

FILED

JUL 24 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 35458-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

VIATER TWIRINGIYIMANA,

Appellant

BRIEF OF APPELLANT IN REPLY

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TABLE OF AUTHORITIES

Table of Cases

<u>Gordon v. Gordon</u> , 48 Wn.2d 222, 266 P.2d 786 (1954)	1, 8, 11
<u>In re Marriage of Tang</u> , 57 Wn.App. 648, 789 P.2d 118 (1990)	1, 8, 11
<u>State v. Bedkar</u> , 74 Wn.App. 87, 871 P.2d 673 (1994)	12
<u>State v. Eisner</u> , 95 Wn.2d 458, 626 P.2d 10 (1981).....	10
<u>State v. Elmore</u> , 139 Wn.2d 250, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000).....	10
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	11
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 247 (1980)	6, 13
<u>State v. Griffith</u> , 45 Wn.App. 728, 727 P.2d 247 (1986).....	4
<u>State v. Kennealy</u> , 151 Wn.App. 861, 214 P.3d 200 (2009)	4
<u>State v. Levy</u> , 156 Wn.2d 52, 155 P.3d 1076 (2006).....	9, 10
<u>State v. Miller</u> , 131 Wn.2d 7, 929 P.2d 372 (1997).....	8, 10
<u>State v. Robinson</u> , 79 Wn.App. 386, 902 P.2d 652 (1995).....	1, 11
<u>State v. Rohrich</u> , 82 Wn.App. 674, 918 P.2d 512 (1996), aff'd, 132 Wn.2d 472, 939 P.2d 697 (1997).....	8
<u>State v. Rohrich</u> , 132 Wn.2d 472, 939 P.2d 697 (1997).....	3
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984)	1, 2, 3, 4, 5, 6, 7, 8, 9, 11
<u>State v. Sivins</u> , 136 Wn.App. 52, 155 P.3d 982 (2007).....	9

<u>State v. Spotted Elk</u> , 109 Wn.App. 253, 34 P.3d 906 (2001)	8
<u>State v. Stevens</u> , 127 Wn.App. 269, 110 P.3d 1179 (2005)	12

Other Case Law

<u>Ballou v. Henri Studios, Inc.</u> , 656 F.2d 1147 (5th Cir. 1983).....	12
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	13
<u>United States v. King</u> , 713 F.2d 627 (11th Cir. 1983).....	12

Statutes

RCW 9A.44.120	1, 2, 3
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Court Rules

RAP 2.5(a)(3)	8, 9, 10
RAP 12.2	8, 12, 15

Constitutional Provisions

Wash. St. Const., Art. I, sec. 3.....	8
Wash. St. Const., Art. IV, sec. 16.....	9, 10, 11

U.S. Const., amend. 5	8
U.S. Const., amend. 6	3
U.S. Const., amend. 14	8

Treatises

5D K. Tegland, ‘‘Courtroom Handbook on Evidence, ‘ <u>Wash.Prac.</u> , Rule 807, §(1)(West 2011)	3
5D K. Tegland, ‘‘Courtroom Handbook on Evidence, ‘ <u>Wash.Prac.</u> , Rule 807, §(2)(West 2011)	3
5D K. Tegland, ‘‘Courtroom Handbook on Evidence, ‘ <u>Wash.Prac.</u> , Rule 807, §(11)(West 2011)	3

A. ARGUMENT IN REPLY

1. Once again and contrary to the determination of the superior court, and the unfounded protestations of the STATE OF WASHINGTON, the proffered child hearsay evidence should not have been presented at trial under the governing law set forth in RCW 9A.44.120 and the related "reliability" criteria identified in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984), and its progeny. [Issue No. 1 revisited].

On pages 11 through 21 of its responsive brief, the STATE OF WASHINGTON claims without merit that the superior court properly admitted the challenged hearsay statement of the complaining witness (a) to her mother and (b) to purported forensic evaluator, Karen Winston. Contrary to the bare assertions of the respondent, the superior court's decision in this regard was without question a manifest abuse of discretion insofar as the court erroneously chose to ignore and misapply the Ryan criteria in direct derogation of the law. See, Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1956); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). In its analysis the STATE totally ignores this aspect of abuse of discretion in turns of a failure to follow the law as emphasized by the foregoing decisions.

As stated before, the trial court found by letter opinion, dated September 6, 2016, that the child hearsay statements of the complaining

witness, as proffered (a) by her mother, Arwa al-Naquash [now Burke] and (b) Karen Winston with Partners with Families and Children, were to be deemed admissible at trial under RCW 9A.44.120 and the corresponding reliability factors set forth in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). [CR 279-80]. Formal “findings fact and conclusions of law” to this effect were later entered by the court on January 19, 2017. [CP 148-50]. In turn, an “order admitting child hearsay statements” was then entered on July 13, 2017. [CP 253-54].

As is clear in this case, RCW 9A.44.120 governs the admissibility of a child’s hearsay statement. Once again, that statute provides, in pertinent part, that 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... is admissible 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 . . .

(a) Testifies at the proceedings. . .

In effect, RCW 9A.44.120 establishes a legislative exception to the

hearsay rule for a child's statements in the context of sexual or physical abuse. See generally, 5D K. Tegland, "Courtroom Handbook on Washington Evidence," Wash.Prac., Rule 807 "Admissibility of Child's Statement-Conditions," §(1) at 471 (West 2011). In the situation where the child is considered "available" and does, in fact, testify at trial, the sixth amendment right of confrontation is not implicated in terms of the child's out-of-court statements even though they may be considered "testimonial" in nature since the defendant is then afforded the opportunity to cross-examine the child. State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997); see also, 5D Tegland, Rule 807 "Admissibility of Child's Statement-Conditions," §(2) at 472, §(5)(f) at 474; Rule 807 "Sixth Amendment Right to Confrontation," §11 at 486.

In any event, there once again remains a critical constitutional issue concerning the lack or absence of any "indicia of reliability" associated with the subject hearsay statements of a child witness as required under RCW 9A.44.120. The accused has an unqualified due process right to exclude such evidence unless the trial court can properly find certain, particularized guarantees of trustworthiness after considering the time, content, and circumstances of each child hearsay statement. State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984).

Under the Ryan guidelines, the trial court must consider the following factors:

1. whether the declarant had an apparent motive to lie;
2. whether the general character of the declarant suggests trustworthiness;
3. whether more than one person heard the statements;
4. whether the statements were made spontaneously;
5. whether the timeliness of the statements and the relationship between the declarant and the witness suggest trustworthiness;
6. whether the statements contain express assertions of past fact;
7. whether cross-examination could not help to show the declarant's lack of knowledge;
8. whether the possibility of the declarant's recollection being faulty is remote; and
9. whether the circumstances surrounding the statements give reason to suppose that the declarant misrepresented the defendant's involvement.

Ryan, at 175-76. Admittedly, no single Ryan factor is controlling. The court's reliability assessment must be based on an overall evaluation of all factors; not just one factor. State v. Kennealy, 151 Wn.App.861, 881, 214 P.3d 200 (2009). Furthermore, each factor must be substantially shown before a statement is demonstrated to, in fact, be "reliable." Id.; State v. Griffith, 45 Wn.App.728, 738-39, 727 P.2d 247 (1986).

Here, as argued before, there were serious questions raised by the defense at the time of the pre-trial hearing concerning the "unreliability" of the complaining witness' hearsay statements in turns of each of the

Ryan factors. Consequently, it was abundantly clear said hearsay statements to the girl's mother and Ms. Winston should not, under Ryan, have been admitted by the superior court in the prosecution's case-in-chief.

First, as previously pointed out, it was evident that the complaining witness had a clear motive to lie insofar as both her and her mother had lived a peripatetic life for several years. They were refugees with no daily sense of stability or certainty by the time they moved into VIATER TWIRINGIYIMANA's residence in June 2013. By the time they later moved out in August of that year, the girl was readily cognizant of animosity and acrimony that existed between the defendant and her mother. She was also fully aware of the tumult that continued between them until she and her mother settled into William Burke's home.

By the same measure, the girl was admittedly upset with Mr. TWIRINGIYIMANA because he was adamant that she had to follow his house rules and instructions while her mother was at work. Also, it was clear that part of the impetus behind her allegations of molestation was to regain the attention and the primary focus of her mother upon her. In sum, the first Ryan factor was clearly in play and remained in issue in terms of the girl's "reliability."

Next, concerning the second Ryan factor, there was again no clear or substantial evidence presented by the prosecution establishing D.A.M.'s general character in terms of trustworthiness. See, State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Thus, this factor is also clearly not established and was missing herein.

Third, the statements allegedly made to Ms. Burke were obviously made to her alone. Fourth, the statements made to her mother could not be characterized as being "spontaneous" insofar as this disclosure of abuse was roughly four [4] months after the fact. The same can be said for the statements later made to Karen Winston after she was taken to Partners and Families with Children by Mr. and Mrs. Burke. Not only was the latter child hearsay statements made months after the fact but it were derived directly through Ms. Winston's leading questioning about "touching". Simply put, the alleged child hearsay statements were not derived by way of any voluntary "narrative" disclosed to Ms. Winston during the subject January 21 forensic interview.

By the same measure, the fifth factor bodes as well against the "reliability" this child's hearsay statements in terms of their untimeliness and the distain both she and her mother then held towards the accused. Likewise, in terms of the seventh factor, there was a total lack of evidence

proffered by the prosecution in terms of this factor demonstrating that cross-examination could not help to show the declarant's "lack of knowledge." Ironically, at trial the plaintiff's exhibit no. 6--which was drawn and written by D.A.M. at school--demonstrated that her knowledge of sexual relations may well have come from some other source or incident involving an attempt by her to have sexual intercourse with a "naked boy." [Trial RP 315-16; Exh. no. 6].

Obviously, this document showed that D.A.M. was already familiar with the male anatomy. Furthermore, it should be borne in mind, that there was never any allegation of actual sexual intercourse raised against Mr. TWIRINGIYIMANA in this criminal matter.

In terms of Ryan factor no. 8, there was a strong possibility that the girl's recollection was faulty and, therefore, unreliable. Not only does the four [4] month delay in allegedly reporting of this sexual abuse weigh heavily in this regard, but also the fact the hearsay statements to her mother and Ms. Winston contain flagrant inconsistencies and are also at odds to what the girl latter testified to at trial in terms of having been additional improper touching. [Trial RP 430-32, 435, 455-57].

Finally, the ninth and final Ryan factor is also at issue. In this vein, there was no physical evidence of molestation or any eye witness

testimony to corroborate D.A.M.'s otherwise spurious claims of sexual improprieties against the defendant, Mr. TWIRINGIYIMANA.

Hence, there can be no question that the superior court committed reversible error in terms of ignoring and or otherwise failing to properly apply all of the forgoing Ryan factors to this case. In sum, such purposeful and willful error committed by the trial court amounts to nothing short of a manifest abuse of discretion. Gordon, at 226-25; Tang, at 654.

Furthermore, from a substantive due process standpoint, this error was clearly of constitutional magnitude, now requiring the present intervention of this court on appeal. See, Art. I, §3, Wash. St. Const; 5th & 14th amdt., U.S.Const.; see also, State v. Rohrich, 82 Wn.App. 674, 918 P.2d 512 (1996), aff'd, 132 Wn.2d 472, 939 697 (1997); see generally, RAP 2.5(a)(3). Since the STATE OF WASHINGTON cannot prove that the resulting prejudice to the appellant was, in fact, harmless beyond a reasonable doubt, the conviction, judgment and sentence wrongfully entered against him [Sentencing RP 154-75; CP 261-76] is now subject to reversal. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); see also, RAP 12.2.

2. Once again, in this same context, the admission of said hearsay statements of the child complainant, D.A.M., are also subject to constitutional challenge insofar as they were unduly prejudicial and clearly constituted an impermissible and tactic comment on the evidence in violation of Article IV, §16, of the Washington state constitution insofar as the declarant herself testified at trial and as stated before should not have been allowed under the applicable Ryan factors. [Issue no. 2 revisited].

Next, on pages 21 through 25 of its brief, the respondent incorrectly claims that the appellate court cannot consider the appellant's arguments associated with the trial court's comment on the evidence, or that said child hearsay was cumulative and overly prejudicial. This flies directly in the face of Mr. TWINGIYIMANA's constitutional right of fundamental fairness and substantive due process under the state and federal constitution, and Article IV, §16, of the Washington state constitution. Hence, there is absolutely no prohibition whatsoever against consideration of these issues on appeal. See, State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); State v. Sivins, 138 Wn.2d 52, 59, 115 P.3d 982 (2007); RAP 2.5(a)(3).

Additionally, it should be borne in mind that, because a judicial comment on the evidence by the trial court is a recognized error of constitutional magnitude, such claim herein can be raised for the first time

on appeal. Levy, at 719-20; see also, RAP 2.5(a)(3). Thus, the appellant, Mr. TWIRINGIYIMANA, is entirely free to seek review of this issue on appeal. Id.

Article IV, section 16, of the Washington State Constitution states “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose of this provision is to prevent the jury from being influenced by the knowledge, tacit or otherwise, conveyed to it by the court as to the purported trustworthiness of evidence submitted at trial. See, State v. Elmore, 139 Wn.2d 250, 275, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000); State v. Miller, 179 Wn.App. 91, 106-07, 316 P.3d 1143 (2014).

The cumulative effect and repeated interjections by the court in terms of allowing the jury to hear repeatedly, by way of the complaining witness’ out-of-court statements of abuse, clearly lends itself to reversible error in terms of a violation of the constitutional bounds of judicial comment. See, Eisner, at 462-63.

In this vein, a prohibited comment on the evidence can be said to have occurred, when it appears that the trial court’s attitude towards the merits of the case is readily inferable, or can readily be discerned, from the nature, manner and action of the court regarding the admission of

evidence. Id. At a minimum, the court's actions in having willfully ignored and misapplied all the Ryan factors amounted to nothing short of a tacit comment on the evidence including D.A.M.'s supposed veracity in terms of sexual abuse. Thus, contrary to the STATE's misinterpretation and misapplication of Article IV, §16, and related case law, on page 23 of its responsive brief, the present case involves far more than "mere evidence having been properly [sic] admitted by the trial court." State v. Gentry, 125 Wn.2d 570, 638-39, 888 P.2d 1105 (1995). The fact that the complaining witness was given three [3] bites of the apple by the court in terms of her own trial testimony before the jury and that of her alleged hearsay statements to her mother and Ms. Winston, is far more than simply admitting this evidence. Rather, this procedural misconduct concerning the misapplication of the governing Ryan factors, as outlined in Part A.1, above, rose to the level of a direct violation of the tenets of Article IV, §16, of the Washington state constitution. Id.; see also, Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990)(manifest abuse of judicial discretion). The proffered child hearsay evidence served no independent or legitimate purpose other to over-emphasize the court's

personal view of the defendant's guilt and, thus, prejudiced the jury into believing the claimed "veracity" of the complaining witness over the opposing trial testimony of the accused, wherein Mr.

TWIRINGIYIMANA flatly denied any such criminal or sexual liaison with the complaining witness. See, State v. Bedkar, 74 Wn.App. 87, 93-94, 871 P.2d 673 (1994); see also, United State v. King, 713 F.2d 627 (11th Cir. 1983); Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1983); State v. Stevens, 127 Wn.App. 269, 110 P.3d 1179 (2005).

Again, and for this additional reason, the conviction, judgment and sentence imposed against Mr. TWIRINGIYIMANA [Sentencing RP 174-75; CP 261-76] should now be reversed by this court on review. RAP 12.2. Simply put, substantive due process and the principle of fundamental fairness require nothing less.

3. Finally, the testimony of the complainant, along with the evidence offered by the prosecution concerning her alleged out-of-court statements to her mother and Karen Winston, failed the requisite proof supporting a finding of guilt beyond a reasonable doubt. [Issue no. 3 revisited].

Lastly, it should again be noted that a criminal conviction is only subject to being upheld on appeal, if it can be said that, after viewing the

evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements and facts of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

Here, it is abundantly clear that this standard of proof beyond a reasonable doubt cannot be met in light of the prosecution's unreliable, tainted and equivocal evidence of the complaining witness. To say the very least, said evidence was contaminated by the in-artful manner and method of questioning of this child by both her mother and Karen Winston. It can easily be said that the alleged molestation was nothing more than a seed planted in this child's mind by way of a vengeful mother and the leading, rather than open-ended, questions posed by Ms. Winston during her forensic interview of the girl.

As emphasized on page 36 of appellant's opening brief, the jury found the appellant "not guilty" on two [2] of the three [3] counts of molestation [CP 246, 247], and "guilty" on the remaining count of molestation in the first degree. [CP 245]. This begs the question whether there was evidence of guilt beyond a reasonable doubt as to any of the three [3] separate charges in this case. Id.

It must be remembered that, in terms of her putative veracity, the complaining witness was adamant that the molestation occurred on multiple occasions, not simply on one. [Trial RP 430-32, 455]. By the same measure, if the so-called complaining witness “lied” or could not be believed about two [2] of the alleged incidents, how could she reasonably be trusted as to the third? Stated differently, if the girl could not be believed beyond a reasonable doubt on two [2] of the counts, why then on the first count? [CP 245-47].

The jury’s apparent settling on misplaced assumption that there must be at least one incident somewhere in the numerous allegations made by the complainant, is entirely at odds with the level of proof required to convict the defendant. In sum, the glaring anomaly and inconsistency in terms of these three [3] verdicts both illustrates and confirms the lack of proof beyond a reasonable doubt presented by the STATE. Id.

Hence, the subject “conviction, judgment and sentence” entered against the appellant VIATER TWIRINGIYIMANA on the one remaining count of molestation in the first degree [Sentencing RP 174-75; CP 261-76] should be reversed and remanded to the superior court with instruction that this case be dismissed with prejudice. See, RAP12.2. These spurious allegations in this case are nothing short of being a microcosm of the

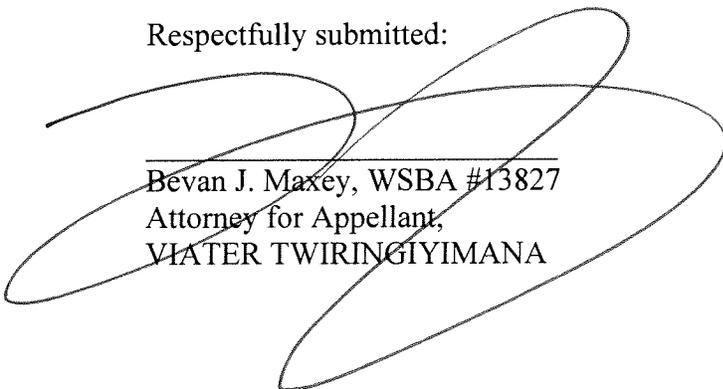
witch hunt which took place in Wenatchee in the mid-1990s.

B. CONCLUSION

Based upon the foregoing points and authorities, the appellant, VIATER TWIRINGIYIMANA, once again respectfully requests that the judgment and sentence which was erroneously entered against him in this matter by the superior court of Spokane County, State of Washington, on January 19, 2017, in cause number 14-1-04234-6, be reversed by this court on review and, further, that said remaining criminal charge of molestation in the first degree against him be remanded and with instructions to the superior court that said charge be dismissed with prejudice. RAP 12.2.

DATED this ^{JM} 7th day of July, 2018.

Respectfully submitted:



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Attorney for Appellant,
VIATER TWIRINGIYIMANA

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**STATE OF WASHINGTON COURT OF APPEALS
DIVISION III**

STATE OF WASHINGTON,)
) No. 354580-III
Plaintiff,)
)
vs.) AFFIDAVIT OF
) MAILING
VIATER TWIRINGIYIMANA,)
)
Defendant/Appellant.)

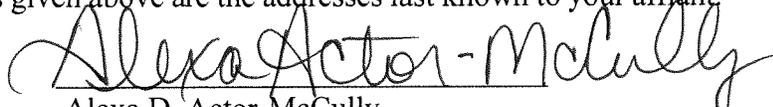
STATE OF WASHINGTON)
: ss.
County of Spokane)

ALEXA D. ACTOR-MCCULLY, being first duly sworn on oath, deposes and says:
that she is a disinterested person, competent to be a witness, and past the age of 21
years; that on the 24th day of July, 2018, affiant caused true copies of the Reply Brief
of Appellant to be served upon the individuals below by depositing a copy of said
document in a United States Post Office Box in Spokane, Spokane County,
Washington, by first class mail addressed to:

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2807 E. Boone, Apt 11
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Gretchen Verhoef
Deputy Prosecuting Attorney
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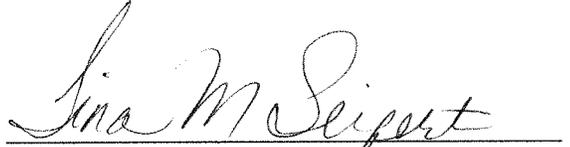
That the addresses given above are the addresses last known to your affiant.



Alexa D. Actor-McCully

I certify that I know or have satisfactory evidence that Alexa D. Actor-McCully is the person who appeared before me, and said person acknowledged it to be her free and voluntary act for the uses and purposes mentioned in the instrument.

DATED: July 24, 2018



NOTARY PUBLIC in and for Washington
Residing at Spokane.
My Commission Expires: 11/29/2018

