COA No. 30707-7

FILED

MAY 06, 2013

Court of Appeals
Division III
State of Washington

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CASMER VOLK, Appellant.

BRIEF OF RESPONDENT

Kittitas County Prosecutor's Office
205 W. 5th Street, Suite 213
Ellensburg, Washington 98926
509-962-7520

TABLE OF CONTENTS

STATEMENT OF CASE 3-15

ANSWERS TO ASSIGNMENTS OF ERROR RAISED BY APPELLANT'S COUNSEL AND APPELLANT 16-17

ARGUMENT (including statement of additional grounds) 18-45

FIRST ASSIGNMENT OF ERROR 18-27

SECOND ASSIGNMENT OF ERROR.....27-31

THIRD ASSIGNMENT OF ERROR.....31-33

FOURTH ASSIGNMENT OF ERROR..... 33-34

FIFTH ASSIGNMENT OF ERROR.....34-36

SIXTH ASSIGNMENT OF ERROR.....36-39

SEVENTH ASSIGNMENT OF ERROR.....39-40

EIGHTH ASSIGNMENT OF ERROR.....41-44

NINTH ASSIGNMENT OF ERROR.....44-45

CONCLUSION 45

STATEMENT OF THE CASE

On April 28, 2001, Travis and Selenia Hamblin started a 4-day vacation to the Oregon Coast without their children: three boys including LH, age 4. The Hamblins decided to leave two of their children with family and LH with Selenia's childhood friend: Diedre Cleary, who ran a daycare operation which LH frequently attended. 2 RP 120-147.

Ms. Cleary and her three children, from prior relationships, lived with her then boyfriend, the appellant, Casmer Volk, a three-time convicted registered sex offender from North Dakota. Id.

The Hamblins left LH in the care of Ms. Cleary because LH liked going to daycare, and the parents reasoned that it would make it easier on everybody if one person did not care for all three children. LH also liked the appellant, known to LH as "Cas." Id.

On April 29, 2013, the appellant and his girlfriend took LH and Ms. Cleary's three children shopping in Yakima. The following day, Ms. Cleary took LH to the emergency room at Kittitas Valley Community Hospital for an ear infection. The treating physician, Dr. Sandra Horning, prescribed augmentin – a common remedy to treat the same. Ms. Cleary called Ms. Hamblin to advise her of the situation. There were no concerns. 2 RP 463-509. 533.

On May 1, 2011, the Hamblins return from their coastal visit. First

they picked-up their two children. Then they picked-up LH at the appellant's residence. Both the appellant and Ms. Cleary and her children were present. The couples spoke briefly, the Hamblins thanked the appellant and Ms. Cleary for taking care of LH, and took their son home. The "bed-time routine" commenced: eating, bathing, and stories. 2 RP 120-147.

LH's father worked at the City of Renton and had to get up at 0300 in order to make it to work on-time. Ms. Hamblin stayed home with the children, and the couple had one vehicle. Therefore, Mr. Hamblin offered to put the children to bed while Ms. Hamblin went to bed early. 2 RP 61-68.

The next morning, May 2, 2011, Ms. Hamblin woke-up. Mr. Hamblin was already gone. Ms. Hamblin first turned to her eldest son to get him off to school. She then tended to her youngest, age 2, while LH played. 2 RP 120-147.

As the morning progressed, Ms. Hamblin noticed that LH was complaining about his butt. She thought he might have a diaper rash. But then noticed him rocking, with his arms crossed, and crying "my butt hurts." Still not thinking that it was anything more than a diaper rash, Ms. Hamblin told LH to pull down his pants. She observed that his anus was bright red and decided to administer diaper ointment. However, the diaper

ointment was in her youngest son's room where he was sleeping, by this point. Therefore, in order to avoid waking him, she decided to use Vaseline. 2 RP 120-147.

As she attempted to administer the Vaseline, LH "freak(ed) out," screaming that his "butt hurts." Ms. Hamblin asked: "Why?" prompting LH to respond: "Cas, he put macaroni, a lot of cream, and his pee pee in my butt." Ms. Hamblin reeled back in shock. Without a vehicle, she thought about to do and then remembered that the appellant had already arranged to come over to her house to return LH's car seat and pick-up some items that Ms. Hamblin had borrowed from Ms. Cleary. Id.

Therefore, Ms. Hamblin decided to stay put. She did not want to appear erratic nor call 911 or confront the appellant. She was very concerned about making a scurrilous accusation. Id.

At 1:30 p.m., the appellant knocked at the door. Ms. Hamblin opened the door and acted as if nothing had happened. LH walked up to the door, next to his mom, and stared at the appellant The appellant reminded Ms. Hamblin that he was also there to pick-up the items Ms. Hamblin had borrowed from Ms. Cleary. Ms. Hamblin walked around the corner to retrieve the items when she heard LH state: "Cas you hurt me." Her worst suspicions were confirmed. Id.

As soon as the appellant left, Ms. Hamblin called her husband to

tell him what happened. They decided she needed to go to the hospital. She found a neighbor who took her and LH and her youngest son to KVCH. Once at KVCH, Ms. Hamblin reported what had happened that morning. Ms. Hamblin knew that the hospital would call law enforcement. 2 RP 120-147.

Kittitas County Sheriff's Detective Darren Higashiyama responded. Once at the hospital, the detective gathered basic background information and approached LH who had yet to be seen by medical staff. Detective Higashiyama bent down on one knee and introduced himself to LH. Unprompted, LH responded: "I have something to tell you." When the detective asked what, LH responded: "Cas he hurt me, he put macaroni, lotion and his pee pee in my butt." 2 RP 337-348.

KVCH Registered Nurse (RN) and Sexual Assault Nursing Examiner (SANE) Megan Day then brought LH and his mother into a room where the following conversation ensued:

> **SANE**: "How are you doing today?"
>
> **LH:** "My butt hurts . . . He – that guy named Cas – he put macaroni in my butt. And lots of cream. And he put his pee pee in my butt. And it hurt."
>
> **SANE:** "I'm sorry that happened, Lane. It's not okay for him to do that. Does anywhere else on your body hurt, Lane?"
>
> **LH:** "No, just my butt."

RN Day observed that LH's anus was red and tender to the touch. She reported that he cried out in pain. She also observed dry blood. In her report, RN Day noted:

> Lane is developmentally appropriate. He flits about from one task to the next & is easily distracted or engaged. He is forthcoming with information about how he's feeling, what happened to him. He repeats a # of times w/o being prompted that "his butt hurts." During the exam, he does begin to whimper, grabs @ his bottom and starts to cry (again this is unprompted). When the exam is nearly over, I ask Lane (using the pain scale) to "point to the face that looks like how he's feeling in his bum." He picks the crying face representing 10/10, then says, "well maybe here" and points to the orange face indicating severe pain. 2 RP 153-193.

Following the hospital visit, LH is interviewed by Ellensburg Police Sergeant Detective Brett Koss. The interview is recorded. Again, in response to general questions, LH repeats that the appellant "put his pee pee in my butt." When asked if the appellant said anything to him, LH responded: "He didn't say he was sorry." 2 RP 216-276.

A few days later, Child Forensic Interviewer Lisa Larrabee conducted a second recorded interview. In that interview, LH, once again, responding to open-ended questions, reiterated that "Cas hurt me . . . he putt his pee pee in my butt." In addition, he gyrated his hips in a circular motion to show what the appellant was doing with his hips. He also bent over at the waist to show the position he was in. 2 RP 373-386.

In the interim, law enforcement began searching for the appellant.

On may 6, 2011, Deputy Nate Foster arrested the appellant after incidentally stopping him for speeding and subsequently recognizing him. Once at the jail, the appellant made a telephone call, in which Deputy Foster overheard the appellant state: "We have to be on the same page. We have to be on the same page or you could lose your kids. We have to be on the same page." 2 RP 450.

On May 11, 2011, the State of Washington charged the defendant with one count of Rape of a Child in the First Degree and alleged an aggravating circumstance that, during the commission of the offense, the appellant knew LH was vulnerable and incapable of resistance.

The case proceeded to trial. The jury was unable to reach a decision. The State of Washington decided to retry the case.

At a pre-trial hearing on January 6, 2012, following the first mistrial, the court inquired how the parties intended to proceed on the child hearsay in the second trial.

The State of Washington summarized: "Probably the biggest issue certainly is that this case . . . is premised upon child hearsay under 9A.44. We are seeking to admit the child's out of court statements under 9A.44 to the mother, a sexual assault nursing examiner . . . multiple police officers and child forensic interviews. There were two recorded interviews." 1 RP 1-24.

The State of Washington explained that it intended to call LH to testify, presuming he was found competent, thereby mitigating any Sixth Amendment confrontation issue.

The appellant, through counsel, responded: "We reached an agreement that all the child hearsay statement(s) - - "we" meaning the state and the defendant, all the statements the child made to others alleging this act would be admitted on condition that the child testify. So the state believes we are in exactly the same situation previously and we believe that." (emphasis added). 1 RP 1-24.

The court then turned to the appellant and his attorney: "Let me understand your position in regard to this issue of the child and the child competency and the issue of hearsay." Id.

Appellant's counsel made it clear that he was not stipulating to the admissibility of the child hearsay until a determination was made as to the child's competency. The appellant was clear that he did not think LH was competent. However, if the court found LH competent, appellant's counsel explained: "We have no problem. We have talked about all of this. We are not shying away from those videos . . . they have to be introduced, and this has been discussed in detail with Mr. Volk and his parents (who) have all been supportive here when we had the mistrial the first time around." Id.

Otherwise, appellant's counsel stated: "It's going to be straight up, straight down just (like the) previous time(,) so that's kind of where we are at." 1 RP 1-24.

At trial, following jury selection, the trial court held a competency hearing, outside the presence of the jury. 2 RP 6-23.

The State of Washington called LH to the witness stand. LH testified as to his name and age, describing his recent birthday party to include who came and the gifts he received. He went on to describe gifts he received for Christmas.

LH identified his parents and siblings by names and ages. LH testified as to where he lived. He testified about the games he likes to play his brothers. LH distinguished between his left and right hands. When asked if he knew the "alphabet," LH responded with a question: "You want me to sing a song?" He then sang the alphabet through "f," stopped, and told the court that he could only sing to "f."

In response to a scenario about a child lying about eating cookies, LH was able to tell the court that the child told "a lie." LH told the court "(i)t's bad to tell a lie . . . because you get into trouble."

When asked if he could tell the truth, LH answered "Yes." The following colloquy occurred:

Q: Do you know why you're here today?

A: Yes

Q: (LH), why are you here today?

A: Because I am here to tell the truth.

Q: Tell the truth about what?

A: About Cas?

Q: What about Cas?

A: He put – about Cas hurt me.

Q: Lane, how did Cas hurt you?

A: He put his pee pee in my butt and macaroni in my butt.

Appellant's counsel interrupted, complaining he could not hear, prompting the State of Washington to ask:

Q: Is that what you said?

A: Yeah, and cream.

LH explained that the appellant retrieved the cream from the "baby's bedroom." He identified his "pee pee" and explained for what it is used. He identified his butt and explained for what it is used. Following LH's testimony, the trial court found LH competent to testify. 2 RP 6-23.

At trial, LH repeated the testimony to which he had already testified at the competency hearing.

The State of Washington called all of the above witnesses.

In addition, the State of Washington called Troy Swarthout, a

convicted felon and inmate at the Kittitas County Jail when the appellant was incarcerated. Mr. Swarthout testified, in orange jail garb, testified as to two conversations he had with the appellant. 2 RP 321-328.

In the first conversation, he testified that the appellant asked him if he knew anything about DNA evidence and, when asked "why," called LH's mom a "vindictive bitch." In the second conversation, the appellant advised that the appellant appeared nervous, and, when asked "why," told Mr. Swarthout that his "girl" was being interviewed by police.

Dr. Sandra Horning testified that when Ms. Cleary brought LH to KVCH on April 30, he did not complain of anything other than an ear ache. 2 RP 540.

Ms. Larabee and SGT Koss testified as to their credentials and laid the foundation for their recorded interviews. Otherwise, the appellant stipulated to playing the entirety of their recorded interviews for the jury.

By the time of the second trial, Diedre Cleary married the appellant and taken his last name: Volk. On examination, the new Ms. Volk admitted that there were two windows of opportunity between April 28 and May 1 when the appellant had exclusive access to LH in her absence. She admitted that LH and his parents had no motive to fabricate the allegation, confirming that she had been best friends with LH's mother and even asked Travis and Selenia to serve as groomsman and bridesmaid,

respectively, in her wedding to the appellant. 2 RP 463-509.

Two Washington State Crime Lab forensic scientists testified that their testing showed the presence of semen in the seat of LH's underwear taken from him at KVCH. However, they were unable to link the appellant to the semen because they were unable to find sperm to develop a DNA profile. 2 RP 254-280, 293-309.

Dr. Robert Johnson, the family's pediatrician, testified that it was unlikely that LH's older brother, who was less than 12, could have contributed the semen. He testified that it was not at all likely that LH, at 4-years-old, could have contributed the same. Dr. Naomi Sugar, at the University of Washington, testified that to the same based upon her training, experience, and medical literature. 2 RP 468-513.

After the State of Washington rested, the appellant took the witness stand. The appellant testified that his semen would have contained spermes while acknowledging that he has not fathered any known children. The appellant denied having any conversations with Mr. Swarthout but could not explain how he would know details that were unique to the case. However, the appellant admitted that LH told him: "You hurt me." Otherwise, the appellant maintained his innocence. 2 551-635.

The jury found the appellant guilty. 2 RP 697.

At sentencing, the court sentenced the appellant as a sex offender. The sentencing court calculated the appellant's offender score as a "6" based upon his two prior convictions, out of North Dakota for "Surreptitious Intrusion," finding them the equivalent of felony Voyeurism. The sentencing court did not include the appellant's prior Washington conviction for Communication with a Minor for Immoral Purposes since it was not a felony. SEE Judgment & Sentence.

With an offender score of "6," the sentencing court calculated the appellant's sentencing range as 162-216 months. He noted in the Judgment and Sentence that during the commission of the crime the appellant "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense." SEE Judgment & Sentence.

The sentencing court noted that it was imposing an exceptional sentence of 10 years above the standard range to a maximum sentence of life, which is the statutory maximum offense for Rape of a Child in the First Degree. The court based the exceptional sentence upon the aggravating factor found by the jury in the special interrogatory, attached to the Judgment and Sentence. SEE Judgment & Sentence.

The sentencing court had the benefit of a Pre-Sentence Investigation, prepared by the Department of Corrections, recommending

a sentence of 400 months based upon the appellant's prior criminal convictions for sex offenses and the particular vulnerability of the victim in the current case. The court heard from the State of Washington and LH's parents. The State of Washington recommended a sentence of 50 years to life. 2 RP 736-739.

On the record, the sentencing court told the appellant that he found LH competent and commended his "bravery" in testifying. He told the appellant that his criminal history counted against him. However, he underlined that he was sentencing the appellant to "the minimum sentence . . . at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison . . . because of the particular vulnerability of the child." 2 RP 736-739.

Appellant's counsel then clarified the court's sentence:

"Sure. Basically the court (has) ordered the maximum under the mandatory minimum plus ten year(s) added on for aggravating factors?"

"Yes," replied the court. 2 RP 736-739.

This appeal followed.

ANSWERS TO ASSIGNMENTS OF ERROR RAISED BY APPELLANT'S COUNSEL AND APPELLANT

1. The trial court erred in admitting multiple child hearsay statements, without holding a RCW 9A.44 hearing to determine the reliability of the statements, after finding the child-victim competent to testify, but the appellant waived the hearing, and thereby the error, on condition that the child-victim and all of the witnesses be present at trial to be cross-examined by the appellant.

2. Appellant's counsel did not provide ineffective assistance of counsel when he advised the court that the appellant agreed to waive a hearing under RCW 9A.44 child hearsay reliability hearing, on condition that the child-victim and all of the witnesses be present at trial to be cross-examined by the appellant, nor did he provide ineffective assistance of counsel for failing to: investigate the physical evidence or consult with a medical expert, investigate the DNA evidence or consult with a forensic expert, or prepare an adequate defense and conduct a pre-trial investigation (incorporates appellant's statement of additional grounds B, C, and D).

3. The State of Washington presented sufficient evidence to permit the jury to find the appellant guilty of Rape of a Child in the First Degree (incorporates appellant's statement of additional grounds A).

4. The State of Washington presented sufficient evidence to prove beyond a reasonable doubt the aggravating sentencing factor alleged in the information and found by the jury.

5. The trial court did not err when it did not enter written findings of fact to support an exceptional sentence because the record amply supports the trial court's findings.

6. The length of the appellant's exceptional sentence was not excessive when the appellant was a three time convicted sex offender and he committed his current offense against a vulnerable 4-year-old child who was incapable of resistance after his parents entrusted him to the care of the appellant.

7. The sentencing court did not act outside its authority by imposing community custody conditions prohibiting the appellant, a twice convicted sex offender, from accessing or possessing pornographic materials and possessing alcohol or being in a place that serves alcohol because pornography stimulates a sex offender's drive to commit sex offenses and alcohol loosens a sex offender's inhibitions.

8. The trial court did not err when it found LH competent to testify (appellant's statement of additional grounds E).

9. The appellant provides no basis to assert that "the forensic interviews were extremely biased, contain coercion, bribery, and inconsistencies" when the trier of fact determines the credibility of witnesses and, after hearing all of the evidence, found the appellant guilty as charged (appellant's statement of additional grounds F).

ARGUMENT

1. **The trial court erred in admitting multiple child hearsay statements, without holding a RCW 9A.44 hearing to determine the reliability of the statements, after finding the child-victim competent to testify, but the appellant waived the hearing, and thereby the error, on condition that the child-victim and all of the witnesses be present at trial to be cross-examined by the appellant.**

RCW 9A.44.120, through ER 807, provides that:

> A statement made by a child under the age of ten describing any act of sexual contact performed with or on the child by another,.... not otherwise admissible by statute or court rule, is admissible in evidence 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.

Presuming the child is found competent to testify, (as in this case), the court must consider whether the child's statements are *testimonial* before deciding whether there is even a need to conduct a RCW 9A.44 and "Ryan" analysis. Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354 (2004). State v. Ryan, 103 Wash. App. 165, 691 P.2d 197 (1984).

TESTIMONIAL

The Sixth Amendment to the United States constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Article I, Section 22 of the Washington State Constitution provides that "(i)n all criminal prosecutions, the accused shall have the right to . . . meet the witnesses against him face to face."

In Crawford, the United State Supreme Court held that if an out-of-court statement is "testimonial," the state can only introduce the statement provided that the accused has had an opportunity to cross-examine the out-of-court declarant.

If the court decides that a child's statement *is testimonial*, then the State of Washington cannot introduce the child's out of court statements, through the testimony of other witnesses, unless the defendant has an opportunity to cross-examine the child. Otherwise, if the child is unavailable as a witness at trial, and the defendant had no prior opportunity to cross-examine the child under oath, then all of the child's out-of-court statements are inadmissible. SEE Karl Tegland's Courtroom

Handbook on Washington Evidence, Author's Comments pgs. 478-479 (5) Checklist, Method of Analysis (2009-2010 Edition).

If the statement is *not testimonial*, then a traditional hearsay analysis applies under ER 807 and RCW 9A.44.120 to include the state invoking traditional hearsay exceptions to introduce such statements. Id. at 479 (1).

What is testimonial hearsay?

There is no formal definition of what constitutes *testimonial* hearsay. The law in our state appears to see-saw between a subjective and objective analysis depending upon whose state of mind is controlling, namely: Did the declarant witness, who made the out of court statements, *subjectively* believe that the statements would be used as evidence OR would an *objective* witness believe that the statements made by the declarant be used as evidence? State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006). State v. Hopkins, 137 Wn.App. 441, 154 P.3d 250 (Division 2 2007). State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007).

In Shafer, the Washington Supreme Court found that that the statements made by a 3-year-old child to a social worker, describing sexual abuse, were not testimonial because a 3-year-old child could not possibly expect that her statements would be used as evidence at trial. The court ruled that what was controlling was whether the declarant child reasonably believed that her statements would be used as evidence.

In Hopkins, Division II ruled that the statements made by an abused child to family members were *non-testimonial* because the child

was not motivated by any intent to seek criminal prosecution (child made statements to mother and grandmother). Supra Tegland's analysis of "Statements that are usually non-testimonial" pg 472. The Hopkins court also found that the statements made by the same child to a CPS social worker were non-testimonial when the CPS social worker was interviewing the child to treat the child's injuries. However, the court found that statements made by the child to the same CPS social worker, in a second interview, were testimonial because the CPS social worker interviewed the child to obtain statements for law enforcement to be used as evidence.

In Mason, the Washington State Supreme Court found that the statements made by an adult victim to a victim's advocate were testimonial because an objective witness would reasonably believe that the victim's statements would be used as evidence, even if the victim did not. On the other hand, the court stated that: *"Until the Supreme Court more fully develops precisely what is testimonial under the confrontation clause, all courts will be divining the intent of our nation's highest court."*

Therefore, it would appear that, until the US Supreme Court states otherwise, in Washington, trial courts should apply an *objective test*, per Mason, asking the question: *Would an objective person in the same position as the victim have reasonably believed that his or her statements would be used as evidence against the person whom is alleged to have committed the abuse?*

In this case, the State of Washington moved to introduce the statements LH made to his mother, two police officers, the SANE, and the child forensic interviewer.

Caselaw supports that LH's statements to his mother were non-testimonial. But without a traditional hearsay exception, potential state of mind, the only remaining question would be whether the time, content, and circumstances of LH's statements to his mother provided a sufficient indicia of reliability under RCW 9A.44. SEE below.

Caselaw also supports a finding that statements made for medical diagnosis or treatment are usually non-testimonial. State v. Sandoval, 137 Wn.App. 532, 154 P.3d 271 (Division III 2007) (in domestic violence case, victim's statement to an emergency room physician were non-testimonial and admissible, even though the victim identified the defendant as her assailant).

In this case, LH was taken to KVCH for a sexual assault exam. However, LH's treatment was also of concern since he had reported pain after being anally penetrated. Therefore, LH's statements could arguably be non-testimonial and admissible under the exception for medical diagnosis or treatment without any need for a RCW 9A.44 reliability analysis. However, it would not appear that any of the traditional exceptions applied to the testimony of the two police officers and the child forensic interviewer.

SUFFICIENT INDICIA OF RELIABILITY

Once the court has decided whether the child is competent to testify and has addressed the issue of whether the statement is *testimonial,* requiring the child to testify, the only remaining issue for the court to decide is whether the time, content, and circumstances of the statements provide sufficient *indicia of reliability.* SEE ER 807 and RCW 9A.44.120.

The reliability test is set forth in State v. Ryan, 103 Wash. App. 165, 691 P.2d 197 (1984). The Ryan court listed nine factors a trial court must apply when determining whether the time, content and circumstances surrounding an out of court declaration provide sufficient indicia of reliability:

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

declarant misrepresented defendant's involvement.

The final three factors listed in Ryan have been determined by the Court of Appeals to be of little use when addressing reliability of child hearsay statements. See, e.g., State v. Borland, 57 Wash App. 7, 20, 786 P2d 810 (1990); State v. Strange 53 Wash App. 638, 645, 769 P.2d 873 (1989). In State v. Strange, 53 Wash. App. 638, 769 P.2d 873 (1989), the court observed that the sixth factor is "unimportant" in the context of the child hearsay reliability analysis.

Statements made to law enforcement officers or designated child interviewers in response to questions may be admissible under the child hearsay statute. State v. Young, 62 Wash App. 895, 901 (1991). In Young, the Court of Appeals rejected the appellant's claim that the child's statements to law enforcement officers and social workers should not be admitted as they were not spontaneous, and because the professional interviewers were aware of the abuse when they questioned the child. The Court noted that "Washington law ... recognizes that a child's answers are spontaneous so long as the questions are not leading or suggestive." Young, at 901. Further, the court held that the professional interviewers enhanced the reliability of the child's statements, rather than diminished it. Id. at 901. The court noted that:

> Professionals are, by definition, trained to be objective in assessing whether a child's complaint merits further investigation, and unlike parents, their perceptions are not impaired by personal attachment to the child. Young, at 910.

Not all of the Ryan factors need be met in order for the court to find a statement reliable. State v. Swan 114 Wash App. 613, 652, 790 P.2d 610 (1990). The test is whether the Ryan factors are "substantially met." Id. The trial court is vested with considerable discretion in making the reliability determination and will not be reversed absent a showing of manifest abuse of discretion. Jones, 112 Wn. 2d at 499.

In this case, even in the absence of a RCW 9A.44 reliability hearing, all the hearsay statements attested to by LH's mother, the two police officers, the SANE, and the child forensic interviewer arguably would have been determined to be reliable and thereby admissible. The statements were made contemporaneously. There was a degree of consistency. They were made to multiple witnesses in a relatively short time period. The context in which LH made all the statements was appropriate. And cross-examination could not show LH's lack of knowledge.

In addition, of greater significance to the present case, in State of Washington v. Leavitt, 111 Wn.2d 66, 758 P.2d 982, the Washington Supreme Court held, en banc, that the trial court's *failure* to hold a hearing

to determine the reliability of a child's out-of-court statements of sexual abuse was error, but the defendant waived the error by failing to timely object to the admission of the hearsay statements. In addition, the Supreme Court found that the trial court's erroneous failure to hold a RCW 9A.44 and reliability hearing did not violate the defendant's right of confrontation and due process because both the child and the social worker, to whom the child made the statements, testified. Last, the Supreme Court found that the child's hearsay statements were reliable because they mirrored those provided to family members typically not subject to a RCW 9A.44 and Ryan analysis.

In Leavitt, a 6-year-old child, who lived with her aunt, was left with the defendant and his family over a weekend while the aunt went camping. After the aunt returned, the child appeared frightened and reported had hurt her. The child then visited her mother and reported that "her bottom hurt." The mother then took her child to Harborview Sexual Assault Center where she was interviewed by a social worker. During the course of the interview, the child reported that the defendant had oral, vaginal, and anal sexual contact with her.

Similarly, in this case, LH, a 4-year-old child, was left by his parents with the appellant and his girlfriend while LH's parents left town for a few days to go to the Oregon Coast. Within 24 hours after returning,

LH began complaining that this butt hurt and ultimately disclosed that the appellant had put his "pee pee in my butt." Ms. Hamblin then took LH to Kittitas Valley Community Hospital where the child repeated the statement multiple times to two law enforcement, a SANE, and later to an experienced child forensic interviewer.

In addition, the appellant, in this case, did not only fail to object to the child hearsay, he stipulated to its admissibility on condition that the child and all the witnesses to whom the child communicated testified. The child and the witnesses testified. Therefore, by the appellant's own stipulation, he waived the error.

The trial court's "erroneous" failure to hold a RCW 9A.44 reliability hearing did not violate the defendant's right of confrontation and due process because both the child and the witnesses, to whom the child made the statements, testified. Last, as argued, the record amply supports that LH's statements were reliable, even if the court did not hold a RCW 9A.44 reliability hearing in spite of the appellant's stipulation.

2. **Appellant's counsel did not provide ineffective assistance of counsel when he advised the court that the appellant agreed to waive the child hearsay reliability hearing under RCW 9A.44, on condition that the child-victim and all of the witnesses be present at trial to be cross-examined by the appellant, nor did he provide ineffective assistance of counsel for failing to: investigate the physical evidence or consult with a medical expert, investigate the DNA evidence or consult with a forensic**

expert, or prepare an adequate defense and conduct a pre-trial investigation (incorporates appellant's statement of additional grounds B, C, and D).

The test for ineffective assistance of counsel is strict. In order to reverse the trial on the ground that counsel was ineffective for failing to impeach a witness with prior convictions during cross examination, the appellant bears the burden of showing that his attorneys' representation was so ineffective as to deny him his constitutional right to a fair trial. State v. McFarland, 127 Wn 2d 322 (1995). There is a strong presumption of competency, and adequacy of counsel is not measured by the result. McFarland, supra.

Put another way, the petitioner must show with a preponderance of evidence that his counsel's performance was objectively unreasonable and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668 (1984).

The defendant petitioner must show both a deficient performance and prejudice. He must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. State v. Lord, 117 Wn 2d 829 (1991). If this part of the test is not satisfied, the inquiry need go no further. State v. Hughes, 118 Wn App 713 (2003) citing State v. Hendrickson, 129 Wn 2d 61 (1996).

In this case, the appellant asserts, through his appellant attorney, that his defense attorney's failure to object to the admission of the child hearsay statements and request a RCW 9A.44 reliability hearing makes him ineffective.

Based upon the argument against appellant's first assignment of error, the appellant has no basis to assert that his defense attorney was ineffective when he stipulated to the admissibility of the child hearsay statements thereby waiving any error. Most importantly, the child and all the witnesses, to whom the child made statements, testified, presenting the appellant a full opportunity to confront the witnesses against him, face to face.

The appellant independently claims, in his statement of additional grounds, that his defense attorney failed to investigate the physical evidence or consult with a medical expert, investigate the DNA evidence or consult with a forensic expert, or prepare an adequate defense and conduct a pre-trial investigation.

The appellant fails to demonstrate how the proceeding would have been different if his defense attorney had investigated the physical evidence, consulted with a medical expert, investigated the DNA evidence or consulted with a forensic expert when the physical evidence introduced (the seminal fluid found in 4-year-old LH's underwear) contained no DNA

to identify the contributor. On the other hand, the appellant was not excluded as being a potential contributor. LH's father was not excluded as being a potential contributor. No male of any age, who could produce seminal fluid, was excluded as a potential contributor. However, after hearing the testimony of both LH's father and the appellant and considering the other facts and circumstances surrounding LH's disclosures and the presence of the seminal fluid in the 4-year-old's underwear, within a relatively tight time-frame, when the appellant had exclusive access to the victim, the jury obviously rejected the defense theory that LH's father anally raped him and left evidence of his crime behind.

The appellant's assertion that his defense attorney failed to prepare an adequate defense and conduct a pre-trial investigation, following the first trial, in which the jury was unable to reach a verdict, lacks specificity to respond.

The appellant cites federal 3rd circuit cases that cite general platitudes about ineffective assistance of counsel. He regurgitates previously arguments about the failure to investigate the physical evidence and seek the testimony of a DNA expert. He focuses considerable attention on his counsel's failure to interview and subsequently discount the testimony of Troy Swarthout whose appearance and testimony, in court, reflected that

he was a convicted felon. But the jury obviously did not feel that Mr. Swarthout's testimony was not credible, or if it did, the jury did not permit Mr. Swarthout's testimony to cast doubt on the credibility of the testimony offered by many more witnesses.

What the appellant's statement of additional grounds reflects is that he was surprised that he was convicted, after the jury failed to reach a verdict, following the first trial. The appellant completely fails to acknowledge that his defense attorney effectively represented him in the first trial, obviously convincing some members of that jury that the State of Washington had not proved the charge beyond a reasonable doubt. In addition, the appellant fails to acknowledge that, following the first trial, his defense attorney had the benefit of having already tried the case once which permitted him to re-examine witnesses for which he had prior sworn testimony.

3. The State of Washington presented sufficient evidence to permit the jury to find the appellant guilty of Rape of a Child in the First Degree (incorporates appellant's statement of additional grounds A).

Evidence is sufficient if a "rational fact finder could have found the essential elements of the crime beyond a reasonable doubt." State v. Drum, 168 Wash.2d 23, 34-35, 225 P.3d 237 (2010) (*quoting* State v. Wentz, 149 Wash.2d 342, 347, 68 P.3d 282 (2003)). An appellant, when

challenging sufficiency of evidence, admits the truth of the State's evidence and all reasonable inferences therein. Id. at 35. A distinction between direct and circumstantial evidence is not made; circumstantial evidence is considered "equally reliable" in determining sufficiency. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). The court gives the fact finder deference to any issue of witness credibility, persuasiveness of evidence, or conflicting testimony. State v. Thomas, 150 Wash.2d 821, 874–75, 83 P.3d 970 (2004). All evidence is viewed in the light most favorable to the state. State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006).

In this case, LH testified that the appellant put his "pee pee" in his butt. His testimony was corroborated by his mother, a police detective, a SANE, a second detective sergeant, and a child forensic interviewer. In addition, the appellant admitted that LH told him: "Cas you hurt me." The appellant's wife admitted that the appellant had a window of opportunity in which he had exclusive access to LH. Deputy Foster testified that the appellant, in a conversation with somebody, wanted to make certain they were "on the same page."

The jury had the opportunity to compare and contrast the testimony of LH's father, whom the defense theorized could have committed the crime, to that of the appellant who chose to testify. Obviously, the jury

did not find the appellant's testimony credible.

Last, there was physical evidence of semen in LH's underwear. While the semen, in the absence of sperm, could not be forensically linked to the appellant as a potential contributor, the facts and circumstances of the case permitted the jury to reasonably find that the State of Washington introduced sufficient evidence to prove the essential elements of the crime beyond a reasonable doubt.

4. The State of Washington presented sufficient evidence to prove beyond a reasonable doubt the aggravating sentencing factor alleged in the information and found by the jury.

The facts supporting an aggravating factor must be proved to the jury beyond a reasonable doubt. RCW 9.94A.537 (3). On a claim of insufficiency of the evidence, the reviewing court considers whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, the State of Washington alleged and the jury found that, in the commission of the crime charged (Rape of a Child in the First Degree), the appellant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

To meet its burden of proof, the State of Washington introduced evidence that LH was 4-years-old, at the time of the offense, when his parents entrusted him to the care of the appellant and his live-in girlfriend. The State of Washington presented evidence that the appellant waited until his live-in girlfriend left when he would have exclusive access to the child victim and there would be no witnesses except his girlfriend's children who were too young to competently testify.

The appellant correctly argues that Rape of a Child in the First Degree already accounts for the youth of the victim. However, the statute encompasses child victims from birth to 11 years of age and 364 days. In this case, LH was less than half the median age for the range of victims the statute encompasses. It is simply not reasonable to argue that, under the circumstances presented, LH, at 4-years-old, was not vulnerable when confronted by a fully grown 30-year-old male intent on satisfying his sexual urges. It further defies logic that the 4-year-old LH was capable of resisting the appellant's sexual advances.

5. The trial court did not err when it did not enter written findings of fact to support an exceptional sentence because the Department of Correction's Pre-Sentencing Report, the record, and the Judgement and Sentence amply support the sentencing court's findings.

RCW 9.94A.585 (4) provides, in relevant part, that:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.
>
> Further, subsection (5) provides:
>
> > A review, under this section, shall be made solely upon the record that was before the sentencing court.

In this case, the sentencing court noted in the Judgment and Sentence that during the commission of the crime the appellant "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense."

The sentencing court noted that it was imposing an exceptional sentence of 10 years above the standard range to a maximum sentence of life, which is the statutory maximum offense for Rape of a Child in the First Degree. The court based the exceptional sentence upon the aggravating factor found by the jury in the special interrogatory and attached it to the Judgment and Sentence

The sentencing court had the benefit of a Pre-Sentence Investigation, prepared by the Department of Corrections, recommending a sentence of 400 months based upon the appellant's prior criminal convictions for sex offenses and the particular vulnerability of the victim

in the current case. The court heard from the State of Washington and LH's parents. The State of Washington recommended a sentence of 50 years to life.

On the record, the sentencing court told the appellant that he found LH competent and commended his "bravery" in testifying. He told the appellant that his criminal history counted against him. However, he underlined that he was sentencing the appellant to "the minimum sentence . . . at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison . . . because of the particular vulnerability of the child."

Appellant's defense attorney then clarified the court's sentence:

"Sure. Basically the court (has) ordered the maximum under the mandatory minimum plus ten year(s) added on for aggravating factors?"

"Yes," replied the court. The sentencing court could not have been more clear.

6. The length of the appellant's exceptional sentence was not excessive when the appellant was a three time convicted sex offender and he committed his current offense against a vulnerable 4-year-old child who was incapable of resistance after his parents entrusted him to the care of the appellant.

RCW 9.94A.507 sets out how "sex offenders . . . shall" be sentenced:

> (T)he court *shall* impose a sentence to a maximum term and a minimum term (emphasis added). The maximum term shall consist of the statutory maximum sentence for the offense . . . (T)he minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence . . .

RCW 9.94A.535 (2)(c) provides that the court may impose an aggravated exceptional sentence without a finding of fact by a jury if "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offense going unpunished."

RCW 9.94A.585 (4) provides, in relevant part, that:

> To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

Further, subsection (5) provides:

> A review, under this section, shall be made <u>solely upon the record</u> that was before the sentencing court.

At sentencing, the court sentenced the appellant as a sex offender. The sentencing court calculated the appellant's offender score as a "6" based upon his two prior convictions, out of North Dakota for

"Surreptitious Intrusion," finding them the equivalent of Washington's felony Voyeurism. The sentencing court did not include the appellant's prior Washington conviction for Communication with a Minor for Immoral Purposes since it was not a felony.

With an offender score of "6," the sentencing court calculated the appellant's sentencing range as 162-216 months. He noted in the Judgment and Sentence that during the commission of the crime the appellant "knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance in the commission of the offense."

The sentencing court noted that it was imposing an exceptional sentence of 10 years above the standard range to a maximum sentence of life, which is the statutory maximum offense for Rape of a Child in the First Degree. The court based the exceptional sentence upon the aggravating factor found by the jury in the special interrogatory, attached to the Judgment and Sentence

The sentencing court had the benefit of a Pre-Sentence Investigation, prepared by the Department of Corrections, recommending a sentence of 400 months based upon the appellant's prior criminal convictions for sex offenses and the particular vulnerability of the victim in the current case. The court heard from the State of Washington and

LH's parents. The State of Washington recommended a sentence of 50 years to life.

On the record, the sentencing court told the appellant that he found LH competent and commended his "bravery" in testifying. He told the appellant that his criminal history counted against him. However, he underlined that he was sentencing the appellant to "the minimum sentence . . . at the top of the range which is 218 plus 120 which is 336 and the maximum is life in prison . . . because of the particular vulnerability of the child."

The basis for the sentence could not have been more clear to the appellant who had been found guilty of anally raping a 4-year-old boy left in his care, while being a registered sex offense after having been convicted of prior sex offenses.

7. **The sentencing court did not act outside its authority by imposing community custody conditions prohibiting the appellant, a three time convicted sex offender, from accessing or possessing pornographic materials and possessing alcohol or being in a place that serves alcohol because pornography stimulates a sex offender's drive to commit sex offenses and alcohol loosens a sex offender's inhibitions.**

RCW 9.94A.507 provides that sex offenders "shall" be sentenced to community custody. As part of any sentence, the court shall also

require the offender to comply with "any conditions" imposed by the parole board.

RCW 9.94A.703 provides a whole range of mandatory waivable, and discretionary conditions the court may impose. These include ordering an offender to refrain from consuming alcohol.

RCW 9.94A.704 provides the Department of Corrections vast authority to impose additional conditions on an offender so long as the department does not impose conditions that are contrary to those ordered by the court nor contravene or decreases court imposed conditions.

In this case, the sentencing court imposed limitations on the appellant's possession of pornography and alcohol. The pornography prohibition seems to be reasonably related to a person convicted of a violent sex offense with three prior convictions, in two states, for committing sex offenses against others. In addition, the Department of Correction's Pre-Sentence Investigation reported that the appellant suffered from "sexual urges" and had attended a "sexual addicts anonymous group" The alcohol prohibition seems related to the Department of Correction's report that the appellant began consuming alcohol as a minor and had a "problem" with drugs.

8. **The trial court did not err when it found LH competent to testify (appellant's statement of additional grounds E).** The court has no obligation to determine a child's competency unless the child's competency is challenged. State v. CMB, 130 Wash.App. 841 (Div I 2005). The burden is on the challenger to demonstrate that the child in question is incompetent to testify. State v. S.J.W. , 170 Wn.2d 92 (2010).

If a child's competency is challenged, the child's competency will determine whether the child is available or unavailable as a witness per RCW 9A.44.120. In determining competency, the court must apply the following legal analysis:

ER 601 provides that *every person is competent to be a witness except as otherwise provided by statute or court rule.*

CrR 6.12 provides, in part:

> (c) The following persons are incompetent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or do not have the capacity of relating them truly.

A trial court has *broad discretion* in determining the competency of a child, and an appellate court will not disturb a trial court's finding of

competency absent a manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 424 P. 2d 1021 (1967); State v. Wyse, 71 Wn.2d 434 (1967)

"The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

At a competency hearing, "a trial court has considerable latitude in choosing the procedure for determining competency, and may proceed ***by any means*** which permits the parties to be heard and allows the court to make a well-informed judgment." State v. Maule, 112 Wn.App. 887, 888-89, 51 P.3d 811 (2002) (emphasis added). The Maule court upheld the trial court's decision to refuse defense counsel's cross examination of the witness because the questions were not related to the child's competency. Id. at 895.

The court in Wyse spelled out just what factors the trial court should consider in determining a child's competency:

> (a) [(1)Whether the child has] an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is about to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence;

> and (5) the capacity to understand simple questions asked about it.

Children as young as three and one half years old have been found competent to testify. Hunsaker, supra. In fact, many children below the age of eight have also been found competent to testify in Washington courts. See State v. Ridley, 61 Wn. 2d 457, 378 P.2d 700 (1963) (five year old); State v. Allen, supra, (six year old); State v. Tate, 74 Wn. 2d 261, 444 P.2d 150 (1968) (seven year old); State v. Sims, 4 Wn. App. 188, 480 P.2d 228 (1976) (five and seven year olds); State v. Johnson, 96 Wn.2d 926, 639 P2d 1332 (1982) (five year old); State v. Woodward, 32 Wn. App. 204, 646 P.2d 135 (1982) (five and one-half year old).

In this case, the court held a competency hearing outside the presence of the jury. LH was able to demonstrate that he understood his obligation to speak the truth, he answered simple questions about the events, prompted by a simple question: "Do you know why you are here today?"

LH independently recounted that the appellant "put his pee pee in my butt and macaroni in my butt," describing each.

Even when counsel interrupted, complaining he could not hear, LH was able to confirm his testimony and volunteer an additional detail.

Q: Is that what you said?

A: Yeah, and cream.

LH explained that the appellant retrieved the cream from the "baby's bedroom." He identified his "pee pee" and explained for what it is used. He identified his butt and explained for what it is used.

Taking LH's testimony in its entirety, the trial court reasonably exercised its discretion in finding LH competent to testify.

9. The appellant provides no basis to assert that "the forensic interviews were extremely biased, contain coercion, bribery, and inconsistencies" when the trier of fact determines the credibility of witnesses and, after hearing all of the evidence, found the appellant guilty as charged (appellant's statement of additional grounds).

It has long been settled that credibility determinations are the exclusive province of the jury. The jury alone makes such determinations. State v. Huff, 76 Wn.2d 577, 458 P.2d 180 (1969).

In this case, the appellant merely makes a sweeping statement that the "the forensic interviews were extremely biased, contain coercion, bribery, and inconsistencies."

The forensic interviews were conducted by Ellensburg Police Detective Sergeant Brett Koss and Child Forensic Interviewer Lisa Larrabee. The jury heard from both witnesses and watched their recorded interviews.

Therefore, the jury had the opportunity to assess whether these

witnesses were extremely biased or coercive or bribed LH. The jury also had the opportunity to assess the interviews for inconsistent statements to determine what weight, if any, to give their testimony and the child hearsay statements.

The jury reached a verdict and found the appellant guilty.

CONCLUSION

Based upon the foregoing legal analysis and application of the facts in evidence at appellant's jury trial, the State of Washington is respectfully requesting that this court deny the appellant's request to reverse his conviction and set the matter for a new trial.

Dated this 3rd day of May 2013.

Respectfully submitted,

GREG ZEMPEL
Kittitas County Prosecuting Attorney

Chris Herion WSBA #30417
Kittitas County Deputy Prosecuting Attorney
Attorney for Respondent