NO. 43438-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BARRY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00241-0

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Catherine Glinski
P.O. Box 761
Manchester, WA 98353
cathyglinski@wavecable.com

This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the right, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 13, 2013, Port Orchard, WA
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in admitting the child hearsay statements when the record shows that the trial court properly applied the *Ryan* factors, found that they had been substantially met, and thus properly determined that the statements provided sufficient indicia of reliability so as to be admissible at trial?

2. Whether the Defendant has failed to show that trial court erred in allowing the jury to consider the Defendant's demeanor, and furthermore, even if the trial court erred in this regard, was the error harmless?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Barry was charged by amended information filed in Kitsap County Superior Court with two counts of child molestation in the first degree, both with special allegations of domestic violence. CP 9. A jury found the Defendant guilty on one count, but was unable to reach a verdict on the second count. CP 137 . The trial court then imposed a standard range sentence. CP 149. This appeal followed.

B. FACTS

In the present case the Defendant was charged with two molesting C.C. and B.C, both of whom were the Defendant's grandsons. CP 9. Prior to trial the State sought to admit certain child hearsay statements made by each

of the children under RCW 9A.44.120. [1] At issue in the present appeal are the statements C.C. made regarding the molestation to his father (Richard Catledge), to his two therapists (Jennifer Fisher and Thomas Sherry) and to a child interviewer with the Kitsap County Prosecutor's Officer (Sasha Mangahas).

At the child hearsay hearing C.C.'s father, Richard Catledge, explained that both C.C. and B.C. were his children, and that their mother was Gwen Barry. RP 123. Mr. Catledge and Ms. Barry had previously been married, but are now divorced. RP 123. Ms. Barry is the Defendant's daughter. RP 123. After his divorce from Ms. Barry, Mr. Catledge married Lindsay Lohrenz. RP 122. Mr. Catledge is the primary custodial parent of the children, and the children spend approximately eight days a month with Ms. Barry. RP 199-200.

In February 2011 Mr. Catledge learned that C.C. had given his male cousin a "hickey." RP 124-26. Mr. Catledge discussed the event with C.C. and told him not to do it again. RP 128. Mr. Catledge and Ms. Lohrenz also decided to have C.C. see a therapist, and they made an appointment for C.C. to meet with a therapist named Jennifer Fisher. RP 128-29. Before the appointment, however, Mr. Catledge learned that the male cousin had further

[1] At trial the jury only convicted the Defendant of the charge relating to C.C. The portions of the child hearsay hearing relating solely to B.C., therefore, have been omitted from this brief.

conversations with his parents and had revealed that C.C. had also performed oral sex on him and had rubbed his penis against his bottom. RP 129-30, 179.

Mr. Catledge was "awe struck," and didn't know what to do. RP 130. He then talked to C.C., who admitted that he had done the things that his cousin had described. RP 130-31. C.C. also initially stated that he had learned this behavior from a young boy that he used to know from school. RP 131-32, 178-79. Mr. Catledge was aware that this other boy had transferred to another school and that C.C. had not seen him for almost a year and a half. RP 131-32, 178-79.

Mr. Catledge and Ms. Lorenz then began taking C.C. to see the therapist, Ms. Fisher. RP 133. When the counseling started, Mr. Catledge was under the impression that C.C. had learned this sexual behavior from the friend as he had described. RP 133. During the course of the counseling, however, it was revealed that C.C. did not learn this behavior from his friend, but in fact C.C. had admitted to the therapist that he had actually instigated the acts and had acted out sexually upon this male friend in a bathroom approximately a year and a half earlier. RP 134-37.

When Mr. Catledge learned about this he was scared to ask C.C. any further questions, as he was afraid of "knowing." Specifically, Mr. Catledge

explained that he was afraid that he would find out that C.C. had done similar things to other children. RP 137. Mr. Catledge, however, tried to make C.C. feel comfortable and safe, and told him C.C. that it was okay for him to talk to him. RP 137. On an evening before one of C.C.'s counseling appointments, Mr. Catledge and Ms. Lohrenz told C.C. that he was going to have a counseling session the next day and asked C.C. to continue being open and truthful with Ms. Fisher and to continue to talk. RP 137.

C.C. then mentioned that it might have been "Dennis" (an ex-boyfriend of Gwen Barry's) who had done things to him. RP 159. Mr. and Ms. Lohrenz explained to C.C. that this was a serious accusation and that if that was the case they would have to contact CPS and call 911. RP 165. C.C. then quickly said "No. It wasn't him. It wasn't him. It wasn't him." RP 169.[2]

Later in the conversation C.C. said repeatedly that "it's there, but it's deep. It's there. It's deep." RP 137. Mr. Catledge eventually went into another room to check on C.C.'s brother, while Ms. Lohrenz remained with C.C. RP 138. Ms. Lohrenz then called for Mr. Catledge and when he returned she told C.C. to "go ahead and tell your dad what you just told me."

[2] Despite the fact that C.C. retracted his statement about "Dennis" and later said that the Defendant was the one that had done something to him, Mr. Catledge nevertheless informed the counselor, CPS, and Detective Butler about C.C.'s statement about "Dennis." RP 169-70.

RP 138. C.C. then "mouthed" the words "It's my papa. It's my papa." RP 138. Mr. Catledge explained that at first C.C. was moving his lips but not actually vocalizing the words, and that C.C. appeared nervous and scared. RP 138. Mr. Catledge and Ms. Lorenz told him that it was ok and tried to reassure him, and eventually C.C. vocalized that it was his "papa." RP 139. Mr. Catledge explained that the Defendant was the only person that C.C. ever called "papa." RP 140.

Mr. Catledge and Ms. Lohrenz did not ask C.C. any further questions about what exactly the Defendant had done to him, but rather told C.C. that he and his therapist could talk about this the next day, and the conversation essentially ended at that point. RP 139-40, 189-90.

At the child hearsay hearing Mr. Catledge explained that he was very angry upon learning this information, but that he didn't want to push his son for more information as it had obviously been hard for him to reveal this information and he did not want to "drive [C.C] away." RP 140-41.

The next day Mr. Catledge took C.C. to his appointment with Ms. Fisher, and Mr. Catledge informed Ms. Fisher about C.C.'s disclosures. RP 141-42. Ms. Fisher said she would take it from there and discuss the matter with C.C. RP 142. During the session C.C. told Ms. Fisher that the Defendant had taught him the sexual behaviors that he had been acting out

with other children. RP 33.

Ms. Fisher testified at the child hearsay hearing that she was not aware of any motive for C.C. to make up the story that the Defendant had molested him. RP 43-44. Ms. Fisher also indicated that based on her experience C.C. appeared to have been truthful with her. RP 43. Finally, Ms. Fisher testified that although there was some tension between C.C.'s biologic mother and father, Ms. Fisher did not think this had any effect on C.C.'s disclosure. RP 50.[3]

After the session Ms. Fisher spoke with Mr. Catledge about some of the details of what C.C. had revealed and Ms. Fisher told Mr. Catledge to call 911. RP 35-56, 142-43. Ms. Fisher also instructed them not to talk about the matter with C.C. until he had been interviewed by a child interviewer. RP 35-36.

Mr. Catledge then took C.C. home, and once they arrived home from the session Ms. Lohrenz called 911, and a detective took a statement from them over the phone and arranged an appointment for the following week for

[3] C.C. later began seeing another therapist named Thomas Sherry. RP 52, 57. C.C. made some limited disclosures to Sherry about what had occurred, although Sherry did not focus on these events (Sherry explained that he was aware of the ongoing criminal case and that he was not an investigator, and thus he did not want to dig deeper out of deference to the criminal process). RP 77-79. At the Child hearsay hearing Sherry testified that it was clear to him that the touching that occurred with C.C. had in fact happened and were real events in CC's life. RP 81. In addition Sherry testified that he didn't think C.C.'s ability to recall information was faulty. RP 88.

C.C. to meet with Sasha Mangahas, a forensic interviewer at the Special Assault Unit. RP 143. Mr. Catledge told C.C. that he was proud of him, but he did not have any discussion about the specifics of what the Defendant had done to him. RP 144.

C.C. was then interviewed by Sasha Mangahas, a child interviewer with the Kitsap County Prosecutor's office. RP 288. Ms. Mangahas explained at the child hearsay hearing that she utilizes a child interviewing protocol or technique in order to avoid and leading or suggestive questions. RP 289-90. Ms. Mangahas further testified that she used this protocol or technique during her interview of C.C. RP 291. Ms. Mangahas's interview of C.C. was recorded, and a DVD of the interview was admitted at the child hearsay hearing. RP 291-94,

After the SAU interview, Mr. Catledge did not have any "one-on-one" conversations with C.C. about the actual nature of the sexual contact that occurred, but Mr. Catledge was present in several counseling sessions with Mr. Sherry or Ms. Fisher where C.C. explained what had happened. RP 145. In those sessions C.C. explained that after school he and the Defendant would have indoor "campouts" at the Defendant's residence and that during these campouts the Defendant would block a door with a toy box and tell C.C. that he would get candy if the Defendant was allowed to touch him on his privates. RP 145-46. C.C. also stated that this happened repeatedly and had

been occurring consistently since C.C. had been in the first grade (C.C. was in the third grade at the time of the disclosure). RP 146-47.

Mr. Catledge also testified that the divorce had been hard on C.C., but that he had no hesitation in believing C.C. since the disclosure had been so hard for him to make. RP 148-49.

C.C. also testified at the child hearsay hearing. RP 95. C.C. was 9 at the time of the hearing, and when asked why he was in court, CC explained that "something bad happened" and further explained that his penis was in the Defendant's mouth and the Defendant had "tried to stick his penis in my butt." RP 97-101. The Defendant also rubbed his penis on C.C.'s penis. RP 103. C.C. further explained that he wanted to tell the Defendant to stop, but he felt scared, and he also explained that this happened on more than one occasion. RP 101.

C.C. also testified that the Defendant told him that if he told he would never see his family again. RP 107. C.C. further explained that he did not reveal these events to his father because he was scared. RP 108, 111. C.C. also acknowledged that he had initially said that another boy had done these things with him, but that his parents found out this was a lie. RP 112-13. C.C. then explained that he had lied about this because he was scared. RP 112-13.

At the conclusion of the child hearsay hearing the trial court first found that C.C. was competent. RP 386-90. Barry has not challenged this finding.

The trial court then addressed the issue of whether the time, content, and circumstances of the statements provide sufficient indicia of reliability as required by RCW 9A.44.120. RP 398. In a detailed ruling, the trial court went through the "*Ryan*" factors and ultimately concluded that there were sufficient indicia of reliability and that the child hearsay statements were admissible. RP 398-409. The trial court also entered written Findings of Fact and Conclusions of Law. CP 143.

At trial, the DVD recording of the child interview was admitted and played for the jury. RP 481-83; Exhibit 1. Richard Catledge also testified at trial concerning C.C.'s disclosure and the circumstances surrounding the disclosure. RP 616-24. Thomas Sherry and Jennifer Fisher also testified about the statements C.C. had made to them about the molestation. RP 673-74, 697-700. C.C. also testified at trial. RP 569-604.

During jury deliberations the jury submitted a question, asking "Can we use as "evidence," for deliberations our observations of the defendant's actions - demeanor during the court case?" RP 823; CP 115. The parties and the court discussed this jury question and the trial court noted that "none of us

knows what they observed or why they are even talking about it." RP 825. The record also shows that neither party had referenced the Defendant's demeanor at trial. Furthermore, neither party offered any suggestion of what events or actions could have led to this question. Rather, the trial court noted that there simply was no record of the defendant's demeanor in the courtroom. RP 832.

The trial court indicated that it believed that the law allows a jury to consider not only what they hear on the stand but also what they witness in the courtroom, and the court thus stated that it didn't want to misadvise the jury regarding the law. RP 824-25. The trial court ultimately gave the following response to the question: "Evidence includes what you witness in the courtroom." RP 829; CP 115.

The jury ultimately found the Defendant guilty of child molestation in the first degree. CP 137-39.[4]

[4] The jury was unable to reach a verdict on the second count, which alleged that the Defendant had molested C.C.'s brother, B.C. CP 137-39.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE CHILD HEARSAY STATEMENTS BECAUSE THE RECORD SHOWS THAT THE TRIAL COURT PROPERLY APPLIED THE RYAN FACTORS, FOUND THAT THEY HAD BEEN SUBSTANTIALLY MET, AND THUS PROPERLY DETERMINED THAT THE STATEMENTS PROVIDED SUFFICIENT INDICIA OF RELIABILITY SO AS TO BE ADMISSIBLE AT TRIAL.

The Defendant first argues that the trial court erred in admitting the child hearsay statements. This claim is without merit because the Defendant has failed to show that the trial court abused its broad discretion in this regard, since the record shows that the trial court appropriately applied the Ryan factors and that those factors were substantially met, as required under Washington law.

A trial court's decision to admit child hearsay statements is reviewed for an abuse of discretion. *State v. Kennealy*, 151 Wn.App. 861, 879, 214 P.3d 200 (2009), citing *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (quoting *State v. Jackson*, 42 Wn.App. 393, 396, 711 P.2d 1086 (1985)). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. *Kennealy*, 151 Wn.App. at 879, citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellate court may uphold a trial

court's evidentiary ruling on the grounds the trial court used or on other proper grounds that the record supports. *Kennealy*, 151 Wn.App. at 879, citing *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Child hearsay statements are admissible in a criminal or dependency case when the statements describe sexual or physical abuse of the child and (1) the court finds, in a hearing conducted outside the jury's presence, that the time, content, and circumstances of the statements 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, the statement may be admitted only if there is corroborative evidence of the act. RCW 9A.44.120(1); *Kennealy*, 151 Wn.App. at 880.

In determining the reliability of child hearsay statements, a trial court considers nine factors: (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) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *State v.*

Ryan, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984) (*citing Dutton v. Evans*, 400 U.S. 74, 88–89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)); *Kennealy*, 151 Wn.App. at 880.

No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors. *Kennealy*, 151 Wn.App. at 881, *citing State v. Young*, 62 Wn.App. 895, 902–03, 802 P.2d 829, 817 P.2d 412 (1991). But the factors must be "substantially met before a statement is demonstrated to be reliable." *Kennealy*, 151 Wn.App. at 881, *citing State v. Griffith*, 45 Wn.App. 728, 738–39, 727 P.2d 247 (1986); *see also State v. Stevens*, 58 Wn.App. 478, 487, 794 P.2d 38 (1990) (appellate court may affirm admissibility of statements when trial court misapplied *Ryan* factors if reliability is apparent from the record).

In the present case the record shows that the *Ryan* factors were substantially met; thus, the trial court did not abuse its discretion.

1. More Than One Person Heard the Statements

This Court has previously explained that when more than one person hears a similar story of abuse from a child, the hearsay statement is more reliable. *Kennealy*, 151 Wn.App. at 881, *citing State v. Swan*, 114 Wn.2d 613, 651, 790 P.2d 610 (1990).

In the present case C.C. gave a substantially similar account of the events to multiple people sequentially, which supports the trial court's ruling on the statements' reliability and trustworthiness. Furthermore, the Defendant's trial counsel conceded below that more than one person heard the statements. RP 381. The trial court, therefore, clearly did not err in finding that this factor weighed in favor of admission of the statements.[5]

2. The Statements Contained Express Assertions of Past Fact

The trial court specifically found that C.C. expressed assertions of past facts. RP 405, CP 145. Barry has not argued, either in the trial court or on appeal that this factor weighed in favor of exclusion.

3. Timing of the Declaration and the Relationship Between the Declarant and the Witness

Another Ryan factor that a trial court must consider is the timing of the statement and what the witness's relationship is to the child. *Kennealy*, 151 Wn.App. at 884, *citing Ryan*, 103 Wn.2d at 176. With respect to timing, the Court of Appeals has explained that,

---

[5] Defense counsel below also conceded that and that C.C would be testifying at trial and that cross examination was thus available to establish any lack of knowledge. RP 382. The trial court also found that cross examination was available. CP 146. The Washington Supreme Court, however, has previously held that factor [whether the declarant's lack of knowledge could be established through cross-examination] does not apply in cases where the child testifies at trial. *See, State v Woods*, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005) ("Factor seven applies in cases where the child declarant is unavailable to testify. Here, the child declarants testified so the trial court was correct in not evaluating this factor.").

> [A] trial judge may find child hearsay statements unreliable on the ground that there has been a lapse of time and intervening counseling between the abuse and the statements at issue only when the evidence demonstrates that the lapse or counseling somehow affected the child's statements.

State v. Carlson, 61 Wn.App. 865, 872-73, 812 P.2d 536 (1991). The trial court below was aware of this and properly explained that C.C.'s counselors both opined that the C.C.'s counseling had not affected C.C.'s statements, thus this *Ryan* factor did not weigh in favor of exclusion. RP 404-05.

With respect to the witnesses' relationship is to the child, Washington courts have explained that when the witness is in a position of trust with a child, this factor is likely to enhance the reliability of the child's statement. *Kennealy*, 151 Wn.App. at 884; *Swan*, 114 Wn.2d at 650. This Court has also explained that this factor is met when a child makes a statement to their family members with whom they were in a relationship of trust. *Kennealy*, 151 Wn.App. at 884. Furthermore, statements to police officers and nurses also qualify, since a child will likely trust them because of their authoritative position in the community and because the discussion took place in a trusting or clinical atmosphere. *Kennealy*, 151 Wn.App. at 884, *citing State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992).

In the present case the statements at issue were made to people in a position of trust with the child and to trained professionals. Thus, this factor

also supports the trial court's finding of reliability, and the Defendant has not argued otherwise.

4. The Remoteness of the Possibility of the Declarant's Recollection Being Faulty

The Washington Supreme Court succinctly addressed this factor in *Woods*. In that case the Court ultimately held that,

> The trial court considered whether the girls' recollections were faulty and decided that they were not. Testimony from the foster mother established that the girls had a normal memory and ability to perceive. Woods does not point to evidence demonstrating otherwise, nor is such evidence found in our review of the record. The trial court did not abuse its discretion in finding factor eight satisfied.

Woods, 154 Wn.2d at 624. In the present case the trial court reached a similar conclusion, noting that succinctly that "With [C.C.] I have no concerns about his ability to recall. RP 406. The Defendant has not challenged this finding.

5. Apparent Motive to lie

Finally, the Defendant claims that C.C. had an apparent motive to lie because he parents had gone through a contentious divorce. App.'s Br. at 11-12. The trial court, however, that there was simply no evidence that the discord between the two parents gave C.C. an apparent motive to fabricate an allegation against the Defendant. RP 400-03.

The trial court's analysis in the present case was consistent with Washington law. First, the general assumption is that a child does not have a motive to lie, in the absence of information in the record indicating such a motive. *State v. Cooley*, 48 Wn.App. 286, 294, 738 P.2d 705 (1987). Furthermore, the trial court was correct in noting that the Defendant had offered no evidence that would connect the divorce to an actual motive to fabricate an allegation against the Defendant. For example, in the case of *In the Dependency of S.S.*, 61 Wn.App. 488, 497, 814 P.2d 204, *review denied*, 117 Wn.2d 1011 (1991), the court held that the motive to lie factor did not weigh against admissibility when the child did not like her father visiting in the absence of evidence indicating that child thought that relaying the abuse would stop her father's visits. Similarly, here no evidence at the hearing indicated that C.C. had anything to gain by making the allegation against the Defendant. Thus the trial court properly concluded that this *Ryan* factor weighed in favor of admissibility.

6. General Character of the Declarant

When assessing a child's general character, a court is to "look to whether the child has a reputation for truthfulness." *Kennealy*, 151 Wn.App. at 881, *citing* State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). Furthermore, a change in the child's story does not necessarily reflect bad character. *State v. Young*, 62 Wn.App. 895, 900, 802 P.2d 829 (1991).

In the present case the trial court specifically found that the general character of C.C. was "neutral" as there was no evidence regarding the C.C. and "a reputation for lying." CP 145. The Defendant claims that the trial court should have considered the fact that C.C. had initially lied about where he had acquired the sexualized behavior, but the Defendant's argument is without merit because the record is utterly void of any evidence that demonstrates that C.C. had a *reputation* for untruthfulness. As there was no evidence regarding C.C.'s reputation, the trial court did not err in finding that this factor was "neutral." RP 404.

7. Spontaneity of the Statements

The Defendant also argues that C.C.'s statements were not spontaneous because they were produced by questioning, and that this factor thus weighs in favor of exclusion. App.'s Br. at 12-13.

This Court, however, has previously explained that statements made in response to questioning are spontaneous so long as the questions are not leading or suggestive. *Kennealy*, 151 Wn.App. at 881, *citing Carlson*, 61 Wn.App. at 872, 812 P.2d 536. Furthermore, the *Ryan* spontaneity requirement is broad, and a child's statements can properly be found to be spontaneous when the questions used were open-ended and did not suggest that the child respond with a statement about sexual contact. *Kennealy*, 151 Wn.App. at 881; *State v. Henderson*, 48 Wn.App. 543, 550, 740 P.2d 329

(1987); *In re Dependency of S.S.*, 61 Wn.App. 488, 498, 814 P.2d 204 (1991)("for purposes of determining the reliability of a statement made by a child victim of sexual abuse, any statements made that are not the result of leading or suggestive questions are spontaneous"). In addition, the fact that professionals investigated the child abuse can enhance the reliability of the child hearsay statements. *Young*, 62 Wn.App. at 834; *State v. Henderson*, 48 Wn.App. 543, 551, 740 P.2d 329 (1987).

Furthermore, the appellate court may uphold a trial court's evidentiary ruling, including a ruling on the admissibility of a child hearsay statement, on the grounds the trial court used or on other proper grounds that the record supports. *Kennealy*, 151 Wn.App. at 879, citing *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

In the present case the trial court found that C.C.'s questions were not spontaneous because C.C.'s statements were "the product of inquiry." RP 404. The record, however, shows that while some of the statements were made during a child interview and during counseling sessions, the statements were made to trained professionals who did not use leading or suggestive questions. In addition, C.C.'s father showed remarkable restrain in not asking C.C. for details regarding the abuse and left those issues to the professionals. Given these facts, the record clearly shows that the records were "spontaneous" under the broad definition given to that term under

Washington law. This Court should therefore find that this factor weighed in favor of admission, since the record shows that great care was made during all of the inquiries and that the record shows no instances of leading or suggestive questions.

Given all of these facts, the Defendant has failed to show that the trial court abused its discretion. To the contrary, the record clearly supports the trial court's finding that there was substantial compliance with the *Ryan* factors.

B. THE DEFENDANT HAS FAILED TO SHOW THAT TRIAL COURT ERRED IN ALLOWING THE JURY TO CONSIDER THE DEFENDANT'S DEMEANOR. FURTHERMORE, EVEN IF THE TRIAL COURT ERRED IN THIS REGARD, ANY ERROR WAS HARMLESS.

The Defendant next claims that the trial court erred when it instructed the jury that it could consider the Defendant's courtroom demeanor. App.'s Br. at 13. This claim is without merit because the Defendant has failed to show that the trial court erred in allowing the jury to consider the Defendant's demeanor and because, even if there was an error, any error was harmless.

In support of his claim, the Defendant first cites a number of federal cases for the proposition that a defendant's demeanor may not be considered as evidence. App.'s Br. at 13-14, *citing U.S. v. Carroll*, 678 F.2d 1208, 1209

(4th Cir 1982); *U.S. v. Schuler*, 813 F.2d 978, 980 (9th Cir 1987); *U.S. v. Pearson*, 746 F.2d 787, 796 (11th Cir 1984); U.*S. v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir 1973). While it is true that some courts have reached that conclusion, numerous other courts from around the country have reached the opposite conclusion.

For instance, in *State v Brown*, 358 S.E.2d 1 (N.C. 1987), the Supreme Court of North Carolina found no error when the prosecutor had made arguments regarding the defendant's stoic demeanor to the jury. The court found nothing wrong with such argument, noting that "Urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." *Brown*, 358 S.E.2d at 15, *citing State v Myers*, 263 S.E.2d 768, 773-74 (N.C. 1980). The court also explained that such remarks were in fact "'rooted in the evidence' and related 'to the demeanor of the defendant, which was before the jury at all times.'" *Brown*, 358 S.E.3d at 15, *citing Myers*, 263 S.E.2d at 774. The court also rejected the Defendant's claim that such comments constituted a comment on his failure to testify. *Brown*, 358 S.E.2d at 15-16. *See also, State v Augustine*, 616 S.E.2d 515, 533 (N.C., 2005)(holding that comments by the State concerning a defendant's courtroom conduct are permissible because the defendant's

demeanor is "before the jury at all times"); *State v. Nicholson*, 558 S.E.2d 109, 137-38 (N.C. 2002) (same); *State v. McNatt*, 463 S.E.2d 76, 77–78 (1995) (prosecutor's argument about the defendant's courtroom demeanor proper).

Similarly, in *Commonwealth v. Smith*, 444 N.E.2d 374 (Mass. 1983), the prosecutor had made the following comment during closing arguments: "And you have had an opportunity to look at him during the trial as he squirms and smirks and laughs, or whatever you have seen him do." Although the defendant did not take the stand, the Supreme Judicial Court of Massachusetts court found no error in the prosecutor's comment as the jury was "entitled to observe the demeanor of the defendant during the trial" and the comment by the prosecutor "did not suggest that he had knowledge the jury did not share." *Smith*, 444 N.E.2d at 380.[6]

The Supreme Court of Ohio has also reached a similar conclusion, holding that a defendant's face and body are physical evidence and that the prosecution may comment on the accused's appearance as well as his or her

[6] In a more recent case the Supreme Judicial Court of Massachusetts reaffirmed this holding when it noted that it was proper for a prosecutor to point out in closing arguments that the evidence at trial showed that the murderer was right-handed and that during the trial the jury had probably seen the defendant writing with his right-hand. *Commonwealth v. Cohen*, 589 N.E.2d 289, 296 (Mass. 1992). The Court rejected the defendant's claim that the prosecutor had argued facts not in evidence, and the court ultimately held that it was not improper for the prosecutor to point out that the defendant was right-handed. *Cohen*, 589 N.E.2d at 296-97.

actions at trial. Specifically, in *State v. Brown*, 528 N.E.2d 523 (Ohio, 1988) the court held that a "defendant's face and body are physical evidence. The prosecution may, of course, comment on the accused's appearance." *See also*, *State v. Lawson*, 595 N.E.2d 902, 911 (Ohio 1992) (argument concerning defendant's chilling demeanor not improper because defendant's "face and body" are physical evidence subject to comment). Later, in *State v. Franklin*, 776 N.E.2d 26 (Ohio, 2002), the court again explained that a prosecutor may also comment on a defendant's actions at trial. In *Franklin*, the defendant had acted rudely during trial by belching loudly and by interrupting the judge. *Franklin*, 776 N.E. 2d at 35. In closing argument the prosecutor commented on the defendant's rude behavior, and on appeal the defendant argued that this comment was improper. *Franklin*, 776 N.E. 2d at 37. The Supreme Court of Ohio, however, found no error and held that "the prosecution may, of course, comment on the accused's appearance" and "this rule can be extended to commentary on a defendant's actions at trial." *Id.* at 37.

Other courts have also treated a defendant's courtroom demeanor as evidence and have held that comments on demeanor are proper. *See Bailey v. State*, 625 So.2d 1182, 1183 (Ala.Cr.App.1993)("The conduct of the accused or the accused's demeanor during the trial is a proper subject of comment."); *Wherry v. State*, 402 So.2d 1130, 1133 (Ala.Crim.App.1981) ("[t]he conduct of the accused or the accused's demeanor during the trial is a proper subject

of comment"); *James v. State*, 564 So.2d 1002, 1007 (Ala.Cr.App.1989)(no error in the prosecutor's comment that the Defendant had been smiling); *Bishop v. Wainwright*, 511 F.2d 664 (5th Cir.1975)(holding it was permissible to refer to defendant's expressionless courtroom demeanor); *U.S. v. Robinson*, 523 F.Supp. 1006 (E.D.N.Y.1981) (holding it was permissible to refer to defendant's indifferent reaction when informed that money in his wallet was counterfeit).

In some cases the courts have held that evaluating whether the Defendant's demeanor was a proper subject of comment requires an examination of the nature of the defendant's defense or conduct. *See, e.g., Wherry v. State*, 402 So.2d 1130, 1133 (Ala Crim App, 1981) (prosecutor's comments regarding a defendant's demeanor were proper where the nontestifying defendant claimed an insanity defense). Examples of nontestimonial acts held admissible by other courts include when there have been threats or intimidation of witnesses, *U.S. v. Gatto*, 995 F.2d 449 (3d Cir.1993); making a hand gesture in the shape of a gun, *U.S. v. Mickens*, 926 F.2d 1323 (2d Cir.1991); and mouthing the words "you're dead," *U.S. v. Maddox*, 944 F.2d 1223 (6th Cir.1991).

In addition, in the *Schuler* case (cited by the Defendant in the present case) there was a vigorous dissent by Judge Hall who concluded that "the principle that a defendant's courtroom demeanor is evidence is well-settled."

Schuler, 813 F.2d at 983 (9th Cir 1987). Judge Hall then went on to note that,

> Sound policy reasons exist for allowing a jury to consider the courtroom demeanor of a defendant. As Wigmore noted: "[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory." 2 J. Wigmore, Evidence § 274 (J. Chadbourn rev. ed. 1979). Taken to its logical conclusion, the majority's opinion would require a court to instruct a jury to reach its verdict as if the accused had not been present before it.

Schuler, 813 F.2d at 983 (9th Cir 1987).[7]

In short, there is no national consensus on the issue of whether a defendant's demeanor (including the demeanor of a non-testifying defendant) is properly considered as evidence that may be used by a jury. Furthermore, many courts that have considered that issue have found that a defendant's demeanor is evidence that a jury may consider. Finally, as some of the cases cited above suggest, a contrary ruling would lead to the rather absurd result that a jury would be unable to consider the outrageous or extremely improper actions of a defendant who openly threatened, intimidated, or even assaulted

---

[7] Judge Hall's dissent also notes that,

> "Practically it is impossible to prevent jurors from observing the appearance and behavior of the accused very closely while he is in court during the trial. They will naturally draw inferences therefrom either favorable or unfavorable to him. The information thus obtained is evidence, and, doubtless, many a verdict has been determined thereby."

Schuler, 813 F.2d at 983 n.2, *quoting* H. Underhill, Criminal Evidence § 125 n. 9 (5th ed. 1956).

or attempted to assault a witness during the witness's testimony. Given this conundrum, one could reasonably conclude that even if a court were inclined to conclude that in some cases demeanor should not be considered evidence, a logical and sensible rule would not include a blanket prohibition, but rather would require some examination of what type of demeanor was at issue and what for purpose the evidence would be used.

After citing the Federal cases mentioned above, the Defendant next turns to the few Washington cases that have addressed the issue. The Washington cases, however, do not resolve the issue. In examining the Washington cases, it is critical to look at the actual language of the cases. For instance, the Defendant cites *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245 (2001) for the proposition that "when the defendant has not testified, it is improper to comment on his demeanor, so as to invite the jury to draw a negative inference about his character." App.'s Br. at 14, *citing Smith*, 114 Wn.2d at 679.

The *Smith* opinion, however, does not say exactly what the Defendant claims it does. Rather, the actual language from *Smith* is that "While it *may* be improper to comment on a defendant's demeanor so as to invite a jury to draw a negative inference about the defendant's character, the prejudice flowing from such comments is not necessarily incurable by instruction." *Smith*, 144 Wn.2d at 679 (emphasis added). In *Smith* the prosecutor had

commented on the defendant's demeanor and described him as looking like he "has an attitude" and a "chip on his shoulder." *Id* at 678-79. The Supreme Court, however, did not ultimately state unequivocally that these comments were improper; rather the Court stated that the comments were "likely improper," but that no objection was raised at trial that if an objection had been raised the trial court could have cured any impropriety. *Id* at 679.

In short, given the lack of a national consensus on the issue, the actual language from *Smith* (which says that it "*may* be improper to comment on a defendant's demeanor so as to invite a jury to draw a negative inference about the defendant's character") provides little guidance in the present case, especially since there was no action by the prosecutor in the present case that invited the jury to draw a negative inference about the defendant's character.

The Defendant also briefly cites *State v Klok*, 99 Wn. App. 81, 992 P.2d 1039. App.'s Br. at 14. In *Klok* the prosecutor commented during closing argument that the defendant had been "laughing through about half of this trial." *Klok*, 99 Wn.App. at 82. On appeal, Division I ultimately held that the issue of prosecutorial misconduct based on this remark was "not reviewable" because the defendant did not object at trial. *Id.* at 85-86. In dicta, however, the court did state (with no citation to authority) that "it is improper to comment on a defendant's demeanor and to invite the jury to draw from it a negative inference about the defendant's character." *Id* at 85.

This statement, however, provides little guidance in the present case and is not particularly persuasive since it is dicta and because it states that it is improper to comment and demeanor *and* to invite the jury to draw from it a negative inference about the defendant's character. In the present case, of course, there is no comment on demeanor nor was there any invitation to the jury to draw a negative inference about the Defendant's character.

Rather, in the present case the record is completely silent about what possible demeanor or actions the jury had in mind when it asked its question.[8] In addition, in the present case the prosecutor never invited the jury to draw a negative inference about the defendant based on his demeanor. Thus the dicta from *Klok*, even if it is to be considered persuasive, is simply not applicable to the actual facts of the present case.[9]

---

[8] Thus, in the present case it is impossibly to say whether the jury saw something in the defendant's demeanor that it felt was inappropriate or whether it saw something that was entirely appropriate and consistent, in its mind, with innocence. Given the silent record, it is simply impossible to saw what the demeanor at issue was.

[9] The only other Washington case cited by the Defendant the seventy five year old opinion in *Henriod v. Henriod*, 198 Wash 519, 89 P.2d 222 (1938). App.'s Br. at 14. The Defendant cites this case for the proposition that a "jury may consider defendant's demeanor during trial only if defendant offers himself as a witness." App.'s Br. at 14. The *Henriod*, case, however, does not exactly say this. Rather, the *Henriod* opinion briefly cites to a Colorado opinion in which the court stated,

> "We cannot agree with the argument that the defendant's conduct during the trial of a case and in the presence of the jury is not a proper subject of their observation. Indeed, we know it to be a fact, grounded in human nature, that the conduct of a defendant or of a party to a suit during the trial is more or less potential, and has necessarily more or less influence with the court and jury upon the question of his credibility * * *. The conduct of the defendant while testifying, and his demeanor during the trial, in the jury's presence, provided he offers himself as a witness, are fit subjects for the jury to consider as affecting the credence to be given to his

In short, the Defendant has failed to show that the trial court's instruction was contrary to Washington law. Rather, the court's instruction was consistent with numerous, well reasoned, cases from around the country and the court's instruction was not directly contrary to any Washington case.[10] This Court, therefore, should find that the trial court did not err in allowing the jury to consider the defendant's demeanor as evidence.

---

testimony."

Henriod, 198 Wash. At 525, *quoting Boykin v. People*, 22 Colo. 496, 45 P. 419, 421. The Washington court in *Henriod* does not ever specifically say that it is adopting this as the law of Washington, but it does appear to imply some approval of the reasoning. In any event, even actual language from the Colorado opinion does not exactly say that there are no circumstances in which the demeanor of a non-testifying witness is admissible. Rather it simply says the demeanor of a testifying defendant is clearly evidence. This holding, of course, at a minimum leaves open the possibility that in some cases demeanor of a non-testifying defendant may be admissible, depending on the circumstances at issue.

[10] The State respectfully submits that the words of Wigmore contain a certain logic and sensibility that should be incorporated into a commonsense rule in the present case. As Wigmore noted:

> "[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory."

2 J. Wigmore, Evidence § 274 (J. Chadbourn rev. ed. 1979). This Court could incorporate this passage from Wigmore, and the previous dicta from *Smith* and *Klok*, into a rule that would read something like this,

> It is improper for a prosecutor to comment on a non-testifying defendant's demeanor and to thereby invite the jury to draw a negative inference about the defendant's character, absent some showing that the comment on the demeanor was consistent with the spirit of ER 404(b) or other evidence rule that would allow evidence regarding certain actions to be considered as evidence. Furthermore, while a prosecutor may not comment on a defendant's demeanor and ask the jury to draw a negative inference about the defendant's character, a jury may nevertheless consider a defendant's demeanor because to suggest otherwise would be an impossibility in practice and a fiction in theory.

Furthermore, even if this Court were to conclude (or to assume for the sake of argument) that the trial court improperly allowed the jury to use the Defendant's demeanor as evidence, any error in the present case was harmless.

The issue in the present case clearly revolves around the issue of whether the trial court properly allowed the jury to consider the Defendant's demeanor as evidence. Under Washington law, a trial court's evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The Defendant, however, claims that the more stringent standard for constitutional errors should apply, and that the State is therefore required to prove that the error was harmless beyond a reasonable doubt. App.'s Br. at 16. The Defendant claims that the error here was "constitutional" because it impacted his privilege against self incrimination and his right to a verdict based solely on the evidence. App.'s Br. at 16. The Defendant has cited no authority, however, holding that an error such as the one in the present case is, in fact, a constitutional error. In addition, since the record is completely silent on what type of demeanor evidence is at issue, the Defendant cannot

show that the instruction impacted his privilege against self incrimination. Rather, based on the record below this court cannot say that the demeanor weighed for or against the defendant. Rather, for all we know the demeanor evidence weighed in the Defendant's favor. Furthermore, the Defendant's claim that the error impacted his right to a verdict based solely on the evidence is similarly without merit. Washington law includes numerous examples where the court applies the non-constitutional harmless error standard in situations where the trial court erroneously admitted certain evidence, including highly prejudicial evidence.

For instance, evidence admitted in violation of ER 404(b) is reviewed under the lesser standard of non-constitutional harmless error. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Similarly, non-constitutional harmless error analysis is used in analyzing challenges to the prior conviction evidence under ER 609(a)(1). *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997) *quoting State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) (holding the same non-constitutional analysis applies to both ER 404 and ER 609(a) rulings). If both ER 404(b) and ER 609 errors do not trigger the constitutional harmless error standard (despite the fact a defendant could certainly argue that both would violate his right to a "verdict based solely on the evidence") then certainly any error in the present case, where the record is silent as to what demeanor evidence was at issue, must be

reviewed under the non-constitutional harmless error standard.

It is also worth noting that had this been a case where the prosecutor actually commented on the defendant's demeanor and asked the jury to draw a negative inference about the defendant's character, then the issue would have been a claim of prosecutorial misconduct. *See, e.g., Klok,* 99 Wn App. at 84; *Smith*, 144 Wn.2d at 678-79. In such a case the law is clear that the defendant would bear the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *See, e.g, State v Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *citing State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). To establish prejudice, the Defendant would be required to demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Sakellis*, 164 Wn.App. 170, 184, 269 P.3d 1029 (2011).[11]

As the present case did not involve an actual comment on the Defendant's demeanor and an invitation to draw a negative inference about his character, it simply makes no sense to apply a higher harmless error standard in the present case, especially when the record does not even demonstrate that the demeanor at issue was weighed against the defendant.

[11] This is the standard that would apply if the Defendant had objected below. If no objection had been made, an even greater showing would be required (namely, that the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an "enduring and resulting prejudice" incurable by a jury instruction). *Sakellis*, 164 Wn.App. at 184.

In conclusion, this Court should apply the non-constitutional harmless error standard and hold that the Defendant has failed to show any prejudice, as the record below is completely silent with respect to what actions or demeanor were at issue.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED February 13, 2013.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1

KITSAP COUNTY PROSECUTOR

February 13, 2013 - 9:18 PM

Transmittal Letter

Document Uploaded: 434385-Respondent's Brief.pdf

Case Name: State v Robert Barry

Court of Appeals Case Number: 43438-5

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Jeremy A Morris - Email: jmorris@co.kitsap.wa.us

A copy of this document has been emailed to the following addresses:

cathyglinski@wavecable.com