

No. 72145-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

J.M. (D.O.B. 4/18/2000),

Appellant.

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

The Honorable Eric Z. Lucas

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Seven year-old K.R.'s hearsay statements to his mother and a child interviewer alleging that 12 year-old J.M. made him "suck his pee pee" were admitted at J.M.'s fact-finding hearing on a charge of first degree child rape, despite the fact the statements were the result of repeated questioning and were the direct result of his mother's leading questions. His conviction must be reversed where a proper application of the factors enunciated in *State v. Ryan*<sup>1</sup> reveals K.R.'s statements were unreliable and should not have been admitted.

## B. ASSIGNMENTS OF ERROR

1. The juvenile court erred in admitting K.R.'s hearsay statements to his mother and a child interviewer under the child hearsay exception.

2. In the absence of substantial evidence, the juvenile court erred in entering Finding of Fact I(B)(3), finding that the fact K.R. made a claim of sexual abuse only to his mother was a factor in favor of admissibility.

3. In the absence of substantial evidence, the juvenile court erred in entering Finding of Fact I(B)(4), which purported to find:

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<sup>1</sup> 103 Wn.2d 165, 691 P.2d 197 (1984).

The initial disclosure was completely spontaneous. The disclosure to Gina Coslett was to a professional; and questions were not generally leading or suggestive. There were direct questions used to follow up on past information which is permissible under *Henderson*, 48 Wn.App. 543 (1987).

4. To the extent it is deemed a finding of fact, and in the absence of substantial evidence, the juvenile court erred in entering Conclusion of Law 2, which purported to find that “K.R.’s statements at issue meet all nine of the *Ryan* factors.”

#### C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Out-of-court statements made by a child about sexual contact may be admitted at trial where the statements are deemed to be reliable. The use of leading questions, repeated questioning and a lack of spontaneity each can indicate an absence of reliability. Here, K.R.’s statements were the result of his mother’s leading questions and repeated questioning, which rendered the statements unreliable. Did the juvenile court err in admitting K.R.’s statements?

#### D. STATEMENT OF THE CASE

On July 21, 2012, Ambur Hernandez dropped her son, five year-old K.R., off to stay with his aunt and uncle and their son, 12 year-old J.M. 6/23/2014RP 37. Ms. Hernandez picked K.R. up one to two weeks later. *Id.*

According to Ms. Hernandez, one to three days after returning home, K.R. said to her that J.M. made K.R. “suck his pee pee” on one occasion. 6/23/2014RP 38-39, 45. Ms. Hernandez questioned K.R. to obtain more details. *Id.* Ms. Hernandez admitted she asked K.R. “like how did it start, where was his grandma and his brother [when this happened], and what he told him.” 6/23/2014RP 39. She spoke to a few people to gain advice on how to proceed and then contacted the police. 6/23/2014RP 42.

K.R. was sent to the Davison Place Child Advocacy Center to be interviewed. On August 22, 2012, Gina Coslett, a child interviewer, interviewed K.R. CP Supp \_\_\_\_, Sub. No. 48, Exhibit 1. In this interview, K.R. did not say J.M. made him do anything.

A second interview of K.R. was conducted a short time later on September 12, 2012. CP Supp \_\_\_\_, Sub. No. 48, Exhibit 2. During this interview, K.R. said J.M. had made him have sexual contact a number of times. 6/23/2014RP 59. At trial, K.R. said the acts occurred in J.M.’s bedroom and occurred four times. 6/23/2014RP 22. K.R. denied not talking about any alleged sexual contact at the first child interview. 6/23/2014RP 28-29. Finally, K.R. denied anything had happened

involving J.M. in a pretrial interview with the attorneys prior to the fact-finding hearing. 6/23/2014RP 30-31.

Notwithstanding K.R.'s conflicting statements, J.M. was charged with one count of first degree rape of a child and one count of first degree child molestation. CP 63-64. Following a fact-finding hearing, the juvenile court found J.M. guilty of both counts. CP 1-6. The court subsequently dismissed the child molestation count on the State's motion. CP 30-33. The juvenile court imposed a standard range disposition of 15 – 36 weeks at JRA. CP 36, 43.

#### E. ARGUMENT

K.R.'S STATEMENTS WERE THE PRODUCT OF IMPROPER AND REPEATED QUESTIONING RENDERING THEM UNRELIABLE AND SHOULD HAVE BEEN EXCLUDED

1. K.R.'s statements were inadmissible hearsay unless they fell within the child hearsay exception.

A child's hearsay statements concerning sexual contact are admissible if the court finds the statements are reliable. RCW 9A.44.120(1); *Matter of Dependency of A.E.P.*, 135 Wn.2d 208, 226, 956 P.2d 297 (1998).<sup>2</sup> In determining reliability, Washington courts

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<sup>2</sup> RCW 9A.44.120 states:

have identified several factors that are applicable in determining the reliability, and thus admissibility, of the child's hearsay statements under RCW 9A.44.120. *Ryan*, 103 Wn.2d at 175-76.<sup>3</sup>

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

<sup>3</sup> These factors are :

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;
7. Whether the declarant's lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

The trial court considers the factors as a whole and no single factor is decisive. *State v. Young*, 62 Wn.App. 895, 902, 802 P.2d 829 (1991). For the trial court to admit the statements, the court must find these statements substantially meet the factors. *State v. Woods*, 154 Wn.2d 613, 623-24, 114 P.3d 117 (2005). The final four *Ryan* factors “are not very helpful in assessing the reliability of child hearsay statements in most sexual abuse cases.” *State v. Henderson*, 48 Wn.App. 543, 551 n. 5, 740 P.2d 329, *review denied*, 109 Wn.2d 1008 (1987); *see also State v. Karpenski*, 94 Wn.App. 80, 111 n. 131, 971 P.2d 553 (1999); *State v. Borland*, 57 Wn.App. 7, 15, 786 P.2d 810 (1990).

2. The repeated questioning of K.R. rendered his statements unreliable, thus inadmissible under the child hearsay exception.

K.R. was initially questioned by his mother using leading questions immediately after his initial statement about J.M. In the first child interview, K.R. did not allege any sexual contact. Despite this fact, K.R. was interviewed a second time by the child interviewer where this time K.R. made several accusations. This repeated questioning of K.R. rendered his statements unreliable, thus rendering K.R.’s statements inadmissible.

Statements are considered spontaneous where they are made in response to questions that are not leading and do not suggest an answer. *In re Dependency of S.S.*, 61 Wn.App. 488, 497, 814 P.2d 204 (1991). Here, all of K.R.'s statements to Ms. Hernandez, except for the initial one, flowed directly from her leading questions, thus K.R.'s statements lacked spontaneity. More importantly, Ms. Hernandez's questioning was followed by further questioning consisting of two consecutive child interviews, the first where no sexual misconduct claims were made.

While there are no published decisions in Washington reversing a conviction for repeated questioning of a child witness, at least one state's supreme court has recognized the danger of repeated questioning of child witnesses and the resulting coercive effect it can have on the witness. In *State v. Michaels*, the New Jersey Supreme Court reversed convictions for sexual misconduct where the Court found the trial court erred in admitting the children's hearsay statements due in part because of the repeated questioning of the child witnesses. 136 N.J. 299, 309-10, 642 A.2d 1372 (1994) ("The issue we must determine is whether the interview techniques used by the State in this case were so coercive or suggestive that they had a capacity to distort substantially the

children's recollections of actual events and thus compromise the reliability of the children's statements and testimony based on their recollections."'). The Court began its examination by noting:

that the "investigative interview" is a crucial, perhaps determinative, moment in a child-sex-abuse case. A decision to prosecute a case of child sexual abuse often hinges on the information elicited in the initial investigatory interviews with alleged victims . . .

*Id.* at 309 ( internal citations omitted, emphasis in original). In looking at the impact of statements made by child witnesses and the techniques used to elicit them, the Court provided a helpful primer for determining when a statement has been gained through improper technique:

That an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted. If a child's recollection of events has been molded by an interrogation, that influence undermines the reliability of the child's responses as an accurate recollection of actual events.

A variety of factors bear on the kinds of interrogation that can affect the reliability of a child's statements concerning sexual abuse. We note that a fairly wide consensus exists among experts, scholars, and practitioners concerning improper interrogation techniques. They argue that among the factors that can undermine the neutrality of an interview and create undue suggestiveness are a lack of investigatory independence, the pursuit by the interviewer of a preconceived notion of what has happened to the child, the use of leading questions, and a lack of control for outside influences on the child's statements, such as previous conversations with parents or peers. Younts,

*supra*, 41 *Duke L.J.* at 729-30, 730-31; *see also*, John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 *Pac.L.J.* 801, 889 (1987) (stating that factors that influence child's suggestibility include: (1) whether interviewer believes in presumption of guilt; (2) whether questions asked are leading or non-leading; and (3) whether interviewer was trusted authority figure).

*The use of incessantly repeated questions also adds a manipulative element to an interview. When a child is asked a question and gives an answer, and the question is immediately asked again, the child's normal reaction is to assume that the first answer was wrong or displeasing to the adult questioner. See Debra A. Poole and Lawrence T. White, Effects of Question Repetition on Eyewitness Testimony of Children and Adults, 27 Developmental Psychology, November (1991) at 975. The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children. Goodman and Helgeson, supra, 40 U.Miami L.Rev. at 184-87.*

The explicit vilification or criticism of the person charged with wrongdoing is another factor that can induce a child to believe abuse has occurred. *Ibid.* Similarly, an interviewer's bias with respect to a suspected person's guilt or innocence can have a marked effect on the accuracy of a child's statements. Goodman and Helgeson, *supra*, 40 *U.Miami L.Rev.* at 195. The transmission of suggestion can also be subtly communicated to children through more obvious factors such as the interviewer's tone of voice, mild threats, praise, cajoling, bribes and rewards, as well as resort to peer pressure.

*Id.* at 309-10 (emphasis added).

While several of the egregious investigative techniques that occurred in *Michaels* did not happen here (failure to videotape, suggestive and leading questions), repeated questioning of K.R. did occur. K.R. was initially interrogated by his mother using leading questions, followed by two child interviews, the second mere weeks after the first and where K.R. did not make any claims of sexual contact. In light of this repeated questioning, K.R.'s statements were not spontaneous, thus not reliable.

The trial court here was persuaded by the State's argument that, since the questioning in the child interview was not leading and the statements resulted from questioning by a trained professional, the statements were *per se* spontaneous and thus reliable, relying on the decision *Henderson*. CP 2, 5; CP Supp \_\_\_\_, Sub No. 40 at 12-14; 6/23/2014RP 99. The trial court's reading of the decision in *Henderson* was in error. *Henderson* did not, as the trial court concluded it did, deal with the spontaneity *Ryan* factor, but rather dealt with the factor concerning the relationship between the declarant and the witness. The portion of *Henderson* relied upon by the trial court stated:

We decline *Henderson*'s implicit invitation to establish a *per se* rule that a child's statement made in response to questioning by sexual abuse professionals, including police officers, is automatically unreliable. Professionals

are, by definition, trained to be objective in assessing whether a child's complaint merits further investigation, and unlike parents, their perceptions are not impaired by a personal attachment to the child.

*Henderson*, 48 Wn.App. at 551 (footnote omitted).

Here, the repeated questioning, including by a trained professional rendered the statements not spontaneous. The result of this repeated questioning was that the statements lacked spontaneity which rendered them unreliable. Contrary to what the juvenile court found, repeated questioning by Coslett in the formal setting at the Child Advocacy Center would have suggested to K.R. he answered incorrectly the first time when he denied being a victim. *See Michaels*, 136 N.J. at 309-10. The statements should not have been admitted and the trial court erred when it admitted them.

3. K.R.'s statements were the result of leading questions by his mother which negated the *Ryan* factor concerning the timing of the declaration and the relationship between the declarant and the witness.

While K.R. made a disclosure to his mother not prompted by questioning, all of his subsequent disclosures were the result of his mother's leading questions immediately following the initial disclosure.

In *Ryan*, the Court found this questioning by the mother of a child witness rendered the subsequent statements unreliable:

[A]s regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children *before* the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.

*Ryan*, 103 Wn.2d at 176.

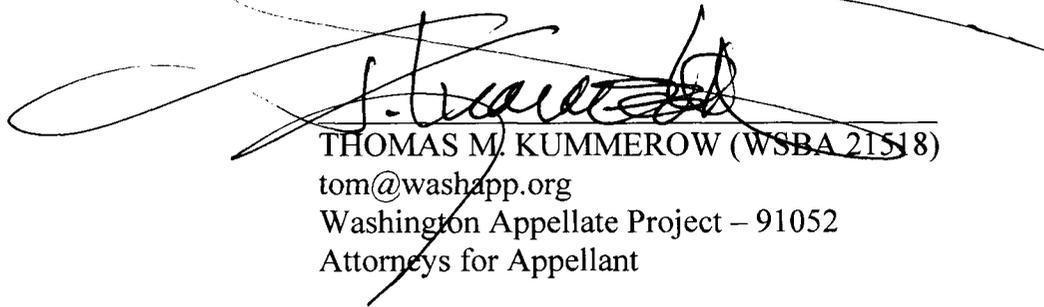
The same is true here. Ms. Hernandez's objectivity was clearly questionable given the fact her son had alleged being the victim of sexual misconduct. In addition, all of K.R.'s subsequent statements, to his mother and the child interviewer, were the result of questioning, specifically Ms. Hernandez's leading questions. K.R.'s statements were unreliable and should have been excluded. As a result, J.M.'s conviction must be reversed.

F. CONCLUSION

For the reasons stated, J.M. asks this Court to reverse the conviction and remand for a new adjudicatory hearing.

DATED this 26th day of January 2015.

Respectfully submitted,



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72145-3-I
	)	
J. M-M.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 26<sup>TH</sup> DAY OF JANUARY, 2015.

X \_\_\_\_\_ 