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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VIATER TWIRINGIYIMANA, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the trial court exercised proper discretion in determining D.A.M.'s out-of-court statements to be sufficiently reliable and admissible under the child hearsay rule, where the court evaluated all of the *Ryan* factors?

2. Whether, in the absence of an objection, the defendant has preserved any ER 403 claim regarding the admissibility of the child hearsay testimony?

3. Whether the trial court commented on the evidence by admitting the child hearsay, and whether that testimony was needlessly cumulative or overly prejudicial?

4. Whether sufficient evidence existed for the jury to convict the defendant of one count of child molestation, notwithstanding their acquittal of the defendant on two other counts of child molestation?

II. STATEMENT OF THE CASE

On November 25, 2014, Defendant Viater Twiringiyimana was charged in the Spokane County Superior Court with three counts of first degree child molestation, from incidents occurring between June 1, 2013, and August 31, 2013. CP 1. Prior to trial, the court held a hearing to determine whether the child-victim's hearsay statements to her mother, and

to a forensic evaluator, would be admitted at trial. After the court determined the statements admissible, the matter proceeded to a jury trial. The defendant was convicted of count 1, and the jury acquitted him of counts 2 and 3. The defendant was sentenced to a low-end, standard range sentence of 51 months. CP 264-65.

Child hearsay hearing.

At the time of the child hearsay hearing, D.A.M. was ten years of age. CP 148; 9/2/16 RP 63.¹ In addition to D.A.M.'s testimony, the State presented the testimony of Arwa Burke (formerly Al-Naqash), D.A.M.'s mother, and Karen Winston, the forensic evaluator. The court also viewed the recorded interview between Ms. Winston and D.A.M. CP 148, 278; Ex. P-1;² 9/2/16 RP 62, 90-91.

Ms. Burke testified that she and her daughter, D.A.M., who was born on September 25, 2005, came to the United States from Amman, Jordan, on March 26, 2013, as refugees. 9/2/16 RP 9-11. They arrived in Spokane, Washington, where Ms. Burke was able to find employment as a housekeeper at the Davenport hotel. 9/2/16 RP 11-12. Ms. Burke met

¹ References to the child hearsay hearing will be denoted by the use of the date of the hearing, September 2, 2016 (9/2/16). The trial transcript consists of four consecutively paginated volumes, and will simply be referred to as "RP."

² On June 18, 2018, the State designated Exhibit P-1 to the Court of Appeals for review.

Mr. Twiringiyimana at the Davenport hotel, where he also worked. Ms. Burke and D.A.M. moved in with the defendant in June 2013. 9/2/16 RP 12-15. They lived with Mr. Twiringiyimana for approximately two months; during that time, Mr. Twiringiyimana drove Ms. Burke to work and looked after D.A.M. while she was at work. 9/2/16 RP 15-20.

Mr. Twiringiyimana complained to Ms. Burke that D.A.M. misbehaved and did not respect him; however, Ms. Burke never saw D.A.M. misbehave in front of Mr. Twiringiyimana. 9/2/16 RP 20-22. D.A.M. lamented to her mother that she could not sleep at night because Mr. Twiringiyimana and his friends were too loud. 9/2/16 RP 23-24.

Approximately two months after the three started living together, the relationship between Ms. Burke and Mr. Twiringiyimana deteriorated, and Ms. Burke and D.A.M. moved out of the residence. 9/2/16 RP 24-25. Ms. Burke and D.A.M. moved in with another woman, and then, in November of that year, after Ms. Burke suffered a bicycle accident, they moved in with Bill Burke (who later became Ms. Burke's husband). 9/2/16 RP 26, 30-31.

Shortly after moving in with Mr. Burke, D.A.M. asked Ms. Burke whether they were in a safe place and whether Mr. Burke was strong enough

to protect them from Mr. Twiringiyimana.³ 9/2/16 RP 30. After Ms. Burke reassured D.A.M. they were safe, D.A.M. disclosed that Mr. Twiringiyimana had touched her and had asked her to touch his penis while Ms. Burke was at work and D.A.M. was in his care. 9/2/16 RP 32-33, 39.

Ms. Burke testified that D.A.M. had never made such complaints about any other men before, 9/2/16 RP 33-34, and testified that D.A.M. was a truthful child. 9/2/16 RP 36. D.A.M. was afraid to tell because she was afraid her mother would be angry, or that Mr. Twiringiyimana would remove them from his house. 9/2/16 RP 57.

³ Ms. Burke testified:

She approached me. I was in bed in the morning and she came to me. She woke me up. She said, Mommy, I want to tell you something. Then I said, Yes, what's wrong? Looks like she -- I thought that she did something wrong and now she want to confess.

Then I said, Okay, tell me what happened. Said, You will not be mad of me? I said, No, I'll not be mad of you as long as you're honest with me. Then she said, Are we -- are we in safe place here? I said, Yes. And, like, she knows that we are safe place but she ask me to make sure, to confirm. Is Bill strong enough to protect us from that guy, which is Viater. I said, Yes, of course, what's wrong. Then she told me, so this guy, he tried to touch me and he showed me something. Then I told Bill. Then we decided to go to report to police.

9/2/16 RP 32.

D.A.M. described living with Mr. Twiringiyimana when she was seven years old. 9/2/16 RP 65. She thought he was kind to both Ms. Burke and herself; she was happy to have a family and to live in a nice house. 9/2/16 RP 65. However, she became unhappy living with Mr. Twiringiyimana because she became uncomfortable in the home. 9/2/16 RP 66. Mr. Twiringiyimana asked her to take her clothes off when she kissed him goodnight.⁴ 9/2/16 RP 66.

D.A.M. told her mother what Mr. Twiringiyimana had done to her because she wanted to get it “off her chest” feeling that she was always going to remember it and hold it in as a “bad dark memory,” if she did not tell her mother. 9/2/16 RP 70-71. She did not inform her mother sooner, however, because she did not feel safe to do so. 9/2/16 RP 71.

During the hearing, D.A.M. exhibited her ability to distinguish the truth from a lie, and a general understanding of the role of a judge and jury in a courtroom, although she could not articulate what would occur if she did not tell the truth in court. 9/2/16 RP 69-70, 73. She understood the value of keeping promises. 9/2/16 RP 74-75. She was able to recall details regarding her life before she came to America, and facts, such as the details of her last birthday party, after arriving in America. 9/2/16 RP 76-78.

⁴ During the hearing D.A.M. began to cry and requested a break from her testimony. 9/2/16 RP 66.

Karen Winston testified that she has been a child forensic interviewer since 1995, and was trained in techniques to avoid leading children into making false accusations. 9/2/16 RP 82, 85. Forensic interviewers question children in a manner that is open ended, nonleading, noncoercive, and gives the child an opportunity to provide a narrative answer. 9/2/16 RP 83. To avoid “suggestibility,” Ms. Winston does not “go through a door until the child opens it.” 9/2/16 RP 84.

Ms. Winston interviewed D.A.M. on January 21, 2014, which was recorded. 9/2/16 RP 88. During the interview, Ms. Winston determined that D.A.M. was able to distinguish between truth and lies. 9/2/16 RP 88; CP 223-26. Ms. Winston found D.A.M. to be bright and articulate. 9/2/16 RP 89.

During the interview, Ms. Winston asked D.A.M. whether her mother had a boyfriend before her current boyfriend. CP 226. D.A.M. told her about “Vii;” she and her mother moved in with “Vii” shortly after they arrived in Spokane because her mother did not have a car and worked late hours. CP 227. D.A.M. told Ms. Winston that “Vii” was mean to both D.A.M. and her mother. CP 227. D.A.M. described “Vii” as being mean because he made her go to bed early and lied to her mother by claiming D.A.M. behaved poorly. CP 228.

D.A.M. told Ms. Winston she had her own bedroom while living with Mr. Twiringiyimana. CP 229. Ms. Winston asked if she ever told her mother that she “had a touching problem.” CP 230. D.A.M. responded by saying, “how did you know that?” CP 230. Ms. Winston asked if it happened, and D.A.M. indicated that it had. D.A.M. indicated that Vii had done the touching, but that she did not wish to discuss it. CP 230-31.

Ms. Winston offered D.A.M a diagram to demonstrate where she had been touched. CP 231; Ex. P-2. D.A.M. marked on the figure, and informed Ms. Winston, that “Vii” had kissed her on the mouth. CP 232; Ex. P-2. Ms. Winston then asked D.A.M. whether anyone had ever shown their body parts to her. CP 233. D.A.M. said that “Vii” “showed her a body part” and asked to draw the part of “Vii’s” body she had seen; she did not know what this body part was called. CP 233; Ex. P-3. On a diagram of an adult male, D.A.M. highlighted the penis, and identified it as a private part. 9/2/16 RP 93; Ex. P-3. She also stated that “Vii” had her touch his private part. CP 237-38. Ms. Winston asked D.A.M. if “Vii” said anything to her when he showed her that private part, and D.A.M. said that he told her that no one needed to know about it. CP 234; *see also*, Ex. P-1.

After the hearing, the trial court concluded by letter opinion dated September 7, 2016, that D.A.M.’s statements to her mother and Ms. Winston would be admissible at trial. CP 278-80. The court’s letter

opinion was later incorporated into formal findings of fact and conclusions of law, filed on January 19, 2017. CP 148-50. In its findings, the trial court found Ms. Burke, Ms. Winston, and D.A.M. to be credible during the child hearsay hearing. CP 150 (FF 20).

In its findings of fact, the trial court determined that D.A.M. lacked any motive to lie about the events. D.A.M. had expressed that she liked the defendant prior to the sexual abuse, was happy to have a family, enjoyed having her own bedroom, and appreciated the defendant's nice home. CP 149 (FF 10), 279.

The court found that D.A.M.'s mother testified that D.A.M. was an honest child and that no testimony to the contrary was presented. CP 149 (FF 11), 279. The trial court determined that the statements were made to two individuals, at different times and under different circumstances. The court further determined, "although minor discrepancies exist, overwhelmingly all of the statements made by D.A.M. are consistent." CP 149 (FF 12), 279.

The trial court determined D.A.M.'s statements to her mother were spontaneous as they were made at D.A.M.'s choosing and not in response to any questions by her mother. The trial court found that Ms. Winston's questions to D.A.M. were open-ended questions, which allowed the child to provide the information. CP 149 (FF 7, 9, 13), 279.

The court found that D.A.M.'s statements to her mother were made within three months after the abuse, and after the child felt safe in making the disclosure. Additionally, the trial court found that the disclosure to Ms. Winston was made within five months of the abuse, and weighed in favor of reliability. CP 149 (FF 6), 280.

The trial court determined that D.A.M. expressly asserted past facts. The trial court additionally determined that cross-examination of D.A.M. at trial would allow the defendant the opportunity to expose any fabrication or lack of knowledge. CP 149 (FF 15-16), 280.

The court determined that it was unlikely that D.A.M.'s memory of the sexual abuse was faulty as she disclosed at the earliest opportunity she felt safe to do so. The trial court found that D.A.M. had not disclosed the abuse earlier because she feared losing her home, and feared that her mother would kill the defendant, resulting in her mother going to jail. The trial court additionally found the time between the first disclosure and the disclosure to Ms. Winston would not likely result in a faulty memory. CP 150 (FF 17), 280.

Based on the totality of the information presented to the court at the hearing, the trial judge concluded that D.A.M. was not likely misrepresenting Mr. Twiringiyimana's involvement. CP 150 (FF 20), 280.

The trial court, therefore, deemed the child hearsay statements admissible at trial. CP 150, 280.

Trial testimony.

The testimony presented at trial was similar to that provided during the child hearsay hearing. D.A.M. testified at trial that Mr. Twiringiyimana had made her touch his penis more than once, but could not recall whether it had occurred more than twice. RP 431. Detective Brian Hammond also testified regarding his investigation – Mr. Twiringiyimana voluntarily spoke with the detective and denied having touched D.A.M. or having made her touch his penis. RP 489-99.

The defendant also testified on his own behalf. Mr. Twiringiyimana claimed that D.A.M. had seen him naked once when she walked in on him and Ms. Burke having intercourse. RP 538. He stated that he and Ms. Burke argued during their relationship about “money and women.” RP 539. His testimony portrayed a contentious break up with Ms. Burke because he would not marry her. RP 526-624. He denied that he had ever made D.A.M. touch his penis. RP 520. However, he did state that D.A.M. “was a child who seemed like she ... knew what to do, and so she knew what to do and what not to do. And so she was the kind of a child that would let you know when you do something wrong to her or you don’t. And she would let you know.” RP 559.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED HEARSAY STATEMENTS MADE BY D.A.M. TO HER MOTHER AND TO THE FORENSIC EVALUATOR.

On appeal, a trial court's determination of the admissibility of child hearsay statements is reviewed for abuse of discretion, and the trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability. *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). "Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons." *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial court abuses its discretion when its decision adopts a view that no reasonable person would take. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). Reviewing courts defer to the trial court on issues of witness credibility and the weight of the evidence because the trial court has had the opportunity to evaluate the witnesses' demeanor in court. *Swan*, 114 Wn.2d at 666.

The legislature has determined that statements made by children under the age of ten, relating to "sexual conduct performed with or on them by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by

another that results in substantial bodily harm” are admissible under certain circumstances.⁵ RCW 9A.44.120.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984), sets forth a non-exhaustive list of criteria for the court to consider in determining whether such “child hearsay” statements are reliable and may be admitted at trial. Those factors include: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statement; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contains an express assertion about past fact; (7) whether cross-examination could not help show the declarant’s lack of knowledge; (8) whether the possibility of the declarant’s faulty recollection is remote; and (9) whether the circumstances

⁵ Those circumstances are:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120 (emphasis added).

surrounding the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76 (citing *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982)); *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).^{6,7}

A trial court applies a totality of the circumstances test in evaluating the reliability of child hearsay statements under the *Ryan* factors, as each factor is non-exclusive and non-essential. *Swan*, 114 Wn.2d at 647-52. The factors must only be "substantially met." *Id.* at 652.

In this case, the State sought to admit statements made by D.A.M. to her mother and to the forensic interviewer. 03/31/15 RP 310. The court considered the testimony of D.A.M., her mother, and Ms. Winston, as well as the videotaped interview of D.A.M. with Ms. Winston. CP 278.

The defendant maintains on appeal that the trial court abused its discretion in finding that any one of the *Ryan* factors was met. Appellant's Br. at 29-31. Each factor will be discussed in turn.

⁶ The first five *Ryan* factors are derived from *State v. Parris*, and the next four factors are derived from *Dutton v. Evans*.

⁷ *State v. Karpenski* has observed that several of these factors are of "doubtful validity" and that the United States Supreme Court has disapproved of factors seven, eight and nine and the sixth factor is "of little use" when applying RCW 9A.44.120. 94 Wn. App. 80, 110-11 n. 125-28, 971 P.2d 553 (1999).

1. Motive to lie.

Mr. Twiringiyimana claims on appeal that the first *Ryan* factor “was clearly in play” based on D.A.M.’s “clear motive to lie” and desire to gain attention from her mother. Appellant’s Br. at 29. In support of this argument, however, the defendant does not cite to any direct testimony from the child hearsay hearing. Additionally, defendant asserts that D.A.M.’s status as a religious/political refugee who lived a “peripatetic life” bears on D.A.M.’s motive to lie. Appellant’s Br. at 29. Defendant provides no evidence, including any citation to the record, that D.A.M.’s travels relate, in any way, to her truthfulness or motive to fabricate the allegations against Mr. Twiringiyimana.

Ultimately, the trial court specifically found that D.A.M. did not have a motive to fabricate the allegations against Mr. Twiringiyimana. The trial court considered the defendant’s argument that D.A.M. was seeking attention or was angry with Mr. Twiringiyimana’s treatment of her mother, and rejected it. Defendant has not explained how, based on the record before the court, this was an abuse of discretion. As the trial court indicated, D.A.M. initially liked Mr. Twiringiyimana, and the home he provided for her mother and herself. D.A.M. did not disclose the abuse until several months after she and her mother had moved out of Mr. Twiringiyimana’s house and Ms. Burke was no longer working – facts which undercut any

allegation that the disclosure was made in an attempt to gain Ms. Burke's attention, or retaliate against Mr. Twiringiyimana for his treatment of Ms. Burke.

2. General character of D.A.M.

The trial court considered the general character of D.A.M. with an emphasis on her character for truthfulness. Finding that this factor was uncontested, the trial court found it had been met. Defendant fails to demonstrate how, based on the record, this finding was in error, or was unsubstantiated. Defendant's claim fails in light of the testimony of Ms. Burke that her daughter was a truthful child. CP 149 (FF 11), 279.

3. Whether more than one person heard the statements.

Although made at different times, more than one person heard D.A.M.'s statements that Mr. Twiringiyimana had molested her. The statements were also video-recorded. The court determined, "although minor discrepancies exist, overwhelmingly all of the statements made by D.A.M. are consistent." CP 149 (FF 12), 279. This finding was supported by the record and was not an abuse of the court's discretion.

4. Whether the statements made by the victim were spontaneous.

The trial court examined the fourth *Ryan* factor as well, finding that several of the statements made by D.A.M. were spontaneous, and that even those that were the result of questioning were the result of open-ended, non-

suggestive questioning. CP 149 (FF 7, 9, 13), 279. As to D.A.M.'s disclosure to her mother, D.A.M. approached Ms. Burke and disclosed the sexual abuse without prompting or questioning. It is irrelevant whether the disclosure occurred several months after the molestation occurred. What is relevant, under this factor, is that the statements were not made in response to any leading questions or suggestion by Ms. Burke. D.A.M. voluntarily and spontaneously disclosed the abuse to her mother as soon as she felt safe to do so.

As discussed above, the spontaneous nature of the statements is but one of the non-exclusive, non-exhaustive *Ryan* factors. The statements made during the forensic interview were not made in response to overly leading questions by Ms. Winston. A review of the video considered by the trial court during the child hearsay hearing demonstrates that the statements made to Ms. Winston during that interview do not appear rehearsed. Ex. P-1. Thus, those statements are sufficiently spontaneous for the court to make this conclusion without abusing its discretion.⁸

⁸ Even if the child's statements during the forensic interview were the product of leading questioning, her statements would not be inadmissible simply because they do not satisfy this single factor. *Swan*, 114 Wn.2d at 647-52.

5. The relationship of the timing of the statements and the events, and the relationship between the declarant and the witness to the statement.

Regarding the fifth factor, the court also analyzed the timing of the statements and events, and the relationship of D.A.M. to the individuals to whom she disclosed details of the sexual abuse. Again, the record supports the trial court's finding that D.A.M. disclosed the abuse as soon as she felt safe to do so. D.A.M. and her mother were no longer living with Mr. Twiringiyimana and they had moved in with Mr. Burke, who, in D.A.M.'s mind could likely protect them from Mr. Twiringiyimana.

Defendant asks this court to assume that Ms. Burke's discussions with her daughter tainted the statements made by D.A.M. to Karen Winston. Defendant has failed to provide any evidence that this occurred. This argument should be rejected as unsupported by the record.

6. Express assertion of past fact.

Defendant does not argue on appeal that the trial court erred in its determination that the child's statements contain express assertions of past fact.⁹ CP 149 (FF 15). The trial court properly made this determination. As

⁹ In his brief, defendant asserts that the sixth factor relates to both (1) express assertions of past fact, Appellant's Br. at 28, and to (2) whether cross-examination could help show the declarant's lack of knowledge, Appellant's Br. at 30. For purposes of this response, the State assumes that the sixth factor relates to assertions of past fact, and the seventh factor relates to the efficacy of cross-examination.

noted above, the sixth factor is “of little use” to the analysis. *State v. Karpenski*, 94 Wn. App. 80, 110-11 n. 125-28, 971 P.2d 553 (1999); *Swan*, 114 Wn.2d at 651 (“child hearsay statements about sexual abuse will usually contain statements about past fact” and usually weigh neither in favor of reliability nor unreliability).

7. Cross-examination could help demonstrate the declarant’s lack of knowledge.

Relating to the seventh factor, the defendant claims that D.A.M. had sexual knowledge relating to “some other source or incident” unrelated to the defendant. Appellant’s Br. at 30-31. He claims that plaintiff’s Exhibit 6, a picture of D.A.M. and a “naked boy,” drawn by D.A.M. in 2014, after D.A.M. was no longer living in Mr. Twiringiyimana’s home, and which was captioned, “the day I tryd [sic] to have sex was a disaster,” reveals that D.A.M. had sexual knowledge outside of the incident occurring with Mr. Twiringiyimana. RP 302-16; Ex. P-6. First, it should be noted that Exhibit P-6 was not offered or discussed at the child hearsay hearing. Thus, it was not considered by the court in making its determination regarding the admissibility of D.A.M.’s out-of-court statements.

Furthermore, defendant makes *no* argument demonstrating that the trial court abused its discretion in determining that D.A.M.’s lack of knowledge of the events (if she lacked knowledge) could be demonstrated

through cross-examination, the pertinent inquiry of the seventh *Ryan* factor. CP 149 (FF 16), 280. Defendant was welcome to cross-examine D.A.M. regarding Exhibit P-6, RP 312, *but declined to do so*, likely for tactical reasons. RP 436-64. He did, however, extensively cross-examine D.A.M. on other issues, such as her ability to recall facts, her motives, and her feelings about the defendant, and she was able to respond to those questions. Defendant has failed to make any showing on appeal, by citation to the record of the child hearsay hearing, that the trial court had any information demonstrating that cross-examination would be useless at trial. The court did not abuse its discretion in making this finding. RP 436-64.

8. The likelihood of D.A.M.'s memory being faulty or tainted is remote.

The trial court also analyzed whether D.A.M.'s memory was likely to be faulty. The trial court based its ruling that D.A.M.'s memory was not faulty on the evidence presented to it during the child hearsay hearing and the child's ability to respond to questioning. The child was capable of remembering and articulating details regarding her move to the United States, and other events, such as her birthday, from a year before the hearing. Additionally, no evidence was introduced, in the form of an expert opinion, or otherwise, that any conversation between D.A.M. and her mother tainted her memory such that the subsequent interview with

Ms. Winston should have been deemed unreliable. The trial court did not abuse its discretion in finding that the likelihood D.A.M.'s memory was faulty or tainted was remote.

9. There was no reason to believe the declarant misrepresented the defendant's involvement.

As discussed above, the trial court considered whether D.A.M. had a motive to lie. The court analyzed whether D.A.M.'s memory was faulty. The Court evaluated the timing and nature of D.A.M.'s disclosures. Based on its consideration of the evidence presented at the child hearsay hearing, the trial court did not abuse its discretion in determining that the circumstances did not suggest that D.A.M. misrepresented Mr. Twiringiyimana's involvement.

The Sixth Amendment right to Confrontation may¹⁰ be implicated by situations where a child victim *does not testify* and child hearsay statements are admitted in the child's absence. *State v. Rohrich*, 132 Wn.2d 472, 478, 939 P.2d 697 (1997). Here, however, D.A.M. testified at trial and was cross-examined by the defendant. Any error in admitting the

¹⁰ Of course, a question exists as to whether the child's statements are testimonial, as required by Sixth Amendment jurisprudence; statements made to private individuals are generally not testimonial. *See State v. Shafer*, 156 Wn.2d 381, 389, 128 P.3d 87 (2006).

child hearsay would be an error regarding the evidence rule, not an error of constitutional magnitude as alleged by the defendant. Appellant's Br. at 31.

Ultimately, the trial court found that the statements by D.A.M. to her mother, law enforcement and the forensic evaluator were reliable. That is the ultimate question in determining whether child hearsay is admissible. As discussed above, the trial court properly analyzed the *Ryan* factors in light of the testimony and evidence presented at the hearing and, in doing so, came to a reasonable conclusion. This reasonable conclusion cannot be said to be an abuse of discretion. This Court should not disturb the trial court's decision on appeal.

B. THE DEFENDANT HAS FAILED TO PRESERVE ARGUMENTS THAT THE ADMITTED CHILD HEARSAY WAS CUMULATIVE, OVERLY PREJUDICIAL, OR A COMMENT ON THE EVIDENCE, AND IN ANY EVENT, THE TESTIMONY WAS PROPERLY ADMITTED.

1. Defendant's ER 403 claim is unpreserved.

The defendant failed to argue in limine or object, before or during trial, under ER 403, to D.A.M.'s hearsay statements being admitted at trial because they were cumulative, redundant and overly prejudicial. Thus, he waived this argument.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 "affords the

trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)).

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.¹¹ The appellate court will not reverse a trial court’s decision to admit evidence where defendant objected to its admission at trial on one ground, but argues for reversal on appeal based upon a different ground. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009); *see also State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1105 (1985) (“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial”). And, specifically, an ER 403 objection is not one that may be raised for the first time on appeal.¹² *See State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006). This court should decline to review this unpreserved issue.

¹¹ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

¹² While authority exists that child hearsay evidence, just like any other evidence, is subject to ER 403 analysis, that issue was not raised below. *See State v. Bedker*, 74 Wn. App. 87, 93-94, 871 P.3d 673 (1994).

2. Defendant's claim that the admission of the child hearsay testimony was a comment on the evidence is meritless.

The defendant's argument that in allowing the testimony of D.A.M.'s mother and the forensic evaluator to D.A.M.'s hearsay statements, the trial court commented on the evidence and on D.A.M.'s credibility is unpreserved, and is wholly unsupported by any of the cases cited by the defendant.¹³ If a court's failure to sua sponte exclude evidence in the absence of an objection is tantamount to a comment on the evidence, then every trial judge would necessarily and routinely offend article V, section 16 of the Washington State Constitution.

Ultimately, the admission of child hearsay statements was not a *comment* on the evidence. The child's statements *were* the evidence. Standing alone, the admission of evidence cannot be considered an unconstitutional comment on the evidence. *State v. Gentry*, 125 Wn.2d 570, 638-39, 888 P.2d 1105 (1995). Other than the defendant's claims that the trial court "repeatedly interject[ed]" comments on the evidence by allowing the child hearsay testimony to be admitted, Appellant's Br. at 33, defendant

¹³ The court does not consider conclusory arguments unsupported by citation to authority. *See* RAP 10.3(a)(6), 10.4. "Such '[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012) (citing *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012)) (alteration in original).

fails to point to any specific portion of the record which is a direct comment on the evidence. This claim fails.

3. The defendant's argument that the hearsay testimony was cumulative is also without merit.

Also, in a conclusory and unsupported manner, the defendant argues that D.A.M.'s statements to her mother and to Ms. Winston were needlessly cumulative. Appellant's Br. at 33. Without identifying which of D.A.M.'s out-of-court statements were cumulative, the defendant cannot establish an objection would have been sustained by the trial court as to any particular statement.

Moreover, evidence is not cumulative if it presents different views or perspectives on the evidence. For example, in *State v. Dunn*, 125 Wn. App. 582, 105 P.3d 1022 (2005), the State charged Dunn with multiple counts of rape of a child and child molestation. The child victim testified in detail about the abuse, as did several other witnesses. The defendant argued that the admission of a victim's statements to various adults was repetitive and cumulative and overemphasized the victim's trial testimony. *Id.* at 587-88. However, this Court upheld the admission of the victim's statements to each of these witnesses, as well as a videotape of the victim's interview with a detective, even though the evidence overlapped and the victim testified at trial. This Court found that the videotaped

interview provided jurors with the victim's demeanor, voice inflections, and there was additional information provided during the interviews to law enforcement not previously revealed by the victim. *See also, State v. Smith*, 82 Wn. App. 327, 333, 917 P.2d 1108 (1996), *review denied*, 130 Wn.2d 1023 (1997), *overruled on other grounds by Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000) ("evidence relating to a material issue is not needlessly cumulative ... simply because it comes in through several witnesses whose accounts are consistent," noting that "each witness had a perspective that helped the State, in different ways, to rebut [the defendant's assertion] that the sex was consensual"); *Bedker*, 74 Wn. App. at 92-93 (holding multiple child hearsay statements were not cumulative because some statements covered additional information not contained in the victim's initial statement or testimony).

Such is the case here. Each of the witnesses gave slightly different accounts of the child's disclosures. Even if this issue had been preserved for appeal, no error occurred when the trial court admitted the child hearsay testimony presented by the child's mother and the forensic interviewer.

C. SUFFICIENT EVIDENCE EXISTED FOR THE JURY TO CONVICT THE DEFENDANT OF ONE COUNT OF CHILD MOLESTATION.

1. Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed de novo. *Rich*, 184 Wn.2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn.2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

Appellate courts assume the truth of the State's evidence, *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); view reasonable inferences from the evidence in the light most favorable to the State, *id.*; and deem circumstantial and direct evidence equally reliable,

State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). “Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). In like manner, the credibility of witnesses and the weight of the evidence is the exclusive function of the trier of fact, and is not subject to review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may draw inferences from the evidence so long as those inferences are rationally related to the proven facts. *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989).

Where a verdict is supported by sufficient evidence from which the jury could rationally find the defendant guilty beyond a reasonable doubt, the court will not reverse that guilty verdict on the grounds that the verdict is inconsistent with an acquittal on another charge. *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988) (discussing considerations of jury lenity, and problems inherent in second-guessing the jury’s reasoning as to an acquittal on one count and a guilty verdict on another; the jury has “the unreviewable power ... to return a verdict of not guilty for impermissible reasons”).

2. Application of the standard of review in this case.

Here, defendant speculates that a “glaring anomaly and inconsistency” between the jury’s verdicts of “guilty” on count 1 and “not guilty” on counts 2 and 3 “confirms the lack of proof beyond a reasonable doubt” on count 1. Appellant’s Br. at 36-37. Essentially, the defendant claims that, if the jury had believed D.A.M.’s testimony, it necessarily would have found the defendant guilty on all three counts of child molestation. Appellant’s Br. at 37. The defendant claims that it logically follows that, because the jury acquitted the defendant of two counts of child molestation, the jury must have found D.A.M. to be not credible, and therefore, sufficient evidence does not support the verdict of guilty on count 1.

Even if the court *were* to question the validity of the jury’s verdict in light of this claim, or second guess its credibility determinations, which it should not do,¹⁴ the jury’s verdict is understandable in light of the testimony that was admitted at trial.

The jury saw, heard, and reviewed the transcript of D.A.M.’s interview with Ms. Winston. CP 21, 212-44; Ex. P-1. During that interview, D.A.M. stated that Mr. Twiringiyimana had D.A.M. “touch his private part”

¹⁴ See *Ng*, 110 Wn.2d at 48.

“*probably* about three times.” CP 238 (emphasis added). However, Ms. Winston never asked, and D.A.M. never clarified that this occurred on three separate days, or three separate times. CP 212-44. Similarly, during the trial, no testimony was elicited that the touching occurred on three separate dates or three separate times. D.A.M simply testified, that it occurred “more than one time;” however, she could not recall at the time of trial if the touching occurred more than twice. RP 431. The prosecutor never inquired, and D.A.M. did not clarify, that the touching occurred on more than one day or during separate incidents. *Id.*

The jury was instructed that it must consider each crime separately, and that its verdict on one count should not control its verdict on any other count. CP 203. The jury was given a *Petrich* instruction and was instructed that to convict the defendant on any count, it must unanimously agree that a particular, specific act occurred. CP 208; RP 664-65; *see also*, WPIC 4.25; *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

With those instructions, and the evidence that it had been presented, a rational jury could reasonably determine that the State had only proven one count of child molestation beyond a reasonable doubt, rather than all three counts, as the defendant was charged. The jury’s determination that D.A.M. was credible is not inconsistent with its determination that the State had not proven, beyond a reasonable doubt, that the molestation had

occurred during separate incidents. Sufficient evidence existed for the defendant's conviction of one count of child molestation, but not necessarily for all three counts. The alleged "inconsistency" in the verdicts is not an inconsistency at all – the verdicts demonstrate that the jury fully and carefully considered the evidence and followed its jury instructions, as the trial court directed it to do.

IV. CONCLUSION

The trial court did not abuse its discretion in allowing D.A.M.'s out-of-court statements to be admitted at trial. D.A.M. was subject to cross-examination at trial, and the trial court properly exercised its discretion in evaluating the *Ryan* factors, determining that the evidence was sufficiently reliable to warrant admission at trial.

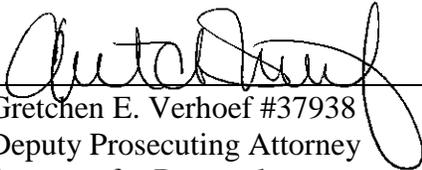
Additionally, although this claim was not preserved for appeal, the trial court did not make any improper comment on the evidence, or otherwise violate ER 403 in admitting the child hearsay evidence.

Lastly, there was sufficient evidence for the jury to convict the defendant of only one count of child molestation. The verdicts were not inconsistent, and rather, evidenced that the jury fully and carefully considered the evidence and the trial court's instructions.

Therefore, the State respectfully requests this Court affirm the trial court and jury verdicts.

Dated this 18 day of June, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

VIATER TWIRINGIYIMANA,

Appellant.

NO. 35458-0-III

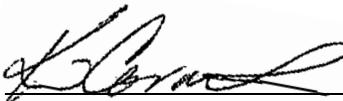
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I certify under penalty of perjury under the laws of the State of Washington, that on June 18, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Bevan Maxey
hollye@maxeylaw.com

6/18/2018
(Date)

Spokane, WA
(Place)



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