating to child hearsay (assuming this court holds that Mr. Gonzalez's counsel did in fact so stipulate) when—without that child hearsay—the evidence was insufficient to identify Mr. Gonzalez as the perpetrator of the rape.
5. Whether this court should reverse the guilty verdict and dismiss with prejudice when without the child hearsay statements, the State failed to present sufficient evidence to identify Mr. Gonzalez.
6. Whether this court should reverse Mr. Gonzalez's conviction because the State did not present sufficient evidence identifying Mr. Gonzalez as the person who molested B.P.
7. Whether, regardless of whether an objection was made, the introduction of the child hearsay in this case violated Mr. Gonzalez's right to confrontation under the "reliability" prong
8. Whether any of the above errors or combination thereof denied Mr. Gonzalez his right to a fair trial.

III. STATEMENT OF THE CASE

1. Procedural Facts

On February 23, 2010, Ramon Gonzalez (hereinafter "Mr. Gonzalez") was charged with one count of First Degree Child Molestation. CP 14. The alleged victim in this matter is "B.P." and Mr. Gonzalez is B.P.'s great-uncle. Just before jury selection, Mr. Gonzalez, upon the advice of counsel, decided to waive his right to a jury trial. CP 32. After a six day bench trial, the court found Mr. Gonzalez guilty as charged, of one count of child molestation. CP 44-50.

2. Substantive Facts

B.P.'s testimony. The victim, B.P., was the first witness to testify. She was 9 years old at the time of trial. RP 18. B.P. testified that she remembered a party that “happened a couple of years ago.” RP 23-24. B.P. did not remember whose house the party was at but that her and her cousin were playing board games “inside the living room.” RP 24. B.P. later stated that she not remember who she was playing with inside. RP 26. B.P. recalled that there were many people there but could only identify her parents, some of her cousins and her grandmother. RP 24. B.P. testified that she remembered that someone had called her into a dark room that was adjacent to the room she was playing board games in. RP 26.

This person called B.P. into the adjacent room and she went into the room. RP 27. When she arrived in the room, “There was no light. It was dark.” B.P. testified that while the two were in the room, the person closed the door; no one else was in the room. RP 28. B.P. stated that the person “took of my pants and touched me in the wrong part. RP 28. When saying “wrong part, B.P. was referring to her genitals. RP 29.

When asked to identify the man who touched her, B.P. could not identify the perpetrator in court. RP 26. Upon further questioning, she stated that it was her “dad’s uncle;” however, she also testified that she doesn’t “know what he looks like.” RP 26. B.P. also testified that she had never met the perpetrator before the molestation and also testified that she

had never seen the perpetrator after the incident. RP 31; RP 43. When she testified, B.P. had no memory of ever identifying Mr. Gonzalez to her mother, by naming him or by picking him out in a photo. RP 31.

Amy Gallardo Testimony. At some point after the incident, B.P. met with Ms. Gallardo, a victim's advocate with the prosecutor's office. B.P. did not know her molester by name, but she did describe to Ms. Gallardo what he looked like. RP 145-46. B.P. described the person who touched her as having "lighter skin, short hair that was kind of dark, tall and thin, [and] a relative." RP 146. In its findings, the court conceded that this description did not fit the description of Mr. Gonzalez. CP 48. During the interview of with B.P., B.P. told Ms. Gallardo that "she had never seen the man [who touched her] before the party." RP 149.

Miriam Pinon's Testimony. Miriam Pinion (hereinafter "Miriam") is the mother of the victim, B.P. She testified that she and M.P. arrived at the barbeque at around 2:00 or 3:00 PM and left around 9:00 PM. RP 50. Miriam testified that the day after the barbeque, B.P. told her about an incident that happened at the barbeque. RP 51. B.P. told Miriam Pinion that "my dad's uncle was playing with the little girls and he was in a room and he called me. He called me a couple times and then she said that she went and that he hugged her. He hug[ged] her like this and then he put his hand in her pants." RP 51. Miriam Pinion was not inside the home

when it occurred. RP 69. After B.P. revealed the incident to her mother, Miriam testified that she wanted to be sure about who it was that B.P. believed had touched her private parts because “I want to be sure, you know, they have – it’s a big family. It’s a really big famil[y].” RP 51.

From the moment that B.P. reported to her mother that someone from this family barbeque molested her, Miriam concluded that Mr. Gonzalez must have been the person who did it, stating, “I knew it was Ramon from the boat. I just needed something else. I don’t know why because I mean, I knew it was Ramon Gonzalez, so I said, hey, do you remember this?” RP 59-60. In asking that question to B.P., Miriam tried to verify her suspicions by getting B.P. to identify Mr. Gonzalez as the man who molested B.P. through words and through pictures. RP 59-60.

About a couple months after the incident, Miriam tried to get B.P. to identify Mr. Gonzalez as the man who touched her by showing her Exhibit 5, a picture taken the day of the barbeque that included Mr. Gonzalez and his four brothers who were at the party. RP 58.

Without pointing at Mr. Gonzalez specifically, Miriam Pinion supposedly showed the picture to B.P and asked her (in some way that was never established at trial). Miriam testified she that she could have asked B.P., “well, look at this picture, who’s that?” RP 61. Or, Miriam could have asked B.P. “Do you know who Ramon Gonzalez is?” RP 62. Miriam

Pinion's testimony did not establish how or *if* B.P. identified Mr. Gonzalez out of the picture of five Gonzalez brothers who were at the party and also in the picture, Exhibit 5.

Defense's Trial Position. Throughout the entire prosecution of this case – from arraignment, to sentencing, and through his appeal – Mr. Gonzalez has maintained his innocence. *See* CP 2-9 (Motion and Declaration for Release on PR); CP 69 (Pre-Sentencing Interview with defendant in which he maintained his innocence). Even when it would have made him eligible for a more favorable sentence (after he was found guilty), Mr. Gonzalez continued to proclaim that he did not commit this crime. *See* CP 73.

Appropriately, at trial, the defenses theory was general denial. As the case developed, the evidence tended to show that B.P. was most likely molested at this barbeque; however, it was *not by* the defendant, Mr. Gonzalez. Several facts supported this theory. The incident in question occurred at a family barbeque in Yakima, Washington. RP 49. This was not a small family gathering, where every family member knows one another. As the victim's mother pointed out, the barbeque was intended to celebrate "an uncle from out of town," but she did not appear familiar with whom that was. RP 49. Needless to say, there were obviously many people at this party who did not know each other. There were as many as

50 people at this party, over half of whom were adults. RP 164. At least one witness estimated that there were at least 20 guests who were over the age of 30. RP 245. This party included many people that were part of the family as well as others who were not relatives at all. RP 258.

In all, over ten defense witnesses testified who were at the party. Aside from one visit to the restroom inside the home, none of the eye witnesses testified that they ever saw Mr. Gonzalez inside the home, where the molestation allegedly occurred. *See* RP 224; RP 300; RP 314. Several witnesses confirmed that he did go inside the home on one occasion to use the restroom. *See* RP 214-40 (Testimony of Ramon Gonzalez). However, when inside, Mr. Gonzalez was within clear view of numerous adults and children and never isolated from large numbers of people. RP 238-40. No witnesses (for the State or Defense), testified that Mr. Gonzalez was ever inside the home unsupervised.

Important to the defense theory was that Mr. Gonzalez had numerous other relative's at the barbeque who could have also been considered B.P.'s "father's uncle." For instance, the barbeque was being held in honor of Mr. Gonzalez's brother, Martin. RP 166. He was visiting from Hawaii. RP 166 (likely that B.P. had never met this uncle before the barbeque and likely that she did not ever see him after).

In addition, because the alleged prior sexual crimes of Mr. Gonzalez was brought up in this case, it is also important to note that one of Mr. Gonzalez's brothers who was also present at the barbeque, had previously been charged with possession of child pornography. RP 187-88. This brother's name was Juan Gonzalez; at one point, he was a student priest at the Diocese. RP 291. Unlike several of the other "uncles" at the barbeque (including Mr. Gonzalez), Juan was not wearing a large cowboy hat. RP 291. Juan Gonzalez was also the only "uncle" who was mentioned in the trial and was present at the party that did not testify.

In closing, defense counsel argued that it could easily have been anyone of the other "uncles" (i.e. appellant's brothers) who molested B.P. In fact, he argued that the description given by the child better fit Juan Gonzalez (once accused of possessing child pornography), "My client's hair on top was underneath the hat but even if it isn't underneath the hat, it's not longer on top, and it's not dark. He's an older guy and he's got gray all over his head. Now, why were these witnesses, these potential witnesses, why were they not contacted, so that this could be a healthy, robust investigation? Write that down, Mr. Prosecutor, because there's no excuse for it. There's no excuse why those people, those men who matched the description were not contacted at all." RP 400.

IV. ARGUMENTS

Seventy years ago, Washington's Supreme Court announced one of the most fundamental tenants of criminal law:

It seems fairly obvious that the ultimate in a criminal trial should be the ascertainment of the truth; that is, *whether the accused is innocent and should be set free, or whether the accused is guilty and should be incarcerated for the protection of society. Again, it should not be a matter of luck or perhaps misadventure of one of the contestants during the course of a trial*; nor should the outcome depend substantially upon the skill or luck of the attorney representing one side of the controversy.

State v. Stacy, 43 Wn.2d 358, 367, 261 P.2d 400 (1953) (emphasis added).

Not only did the court err in several of its most crucial legal rulings and findings of fact on its way to finding Mr. Gonzalez guilty, the evidence presented at trial did not establish that Mr. Gonzalez was the perpetrator of this crime. In fact, in light of the evidence presented, the risk of that Mr. Gonzalez is truly innocent of this crime is far too great to let his conviction stand. This Court should reverse his single conviction in this case for child molestation because Mr. Gonzalez was not the man who committed this crime.

A. The Trial Court erred in entering finding of fact 1.7 and finding of fact 1.10.

Appellate Court reviews a trial court's findings of fact and conclusions of law for abuse of discretion. Washington courts have formulated the standard in different ways. In general, these standards

require examination of the existence substantial evidence in the case and whether a Court order is unreasonable or untenable.

Generally, this court should review the Trial Court's findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. *State v. Davis*, 152 Wn.2d 647, 680, 101 P.3d 1 (2004). "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." *Id.*

Similarly, it has been said that a trial court abuses its discretion when it issues an order that is manifestly unreasonable or based on untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Such a decision "is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.*

Under either formulation, the Trial Court's findings of fact and conclusions of law with regard to the child hearsay statements to Miriam Pinion and Ms. Gallardo were both "unsupported by substantial evidence" and also rested on facts "unsupported in the record." Mr. Gonzalez is challenging two of the Trial Court's written findings of fact that were crucial for the court's decision to find Mr. Gonzalez guilty of the one charged count. First, Mr. Gonzalez challenges the court's finding of fact

that the victim identified Mr. Gonzalez as the perpetrator of the molestation (Finding 1.7). Second, he challenges the Trial Court's factual finding that the "oral description" given to Ms. Gallardo and the victim's mother supports a finding of guilt (Finding 1.10).

1. The Trial Court erred in entering finding of fact 1.7 because the key findings of fact therein are not supported by substantial evidence in the record.

Mr. Gonzalez first contests Finding of fact 1.7, in which the court finds that "B.P. identified Mr. Gonzalez." That finding reads as follows:

B.P. identified the defendant through State's Exhibit 5. There was some question as to whether this was an appropriate exhibit. The Court would agree with the defendant and defense counsel that had this been done by law enforcement it probably would not have been admitted. Nevertheless it was done by a lay person in a way the Court finds was not leading, and did not infer what the answer should be. The Court accepts Miriam Pinon's testimony that she did not specifically point at the defendant here, but pointed at the picture and asked the child to identify the defendant, which B.P. did. There is also testimony that B.P. remembered the defendant from the trip on the boat. It is clear to the Court that the identification is acceptable and reliable. The Court accepts the testimony.

This finding contains numerous sub-findings by the court, almost all of which either (a) are not supported by substantial evidence in the record (b) actually disprove the basic finding that B.P. ever actually identified Mr. Gonzalez as the perpetrator.

First, 1.7 begins with the claim that “B.P. identified the defendant through State’s Exhibit 5.” This finding is not supported by substantial evidence because the record lacks evidence of sufficient quantity to persuade a fair-minded, rational person that B.P. identified Ramon Gonzalez from the photo of him and numerous relatives. At best, the record only establishes that B.P. identified the picture or event when her mother showed it to her.

Sometime after the incident occurred, Miriam attempted to have B.P. identify Mr. Gonzalez as the man who touched her by showing her a photograph taken the day of the barbeque. RP 57. The picture – taken the day of the barbeque – included Mr. Gonzalez and four other men who were at the party. RP 58. This was State’s Exhibit 5. RP 58. When asked to identify the picture, Miriam stated that she “believed” that it was the picture that she showed her daughter, but did not testify that she was certain it was the same picture. RP 58. If the court evaluates all the limited evidence *in its totality* regarding this supposed identification (including direct and cross examination), it should conclude that a rational, fair-minded person would not be convinced that B.P. identified Mr. Gonzalez from that picture.

Finding of fact 1.7 claims that although every party agreed that the identification procedure would certainly not be admissible if was

administered by a police officer, it was “nevertheless it was done by a lay person *in a way the Court finds was not leading, and did not infer what the answer should be.*” This finding lacks support by substantial evidence because neither B.P. nor her mother could remember the circumstances under which this supposed “identification” occurred. Furthermore, there is substantial evidence which indicates that this identification was, in fact, based upon “facts unsupported in the record.”

Miriam’s testimony clearly establishes that she *did not remember* the circumstances under which she presented the photo to B.P. or even whether or not B.P. actually identified Mr. Gonzalez in the picture. Based upon the testimony *as a whole*, it is impossible for a rational person to conclude that B.P. identified Mr. Gonzalez through this photo.

The court’s error in concluding that the presentment of Exhibit 5 was critical to Mr. Gonzalez’s case because Mr. Gonzalez was not claiming that the victim was lying (as the only evidence of ID was all child hearsay); instead, he was arguing that the victim’s mother first determined Mr. Gonzalez was the perpetrator, then some planted the name “Ramon Gonzalez” in B.P.’s head

Without pointing at Mr. Gonzalez specifically, Miriam first testified that she showed the picture to B.P and asked her (in some way), “well, look at this picture, who’s that?” R 61. However, immediately after

making that statement, Miriam, stated that she could have asked B.P. “Do you know who Ramon Gonzalez is?” RP 62. Miriam simply did not remember if B.P. had actually identified Mr. Gonzalez or if she had accidentally planted Mr. Gonzalez’s name in B.P.’s head before any identification actually occurred.

In fact, when questioned, Miriam admitted that she didn’t remember how she showed the picture to B.P., “It’s been a couple of years ago, I mean, I don’t—I don’t really remember. I remember showing her like *do you remember this?*” RP 59. Under these circumstances, the phrase, “Do you remember this?” could have meant just about anything to B.P. It could have meant, “Do you remember the barbeque?” Such an answer would not have established an identification of Mr. Gonzalez (or any of the men in that picture for that matter) as B.P.’s molester because asking such general questions would only establish that B.P. remembered the event pictured without more necessarily being asked – regardless of the circumstances. Because Miriam could not remember how B.P. supposedly identified Mr. Gonzalez, it was impossible for the Trial Court to fairly evaluate the circumstances surrounding the identification so that it could conclude that the identification “was not leading” and whether it was permissible.

Finding of fact 1.7 continues with the concession that when presenting the picture to B.P., Miriam “did not specifically point at the defendant here,” which is clearly supported by Miriam’s testimony, but then still claims that Miriam “pointed at the picture and asked the child to identify the defendant, which B.P. did.” However, as stated above, there was no conclusive evidence establishing the circumstances surrounding the alleged identification. Without being able to evaluate such circumstances, there is no way the Trial Court could have concluded that this supposed identification was reliable.

Even if B.P. had told her mother that she recognized the picture itself – i.e., in response to Miriam asking “Do you remember this (the picture)” – a fair-minded person could not reasonably conclude that such recognition implied that she recognized Mr. Gonzalez (rather than any one of the other brothers in the picture), let alone the fact that it completely fails to establish a connection between Mr. Gonzalez and the alleged crime. Even if Miriam did present the photograph in a way that asked “Is this Ramon Gonzalez?” – which is not supported by the record – there is no way to know, based upon the record, *which* person B.P. thought she was identifying in the picture.

Moreover, it becomes even more likely that B.P. did not identify Mr. Gonzalez given the fact that there is considerable similarity in

appearance between Mr. Gonzalez and three of the other family members in the picture. As identified by Mr. Gonzalez's sister, there were four other people in the photograph of Mr. Gonzalez in which B.P. allegedly identified Mr. Gonzalez. RP 172-73. Those four people included three of Mr. Gonzalez's brothers, all men who B.P. would consider "father's uncle," which is how B.P. referred to her molester. RP 172.

In fact, during closing argument, the State conceded that it would be extremely difficult to identify one of these individuals, "It's a photograph of four very similar looking individuals. They're all brothers. It's probably one of the better montages we'll ever see because when law enforcement is out there carrying montages, we're getting six unrelated individuals that just have similar characteristics. *Here we have four brothers that are very similar in all their characteristics.*" RP 394 (emphasis added).

In sum, unlike Finding of Fact 1.7 claims, the record shows that Miriam Pinion's testimony did not establish how or even *if* B.P. identified Mr. Gonzalez out of the picture of five men who were at the party. The finding is not supported by substantial evidence because B.P. did *not* identify Mr. Gonzalez through this photo. A rational, fair-minded person would not be convinced that B.P. identified Mr. Gonzalez as the perpetrator of the molestation.

2. The trial court erred in entering finding of fact 1.10 because the “oral description” that B.P. gave to Ms. Gallardo did not identify that man as Mr. Gonzalez but actually suggested that he was not the perpetrator.

Mr. Gonzalez next contests Finding of fact 1.10, which contained contradictory conclusions of fact and yet was still a “substantial item” upon which the court based its guilty finding. That states,

The Court did consider that B.P.'s physical description of the perpetrator is different than the defendant's actual physical appearance; however, based upon the oral description B.P. gave to her mother and Ms. Gallardo the Court finds that is *the substantial item* that the Court basis it's decision.

CP 48 (emphasis added). This finding is not supported by substantial evidence because “the oral description” that B.P. gave to Ms. Gallardo did not support the conclusion that Mr. Gonzalez was the perpetrator. These errors require reversal as any one of them likely swayed the court’s decision as they were *the substantial item* upon which the court based its decision.

While the facts surrounding the alleged disclosure to Ms. Gallardo are clear, the description of the perpetrator that B.P. gave to Ms. Gallardo was not. At some point after the incident, B.P. met with Ms. Gallardo, a victim’s advocate with the prosecutor’s office. B.P. did not know her molester by name, but she did describe to Ms. Gallardo what he looked like. RP 145-46. B.P. described the person who touched her as having

“lighter skin, short hair that was kind of dark, tall and thin, [and] a relative.” RP 146. There are several problems with this description that tend to show that B.P. did not in fact identify Mr. Gonzalez.

First, not only did B.P.’s description to Ms. Gallardo did fail to support the conclusion that B.P. ever identified Mr. Gonzalez as the perpetrator, B.P.’s child hearsay to Ms. Gallardo actually undercuts the conclusion that Mr. Gonzalez was the perpetrator. In particular, the description did not mention that Mr. Gonzalez was wearing a large cowboy hat, as several witnesses from the party confirmed Mr. Gonzalez was wearing. RP 290-91. It also did not include the eye glasses that Mr. Gonzalez must wear to see. RP 290. Moreover, as argued by counsel in closing, *Mr. Gonzalez was not tall or thin.*

Second, B.P.’s own statements during this interview actually tend to prove that Mr. Gonzalez was *not* the person who molested her. During the interview, for instance, B.P. told Ms. Gallardo that “she had never seen the man [who touched her] before the party.” RP 149. This conflicted directly with Miriam’s claims that she thought B.P. identified the perpetrator as Mr. Gonzalez, aka “the man from the boat.” Unfortunately for Mr. Gonzalez, despite these obvious inconsistencies, the Trial Court gave great weight to this description, finding that these descriptions were “*the* substantial item that the Court basis its decision.” CP 48.

Third, this description given to Ms. Gallardo was so general that it could not have reasonably eliminated a large number of other potential persons that were at this family barbeque. Even the State conceded during oral argument that it would be very difficult to tell these people apart: “Here we have four brothers that are very similar in all their characteristics.” RP 394 (emphasis added). This mistake in reasoning is crucial given the nature of Mr. Gonzalez’s defense that even though the molestation may have occurred, Mr. Gonzalez was not the perpetrator.

Fourth, when she met with Ms. Gallardo to discuss the molestation, B.P. could not identify the perpetrator by name. Likewise, when Miriam never testified that B.P. had ever identified Mr. Gonzalez by his name. Strangely, however, several years after the incident, B.P.’s memory seemingly improved from not knowing the name of her molester during the initial investigation with Ms. Gallardo, to all of the sudden recalling to the Trial Court that it was her uncle “Ramon,” but told the Trial Court that Uncle Ramon was not in the court room. This fact is important because it (1) negates any weight a reasonable person could give to the naming of Mr. Gonzalez as the perpetrator; and (2) it actually supports the defendant’s argument the B.P. was conditioned to identify Mr. Gonzalez as the perpetrator.

In an attempt to save this fatal defect in the Trial Court's reasoning, the State will likely argue that reviewing court should ignore this discrepancy because there is a distinction between an "oral" description and a "physical" description. Such a technical argument misses the point. Specifically, it ignores the fact that the "oral" description B.P. gave to Ms. Gallardo *includes* a physical description and that physical description actually undercuts the Trial Court's other factual findings and conclusions of law as stated above because it indicates that B.P. was molested by someone with a completely different physical description than Mr. Gonzalez at the time of the incident.

When the alleged "identification" that B.P. gave to Ms. Gallardo is analyzed from a common sense perspective, it baffling how the Trial Court could have concluded that such a description was *the* substantial item in making its decision. Thus, the Trial Court clearly erred by concluding that B.P. "orally described" the perpetrator to Ms. Gallardo in a way that established Mr. Gonzalez was the perpetrator.

The Trial Court erred by concluding that the description of the perpetrator that B.P. gave to Ms. Gallardo, over a year after the alleged event, did not adequately identify Mr. Gonzalez any more than it identified any number of the other adult men at the party because this description is not sufficient to "persuade a fair minded person" that B.P.

identified Mr. Gonzalez over any number of the other adult men at the barbeque. *See Avila*, 102 Wn. App. at 882 (stating standard for review of factual errors by court). Finding of fact 1.10 is more than simply “strained” due to poor grammar, as conceded by the State in its Motion on the Merits. It is factually inaccurate and a clear mistake by the Trial Court.

The Trial Court inexplicitly gives great weight to the “oral” description of the perpetrator that B.P. allegedly gave to her mother, Miriam, and Ms. Gallardo, finding that these descriptions were “*the* substantial item that the Court basis its decision.” CP 48 (emphasis added). However, the description B.P. gave to Ms. Gallardo in fact suggested that Mr. Gonzalez was **NOT** the perpetrator. The gravity of the Trial Court’s mistake here cannot be understated, as it clearly implies that the description B.P. gave to Ms. Gallardo was “the substantial item” upon which to find him guilty, when in fact, the opposite was true.

3. Without the deficient findings of fact, the State failed to present sufficient evidence that Mr. Gonzalez committed this crime.

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Because of the crucial errors in factual findings 1.7 and 1.10, Mr. Gonzalez is entitled to dismissal with prejudice

because the State failed to prove Mr. Gonzalez's guilty without those findings of fact.

Although a claim of insufficient evidence must admit the truth of the State's evidence, an appellate court is bound to make *reasonable* inferences based upon those facts when evaluating a claim of insufficient evidence. *State v. Salinas*, 119 Wn. 2d 119, 201, 829 P.2d 1068 (1992). If, then, the limited facts supplied at trial do not allow the trier of fact to reasonably infer that the defendant was the perpetrator of the crime, the Court must reverse. Such is the case here.

In this case, the victim could not identify Mr. Gonzalez in court as the man who molested her. RP 42. She was nine years old when she testified and was 6 years old when the alleged molestation occurred. B.P. identified this person by name as her "dad's uncle;" however, she also testified that she doesn't "know what he looks like." RP 26.

Because B.P. could not identify the man who molested her in court, the State relied almost exclusively on child hearsay statements allegedly made to B.P.'s mother Miriam and to Ms. Gallardo, the victim's advocate with whom B.P. discussed the molestation. After a careful review of the testimony of Miriam and Ms. Gallardo, the record shows that a person of ordinary judgment could not – based upon the facts

presented at trial – have concluded that Mr. Gonzalez was the perpetrator beyond a reasonable doubt.

Miriam claimed at trial that B.P. somehow identified the perpetrator as “the uncle from the boat.” RP 53-54. However, B.P.’s later statements to Ms. Gallardo and her in court testimony directly contradict a finding that B.P. ever identified the perpetrator as “the man from the boat,” because she consistently told people that she had never seen the perpetrator before or after the barbeque. RP 31; RP 43.

Even if one were to give great weight to B.P.’s statement that it was a “relative” or an “uncle,” a fair minded person could not rule out the numerous other relatives and uncles that were at this barbeque. Consistent with defense counsel’s closing argument, the evidence objectively shows that the crime could easily have been (and likely was) committed by someone other than Mr. Gonzalez.

First, Mr. Gonzalez presented ample evidence that he was outside for the vast majority of the party. Even if none of these witnesses could tell the Trial Court for sure that they were with him the entire time, the State presented no evidence that Mr. Gonzalez entered the home more than one time. More importantly, the evidence of the size of the party and the number of similar looking relatives at this party severely undercuts the Trial Court’s conclusion that B.P. ever identified Mr. Gonzalez.

Second, as defense counsel argued in closing, the most likely suspect was another one of B.P.'s uncles (whom were never investigated). Specifically, Juan Gonzalez, who had been charged at one point with possessing child pornography while he worked at the diocese was and should have been a prime suspect in the case. Yet, for reasons unknown, he was never investigated and did not even testify at trial.

Third, the vague description of the perpetrator actually fit the profile of another one of B.P.'s "uncles" better than Mr. Gonzalez. This explains why B.P. didn't identify Mr. Gonzalez in court, and why she told Ms. Gallardo and the Trial Court that she never saw the perpetrator before or after the incident. In fact, in closing argument, defense counsel argued that the description given by the child better fit Juan Gonzalez (previously accused of possessing child pornography),

"My client's hair on top was underneath the hat but even if it isn't underneath the hat, it's not longer on top, and it's not dark. He's an older guy and he's got gray all over his head. Now, why were these witnesses, these potential witnesses, why were they not contacted, so that this could be a healthy, robust investigation? Write that down, Mr. Prosecutor, because there's no excuse for it. There's no excuse why those people, those men who matched the description were not contacted at all."

RP 400. Without Findings of Fact 1.7 and 1.10—which are not supported by substantial evidence—the trial court's verdict was ultimately swayed in the wrong direction.

This court should reverse the Trial Court's guilty verdict because the record as a whole would not "convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated." *Hill*, 83 Wn.2d at 560. Because the findings of fact that are supported by substantial evidence fail to establish Mr. Gonzalez's guilt (and because remand for additional fact finding is not an option in this case), This Court should reverse and dismiss with prejudice.

4. Even if there was sufficient evidence without the deficient Findings of Fact, the Trial Court's deficient findings of fact deprived Mr. Gonzalez of his right to a fair trial.

Generally, "[i]n a jury trial, [a court of appeals does] not have a window into the jury's decision-making process, and therefore, [it has] no way to know if the jury relied on inadmissible evidence." *State v. Gower*, 172 Wn. App. 31, 40, 288 P.3d 665 (2012). Yet, in a bench trial, the parties and the court have "the great benefit of detailed findings of fact and conclusions of law that allow us to see precisely what evidence the trial court relied on to reach each of its verdicts." *Id.* In the absence of such findings of fact and conclusions of law, the typical remedy is remand for additional findings of fact by the Trial Court judge.

However, when the trial court judge is now retired, such a remedy is not an option because the judge is unavailable to retry, and any inaccurate findings of fact can severely hinder a defendant's ability to obtain a fair

trial – specifically the due process guarantees that a defendant be tried before a fair and impartial tribunal because the fact finding judge is unavailable. *State v. Richard*, 4 Wn. App. 415, 424-25, 482 P.2d 343 (1971). Such a guarantee must include the right to have his guilt be determined by facts submitted at trial and only *reasonable* inferences therefrom. In this case, the Trial Court erred in the most crucial findings and this court should reverse his conviction.

B. The Trial Court erred because B.P.’s hearsay statements were not reliable under the factors enumerated in *State v. Ryan*.

RCW 9A.44.120 governs the admissibility of a child victim’s out of court hearsay statements. ER 807. The statute provides:

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, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, *that the time, content, and circumstances of the statement provide sufficient indicia of reliability*; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120 (emphasis added); ER 807.

Hearsay statements of children under age 10, describing actual or attempted sexual contact, are admissible in juvenile adjudications if the Juvenile Court determines that the “time, content, and circumstances of the statement[s] provide sufficient indicia of reliability.” RCW 9A.44.120. We look to the circumstances surrounding the statement's making, rather than to later corroboration of the criminal act, to determine reliability.

State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984).

Although admissibility of child abuse hearsay is within the discretion of the Trial Court, the Court of Appeals should reverse the Trial Court's admission of child hearsay statements under RCW 9A.44.120 when it abuses its discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). The Trial Court abuses its discretion when it bases its decision on unreasonable or untenable grounds¹ or similarly when it bases its legal conclusions on findings that are not supported in the record.² In other words, the Trial Court's findings are made in error when (a) not supported by substantial evidence; or (b) the conclusions of law are either not supported by the findings of fact or are based upon findings of fact that are not supported in the record.

¹ *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)

² *Davis*, 152 Wn.2d 647, 680.

Since the child sexual abuse exception is not a “firmly rooted” hearsay exception, particularized guarantees of trustworthiness are required before the hearsay is admissible, thus requiring a *higher standard of reliability* as a substitute for the traditional hearsay exceptions. *State v. Slider*, 38 Wn. App. 698, 688 P.2d 538 (1984).

The child hearsay statement's reliability depends on the nine *Ryan* factors: (1) whether the child had an apparent motive to lie; (2) the child's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness; (6) whether the statements contained express assertions of past fact; (7) whether the child's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the child's recollection being faulty; and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. *State v. Woods*, 154 Wn. 2d 613, 114 P.3d 1174 (2005).

No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors. *State v. Young*, 62 Wn. App. 895, 902-03, 802 P.2d 829 (1991). But the factors must be “substantially met before a statement is demonstrated to be reliable.” *State v. Griffith*, 45

Wn. App 728, 738-39, 727 P.2d 247 (1986). Additionally, RCW 9A.44.120(1) clearly requires the Trial Court to review "the time, content, and circumstances of the statement [for] sufficient indicia of reliability". Thus, "the plain language of the statute indicates that the individual statements are the proper focus of the inquiry." *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990)

Here, the most crucial evidence for the State's case in chief was child hearsay. As the court noted, B.P.'s statements to her mother and Ms. Gallardo were "*the* substantial item that the Court basis its decision." CP 48 (emphasis added). The Trial Court found that their testimony was admissible child hearsay. CP 49. However, B.P.'s statements to her mother and Ms. Gallardo lacked the assurances of reliability required by *State v. Ryan*; based upon an unbiased "overall evaluation of the factors," the factors listed in that case were not "substantially met." *See Young*, 62 Wn. App. At 902-03. By admitting the hearsay statements of declarant B.P. through her mother, Miriam, and through Ms. Gallardo, the Trial Court abused its discretion because those statements were not "reliable" as required by RCW 9A.44.120.

- 1. B.P.'s hearsay statements to her mother, Miriam, were not reliable.**

According to the Miriam's testimony, B.P. never identified Mr. Gonzalez by name. However, Miriam testified that B.P. told her that it was an "uncle", RP 53, and that it was the one from the boat. RP 69. These statements were not sufficiently reliable because they fail to meet several of the *Ryan* factors.

First, it is unlikely that B.P. was motivated to lie, especially because the record suggests she could not specifically identify her molester at any point prior to the trial. However, throughout the trial, her mother's bias against the family was certainly an issue. At the very least, Miriam's own testimony made it quite clear that she had predetermined that Mr. Gonzalez must have been the person who molested B.P. when she stated on the record that, "I knew it was Ramon from the boat. I just needed something else. I don't know why because I mean, I knew it was Ramon Gonzalez, so I said, hey, do you remember this?" RP 59-60. Once Miriam concluded that he was the most likely person to have done this (based solely on his record), Miriam tried to verify her suspicions by getting B.P. to identify him, through words and through pictures. RP 59-60. Such a bias by itself casts doubt upon the circumstances in which B.P. allegedly identified "the uncle from the boat."

Second, there was no evidence that suggested that B.P. had a poor character. This factor does not negate the argument that these statements

were not reliable, however, because the concern in this particular case – unlike most child rape and molestation cases – was never about the child’s character. Instead the mother’s character, or at the very least, Miriam’s thoroughness in assessing B.P.’s “identification” of the perpetrator, was the central issue. This factor, then, does not prove helpful in the analysis of the reliability of each statement in this case.

Third, Miriam was the only person who allegedly heard these initial statements the day after the alleged molestation. This factor strongly weighs against reliability. Although B.P. may have repeated that it was her “uncle” to other people, it is clear that B.P. repeated several facts to others for which she had no personal knowledge. For instance, when she testified at trial, B.P. stated that her “uncle Ramon” was the one who had touched her at the barbeque. However, Miriam testified that at the time of the incident, B.P. did not know the name of the uncle. Therefore, the fact that Miriam was the only person who heard the statement identifying the man as the “uncle from the boat,” strongly supports exclusion of the evidence based upon unreliability.

Fourth, because the record does not reflect how B.P. disclosed the specific facts to her mother, B.P.’s alleged statements to her mother cannot weigh in favor of admission. A child’s answers are spontaneous so long as the questions are not leading or suggestive. *Young*, 60 Wn. App. At 95.

Here, it is unclear from the record how B.P. identified the perpetrator as “the man from the boat,” and Miraim’s testimony made it quite clear that she could not remember many details about the identification. In fact, her predetermination that Mr. Gonzalez was the perpetrator made it more likely that Miriam identified Mr. Gonzalez when B.P. did not, or at the very least her questioning methods to B.P. were likely highly suggestive.

Fifth, although the relationship between B.P. and her mother does not weigh in favor of exclusion of the statements to Miriam (factors four and five), the child’s lack of personal knowledge was clearly established through cross examination (factor seven). When asked to identify the man who touched her, B.P. could not identify the perpetrator in court, but said that it was her “dad’s uncle;” however, she also testified that she doesn’t “know what he looks like.” RP 26. Further, since the day of the incident, B.P. testified that she did not remember ever seeing the person who touched her again, RP 31, when she did in fact, see Mr. Gonzalez again at a later family gathering. Likewise, B.P. did not remember ever seeing the person who touched her before the incident, RP 31, RP 43, which conflicts directly with her mother’s claim that B.P. identified the perpetrator as the “man from the boat.” Finally, when she testified, B.P. had no memory of ever identifying Mr. Gonzalez to her mother, by naming him, or by picking him out in a photo. RP 31.

Sixth, the chance of B.P.'s recollection being faulty was extremely high, as established by her the inconsistencies between her trial testimony, discussed above, and the alleged statements made to her mother. B.P.'s confusion, under the circumstances, is easily explained, given her young age at the time of the incident (six) and the circumstances surrounding the alleged molestation. The un-refuted testimony established that these events occurred at a large family party, in which there were numerous family members who B.P. had never met before that party; moreover, being all relatives, they all looked very similar, especially to a six year old child. In addition, no evidence was given to the court regarding the circumstances under which B.P. allegedly identified the perpetrator as "the man from the boat."

2. B.P.'s hearsay statements to Ms. Gallardo were not reliable.

At some point after the incident, B.P. met with Ms. Gallardo, a victim's advocate with the prosecutor's office. B.P. did not know her molester by name, but she did describe to Ms. Gallardo what he looked like. RP 145-46. B.P. described the person who touched her as having "lighter skin, short hair that was kind of dark, tall and thin, [and] a relative." RP 146. During the interview with B.P., she told Ms. Gallardo that "she had never seen the man [who touched her] before the party." RP

149. This conflicted directly with B.P.'s statement before that the man was "the one from the boat." Like the statements B.P. allegedly made to her mother, the statements B.P. made to Ms. Gallardo – especially with regard to the description of the perpetrator – were not sufficiently reliable. These facts are important because they weigh against both reliability and admission.

First, Ms. Gallardo was the only witness who testified that B.P. had ever given a physical description of the perpetrator. In fact, although Miriam testified that B.P. disclosed the molestation to her the day after it happened, B.P. never gave a physical description of the person to her. This factor thus weighs against reliability.

Second, B.P. gave the description of the perpetrator to Ms. Gallardo in a professional setting at the prosecutor's office. Her responses were given to directed questions in an investigatory setting. Thus, the statements were not spontaneous. This factor also weighs against admission.

Third, the child's trustworthiness with regard to these statements is not crucial, as the defense never presented the theory that the child was actually lying. Believably, the argument was that the child was either conditioned by her mother—but not necessarily purposefully—that Ramon Gonzalez was the perpetrator. The child's trustworthiness is of little

importance in this case when determining the reliability of these hearsay statements because B.P.'s trustworthiness was not the central issue regarding whether these statements should be admitted and considered by the fact finder.

Fourth, although the description of the perpetrator B.P. gave to Ms. Gallardo contained expressions of fact (i.e. skin and hair color), these descriptions were general and non-specific. Even the statement that identified the perpetrator as "a relative" was not specific under the circumstances because the alleged molestation occurred at a family barbeque with upwards of 50 people, most of whom were likely relatives and over half of whom were adults. RP 164.

Fifth, as argued above, B.P.'s lack of personal knowledge was clearly established through both direct and cross examination (factor seven) The chance of B.P.'s recollection of the identity of the perpetrator being faulty (at any point) was far too high for this evidence to be admitted. During the interview of with B.P., B.P. told Ms. Gallardo that "she had never seen the man [who touched her] before the party," RP 149, which clerly contracted B.P.'s alleged statement that the man was "the one from the boat."

- 3. The court should reverse and dismiss with prejudice because without the child hearsay, the State failed to present sufficient evidence that Mr. Gonzalez was the perpetrator.**

Both of B.P.'s alleged statements to her mother and to Ms. Gallardo are inadmissible hearsay. B.P.'s alleged hearsay statements – which lack any corroborative evidence – do not meet the child hearsay statute's *heightened standard of reliability* for hearsay statements. *See Slider*, 38 Wn. App. at 698. Because this was a bench trial, the Trial Court reserved ruling on determining the admissibility of these statements until the end of trial. *See* CP 48-50 (Conclusions of Law). The court erred in admitting these statements.

The defense made a halftime motion to dismiss based upon insufficient evidence to prove that Mr. Gonzalez was the perpetrator of this crime. RP 157-162. At that point, if the Trial Court made the proper ruling and excluded the hearsay testimony given by Miriam and Ms. Gallardo, it would have had to grant the defendant's motion to dismiss the charge because there was simply not enough evidence in the record to convict Mr. Gonzalez because B.P. (the only witness to the crime) could not identify the perpetrator.

This Court, therefore, should reverse the guilty verdict and dismiss the charge with prejudice because the State failed to present sufficient evidence to identify anyone as the perpetrator of the molestation. *See State v. Smith*, 148 Wn. 2d 122, 59 P.3d 74 (2002) (remedy for admission of

child hearsay statements that were integral for guilty verdict required reversal and vacation of the conviction).

C. By proposing the findings of fact and conclusions of law that were adopted by the Trial Court, the State has set up this error on appeal and cannot now argue that the ambiguous findings of fact and conclusions of law should be interpreted against Mr. Gonzalez.

Seventy years ago, Washington's Supreme Court announced a basic tenant of a criminal trial: criminal trials are not intended to be "a game of chance" in which one party "sets up a "technical" error at trial and then later complains about it upon appeal." *State v. Stacy*, 43 Wn.2d 358, 367-68, 261 P.2d 400 405 (1953) (emphasis added). In Mr. Gonzalez's trial, the fact finding process did not promote a fair determination of Mr. Gonzalez's guilt or innocence and the technical errors described herein were advanced by the State – not the defense.

As noted above, the findings of fact (which were drafted by the State) contain critical errors that throw the Trial Court's verdict into serious question. Moreover, the conclusions of law endorsed by both the State and the Trial Court are also incomplete, did not accurately apply the law (especially with regard to child hearsay statements), and were erroneously based upon the poorly worded findings that were not based upon the evidence actually submitted at trial. These errors in the Findings of Fact and Conclusions of Law were all advanced by the State; yet,

ironically now, the State will surely claim the Mr. Gonzalez waived his right to object to them.

This court should reject this argument because the State should not be allowed to set up its own error (in drafting the Findings of Fact and Conclusions of Law) and then expect the ambiguity to be interpreted in its favor. Such an argument would contravene Washington's established jurisprudence with regard to the invited error doctrine that the State cited in its motion on the merits.

- 1. Mr. Gonzalez's trial counsel did not "waive" his right to object to the child hearsay because defense counsel never stipulated to admitting the child hearsay statements *as substantive evidence*; rather, counsel informed the court that he wanted the statements "for impeachment purposes."**

It is anticipated that the State will argue that Mr. Gonzalez's trial counsel waived his right to object to the admissibility of the child hearsay statements because defense counsel "stipulated" to the admission of such testimony. Such an argument should be rejected Mr. Gonzalez did not stipulate to blanket admissibility of the child hearsay statements, nor did he in any other way waive his right to object to the introduction of the child hearsay on appeal, Mr. Gonzalez's only stipulation was to use the statements to impeach the State's only witness.

If trial counsel explicitly and clearly stipulates to the admissibility of child hearsay, it may under some circumstances, preclude consideration of their admissibility on appeal. *State v. Clark*, 91 Wn. App. 69, 75-76, 954 P.2d 956 (1998), *aff'd*, 139 Wn.2d 152, 985 P.2d 377 (1999). Such a stipulation did not occur here. Defense counsel told the court that he wanted the statements for impeachment purposes, but he never stipulated in any way to their admission for substantive reasons. Evidence that comes in for “impeachment” is not hearsay because it is not being offered for the truth of the matter asserted therein but instead to impeach the witness’s prior testimony and/or credibility. *See State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008).

There would have been absolutely no benefit to Mr. Gonzalez stipulating to the admissibility of child hearsay in this case. In any event, had he stipulated to such testimony, any competent counsel would have objected at some point throughout the trial when it was clear that the alleged child hearsay statements that supposedly “identified” Mr. Gonzalez were in almost no way reliable under the *Ryan* factors. Mr. Gonzalez was represented by a trial attorney with over 30 years of trial experience and such an error is unlikely, especially in a bench trial, when such objections can typically be raised with little to no prejudice to the opposing party.

- 2. The invited error doctrine does not prevent Mr. Gonzalez to objecting to the admission of the child hearsay because the State, not the defendant, requested that the Trial Court issue a special finding that the child hearsay statements were admissible.**

In its Motion on the Merits, the State argued that Mr. Gonzalez should be precluded from raising the issue of child hearsay on appeal under the “invited error doctrine,” which “prohibits a party from *setting up an error* at trial and then complaining of it on appeal.” *State v. Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000) (court’s emphasis).

The state’s argument that Mr. Gonzalez somehow waived this argument is merely a technical argument that ignores two important facts which must not be again overlooked. First, it ignores the fact that the State – not the defendant – requested the finding. Because the defense did not request the finding, the “invited error doctrine” does not apply. Second, it ignores the purpose of the waiver rules which are aimed at preventing one party from “setting up” a technical error to obtain a new trial in case the trial tactics fail and the verdict is not favorable.

Although it is true that the invited error doctrine can, under some circumstances, prevent a defendant from assigning error to a trial court ruling when he did not specifically object to it at trial, this rule is not without its limits, and does not apply to here. An important aspect of the invited error doctrine is that it is inapplicable when the error is caused by

actions of the Court rather than the defendant. *Id.* at 724. Similarly, the doctrine does not typically apply when the State itself affirmatively sets up the error itself. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (when the State proposes a jury instruction that requires it to prove venue beyond a reasonable doubt, venue thus becomes the law of the case and the defendant does not waive an objection to failure of proof of venue).

In this case, the invited error doctrine does not prevent Mr. Gonzalez from raising the issue of child hearsay because *the State* affirmatively requested a ruling by the court regarding the admissibility of the child hearsay, “Then the only other special finding would be to child hearsay relying upon Ms. Gallardo’s forensic interview the Court finds that that is admissible as child hearsay?” RP 424. The court responded, “Yes.” RP 424. The court’s written findings of fact and conclusions of law explicitly address the issue which the State argues Mr. Gonzalez somehow waived:

The court concludes that the testimonies of Miriam Pinon and Amy Gallardo are admissible as child hearsay. B.P. was six to eight when she made her disclosures. B.P. testified, and the time, content, and circumstances of her statements to her mother, Miriam, and Amy Gallardo provide sufficient indicia of reliability as outlined in *State v. Ryan*, 103 Wn. 2d 165, 175-76, 691 P.2d 197 (1984).

CP at 49.

The Trial Court evaluated the admissibility of the child hearsay statements *at the request of the State* and then drafted and submitted the findings of fact to the court as currently drafted (errors and all). Had the State honestly believed that the defendant had stipulated to the admissibility of the child hearsay statements, the proper course of action would have been a written or explicit verbal “stipulation” to such an effect, rather than requesting written findings by the Trial Court.

- 3. Like the court places the burden on the State to submit jury instruction that accurately reflect the law, the court here should also require it to submit findings of fact and conclusions of law that accurately reflect the law and the particular facts of the case.**

It is likely that the State will advance an argument similar to the one it advanced in *State v. Hickman* to claim that the defendant in that case waived his objection to venue by failing to object to it – even though *the State* proposed the jury instruction that required it to prove venue beyond a reasonable doubt. *See State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). However, in that case, the Court rejected the similar argument as This Court should also do because the State failed to prove venue beyond a reasonable doubt, the Court dismissed the case based upon insufficient evidence under the “law of the case doctrine.”

Here, although the “law of the case doctrine” is not technically applicable to the facts of this case, the reasoning behind it and *Hickman* are directly analogous because both prevent the prosecutor from submitting an appealable mistake to the court for entry into judgment, and then subsequently claiming waiver by the defendant. In *Hickman*, the court noted the clear benefit from holding the State responsible for the jury instructions that it proposes for the jury because such responsibility “benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury.” *Id.* at 105.

Moreover, the mistake here, like that in *Hickman* is completely avoidable by the State and does not create any unfair burden on the State in order to comply with the rule. With the problem in *Hickman*, the solution to avoid misapplication of the law is simple for the State: submit jury instructions which accurately reflect the law (or else be required to prove the additional burden). Likewise, here, the State could have avoided (or at least tried to avoid) the factual issues here had it more carefully drafted the proposed findings of fact and conclusions of law.

4. Under the Rule of Lenity, the findings of fact and conclusions of law must be interpreted against the State, the party who drafted them.

The rule of lenity requires a court to interpret an ambiguous criminal statute in favor of the defendant. In the context of an ambiguous plea agreement – a document, the findings of fact in question here that was drafted entirely by the State – the rule of lenity supports construing ambiguous plea agreements against the State. *See also United States v. De La Fuente*, 8 F.3d 1333, 1338 (9th Cir. 1993) (The Government "must bear responsibility for any lack of clarity" in a defendant's plea agreement). If the State is to be held responsible for any lack of clarity in a plea agreement – which is almost invariably drafted by the State, so should it be held responsible for any lack of clarity or poor word choice when it drafts the court's findings of fact and conclusions of law.

Similar to the plea bargaining context, and very on point here, the rule of lenity also applies to when a verdict form is ambiguous and the State has failed to request a jury instruction as to which specific acts constituted a particular element of a crime. *State v. DeRyke*, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002). Under such circumstances, the principle of lenity requires the court to interpret that verdict in the defendant's favor. *Id.* There is no reason to distinguish *DeRyke* from the facts of this case because in both instances, the "ambiguity" was essentially created by the State and it could have easily been "eliminated had the State proposed [a more well-drafted jury] instruction.

Like in the context of the ambiguous plea agreement or ambiguous jury verdict, this court should use the rule of lenity to interpret the court's ambiguous findings of fact and conclusions of law in favor of Mr. Gonzalez because remand is not an option in this case and an "appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Id.*

D. If the Court holds that Mr. Gonzalez's counsel stipulated to the admissibility of the child hearsay at trial, then his counsel was ineffective for doing so when the evidence was certainly insufficient to convict him without the child hearsay.

Assuming arguendo that This Court finds that Mr. Gonzalez's defense counsel stipulated to the admissibility of the child hearsay statements or otherwise waived his right to object to the admission of such testimony, his counsel was ineffective for doing so and such error was reversible as it almost certainly prejudiced Mr. Gonzalez as shown by the findings of fact and conclusions of law.

A claim of ineffective assistance of counsel for failing to object to the admission of these hearsay statements would very likely succeed. To establish ineffective assistance of counsel, Mr. Gonzalez must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first

element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. The second test is met by showing a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *State v. Hendrickson*, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996). In general, performance is deficient when it falls below an objective standard of reasonableness, but not when it is undertaken for legitimate reasons of trial strategy or tactics. *Horton*, 116 Wn. App. 909. Here, failure to object to child hearsay was deficient and incredibly prejudicial, requiring reversal.

First, the failure to object to the admission of the child hearsay statements as substantive evidence served no legitimate purpose because (1) counsel only wanted the evidence admitted as impeachment evidence against the State's witness – not as established facts; and (2) had the Trial Court excluded the evidence, the charges would have been dismissed based upon insufficient evidence.

As stated above, counsel only wanted these statements admitted *for impeachment purposes*. Counsel should have objected to such evidence *as hearsay* which would have made the evidence inadmissible as substantive evidence. Had the court granted that motion, he still could have used the witnesses' prior statements as impeachment evidence if

appropriate. There was, therefore, no legitimate trial reason to stipulate to the admission of the child hearsay as substantive evidence.

In addition, the case against Mr. Gonzalez hinged entirely on the hearsay testimony of these two witnesses. Had the Trial Court excluded it, the case would have been dismissed. It is unlikely that the State will dispute this contention. No reasonable trial attorney would stipulate to such damning evidence when it was clear that its exclusion would have resulted in dismissal of the case.

Second, had counsel objected and the court applied the child hearsay rule correctly, the Trial Court should have excluded the evidence as not reliable. *See Argument Regarding Child Hearsay Statements and the Ryan Factors*. If the Trial Court had properly considered the admissibility of the child hearsay in accordance with the statute and the *Ryan* factors, the court would dismissed the single charge against Mr. Gonzalez because there would not have been sufficient evidence to identify Mr. Gonzalez as the perpetrator of the crime. The only evidence that identified Mr. Gonzalez as the perpetrator was a vague reference from the victim's mother about the perpetrator being B.P.'s "uncle" at a party where there were numerous "uncles."

E. Regardless of whether an objection was made, the introduction of the child hearsay in this case violated Mr. Gonzalez's right to confrontation under the "reliability" prong.

It is well established that every defendant has the right to confront witnesses against him (guaranteed by the sixth amendment to the United States Constitution and article 1, section 22 (amendment 10) of the Washington State Constitution). *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *State v. Carter*, 23 Wn. App. 297, 299, 596 P.2d 1354 (1979). The United States Supreme Court recently ruled on the admissibility of hearsay statements with respect to the confrontation clause:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

It cannot be disputed that the child sexual abuse exception is not a "firmly rooted" hearsay exception. "Particularized guarantees of trustworthiness" are required before hearsay statements are admissible; this standard requires a higher standard of reliability as a substitute for the traditional hearsay exceptions. *See State v Slider*, 38 Wn. App. 689, 698, 688 P.2d 538 (1984).

The fact that the act requires "corroborative evidence of the act" does not fulfill this higher standard. Corroboration of the sexual abuse alone "does not lend particular trustworthiness to the child's statement regarding the identity of the abuser". Nevertheless, this corroborative evidence may certainly be considered in the Trial Court's balancing process, as is required by *Ryan*.

To fulfill the judicial interpretations of a defendant's confrontation rights requiring "particularized guarantees of trustworthiness," our Legislature mandated that the Trial Court evaluate "in a hearing conducted outside the presence of the jury . . . the time, content, and circumstances" surrounding the child's statement. In the constitutional context, such "particularized guarantees of trustworthiness" include such additional facts as physical evidence of the abuse. *See State v Slider*, 38 Wn. App. 689 698, 688 P.2d 538 (1984).

On Mr. Gonzalez's trial, no such guarantees were produced at trial, because none existed. The State produced no physical evidence of the alleged abuse, although it is unlikely that given the nature of the charges, any physical abuse would have been evident. Mr. Gonzalez did not confess; in fact, as noted above, Mr. Gonzalez consistently maintained his innocence throughout the entire proceeding and even at sentencing when it would have certainly benefited him to admit to the crime – had he actually

committed it. Moreover, as the above analysis from *Ryan* shows, the admitted statements lacked the most basic assurances of reliability and should not have been admitted at trial.

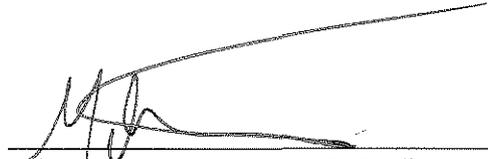
F. Any combination of the above errors denied Mr. Gonzalez his right to a fair trial.

Even if any single error standing alone did not entitle Mr. Gonzalez to relief, the Trial Court committed reversible error because although the errors above amounted to several trial errors which may not be sufficient to justify reversal, when combined they may deny a defendant a fair trial. *See, e.g., State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Whalon*, 1 Wn. App. 785, 464 P.2d 730 (1970).

V. CONCLUSION

For the reasons stated above, Mr. Gonzalez respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 17th day of April, 2012.



Mitch Harrison, ESQ., WSBA# 43040
Attorney for Appellant

PROOF OF SERVICE

On April 25, 2013, I filed the attached Appellant's Second Amended Brief and proof of service by personally delivering it with the Court of Appeals Division I, location at 600 University St, Seattle, WA 98101.

Dated this 25th day of April, 2013.



David Savage, Law Clerk
101 Warren Avenue North
Seattle, Washington 98109
Tel (253) 335 - 2965
Fax (888) 598 - 1715

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On this same date, I deposited into the United States Postal service a copy of a copy of this Appellant's Second Amended Brief and proof of service to the Cowlitz County Prosecuting Attorney's Office, located at 312 SW 1st Ave, Kelso, WA 98626. The appellant in this case, Ms. Malone DOC#359309, was sent a copy of the attached document and proof of service via the United States Postal Service at Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

Dated this 25th day of April, 2013.



Mitch Harrison, Attorney
101 Warren Avenue North
Seattle, Washington 98109
Tel (253) 335 - 2965
Fax (888) 598 - 1715

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MAY 06 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

BY _____
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AMENDED PROOF OF SERVICE

On April 25, 2013, I filed the attached Appellant's Second Amended Brief and proof of service by personally delivering it with the Court of Appeals Division I, location at 600 University St, Seattle, WA 98101. On the same day, I emailed a copy of this Appellant's Opening Brief and proof of service to the appointed attorney of the State, David Trefry, via email at **TrefryLaw@WeGoWireless.com**. There is an agreement between our firm and Mr. Trefry that service via email is acceptable. The defendant in this case, Mr. Ramon Gonzalez, was sent a copy of the attached document and proof of service via the United States Postal Service at DOC#767724, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001-1899.

Dated this 25th day of April, 2013.



Mitch Harrison, Attorney
101 Warren Avenue North
Seattle, Washington 98109
Tel (253) 335 - 2965
Fax (888) 598 - 1715