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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KURT BRODERICK LEPPERT, SR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion by admitting child hearsay under RCW 9A.44.120 when it reviewed P.D.'s forensic interview and considered all of the child hearsay factors?

2. Did the trial court abuse its discretion by granting the State's motion in limine to exclude testimony about a possible source of C.I.'s knowledge of sexual activity where no offer of proof corroborated the claim and Mr. Leppert stipulated that it was not being offered pursuant to an other suspect defense?

III. STATEMENT OF THE CASE

Background facts.

Kurt Leppert, Sr. is the father-in-law of Amanda Douglas. Report of Proceedings (RP[1]) 198. Ms. Douglas is the mother of P.D. and H.D., and the aunt of C.I. RP 199, 207. At the time of the crimes, the children were ages 8, 10, and 12, respectively. RP 199, 207.

[1] The State has adopted Mr. Leppert's numbering system for the record. RP refers to the trial record prepared by Ms. Cochran, 2RP to the volume prepared by Ms. Rosadovelazquez and 3RP to Ms. Hicks.

Between February 23, 2017, and April 7, 2017, Ms. Douglas was in-and-out of a hospital while experiencing a difficult pregnancy, and the children stayed with their grandfather, Mr. Leppert, in Spokane, Washington. RP 208-10. Mr. Leppert set up a room in the basement for the three children, and Ms. Douglas also stayed there while she was not in the hospital. RP 209-11.

On April 7, 2017, the three children were visiting Ms. Douglas at the hospital. RP 214-15. All three girls told Ms. Douglas that Mr. Leppert had been sexually assaulting them. RP 215. Ms. Douglas immediately called law enforcement. RP 215. A sexual assault examination revealed that P.D. had a urinary tract infection. RP 215. The victims each did a videotaped forensic interview with Tatiana Williams. RP 52, 314.

According to the three victims, Mr. Leppert committed several acts of abuse. *See generally* RP 135-350. He placed his hands down their pants to touch them inappropriately, including penetration. RP 135-38, 242-43. He performed oral sex on the victims, and forced them to touch his penis. RP 243, 245. The sexual assaults and abuse happened at times with all three victims present, and each saw acts Mr. Leppert committed against the others. RP 250. Most of the assaults happened under the guise of a truth-or-dare type game that Mr. Leppert played with the victims. RP 144.

One time, Mr. Leppert cornered C.I. while she was alone in the basement. RP 251-52. He committed several similar acts against her, as she fought; she eventually screamed for help and H.D. came downstairs. RP 252. C.I. disclosed the assaults to Mr. Leppert's wife, Carolyn, immediately prior to telling Ms. Douglas at the hospital. RP 255.

Mr. Leppert has a vertical scar extending "from the bottom of his belly button down towards the base of the pubis area down towards his penis." RP 322. That scar extends to the base of his penis and he also has scarring on his hip. RP 322. C.I., P.D., and H.D., all identified Mr. Leppert's scarring. RP 245, 171, 140; 3RP 14. P.D. drew a picture of Mr. Leppert's scarring. 3RP 13.

Procedure.

The State initially charged Mr. Leppert with seven crimes related to the sexual assaults of the three victims. Clerk's Papers (CP) 31-33. The State moved in limine to exclude evidence of C.I.'s father's prior conviction and incarceration for child pornography. CP 52-53. During C.I.'s forensic interview, she answered no when directly asked whether anyone else had abused her, and if she had ever seen any images on her father's computer. CP 52. Mr. Leppert specifically responded that he was not asserting C.I.'s father was an other suspect, but just wanted to establish that C.I. might have knowledge of sexual imagery other than from Mr. Leppert. CP 90. The trial

court determined any evidence on this point was both irrelevant and speculative, and granted the State's motion. RP 66.

The State sought to introduce hearsay statements made by P.D. to both Ms. Douglas and to Ms. Williams, pursuant to RCW 9A.44.120. CP 41-42. After a pretrial child hearsay hearing, the trial court found P.D. competent to testify. 2RP 48-49. The court did not admit statements P.D. made to Ms. Douglas at the hospital because all three victims were talking simultaneously and Ms. Douglas could not clarify which statements came from P.D. alone. 2RP 49-50. For the statements P.D. made to Ms. Williams, the trial court considered the *Ryan*[2] factors and determined her statements were reliable. 2RP 50-53.

The matter proceeded to a jury trial, and the jury found Mr. Leppert guilty on all counts. CP 259-72. The court imposed a sentence of 252 months total confinement. CP 329. Mr. Leppert timely appealed. CP 320.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN RULING P.D.'S STATEMENTS WERE ADMISSIBLE AFTER HOLDING A CHILD HEARSAY HEARING AND REVIEWING THE *RYAN* FACTORS.

Mr. Leppert argues that the statements P.D. made to Ms. Williams are not reliable. In support of this claim, Mr. Leppert disputes the trial

[2] *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

court's oral findings[3] on two of the *Ryan* factors. He also claims the court should not have admitted the forensic video interview because P.D.'s statements went beyond the scope of the relevant statute. Because the trial court is in the best position to determine reliability and did not abuse its discretion, this Court should disagree.

1. Challenged *Ryan* factors.

RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse. *State v. Brousseau*, 172 Wn.2d 331, 351, 259 P.3d 209 (2011). RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or attempts at, "sexual contact performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child "[t]estifies at the proceedings."

This court reviews a trial court's determination that child hearsay statements were reliable for an abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court abuses its

[3] Typically, an appellant must assign error to each erroneous finding or they are treated as verities on appeal. RAP 10.3(g); *State v. Stevernson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). However, in this case, the trial court did not enter written findings of fact and conclusions of law.

discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *Id*. (quotations and citation omitted). Trial courts are "necessarily vested with considerable discretion in evaluating the indicia of reliability" in a child victim's hearsay statements. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

A trial court does not abuse its discretion where it follows the requirements of RCW 9A.44.120 and the *Ryan* factors in concluding that a child's hearsay statements are reliable. *See C.J.*, 148 Wn.2d at 686. "The abuse of discretion standard, as applied in child hearsay cases, ... acknowledges the obvious, that the trial court is the *only* court that sees the children and listens to them and to the other witnesses." *State v. Swan*, 114 Wn.2d 613, 667, 790 P.2d 610 (1990), *as clarified on denial of reconsideration* (June 22, 1990) (emphasis added).

The *Ryan* factors to determine reliability are:

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

> to suppose the declarant misrepresented defendant's involvement.

Ryan, 103 Wn.2d at 175-76 (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). Although there are nine factors, "[n]o single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors." *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). Mr. Leppert only challenges the court's determination on two of the *Ryan* factors.

a. Competency.

Before reaching the factors, it is important to note Mr. Leppert first argues that P.D. could not tell the difference between truth and lie, and for that reason her statements were not reliable under the statute. This is a question of competency; it is not a *Ryan* factor. Although there may be minimal overlap, the two issues are distinct. Mr. Leppert did not assign error to the trial court's determination of competency and did not provide any legal authority on competency, so this Court should decline to address it. RAP 10.3(g); *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 392, 321 P.3d 1261 (2014).

Competency is a low bar; all persons including children are presumed competent. RCW 5.60.020; *Brousseau*, 172 Wn.2d at 347. A young child is competent to testify as a witness at trial if that child has (1) an

understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it. *Swan*, 114 Wn.2d at 645. The determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence. *C.J.*, 148 Wn.2d at 682. Courts afford significant deference to the trial judge's competency determination, and disturb such a ruling only upon a finding of manifest abuse of discretion. *Brousseau*, 172 Wn.2d at 340.

Mr. Leppert first points to alleged inconsistencies in P.D.'s statements to demonstrate she did not know the difference between truth and lie. He does not attempt to explain how the trial court abused its discretion by determining P.D. was competent and understood the need to tell the truth, or identify any fault with the court's reasoning in that regard. *See* 2RP 48-49. This is likely because Mr. Leppert frames this issue as an error in the *Ryan* factors rather than an error in the court's assessment of P.D.'s competency.

Mr. Leppert also argues that P.D. could not tell truth from lie because the court found that any statements made to Ms. Douglas at the hospital were not admissible under RCW 9A.44.120. However, that is not the reason that the court excluded statements P.D. made to Ms. Douglas at the hospital. The court excluded hearsay statements P.D. made to Ms. Douglas because Ms. Douglas could not isolate which statements P.D. made. A careful review of the record demonstrates that all three victims were talking to Ms. Douglas at the same time, and she could not remember with specificity which statements came from P.D. alone. The court noted that Ms. Douglas described the encounter as, "all three girls were talking" concurrently. 2RP 49. The court reasoned, "all three girls were talking, but, again, I think that the purpose for the hearing was to determine if [P.D.]'s statement is admissible. And I don't know what [P.D.]'s statement is." 2RP 50. The court did not deem P.D.'s statements unreliable; the court merely could not determine which statements P.D. made to Ms. Douglas at the hospital.

b. Factor one: motive to lie.

Mr. Leppert contends the court's decision on the factor of whether P.D. had a motive to lie was error. He claims P.D. did not report the sexual activity to anyone until after Mr. Leppert had called Ms. Douglas and told her the victims were playing inappropriate games.

The court did not make a conclusion either way on this factor. The court did not find that P.D. did have a motive to lie but simply stated it could not decide. *See* 2RP at 50-51. Mr. Leppert does not claim the court disregarded any evidence before it. This is only one of nine factors and the trial court is in the best position to determine reliability. Absent Mr. Leppert showing of manifest abuse of discretion this Court should not disturb the trial court's ruling.

c. Factor four: spontaneity.

Mr. Leppert also claims the spontaneity factor does not favor reliability. He argues this is so because P.D.'s taped forensic interview lasted 100 minutes but she did not talk about abuse specific to her until well into the interview.

The correlation between length of time and lack of spontaneity is unclear to the State. Mr. Leppert describes the interview as lengthy and noted the trial court also described it as "long and rambling." 2RP 37. A rambling interview suggests spontaneity in P.D.'s answers rather than leading questions from Ms. Williams. The court also elaborated on spontaneity in its findings, "the forensic therapist really gave [P.D.] free rein to go wherever she wanted … she just launched into it, and there weren't really any questions asked. That was fairly spontaneous." 2RP 52. The court was satisfied that Ms. Williams interviewed P.D. in a non-

suggestive manner. Mr. Leppert may disagree with the court's finding, but that does not establish the court manifestly abused its discretion.

As indicated above, Mr. Leppert does not challenge the court's other oral findings with regard to the *Ryan* factors and reliability of P.D.'s statements. This court should give deference to the trial court's findings. Reliability is based on an overall view of the factors. As a result, this claim fails; the court did not abuse its discretion by allowing P.D.'s statements to be admitted.

2. Admission of the forensic interview on other grounds.

Mr. Leppert also challenges the trial court's decision to admit and publish the forensic interview video because during the interview P.D. discussed sexual contact she witnessed between Mr. Leppert and the other two victims, which he argues violates RCW 9A.44.120. This alleged evidentiary error is not preserved because it comes for the first time on appeal. RAP 2.5(a). Mr. Leppert does not argue this alleged error fits into one of the three exceptions contained in RAP 2.5. Mr. Leppert never specifically objected to the admission of the interview video either in pretrial motions or later when it was admitted and published to the jury. RP 54; 3RP 11. Importantly, Mr. Leppert declined to object after the trial court and both parties had spent a lengthy amount of time heavily redacting

portions of the video. For these reasons, the court should decline to review this claimed error.

Additionally, if the admission of the video was error for this reason, it would not have prejudiced Mr. Leppert. Courts will not reverse an evidentiary error unless it results in prejudice to the aggrieved party. *State v. Thomas*, 150 Wn.2d 851, 871, 83 P.3d 970 (2004). An error is not prejudicial unless within reasonable probabilities the outcome of the trial would have been materially affected had the error not occurred. *Id*. Mr. Leppert sometimes assaulted the children at the same time and consequently each witnessed some of the assaults committed upon the others. P.D., H.D., and C.I. all testified about the abuse they suffered during the State's case-in-chief, and that it sometimes occurred simultaneously. Any error Mr. Leppert alleges would not be prejudicial to him because it was cumulative to testimony elicited during his trial.

3. Conclusion.

The trial court determined P.D. was competent, viewed the forensic video, and evaluated P.D. and the reliability of her statements. The court articulated its reasoning, considered the *Ryan* factors and ultimately concluded P.D.'s statements demonstrated sufficient indicia of reliability. Mr. Leppert does not establish any abuse of the court's discretion. Any other error is either not preserved, or not prejudicial.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE STATE'S REQUEST TO EXCLUDE SPECULATIVE EVIDENCE PERTAINING TO C.I.'S FATHER'S CONVICTION.

The State sought in limine to exclude evidence of C.I.'s father's conviction for possessing or dealing in child pornography. The trial court granted this motion. Mr. Leppert challenges that decision by claiming it violated his right to present a defense under an "other suspect" theory. This challenge fails because the evidence was not relevant, it was too speculative, and because Mr. Leppert repeatedly asserted he was *not* pursuing an "other suspect" theory.

This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), *as amended on denial of reconsideration* (Oct. 31, 2017), *review denied sub nom. State v. Vela*, 190 Wn.2d 1005, 413 P.3d 11 (2018). But "[i]f the court excluded relevant defense evidence, [the appellate court] determine[s] as a matter of law whether the exclusion violated the constitutional right to present a defense." *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). The more the exclusion of defense evidence prejudiced the defendant, the more likely this Court will find a constitutional violation. *State v. Jones*, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010).

Both the United States Constitution and the Washington Constitution guarantee the right to present testimony in one's defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. "Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" *Id*. (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Defendants have a right to present only relevant evidence with no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006), *as corrected* (Dec. 22, 2006), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014).

1. <u>The court determined the evidence was not relevant.</u>

After hearing argument concerning C.I.'s father, the court did not find the proposed evidence relevant. RP 66. There is no constitutional right to present irrelevant evidence. *Gregory*, 158 Wn.2d at 786 n.6. Mr. Leppert

does not assign error to or argue against the court's finding that the evidence was irrelevant.

2. The court determined the evidence was too speculative.

After noting the evidence was irrelevant, the Court also reasoned that it was deficient because it was too speculative. This court should agree.

The most on-point case is *State v. Burnam*, 4 Wn.App.2d 368, 421 P.3d 977 (2018), *review denied*, 192 Wn.2d 1003, 430 P.3d 257 (2018). Mr. Burnam was charged with first degree murder and interfering with the report of domestic violence. *Id*. at 372. He asserted a theory of self-defense. *Id*. at 373. In support of that claim, he sought to introduce vague and speculative evidence that the victim "had been involved in a prior homicide." *Id*. The record in that case was clear that Bud Brown had been charged with an unrelated murder, and at some unspecified point in time after the killing, had Ms. Sweet, the victim of the Burnam murder trial, dispose of the weapon. *Id*. She was later charged with first degree rendering criminal assistance. *Id*. at 378. Mr. Brown's offer of proof was speculative and repeatedly vague about what Ms. Sweet did, what Mr. Brown knew about what Ms. Sweet did, and how Mr. Brown knew what he alleged Ms. Sweet to do. *Id*. at 377-79. This Court ruled that the trial court did not violate Mr. Burnam's constitutional right to present a defense by excluding evidence of Ms. Sweet's conviction. *Id*. at 378.

The case at hand is similar. Mr. Leppert repeatedly speculated that C.I. had seen or somehow obtained knowledge of sexual acts from images on her father's computer related to his child pornography conviction. However, C.I. was specifically asked during a forensic interview if she knew what was on her father's computer and if she had seen what was on it and she answered no. RP 65-66. Mr. Leppert did not make an offer of proof to the court concerning what images or files were on the computer or whether C.I. had seen any of those materials. Not even speculation explains how C.I. or the other victims could identify Mr. Leppert's unique physical scarring and characteristics.

3. <u>The defense did not assert an other suspect theory.</u>

Finally, the court's decision to exclude this evidence did not violate Mr. Leppert's right to present a defense because he specifically did not assert another suspect defense at trial.

> [T]he trial court should be given an opportunity to correct errors and omissions at the trial level, and that it was the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal.
>
> ....
>
> [Additionally,] opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level,

> rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re Det. of Audett, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006) (quoting 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5, cmts. at 192 (6th ed. 2004)); *see also Matter of Det. of Belcher*, 196 Wn. App. 592, 613, 385 P.3d 174 (2016), *aff'd*, 189 Wn.2d 280, 399 P.3d 1179 (2017).

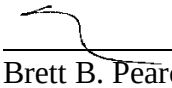
Mr. Leppert's theory of defense as articulated in pretrial hearings was only to hold the State to the burden of proof. RP 45. Mr. Leppert also specifically responded to the State's motion in limine on this subject and plainly stated that he was not seeking to admit this evidence pursuant to an other suspect defense. CP at 90 ("… seeks to introduce limited evidence that C.M.I.'s father has been convicted of possessing/dealing in child pornography charges not to assert him as an alternate suspect in the abuse"). Mr. Leppert at first equivocated during argument on the motions in limine, but ultimately agreed that C.I.'s father did not sexually assault any of the children. RP 65. Although the record is unclear because the evidence was ultimately irrelevant and excluded, it appears C.I.'s father was incarcerated at the time of the assaults, and so could not have committed the crimes in this case. Mr. Leppert cannot represent to the trial court he is not pursuing an "other suspect" theory and then attempt to argue on appeal he deserves a new trial because the trial court did not allow him to pursue that theory.

V. CONCLUSION

The State respectfully requests this Court affirm.

Dated this 3 day of April, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

STATE OF WASHINGTON, Respondent, v. KURT LEPPERT, SR., Appellant.	NO. 36108-0-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 3, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer Stutzer
jennifer@stutzerlaw.com

4/3/2019	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

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