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Court of Appeals  
Division III  
State of Washington  
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NO. 36108-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KURT BRODERICK LEPPERT SR.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting unreliable hearsay under RCW 9A.44.120.

2. The trial court erred when it granted the State's Motion in Limine to exclude testimony about C.I. having another source of knowledge regarding sexual activities.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the time, content and circumstances of P.D.'s out-of-court statements to the forensic child interviewer showed such statements to be unreliable, and therefore inadmissible under RCW 9A.44.120, did the court err in admitting them? (Assignment of Error 1).

2. Whether the trial court abused its discretion by granting the State's Motion in Limine to exclude any testimony regarding C.I. having another source of knowledge regarding sexual activities? (Assignment of Error 2).

C. STATEMENT OF THE CASE

a. Procedural Facts:

Appellant Kurt Broderick Leppert, Sr. was charged in Spokane County Superior Court by information with the following counts: (1) first degree child rape of P.D., in violation of RCW

9A.44.073; (2) first degree child molestation of P.D., in violation of RCW 9A.44.083; (3) first degree child rape of H.D., in violation of RCW 9A.44.073; (4) first degree child molestation of H.D., in violation of RCW 9A.44.083; (5) second degree rape of C.I., in violation of RCW 9A.44.076; (6) second degree child molestation of C.I., in violation of RCW 9A.44.086; and (7) unlawful imprisonment of C.I., in violation of RCW 9A.44.040, 9.94A.835 and RCW 9.94A.533(8). CP 31-33. The first six counts also charged RCW 9.94A.535(3)(g), which provides the following aggravator: “the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.” CP 31-33.

Each of these counts was alleged to have occurred between February 23, 2017 and April 7, 2017. CP 31-33. At the time of the incidents alleged, P.D. was 8 years old, her sibling H.D. was 10 years old, and their cousin C.I. was 12 years old. RP 441.

A child hearsay hearing was held on March 9 and 15, 2018. RP 7-59; RP2 9-57.<sup>1</sup> The prosecution had moved to admit out-of-

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<sup>1</sup> Appellant will cite to the Verbatim Report of Proceedings (“VRP”) as RP (which covers the majority of the VRP and are all proceedings transcribed by Ms. Cochran), RP2 (for the 3/15/18 hearing transcribed by Ms. Rosedovelasquez), and RP3 (for the portion of 3/21/18 Ms. Hicks transcribed).

court statements made by P.D. to her mother, A.D. (hereinafter "Amanda"), and also statements made to the child interviewer, Tatianna Williams, during the recorded forensic interview. RP 53, RP2 22, CP 58-82. Ms. Williams had interviewed each of the girls. RP 52, 314. At the child hearsay hearing, the court heard testimony from P.D., Amanda, Ms. Williams and Detective Brandon Armstrong. RP 7-59; RP2 9-57. The trial court found P.D. to be a competent witness. RP2 48-49. The court ruled against allowing Amanda to testify as to hearsay statements by P.D., finding that because no specific statement by P.D. to Amanda had been identified during the hearing, none could be admitted as child hearsay. RP2 49-50.

However, the trial court did find P.D.'s child hearsay statements to Ms. Williams were admissible. RP2 50-57. The court agreed that sections of the video would need to be redacted. *Id.* The redacted interview was played during trial and the recording was admitted as an exhibit. RP3 11; Ex. 1.

Mr. Leppert had a jury trial on March 19-22 and 26-27, 2018. RP 2-3. The jury found Mr. Leppert guilty of all counts and aggravators charged. RP 615-18; CP 259-72. The parties agreed that Mr. Leppert's offender score was 18. RP 623-25; CP 303-19.

Judge Moreno entered the Judgment and Sentence on May 16, 2018. RP 623-39; CP 303-19. The court sentenced Mr. Leppert to the low end of the standard range, 240 months, with one year added for each aggravator, for a minimum term of 252 months. RP 635; CP 307-09. Mr. Leppert appeals. CP 320-50.

b. Background Facts:

During the time period in question, Mr. Leppert lived in Spokane Valley Washington with his wife of 26 years, Carolyn Leppert, and the couple's 7-year-old foster son, Kady. RP 385-87. Mr. Leppert is the father of five grown children from prior marriages. *Id.* Mr. Leppert received disability benefits, as he was unable to work due to physical ailments. RP 390-92, 468.

Mr. Leppert's son, Kurt Leppert, Jr. (hereinafter "K.B.") is married to Amanda. RP 198-99, 275-76, 388. Amanda has two daughters from a previous relationship, P.D. and H.D., and during the relevant time period was expecting her first child with K.B. *Id.* Amanda's 12-year-old niece, C.I., had also been staying with Amanda's family. RP 207, 276.

Amanda experienced medical issues during her pregnancy that required her to be hospitalized on two separate occasions between February 23, 2017 and April 7, 2017. RP 208-10, 277-78.

She was admitted to the hospital for the first time on February 23, 2017. RP 208. During her stay at the hospital, the three girls, P.D., H.D., and C.I., stayed with Mr. and Mrs. Leppert. RP 208-10, 277-78. There was a room set up for the three girls in the basement. RP 209-10. Amanda was released from the hospital and during this time she also stayed at the home of Mr. and Mrs. Leppert, in a different basement bedroom. RP 210-11. Amanda had to be re-admitted to the hospital and during that time P.D., H.D. and C.I. continued to stay at the Leppert home during the week. RP 213. On the weekends, the three girls stayed with K.B. and visited Amanda at the hospital. RP 210, 277-78.

On April 7, 2017, while visiting the hospital, C.I., H.D. and P.D., as a group, told Amanda that they experienced sexual abuse from Mr. Leppert while staying at his home. RP 34-38, 214-16. The day before, C.I. had told Carolyn Leppert that inappropriate behavior had occurred in the basement. RP 255, 453-54. Mr. Leppert had then called Amanda at the hospital to tell her that the girls were playing inappropriate dare games. RP 223-25. When the girls' visited the hospital the next day, after Amanda had asked the girls about playing inappropriate games, the girls conveyed, as a group, that Mr. Leppert had sexually abused them during their

stay at the Leppert home. RP 34-38, 214-16, 230-231. Amanda then contacted law enforcement, which responded to the hospital, where the three girls were then interviewed as a group, answering questions at the same time. RP 37-38, 42, 214, 593. After the report of abuse, none of the girls returned to the Leppert home. RP 40, 179, 216.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING P.D.'s HEARSAY STATEMENTS TO MS. WILLIAMS.

RCW 9A.44.120 governs the admissibility of child hearsay.<sup>2</sup>

The child hearsay statute strictly limits the type of out-of-court allegations that may be admitted at trial. In order to admit a hearsay statement made by a child under the age of 10 related to sexual contact, the court must find that the statement is reliable.

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<sup>2</sup> RCW 9A.44.120 provides in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if: (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness.

*State v. Beadle*, 173 Wn.2d 97, 111–12, 265 P.3d 863, 870–71 (2011). If so, the statement may be admitted if the child testifies at trial or the child is “unavailable as a witness,” and there is “corroborative evidence of the act.” RCW 9A.44.120(1)(b). The court must find the statement reliable even when the child testifies at trial. *Id.*; see *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 76 (2003) (detailing procedures for finding child hearsay reliable). Because all three girls testified at trial, the question here is of reliability.

This Court reviews a trial court's admission of child hearsay statements for abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). “A trial court abuses its discretion ‘only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.’” *Id.* (quoting *State v. C.J.*, 148 Wn.2d at 686).

In *State v. Ryan*, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984), the Supreme Court adopted a set of factors applicable to determining the reliability of hearsay statements. They are:

- (1) [W]hether there is an apparent motive to lie;
  - (2) the general character of the declarant;
  - (3) whether more than one person heard the statements;
  - (4) whether the statements were made spontaneously; and
  - (5) the timing of the declaration and the relationship between the declarant and the witness [;]”
- ... [(6)] the statement contains no express assertion

about past fact [;] [(7)] cross examination could not show the declarant's lack of knowledge [;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

*Id.* (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982); *Dutton v. Evans*, 400 U.S. 74, 88–89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

P.D.'s Statements to Ms. Williams were not reliable. The defense objected to the State's improper use of child hearsay testimony. RP2 38-40. After the child hearsay hearing on the reliability and competency of the witnesses, the court admitted the child hearsay statements that P.D. made to Ms. Williams, but did not admit any child hearsay alleged to have been heard by Amanda. RP2 50-53.

Several of the *Ryan* factors weighed against reliability and the trial court's decision to admit P.D.'s recorded statements to Ms. Williams. First, it was not clearly established that P.D. knew the difference between the truth and a lie. RP2 35-36, 44. During the interview P.D. alleged acts by Mr. Leppert occurring years before the charging period, however, she denied referencing earlier abuse

at trial. RP 147, RP2 47. Key portions of what P.D. testified to was refuted by her mother, H.D. and/or C.I. RP 190, 218, 258. For example, P.D. alleged in the interview that Mr. Leppert had abused her years earlier, when she was five or six and that she had told Amanda about this abuse, but was not believed. RP2 47; Ex. 1. Testimony from Amanda directly refuted that this occurred. RP 42, 218. In addition, P.D. states multiple times during her interview that Mr. Leppert's foster son, Kadyn, was present for the abuse. Ex. 1. At trial, P.D. denied saying this and did not recall participating in the forensic interview. RP 148, 160. The other girls had either denied Kadyn being present, or had said he was present and then later said he was not. RP 189-90, 258, 264.

Moreover, it was not clear that P.D. understood the need to provide information that she personally knew to be true, not information that she was told by another person, whom she believed to be telling the truth. When responding to questions of whether something happened to her, P.D. would answer that it happened to "us", referencing all three of the girls, making it unclear throughout the interview which statements, if any, related specifically to P.D. Ex. 1. This interview had occurred approximately 2-3 weeks after the group disclosure of abuse

occurred at the hospital. RP 52, 315. C.I., H.D., and P.D. were treated as a group throughout the process, clearly illustrating that law enforcement did not follow proper witness interviewing techniques when interviewing the girls. RP 37, 42, 309. P.D. had been present for all of the discussion and interviews and had had additional time before her interview with Ms. Williams to discuss the matter further with her mom, C.I. and H.D. It was precisely because Amanda could not testify to specific statements made by P.D. during the child hearsay hearing that the court ultimately found any alleged child hearsay told to Amanda by P.D. to be inadmissible. RP2 50. Thus, under the circumstances of this interview, it is not possible to tell whether P.D.'s allegations were the truth based on her personal experience or a re-telling of the other girls' experiences.

Under the statute, the use of child hearsay should be limited to one child's claim of "sexual contact" performed on or with that same child. However, here the prosecution used RCW 9A.44.120 as a way to admit evidence about C.I. and H.D. as well as evidence of wrongful acts that did not happen to P.D. Ms. Williams offered extensive child hearsay by videotaping her free-form interview with P.D. and that video was admitted as evidence. RP 54; Ex. 1. The

jury watched the videotape during trial. RP3 11. The redacted video shows Ms. Williams' interview with P.D. where P.D. repeatedly answers questions directed to her by saying the things she saw happened to all of the girls, at the same time, she said several times during the interview that the touching happened to C.I. and H.D., not to herself. RP2 36, 39; Ex. 1. Therefore admitting this video, with all of its child hearsay, was in error, because P.D.'s hearsay should have been limited to her discussion of abuse that she experienced.

Further, there was a lack of spontaneity because Ms. Williams' interview of P.D. lasted about an hour and forty minutes, even the redacted version that was admitted lasted approximately one hour. Ex. 1. The court described the interview as "long and rambling". RP2 37. During the long interview, P.D. said several times that the abuse occurred to the other girls and not to her. P.D. did not start making statements about abuse occurring specifically to her until well into the interview. RP2 36, 41-42; Ex. 1. Finally, there was some evidence presented that the girls had a motive to lie because even though the girls frequently visited Amanda at the hospital, no statements regarding sexual abuse by Mr. Leppert

were made until after Mr. Leppert had called Amanda to tell her that the girls were playing inappropriate games. RP 223-25

The court abused its discretion in admitting P.D.'s statements to Ms. Williams where the state failed to prove they were reliable. Evidentiary error requires reversal if the defendant was prejudiced. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). This Court must reverse if “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *Id.* (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

The admission of the prior statements bolstered P.D.'s credibility and therefore materially affected the trial. As a result, the trial court's error in admitting P.D.'s prior statements to Ms. Williams through the video of the forensic interview requires reversal. Prejudice is shown by how P.D.'s statements regarding key issues, such as whether prior abuse had occurred, and who

was present during the abuse, changed from the time of her interview with Ms. Williams to the time of the trial.

Because the inadmissible child hearsay improperly emphasized P.D.'s stories, key parts of which she could not articulate at trial, the proceedings were rendered unfair. Improperly admitted evidence that impacts the jury's deliberations causes reversible error. The child hearsay testimony also bolstered the testimony of both C.I. and H.D. and was decidedly prejudicial because P.D. did not articulate the same allegations as she had out-of-court.

The court therefore erred in admitting P.D.'s statements to Ms. Williams. This was not an overwhelming case with respect to P.D. The admission of P.D.'s prior statements bolstered her testimony at trial and likely affected the jury's determination of her credibility. This Court should therefore reverse.

2. THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE TO PRECLUDE TESTIMONY THAT C.I. MAY HAVE HAD ANOTHER SOURCE OF KNOWLEDGE OF SEXUAL ACTS.

The State made a Motion in Limine to exclude mention that C.I.'s father was in prison for child pornography charges and to prevent any argument that C.I. was sexually abused by her father

or was confusing the abuse by the defendant with abuse by her father. RP 61-62, 65-66; CP 50-57, 93-94. The State argued that there was no evidence this had occurred because C.I. was specifically asked in her forensic interview if anyone else had done anything inappropriate, and she stated that not her father, only Mr. Leppert. *Id.* C.I. was also asked about images on her father's computer, and she had denied seeing any inappropriate images on his computer. *Id.*

The defense argued that it was seeking to establish C.I.'s father as a possible alternative suspect. RP 62-65. The defense asserted that C.I. had given conflicting information in past interviews regarding what, if anything, she had seen on her father's computer and that this supported the defense argument. *Id.* The defense sought to present evidence that C.I. was aware of some of her father's legal issues, and that this matter had been discussed during interviews. *Id.* The defense maintained that C.I.'s knowledge of these issues, even if limited, showed that there was another way for these girls to have learned about sexual behaviors besides learning it from Mr. Leppert. RP 64-65.

The court granted the State's Motion in Limine. RP 66. The court ruled that there was no evidence that C.I. was molested by her father or that she saw the pornography in his possession. *Id.*

In general, a trial court must instruct on a party's theory of the case if the law and the evidence support it; the failure to do so is reversible error. *State v. May*, 100 Wn. App. 478, 482, 997 P.2d 956, rev. denied 142 Wn.2d 1004, 1 P.3d 825 (2000) (citing *State v. Birdwell*, 6 Wn. App. 284, 297, 492 P.2d 249, rev. denied, 80 Wn.2d 1009.) Defendants have the right to present a defense. *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004), rev. denied, 154 Wn.2d 1026, 120 P.3d 73 (2005). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense. *State v. Jones*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). In evaluating whether the evidence is sufficient to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant. *May*, 100 Wn. App. at 482.

The evidence offered by Mr. Leppert against the State's Motion in Limine was sufficient to create a question of fact for the jury. The defense argued that C.I. had some knowledge regarding her father's illegal activities, due to her inconsistent statements on

the issue and because the question of why C.I. was living with the girls had been raised and discussed to some degree at the interviews. RP 65. Thus, there was some evidence of C.I.'s father's conviction for possession of child pornography, which was relevant to the question of the girls' sexual knowledge and relevant to whether Mr. Leppert committed the crimes at issue. Mr. Leppert should have been able to argue the alternative suspect theory and this should have been an issue of fact properly submitted to the jury. Because the court's ruling precluded Mr. Leppert from asserting evidence of an alternative suspect, he was not properly able to submit his theory of the case to the jury. The trial court's refusal to permit Mr. Leppert to present this defense was reversible error. See *May*, 100 Wn. App. at 482.

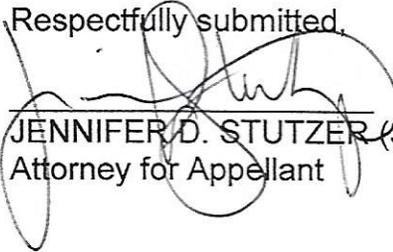
#### E. CONCLUSION

Mr. Leppert respectfully requests that this Court find that prejudicial errors were committed such that his convictions require reversal and his case be remanded for further proceedings. First, because the trial court's admission of P.D.'s child hearsay statements to Ms. Williams was reversible error. Second, because the trial court's granting of the State's Motion in Limine to exclude

alternative suspect evidence pertaining to C.I.'s father violated Mr. Leppert's right to present his defense. These errors significantly prejudiced Mr. Leppert's defense, depriving him of a fair trial and a full opportunity to challenge the State's evidence against him. Therefore Mr. Leppert's judgment and sentence should be vacated, his conviction reversed, and the case remanded for a new trial.

DATED this 2nd day of January, 2019.

Respectfully submitted,

  
JENNIFER D. STUTZER (38894)  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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	)	
RESPONDENT,	)	
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KURT BRODERICK LEPPERT, SR.,	)	
	)	
APPELLANT.	)	

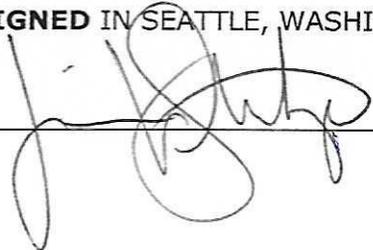
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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[X] KURT B. LEPPERT SR. DOC NO. 407444 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326	( X) ( ) ( )	U.S. MAIL HAND DELIVERY EMAIL

**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>nd</sup> DAY OF JANUARY, 2019.

X  \_\_\_\_\_

**STUTZER LAW PLLC**

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