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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 VIATER TWIRINGIYIMANA
AMENDED

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A. ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, erred on September 6, when entering its letter decision admitting the alleged child hearsay statements of the complaining witness, D.A.M., allegedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, which was filed the next day. [CP 278-80].

2. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, erred on January 19, 2017, when entering finding of fact no. 9 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that said complaining witness made certain “statements” described in finding of fact no. 8 “to Karen Winston in the course of a properly conducted forensic interview in a manner designed to promote reliability.” [CP 149].

3. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, also erred on January 19, 2017, when entering finding of fact no. 10 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-

Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that said complaining witness ‘‘had not [sic] motive to lie about the alleged abuse.’’ [CP 149].

4. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, likewise erred on January 19, 2017, when entering finding of fact no. 11 of its ‘‘findings of fact and conclusions of law regarding’’ the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that said complaining witness ‘‘is an honest child.’’ [CP 149].

5. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, in turn erred on January 19, 2017, when entering finding of fact no. 13 of its ‘‘findings of fact and conclusions of law regarding’’ the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Winston, wherein the court opined that said complaining witness’ ‘‘statements to her mother were spontaneous and unsolicited and her statements to Karen Wilson were elicited with open-ended questions, allowing . . . [the child]. . . the opportunity to provide the information in her own words.’’ [CP 149].

6. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, also erred on January 19, 2017, when entering finding of fact no. 14 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that “the manner and timing of . . . [the complaining witness]. . . disclosures--along with the fact that she disclosed to her mother, whom she trusted--weigh in favor of reliability.” [CP 149].

7. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, similarly erred on January 19, 2017, when entering finding of fact no. 17 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that “the likelihood that . . . [the complaining witness] . . . recollections are faulty is minimized by the fact that she made the disclosures to her mother as soon as she was away from the perceived danger and felt safe to reveal what allegedly was happening to her. . . [; and] . . . the statements to Ms. Winston were similarly made within a short time of the initial disclosure.”

[CP 150].

8. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, also erred on January 19, 2017, when entering finding of fact no. 18 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court opined that “given the totality of the circumstances, it is unlikely . . . [the complaining witness]. . . is misrepresenting the defendant’s involvement. . . .” [CP 150].

9. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, in turn erred on January 19, 2017, when entering conclusion of law no. 2 of its “findings of fact and conclusions of law regarding” the admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson, wherein the court failed to follow and abide by the requirements, standards and requirements of proof mandated under RCW 9A.44.120 and State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) opined that said complaining witness “is an honest child.” [CP 150].

10. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, in turn erred on January 19, 2017, when

entering conclusion of law no. 2 of its “findings of fact and conclusions of law regarding” wherein the court concluded that the government had met its burden to demonstrate the reliability and admissibility of alleged child hearsay statements of the complaining witness, D.A.M., supposedly made to her mother, Arwa al-Naquash [now Burke], and to a purported child forensic interviewer, Karen Wilson. [CP 150].

11. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, in turn erred on January 19, 2017, when entering conclusion of law no. 3 of its “findings of fact and conclusions of law regarding” and thereby adopting any oral rulings, as well as the ruling set forth in the court’s letter decision dated September 6, 2016, and filed the next date, September 7. [CP 150, 278-80].

12. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, further erred on July 13, 2017, when entering its “order” allowing and admitting the subject child hearsay statements of the complaining witness, D.A.M.. [CP 253-54].

13. The superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, in turn erred when allowing the plaintiff, STATE OF WASHINGTON, to present at trial the additional, needlessly cumulative and redundant testimonies of other witnesses regarding the alleged incidents of sexual misconduct, which witnesses included Arwa al-Naquash [now Burke], the biological mother of the complainant, D.A.M.;

and Karen Wilson, a purported forensic interviewer from the organization Partners with Families and Children, concerning certain alleged out-of-court statements of D.A.M., which she had allegedly made to them and which purportedly involved accusations of sexual misconduct and improprieties committed by the defendant, VIATER TWIRINGIYIMANA, so as prove those criminal charges brought against him on three [3] counts of child molestation in the first degree [RCW 9A.44.083(1)]. [CP 1-2; 148-50].

14. After trial, the superior court of Spokane County, State of Washington, in criminal cause no. 14-1-04234-6, erred on May 26, 2017, in accepting the Verdict Form A from the jury wherein the defendant, VIATER TWIRINGIYIMANA, was found guilty as alleged by the plaintiff, STATE OF WASHINGTON, in Count I of the November 25, 2014, criminal information, to wit: child molestation in the first degree [RCW 9A.44.083(1)]. [Jury Verdict RP 139-42; CP 245].

15. Finally, the superior court of Spokane County, State of Washington, erred in criminal cause no. 14-1-04234-6, in entering its "Judgment and Sentence in a Criminal Case," and other related final decisions of the court on July 13, 2017, as against the defendant, VIATER TWIRINGIYIMANA, which judgment and related decisions were based upon the erroneous May 26, 2016, jury Verdict Form A [Jury Verdict RP 139-42; CP 245] wherein said defendant was found guilty solely of the

crime charged in Count I of the November 25, 2014 information, to wit: child molestation in the first degree [RCW 9A.44.083(1)]. [Sentencing RP173-81; CP 261-76].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether child hearsay testimony, which the superior court allowed the prosecution to present at trial in terms of the testimonies of the complaining witness' mother, Arwa al-Naquash Burke, and Karen Winston regarding the alleged out-of-court statements of the complaining witness, D.A.M., were inadmissible under the governing provisions of RCW 9A.44.120 and the "reliability" standards set forth in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984), and its progeny? [Assignments of Error nos. 1 through 15].

2. Whether, said hearsay statements are also subject to further constitutional challenge insofar as said statements were unduly prejudicial, since the complaining witness herself testified at trial, and in turn constituted an impermissible and tacit comment on the evidence in violation of Article IV, §16, of the Washington state constitution? [Assignments of Error nos. 1 through 15].

3. Finally, whether the remaining evidence and testimony of the complainant, D.A.M., while excluding her alleged out-of-court, hearsay statements to her mother and Karen Wilson, lacked the requisite credibility and required proof of guilt beyond a reasonable doubt as

required under 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), when in contrast the defendant testified before the jury and flatly denied all the allegations of molestation raised by the prosecution? [Assignments of Error nos. 14 and 15].

C. STATEMENT OF THE CASE

1. Factual Background.

In December 2013, the complaining witness, D.A.M., first disclosed to her mother, Arwa al-Naquash [now Burke], that she had allegedly been molested by her mother's former lover and boyfriend, VIATER TWIRINGIYIMANA. [Trial RP 297-98, 333, 352]. This had supposedly occurred when they had resided with Mr. TWIRINGIYIMANA in his apartment here in Spokane, Spokane County, State of Washington, between June and August 2013. [Id.]. At the time when this information was disclosed in December, D.A.M. and her mother were then living with the mother's new fiancé, William Burke, who she later married. [Trial RP 367].

The next day after the disclosure of this sexual abuse, D.A.M.'s mother and Mr. Burke contacted the Spokane city police department. [Trial RP 301]. It was later noted by the investigative officer, Brian Hammond, that too much time had elapsed for there to be any independent forensic or physical evidence to corroborate D.A.M.'s claims of against

Mr. TWIRINGIYIMANA. [Trial RP 485-87]. Likewise, it was clear to Detective Hammond there had been no eye witness to any such sexual misconduct. [Trial RP 487].

Thereafter, on January 21, 2014, D.A.M. was interviewed by Karen Winston, a so-called child forensic interviewer associated with Partners and Families with Children in Spokane. [Trial RP 394, 482, 484]. Detective Hammond witnessed the interview from an adjacent room inside the facility. [Trial RP 484].

Later on, Detective Hammond contacted Mr. TWIRINGIYIMANA and arranged for him to come to Gardner Building for an interview on February 3, 2014. [Trial RP 488-89]. During the course of Detective Hammond's examination and questioning of Mr. TWIRINGIYIMANA, he was asked at various times whether he had ever had, or attempted to have, any sexual contact with D.A.M.. [Trial RP 495, 499, 510-11]. On each such occasion, Mr. TWIRINGIYIMANA adamantly denied any such wrongdoing. [Id.].

2. Procedural History.

Eventually, on November 11, 2014, the defendant, VIATER TWIRINGIYIMANA, was charged by information with three [3] counts of the crime of child molestation in the first degree [RCW 9A.44.083] wherein the plaintiff, STATE OF WASHINGTON, alleged the defendant had separately committed said criminal acts upon the complaining witness,

D.A.M., then age 7 years, either on, about or between June 1 and August 31, 2013. [CP 1-2].

a. Child Hearsay Proceedings.

On February 9, 2015, the government filed and served notice on the defendant, under RCW 9A.44.120, that the prosecution planned on seeking admission at trial of D.A.M.'s alleged hearsay statements to both her mother, Arwa Al-Naquash [now Burke] and Karen Winston, as to what allegedly occurred in terms of the alleged molestation. [CP 4-5]. The hearsay statements were alleged made in 2013 and early 2014. [Id.]. On March 11, 2015, a second or amended child hearsay notice was served on the defendant by the plaintiff, STATE OF WASHINGTON. [CP 6-7].

With respect to these child hearsay notices, the defendant TWIRINGIYIMANA opposed the introduction of any alleged out-of-court statements of D.A.M. on the basis that there was clearly insufficient “indicia of reliability” associated with these alleged statement under the nine [9] factors identified in State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984). [CP 127-31].

Thereafter, on September 2, 2015, a hearing was held on the issue of admissibility of the alleged hearsay statements of D.A.M. to her mother and Ms. Winston under RCW 9A.44.120. [September 2, 2015 Pre-Trial RP 7-97].

(1). Arwa al-Naquash [now Burke] testimony. During the course of

said hearing, D.A.M.'s mother, Arwa al-Naquash [now Burke], was called to testify on behalf of the prosecution. [Pre-Trial RP 8-60]. Ms. Burke stated that she was born in 1972 in Bagdad, Iraq, and had left that country at the end of 2004. [Pre-Trial RP 9]. Her daughter, D.A.M., was later born in Anman, Jordan, on September 25, 2005. [Pre-Trial RP 10]. They had had no contact with her husband after he left Jordan in 2008. [Pre-Trial RP 10-11; Trial RP 394]. Later on, Ms. Burke and D.A.M. left Jordan and entered the United States on March 26, 2013, and eventually settled in Spokane, Spokane County, State of Washington. [Pre-Trial RP 10].

Thereafter, Ms. Burke began work as a housekeeper at the Davenport Hotel on May 10, 2013. [Pre-Trial RP 12-13, 49]. There she met the defendant, VIATER TWIRINGIYIMANA, who was a cook at the same establishment. [Id.]. Roughly a month later, she and her daughter moved into Mr. TWIRINGIYIMANA's residence on June 15, 2013; and the couple then began a torrid, romantic relationship with one another. [Pre-Trial RP 13-15]. During the course of this relationship, D.A.M. never slept in the same bed with them. [Pre-Trial RP 20].

After moving in together, Mr. TWIRINGIYIMANA and Ms. Burke worked different shifts at the Davenport. [Pre-Trial RP 19-20]. The defendant babysat D.A.M. while her mother was at work from 3:00 to 11:00 p.m. [Pre-Trial RP 20, 49-50]. At some point during this

arrangement, Mr. TWIRINGIYIMANA advised Ms. Burke that D.A.M. was ‘misbehaving’ while in his care and would not following his instructions. [Pre-Trial RP 20-22].

In turn, D.A.M. readily complained to her mother that she was upset with the defendant because she did not like him telling her to go to bed early when school was not in session during the summer months. [Pre-Trial RP 23-24]. Also, she complained to her mother that she could not sleep due to the defendant and his friends being loud and entertaining in the living room. [Id.]. Although D.A.M. spoke freely to her mother, there were no complaints made at this time of as to any alleged sexual abuse. [Id.].

Eventually, in August 2013, Ms. Burke and D.A.M. decided to move out of the defendant’s residence. [Pre-Trial RP 19, 24-27, 53]. D.A.M.’s care was then entrusted other persons while Ms. Burke continued to be employed at the Davenport until November 2013. [Pre-Trial RP 51-52].

In October 2013, Ms. Burke started a sexual relationship with William Burke, whom she later married. [Pre-Trial RP 30-31, 54]. Eventually, during the course of their courtship she and her daughter, D.A.M., moved into the Mr. Burke’s home in November 2013. [Pre-Trial RP 30-31, 54].

Once again, prior to this time, D.A.M. said nothing to her mother

about her having been sexually molested by Mr. TWIRINGIYIMANA; nor did she even mention his name after they left his residence in August [Pre-Trial RP 27-28, 29]. Instead, her main complaint, both before and after moving out of Mr. TWIRINGIYIMANA's apartment, was that she missed her mother and mother's attention while she was at work. [Pre-Trial RP 28, 50-51]. On November 2, 2013, Ms. Burke was injured during a bicycle accident and was forced to leave work. Sometime in December 2013, after they were settled in with Mr. Burke, D.A.M. allegedly told her mother, for the very first time, that Mr. TWIRINGIYIMANA had supposedly tried on various occasions to inappropriately touch her, and had asked her to remove her panties and to touch his penis when Ms. Burke was at work. [Pre-Trial RP 33, 55-57]. Again, this was some three [3] months after they had last been in contact with Mr. TWIRINGIYIMANA. [Pre-Trial RP 54].

Ms. Burke had no prior suspicions whatsoever of any such sexual misconduct occurring prior to this disclosure by D.A.M.. [Pre-Trial RP 35].

Sometime later on, Ms. Burke questioned her daughter once more so as to confirm these allegations of sexual abuse. [Pre-Trial RP 58, 59]. Prior to this time, Ms. Burke claimed she had never known her daughter to falsely accuse an adult of any type of wrongdoing. [Pre-Trial RP 38].

(2). D.A.M.'s testimony. Thereafter, the prosecution called

D.A.M. to testify at this child hearsay hearing. D.A.M. acknowledged that she had said nothing about the alleged sexual abuse until she had her mother had moved into Mr. Burke's residence after leaving a Church facility located next to Christ Our Hope Church. [Pre-Trial RP 67, 68-69]. Curiously enough, during the course of her testimony on September 2, 2015, D.A.M. further acknowledged she was unaware of what might happen if a witness should fail to tell the truth to either the judge or the jury. [Pre-Trial RP 73].

(3). Karen Winston's testimony. The STATE's final witness during this child hearsay proceeding was Karen Winston. She is a "forensic child interviewer" and the director of "Partners with Families and Children," which is a child advocacy center in Spokane. [Pre-Trial RP 81]. Ms. Winston acknowledged early on that there is no certification process associated with being a forensic examiner. [Pre-Trial RP 82]. Later on, after entering its child hearsay ruling, the court granted the defendant's motion in limine that Ms. Winston could not be offered as an expert concerning the "truthfulness" of D.A.M.'s alleged claims of abuse, or whether any abuse had in fact occurred in this case. [Pre-Trial RP 127-28].

As to the interview, Ms. Winston examined D.A.M. on January 21, 2014, after Ms. Burke and her fiancé, Mr. Burke, contacted the City of Spokane police department about the possible sexual abuse. [Pre-Trial RP

85-86, 88]. A DVD recording of this interview was admitted by the court, as Exhibit no. 1. [Pre-Trial RP 90-91; CP 212-44]. Also, admitted were printed drawings or body diagrams (a) of a girl where D.A.M. alleged put marks indicating that she had been kissed on the lips and on the arm by the accused [Exhibit no. 2], and (b) of an adult male indicating that she had been made to touch the accused's penis [Exhibit no. 3]. [Pre-Trial RP 90-93].

During the course of Ms. Winston's testimony, she admitted a "forensic interviewer" should attempt to ask only open-ended, indirect inquiries regarding possible abuse, and avoid either leading, suggestive or coercive questioning so as to enable the child to give a "narrative" description of what had allegedly transpired. [Pre-Trial RP 83]. In addition, Ms. Winston readily admitted she has no way of knowing or surmising whether the child being interviewed may have some ulterior motivation, or purposely misled by a parent or adult to make false accusations against an accused. In this regard, not knowing the child beforehand, she has no way of evaluating the child's trustworthiness, veracity or proclivities towards lying. [Pre-Trial RP 97].

As to the January 21, 2014, forensic interview itself, D.A.M. advised Ms. Winston that she did not like the defendant because he was "mean" to her and her mother while they were living with him. [CP 227, 240-41]. In addition, she told Ms. Winston that, in terms of the alleged

abuse, Mr. TWIRINGIYIMANA ‘‘never threatened’’ her not to tell about the alleged sexual misconduct. [CP 234, 239]. Finally, she stated the abuse occurred during the daytime when her mother was at work, and this had happened after she had turned 8 years of age and after her September 25th birthday in 2013 [sic]. [CP 240]. If this were true, the abuse would have occurred when they were no longer residing in the defendant’s home and were, instead, living with a friend of mother who speaks Arabic. [CP 240-41].

(4) The Court’s ruling re: child hearsay. At the conclusion of this child hearsay hearing, the superior court took the matter under advisement. On September 27, 2016, the court, by letter opinion dated the previous day, entered its decision that there was substantial indicia of reliability in terms of child hearsay and, in this regard, the statutory requirements of RCW 9A.44.120 and the nine [9] factors identified in State v. Ryan, 103 Wn.2d 165, 170, 691 P.2d 197 (1984), had been satisfied in this matter. [CP 279-80]. Therefore, the testimonies of the complaining witness’ mother, Arwa al-Naquash [now Burke] and Karen Winston, regarding the alleged out-of-court statements of the complaining witness, D.A.M., were held to be admissible at trial. [CP 279-80].

Formal ‘‘findings fact and conclusions of law’’ to this effect were 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].

b. Trial Proceedings.

A jury trial commenced on the criminal charges against VIATER TWIRINGIYIMANA in the superior court of Spokane County, State of Washington, on May 22, 2017. [Trial RP 1, et seq.].

(1) Trial testimony of Arwa al-Naquash [now Burke]. On the following day, the prosecution called Arwa al-Naquash [now Burke] as its first witness. [Trial RP 271]. During the course of her testimony, she stated that the new life and set of circumstances presented here in Spokane had been especially, emotionally hard of her daughter D.A.M. [Trial RP 280-82]. From the start, she had evidenced a sense of “clinginess” and would not give her any space. [Trial RP 280-82]. Prior to being sponsored to immigrate and come to the United States, D.A.M. had been her entire focus. [Trial RP 366].

After starting work on May 10, 2013, she could not spend much time with D.A.M. because of her work schedule and the fact D.A.M. was in bed by the time she got home on an evening. [Trial RP 278, 280, 289]. D.A.M. thought she was more interested in work than attending to or spending time with her. [Trial RP 290].

With respect to her torrid, romantic and sexual relationship with the defendant, which took place after moving in with him, Ms. Burke testified she had initially expected him to marry her because of the views

of the Church on adultery and the shame associated with her living with a man out of wedlock. [Trial RP 291, 335-36]. She had converted to Christianity from Islam prior to leaving Jordan. [Trial RP 336].

However, Ms. Burke's expectations and desire for marriage were eventually dashed and waned when she concluded Mr. TWIRINGIYIMANA was becoming too "controlling," was being "disrespectful" towards her, and did not care in the least about her "reputation" as an adulterous, unmarried woman. [Trial RP 291-93, 362-63].

At this juncture, she testified she felt "trapped" in this sexual relationship since Mr. TWIRINGIYIMANA obviously had no interest in marrying her. [Trial RP 349-50]. In addition, she came to believe that he was "greedy" and simply using her financially, insofar as she was required to share living expenses with him. [Trial RP 338, 345, 348-50].

Finally, in mid-August 2013, Ms. Burke and her daughter decided to move out of Mr. TWIRINGIYIMANA's residence and made temporary arrangements to stay with an Iraqi woman. [Trial RP 295, 352, 360-61]. Once again, D.A.M. continued to get emotionally upset and cry when she left for work. [Trial RP 365]. During this transition, relations between Ms. Burke and Mr. TWIRINGIYIMANA became even more acrimonious. [Trial RP 352-54]. He was upset because she moved out and, at one point, she undertook to obtain a restraining order against him. [Trial RP 353-54,

358].

Subsequently, Ms. Burke and D.A.M. found their own place to live. [Trial RP 361-62]. Then, in October 2013, Ms. Burke started a relationship with her eventual husband, William Burke. Later on, she and her daughter moved in with Mr. Burke after she had to quit work, and could no longer support herself and D.A.M., as a result of a bicycle accident on November 2, 2013, when she broke her wrist. [Trial RP 367, 469].

A few weeks later, sometime in December, D.A.M. allegedly disclosed to her that she had been sexually molested by Mr. TWIRINGIYIMANA when they were residing with him and she was away from the apartment while at work. [Trial RP 297-98]. Prior to this time, Ms. Burke had never once seen the defendant either physically or sexually mistreat D.A.M.. [Trial RP 292]. The next day, she and Mr. Burke, contacted police about what D.A.M. had disclosed to her mother. [Trial RP 301, 474].

Finally, it should be noted that during her trial testimony, Ms. Burke was asked by the prosecution to identify a drawing and statement she had received from D.A.M.'s school as having been drawn and written by D.A.M.. [Trial RP 315-16; Exh. no. 6]. The picture itself depicted a naked boy and D.A.M. herself, along with the statement "The day I tried to have sex was a disaster." [Id.]. There was no indication when she produced the document. [Id.].

(2) Trial testimony of Karen Winston. On May 24, 2015, the STATE OF WASHINGTON also called Karen Winston as a prosecution witness. [Trial RP 371]. During the course of her testimony, she once again emphasized the paramount importance of avoiding leading or suggestive questioning of a child during an interview this could easily lead to the “Salem witch-hunt” scenario as had occurred in Wenatchee, Washington, in 1994 and 1995, wherein over some forty [40] innocent adults were falsely accused of committing various egregious sexual acts on school-age children. [Trial RP 395-96]. Ms. Winston further acknowledged that no forensic interview of a child is ever “perfect” in nature, nor is it recognized as a reliable science. [Trial RP 397].

By D.A.M.’s account, the defendant had allegedly kissed her, and had then supposedly shown her his penis and asked her to touch it. [Trial RP 400]. She was not aware beforehand as to any other “touching problem.”

In fact, D.A.M. had not volunteered this information until Ms. Winston directly brought the subject up during the course of the interview. [Trial RP 401-06, 414]. D.A.M. then disclosed that she had touched the defendant’s private parts, and that he had kissed her on the lips and had touched her arm. [Trial RP 401-06; Exh. nos. 2, 3]. The only information that D.A.M. “volunteered” to Ms. Winston about the Mr. TWIRINGIYIMANA was that she did not like the defendant because he

was “mean.” [Trial RP 401-02, 414].

Also, during the course of her trial testimony, Ms. Winston stated that she does not examine a child concerning the child’s possible motivation. [Trial RP 407]. Ms. Winston also conceded towards the end of her testimony that there was nothing to corroborate the alleged abuse in this case since she was not there at the time when it supposedly occurred. [Trial RP 419].

(3) Trial testimony of D.A.M. On May 24, 2017, the alleged victim herself was called to testify by the prosecution. [Trial RP 421]. D.A.M. acknowledged that while she and her mother were living with the defendant, Mr. TWIRINGIYIMANA would babysit her during the afternoon and evening while her mother was at work. [Trial RP 428-29, 430]. Supposedly, during this time, there had some “uncomfortable touching” which had occurred between her and the Mr. TWIRINGIYIMANA. [Trial RP 430]. On one occasion, she had gone to his and her mother’s bedroom in order to him kiss and tell him goodnight; he then told her to stay and started grabbing her bottom and thighs. [Trial RP 430-31, 455].

He also allegedly asked her to touch his private area which she did. [Trial RP 432, 466]. However, D.A.M. could not recall whether she did this over or under his clothing and underwear. [Trial RP 432]. D.A.M. further testified this form of touching occurred on more than one occasion.

[Trial RP 431-42]. She also claimed during her testimony that the defendant had tried to touch her private parts as well, but never actually did so. [Trial RP 456].

Eventually, they moved out of Mr. TWIRINGIYIMANA's residence in August 2013 because he was being 'mean' to her mother, and she and the defendant were fighting a lot. [Trial RP 458]. Contrary to her mother's desires, it was clear by this time that the defendant was not going to marry her mother. [Trial RP 466-67]. Roughly four [4] months after leaving the defendant's residence, D.A.M. finally decided to tell her mother in December 2013 about the sexual molestation allegedly committed by Mr. TWIRINGIYIMANA. Again, this was after moving in with Mr. Burke. [Trial RP 433-44].

(4) Trial testimony of Detective Brian Hammond. Thereafter, the prosecution called Detective Brian Hammond as a final witness. [Trial RP 476]. He once again acknowledged that during the February 4, 2014, interview of Mr. TWIRINGIYIMANA, the latter had adamantly denied any such sexual misconduct or wrongdoing as falsely claimed by D.A.M. [Trial RP 495, 499, 509, 510-11].

(5) Trial testimony of VIATER TWIRINGIYIMANA. After the STATE OF WASHINGTON rested on May 24, 2017, the defense called the defendant, Mr. VIATER TWIRINGIYIMANA, to testify on his own behalf [Trial RP 519], wherein he flatly and adamantly denied the

prosecution's allegations of molestation against him and further asserted such claims of sexually wrongdoing were being fabricated by the complaining witness's mother, Ms. Burke, because he had "shamed" her by having refused to marry her. [Trial RP 599-604].

c. Jury deliberations. After the defense rested [Trial RP 637-38], and final arguments of the parties were presented [Trial RP 657-700, 700-11], the jury undertook its deliberation. At the conclusion of same on May 25, 2017, the jury found the defendant, VIATER TWIRINGIYIMANA, not guilty on counts II and III [May 26, 2017 Jury Verdict RP 139, 140-41; CP 1-2, 246, 247], but "guilty" the remaining count of the crime of child molestation in the first degree [RCW 9A.44.083(1)] as charged in connection with count I of the November 25, 2014 information. [Jury Verdict RP 139, 140-41; CP 1-2, 245]

d. Sentencing and Judgment. Thereafter, a sentencing hearing was held on July 12, 2017. [July 12, 2017 Sentencing RP 147, et seq.]. The, following argument, the superior court imposed a sentence of 51-68 month imprisonment. [Sentencing RP 174-75; CP 261-76].

This appeal follows. [CP 260, 277; spindle]. Additional facts and circumstance are set forth below as they apply to a particular issue or argument now on appeal.

D. STANDARD OF REVIEW

Errors of law involving evidentiary matters, including those of a

constitutional magnitude, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 690, 105 P.3d 1022 (2005). In a criminal case, an error of constitutional magnitude is presumed prejudicial and requires reversal unless the prosecution establishes, by way of the remaining competent evidence in the case, that such error was harmless beyond a reasonable doubt. 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); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Such error of constitutional magnitude, including a prohibited judicial comment on the evidence under Article IV, §16, of the Washington state constitution, may be raised for the first time on appeal. See, State v. Levy, 156 Wn.2d, 709, 719-20, 132 P.3d 1076 (2006); State v. Sivins, 138 Wn.App. 52, 59, 155 P.3d 982 (2007) see also, RAP 2.5(a)(3).

In terms of any aspect of review associated with the exercise of discretion by the trial court, the governing standard is whether there has been a manifest abuse of discretion committed by said court. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court will be deemed to have so abused its discretion when it can be said the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted, applied or chosen to ignore the governing law.

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). In other words, misapplication of the law constitutes a manifest abuse of discretion warranting reversal on appeal. In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

In addition, the standard for review governing the sufficiency of evidence to criminal convict a defendant is whether, after viewing the evidence in the light most favorable to the prosecution, a rational 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).

E. ARGUMENT

1. Contrary to the determination of the superior court, the proffered child hearsay evidence should not have been presented at trial under the governing provisions of RCW 9A.44.120 and the related 'reliability' criteria set forth in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984), and its progeny. [Issue No. 1].

As previously pointed out, the superior court, by letter opinion dated September 6, 2016, held the child hearsay statements proffered by her mother, Arwa al-Naquash [now Burke] and Karen Winston with Parents and Partners with Children, were 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].

Thereafter, formal ‘‘findings fact and conclusions of law’’ to this effect were 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].

RCW 9A.44.120 governs the admissibility of a child’s hearsay statement. 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 remains a critical constitutional issue in this case concerning the lack or absence of any “indicia of reliability” associated with the subject hearsay statements of D.A.M. as required under RCW 9A.44.120. The defendant has an unqualified 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 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. No single Ryan factor is controlling. The court's reliability assessment must be based on an overall evaluation of all factors.

State v. Kennealy, 151 Wn.App.861, 881, 214 P.3d 200 (2009).

Furthermore, each factor must be "substantially met before a statement is demonstrated to be reliable." Id.; State v. Griffith, 45 Wn.App. 728, 738-39, 727 P.2d 247 (1986).

Here, in terms of these factors, there were serious questions raised by the defense at the time of the pre-trial hearing as to the unreliability of D.A.M.'s hearsay statements concerning each of the Ryan factors.

Accordingly, it was abundantly clear said hearsay statements should not have been admitted by the superior court in the prosecution's case-in-chief.

First, it was evident for a number of reasons that D.A.M. had a clear motive to lie insofar as both her and her mother had lived a peripatetic life their entire life. 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, D.A.M. was fully cognizant of the animosity and acrimony that existed between the defendant and her mother, as well as the tumult that continued between them until she and her mother settled into William Burke's home.

By the same measure, D.A.M. was upset with Mr. TWIRINGIYIMANA because he was adamant that she had to follow his house rules and instructions while her mother was at work. She perceived him as mean. 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 or in issue in this case.

Next, concerning the second Ryan factor, there was no clear or substantial evidence presented by the prosecution establishing D.A.M. 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 missing.

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 of D.A.M. about "touching" Simply put, they were not derived by way of any "narrative" disclose to Ms. Winston. By the same measure, the fifth factor clearly bodes against the "reliability" of D.A.M.'s hearsay statements in terms of their untimeliness and the distain both she and her mother then held towards the accused.

In terms of the sixth factor, there was once again a total lack of evidence proffered by the plaintiff at the time demonstrating that cross-examination could not show the declarant's lack of knowledge of sexual matters. The argument that she could only have gathered this information from the defendant is misplaced. Ironically, at trial, the plaintiff's exhibit no. 6 which was drawn and written by D.A.M. at school seemingly 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 drawing showed that D.A.M. was already familiar with the male anatomy. Furthermore, no allegation of actual sexual intercourse was ever raised against Mr. TWIRINGIYIMANA in this case.

In terms of factor no. 8, there was a strong possibility that D.A.M.’s recollection is faulty. Not only does the four [4] month delay in the reporting of this alleged abuse weigh heavily in this regard, but also the fact the hearsay statements to her mother and Ms. Winston contain inconsistencies and are also at odds to what D.A.M. later testified at trial in terms of having allegedly been additional inappropriate touching. [Trial RP 430-32, 435, 455-57]. Finally, the ninth and final Ryan factor is also absent. There was no physical evidence of molestation or any eye witness testimony to corroborate D.A.M.’s otherwise bald claims of sexual improprieties against the defendant, Mr. TWIRINGIYIMANA.

Hence, the superior court committed reversible error when ignoring or failing to properly apply the forgoing Ryan factors in this case. Such error amounts to nothing short of a manifest abuse of discretion. Furthermore, from a due process standpoint, this error was clearly of constitutional magnitude, requiring the 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), affd, 132 Wn.2d 472, 939 697 (1997). Since the respondent, STATE OF WASHINGTON, cannot prove that the resulting prejudice to appellant was harmless beyond a reasonable doubt, the conviction, judgment and sentence entered against him [Sentencing RP 154-75; CP 261-76] is now subject to reversal on this appeal. 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. 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 tacit 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].

Initially, it should be borne in mind that, because a judicial comment on the evidence by the trial court is an error of constitutional magnitude, such claim can be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); see also, RAP 2.5(a)(3). Thus, the appellant, Mr. TWIRINGIYIMANA, is now 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 latter’s assessment and trustworthiness of the 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, State v. Eisner, 95 Wn.2d 458, 462-63, 626 P.2d 10 (1981). 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 ignored and misapplied all the Ryan factors amounted to nothing short of a tactic

comment on the evidence including D.A.M.'s supposed veracity in terms of sexual abuse. Thus, the present case involves far more than evidence having been properly [sic] admitted by the superior court. Id.; see also, State v. State v. Gentry, 125 Wn.2d 570, 638-39, 888 P.2d 1105 (1995).

The present case involves far more than evidence having been properly [sic] admitted by the superior court. Id. The admission of this evidence by the superior court, as outlined in Part E.1, above, rose to the level of a manifest abuse of judicial discretion resulting in a direct violation of the tenets of Article IV, §16, of the Washington state constitution. Id.; see generally, 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.

In sum, the proffered child hearsay evidence of D.A.M. served no independent or legitimate purpose other than to over-emphasize the court's personal view of the evidence and, thus, prejudice 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 D.A.M.. See, State v. Bedkar, 74 Wn.App. 87, 93-94, 871 P.2 673

(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).

For this additional, related 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 and procedural due process along with the principle of fundamental fairness requires nothing less in terms of these egregious circumstances.

3. Finally, the testimony of the complainant, D.A.M., 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].

Lastly, it should be duly 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 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. Said evidence was arguably contaminated by the in-artful manner, method and means of questioning of this child witness by inexperienced adults including her mother and Karen Winston. It can easily be said be said that the entire series of alleged molestation was nothing more than a seed planted in this child's mind by way of a vengeful mother and the direct, leading and pointed, rather than open ended, questions posed by Ms. Winston.

As stated above, 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 issue of whether there was evidence of guilt beyond a reasonable doubt presented in this case. Id.

Why not a finding of "guilty" in terms of all three [3] counts, given the fact the same, exact claims and evidence was presented to it by the prosecution? Stated differently, if D.A.M. could not be believed beyond a reasonable doubt on last two [2] of the counts, why then on the first count? [CP 245-47] This glaring anomaly and inconsistency in verdicts both illustrates confirms the lack of proof beyond a reasonable

doubt 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. [Trial RP 430-32, 455].

Hence, the subject “conviction, judgment and sentence” entered against the appellant VIATER TWIRINGIYIMANA on the remaining count of molestation in the first degree [Sentencing RP 174-75; CP 261-76] should once more be reversed and remanded to the superior court with instruction that this case be dismissed with prejudice. See, RAP12.2.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, VIATER TWIRINGIYIMANA, 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 no, 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. Justice requires nothing less in light of the absence of any credible evidence of guilt beyond a reasonable doubt including that of the complaining witness.

DATED this 19 day of ~~March~~ ^{April}, 2018.

Respectfully submitted:

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Attorney for Appellant,
VIATER TWIRINGIYIMANA

FILED

APR 19 2018

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

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

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

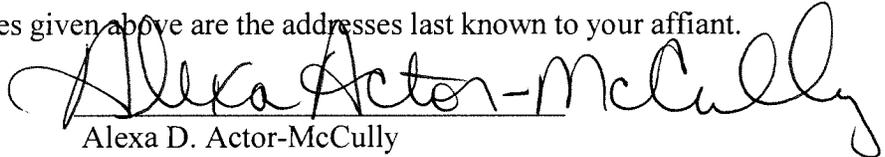
STATE OF WASHINGTON)
: ss.
County of Spokane)

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 19th day of April, 2018, affiant caused true copies of the Amended
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:

Viater Twiringiyimana
2807 E. Boone, Apt 11
Spokane, WA 99202

Deric Martin
Deputy Prosecuting Attorney
1100 W. Mallon
Spokane, WA 99260

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: April 19, 2018


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

