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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO.19429-5-II

COUNT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

CHRIS A. FORTH,

Appellant

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APPELLANT'S BRIEF

---

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**CERTIFICATE OF SERVICE**

I certify that I mailed

2 copies of App Brief  
to P. Mhoon Barbara C-B  
& (1) to C. Forth  
2/19           *g*            
Date Signed

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**ASSIGNMENT OF ERRORS**

**ASSIGNMENT OF ERROR PERTAINING TO ISSUE NO. I**  
THE TRIAL COURT ERRED BY FAILING TO APPLY THE NINE FACTORS SET FORTH IN STATE V. RYAN FOR EVALUATING THE RELIABILITY OF THE CHILD'S OUT-OF-COURT STATEMENTS PRIOR TO ADMITTING THEM INTO EVIDENCE

**ASSIGNMENT OF ERROR PERTAINING TO ISSUE NO. II**  
THE TRIAL COURT ERRED BY NOT TAKING COUNT I FROM THE JURY WHEN NO RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS GUILTY OF CHILD MOLESTATION IN THE FIRST DEGREE

**ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

- I DID THE TRIAL COURT ERR WHEN IT FAILED TO APPLY THE NINE FACTORS SET FORTH IN STATE V. RYAN FOR EVALUATING THE RELIABILITY OF THE CHILD'S OUT-OF-COURT STATEMENTS?
  
- II VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, COULD ANY RATIONAL TRIER OF FACT HAVE FOUND GUILT BEYOND A REASONABLE DOUBT?

## STATEMENT OF THE CASE

### Procedural History

On July 14, 1993, the State charged Chris Forth with one count of child molestation in the first degree, contrary to RCW 9A.44.083, alleging that Forth had sexual contact with Christina sometime between June 1, 1991 and August 31, 1991. CP 1-2. Trial was set for October 20, 1993, and the defendant failed to appear. SCP, Exhibits 12-14; RP 1-2. A bench warrant was issued for his arrest. Id. On August 17, 1994, an amended information was filed charging Mr. Forth with one count of bail jumping, contrary to RCW 9A.76.170(1). RP 3-5.

Trial was held November 1-8, 1994. RP I-VI. The defendant stipulated to the admission into evidence of the certified copies of a scheduling order setting trial date, signed by Chris Forth, an order authorizing issuance of bench warrant, and the bench warrant, all of which related to the charge of bail jumping. SCP Exhibits 12-14; RP I, 1-2; RP II, 43. Prior to trial, a hearing was held to determine whether the out-of-court statements by Christina to Tina Bennett and Linda Olson should be admitted pursuant to RCW 9A.44.120.

RP II, 2-43. Over objections by defense, the court admitted the statements. RP II, 57-59. The defendant also conceded to the competency of Christina to testify. The jury returned a verdict of guilty as charged. CP 22-23. Mr. Forth was sentenced on March 29, 1995. CP 24-31.

Notice of appeal of the finding of guilt was timely filed. CP 35.

### **Substantive Facts - Child Hearsay Hearing**

Tina Bennett, mother of Christina, testified that in August of 1992, Christina told her that her father, the defendant, had "touched her inappropriately" in August of 1991, when Christina was 6 years old. RP II, 14-15. Ms. Bennett recalled that Christina told her about the alleged incident on an evening in August of 1992 when Christina got in her stepfather's lap, hugged him, and asked him for "special attention." RP 11, 15. Apparently, Mr. Bennett indicated that he did not know what she meant by "special attention." RP II, 16. Christina then went to her bedroom and Ms. Bennett followed her. RP II, 16. After questioning Christina as to the meaning of special attention, Ms. Bennett said that Christina told her it was "special attention like daddy Chris gave

her." RP II, 16. She indicated that she was not supposed to say what the special attention was. After further questioning, Ms. Bennett testified that Christina said her father had touched her with his mouth on her nipples and with his hand on her private parts in his bedroom at night, and they had played a "toilet game" where the defendant lay on the floor of the bathroom while she urinated in his mouth. RP II, 16-17; 28-29.

According to Ms. Bennett, they had taken Christina by ferry from Oregon to Seattle on July 14, 1991, for a visit with her father in Puyallup, and Christina was returned to Oregon in August of 1991. RP II, 20-21.

Linda Olson is a social worker with the Child Services Division (CSD) in Pendleton, Oregon. RP II, 31. Ms. Olson testified that Ms. Bennett contacted CSD on August 19, 1992 and reported that Christina had been sexual abused. RP II, 34. Ms. Olson spoke with Ms. Bennett prior to her interview with Christina on August 21, 1992. Id. Ms. Olson testified that Christina related the same type of touching that Ms. Bennett reported to her the day previous, except Christina told Ms. Bennett that the incident occurred once in the daytime. RP II, 39-40; 47. Ms. Bennett told Ms. Olson that

Christina had told her that the "special attention" meant rubbing her back and tummy. RP II, 49.

Using anatomical drawings in the interview, Ms. Olson testified that Christina indicated the parts of her body touched by circling the female's nipples and private parts and the male mouth and hand. RP II, 38-39. Timing as to when the alleged touching occurred was not definitely established, but Ms. Olson said Christina believed it was in the summer of 1991. RP 42, 47.

Over defense objection, the court admitted the hearsay evidence, ruling as follows:

Well, the Court at this point makes evidentiary rulings only and in this case, like every other case, the jurors will be free to believe all or part or none of the testimony of any witness who testifies in the case. The child's competence to testify has been conceded, so we'll state the jurors will either believe or disbelieve the child. We then get to the mother and to Linda Olson.

The court, of course, can take judicial notice and note that there are always motivations, ex-husband, ex-wife, there can be lots of animosity or maybe not such animosity and all different gradations (sic) and variations. Other than the obvious fact that this ex-husband and ex-wife, I didn't detect any particular motivation (sic) to do anything other than what a mother should do. That doesn't mean I'm putting a stamp of accuracy on any particular witness, but I didn't see anything other than the ex-husband, ex-wife syndrome to detract from the testimony of mother. And of course whether she should or should not be believed, again, can be



argued to the jury.

As far as Ms. Olson, all of us are handicapped by the allegations that something happened in 1991. It, whatever it was, was disclosed in 1992 and people had to act upon it, or they did act upon it in 1992. It's now November 1, 1994 and we all have to struggle with that, and whether that hurts or helps the state, whether that hurts or helps the defense remains to be seen.

I find that any inconsistencies or problems with Linda Olson's report are simply things where there can be problems and both sides can argue whether these are problems that should cause anybody to particularly believe or disbelieve a particular witness.

The Court will rule that the hearsay statements of the mother and of Linda Olson are admissible. The Court certainly is amenable, and I'm not dead sure at all on this, but if a cautionary instruction is appropriate, I hope--I would hope that it's available and written out so I'm not ad-libbing something to the effect that we evaluate the little girl and either believe or disbelieve her.

And then I should have said it right at the start, the legislature has struggled with this whole issue and made certain determinations as to what evidence might be admissible and what might not and this appears to be a case where the hearsay statements should be admissible, but no prediction as to whether the jurors will be impressed or unimpressed.

We'll note an exception to the defense on the Court's ruling and as I say, I don't know if a cautionary instruction is appropriate or not, but I'll certainly consider it.

RP II, 57-59.

Substantive facts - Trial

At trial, Ms. Bennett's testimony regarding the statements made to her was basically the same as her testimony at the child hearsay hearing. RP III, 10-11. On cross-examination, Ms. Bennett admitted that she had made sexual abuse allegations against Mr. Forth during their divorce proceedings, which were allegations that proved to be untrue. RP III, 25-27. She testified as to the children's visiting arrangements with their father since she and the defendant divorced, indicating that they had spent the summer of 1990 in Puyallup and again testifying that they had taken Christina and Jason to Seattle by ferry in mid-July of 1991, and that she remained in Puyallup until late August, 1991. RP III, 15-18.

Ms. Olson's testimony at trial regarding the out-of-court statements was also the same as her testimony at the child hearsay hearing. RP III, 43-47.

Christina testified that she spent the summer of 1991 with her father in a trailer where he lived with his parents and two brothers. RP 10-11. She described the living arrangements, indicating that she and her brother Jason slept in one bedroom next to the living room, her

grandparents in another bedroom, and Chris in the third bedroom. The teenage boys slept on the sofa in the living room. RP IV, 11-13. In describing the alleged incident at trial, Christina testified to more details than her mother and Ms. Olson reported in their testimony. At trial, Christina recalled that she a bad dream about dinosaurs while visiting her father in 1991, and when she went to his bedroom, he told her to go back to bed, and then later called her back into his bedroom where the touching occurred. RP IV, 18-20. She did not recall his saying anything to her about "special attention." RP IV, 18. Then, she remembered a different night when her father followed her into the bathroom. She recalled asking him to leave and he instead sat on the floor in the bathroom, and then arched his back and put his head over the seat of the toilet and made her urinate in his mouth. RP IV, 22-24.

In the defense case, it was established by testimony that the bathroom where Christina alleged the incident occurred was approximately 4' x 7' from wall to wall. Included in this space was a bathtub, shower, vanity, toilet seat, and clothes hamper. RP IV, 52-53; 75. Joe Forth, Chris' brother testified that he is 5' 11" and weighs

about 190 pounds and there is no space for a man his size or the size of his brother, Chris, who is apparently heavier, to either sit down or lie down on the bathroom floor. He indicated that the bathroom was so small that when he stood in front of the vanity, his legs touched the toilet. RP IV, 54-55, 61. Chris' mother, Myrna Coan, described the size of the trailer's bathroom in much the same way as Joe Forth, mentioning the closeness of the wall in front of the toilet seat. RP IV, 75.

Testimony regarding the timing and circumstances of Christina's visit with her father in the summer of 1991 sharply differed in the testimony of the defense witnesses than the testimony of Ms. Bennett. Joe Forth, who is a psychiatric social worker for the Department of Mental Health in Massachusetts, came for the trial and testified that he had been at a family reunion of the Forth/Erickson families, including Chris and Christina and Jason, in Pendleton, Oregon from July 7-11, 1991. RP IV, 45-48. After the reunion, Joe said his parents returned to Puyallup on July 8, 1991, Chris and the children returned to Puyallup on July 9, 1991, and he went to Puyallup to visit with his parents and Chris on July 11, 1991, and stayed until July 14, 1991. RP IV, 48. Because he

was with Chris and the children, Joe testified that he knew it was not possible that Ms. Bennett dropped off the children at the ferry dock in Seattle on July 14, 1991 as she testified. RP IV, 58-59. Joe keeps a daily calendar because of his professional schedule, which is marked with times and dates of his activities and travels, so he was certain of the dates. RP IV, 47-49. Joe described the crowded living arrangements in the trailer while he was there. He slept in the room with Chris, Christina and Jason in another bedroom with Cory and Colton sometimes sleeping in the bedroom with Christina and Jason and sometimes in the living room. RP IV, 53-54. Although Joe left on July 14, 1991, he was aware that Chris returned to Pendleton with the two children a few days after he left. RP IV, 61.

Chris' mother, Ms. Coan, confirmed the dates they were all in Pendleton for the family reunion, which occurred on July 7, 1991. She identified in court a photo of that family reunion RP IV, 68. Chris had gone to Pendleton the latter part of June in order to work on his grandparents landscaping. RP IV, 67. Ms. Coan recalled Ms. Bennett bringing Christina and Jason to the home of the family reunion in Pendleton where they stayed

until after the reunion and returned with Chris to Puyallup on July 9, 1991. RP IV, 69. She also described the small and crowded trailer in Puyallup, which was approximately a total of 1,000 square feet. RP IV, 71. After Joe left, they also had her stepdaughter, Celeste, her husband, James Julien, and their two children, Dan and Nat. RP IV, 74-75. Sleeping arrangements were doubled up in the beds and on the floors. RP IV, 72. Nat and Dan stayed in the trailer from mid-July until mid-August, 1991. RP IV, 75. Chris left with Christina and Jason and returned to Pendleton on July 17, 1991 to attend his school class reunion. RP IV, 79. He took the children back to the Bennett home at that time. The crowded living conditions and lack of privacy with 9 to 11 people staying in the trailer was also confirmed in the testimony of Chris' stepfather, William Coan, and his brother, Cory, and James Julien. RP IV, 85-93; 100-106; RP V, 2-12.

Chris testified on his own behalf confirming that he had gone to Pendleton in late June before the family reunion to work for his grandparents. RP IV, 111. Ms. Bennett brought Christina and Jason to him in Pendleton on the 6th or 7th of July 1991. RP IV, 117. After the family

reunion, Chris took the children to Puyallup where they stayed with all of the others in the trailer until he returned to Pendleton for his class reunion July 17, 1991. RP IV, 119. Chris denied any of the improper touching described by Christina. RP IV, 127. He could not recall any time when he was alone in the trailer with Christina. RP IV, 133.

#### ARGUMENT

I THE TRIAL COURT FAILED TO APPLY THE NINE FACTORS SET FORTH IN STATE V. RYAN FOR EVALUATING THE RELIABILITY OF THE CHILD'S STATEMENTS

Before a child's hearsay statements are admissible under the child victim hearsay statute, RCW 9A.44.120, the court must find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." State v. Swanson, 62 Wn. App. 186, \_\_ P.2d \_\_ (1991), citing State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). In Ryan, the Supreme Court set forth nine factors for determining whether a child's out of court statements are reliable and admissibility pursuant to RCW 9A.44.120:

- (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;
- and (5) the time of the declaration and

the relationship between the declarant and the witness. [State v. Parris, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)..(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 at 176-76.

Over defense objections, the court admitted the statements through the testimony of Tina Bennett and Linda Olson. In doing so, the court did not evaluate on the record the nine factors in Ryan to determine that the statements were reliable. RP II, 57-59.

To the extent that the court may have silently weighed some of the Ryan factors to determine the reliability of the out-of-court statements, it appears as if the court did so with reference to Tina Bennett, the mother, rather than the child, and whether or not Tina had a motive to influence the child to lie. As to the statements made to Linda Olson, the court found that any "inconsistencies or problems with Linda Olson's report are simply things where there can be problems and both sides can argue whether these are problems that should cause anybody to particularly



believe or disbelieve a particular witness." RP II, 58. These findings by the court fall well short of the requirement that before child hearsay may be admitted, the court must find on the record that the time, content, and circumstances of the statements provide sufficient indicia of reliability. State v. Ryan, supra, See also State v. Jackson, 46 Wn. App. 360, 730 P.2d 1361 (1986).

In State v. Strange, 53 Wn. App. 638, 769 P.2d 893 (1989), the court held that a trial court can ignore questions as to whether the statement does or does not contain assertions as to past fact, the sixth Ryan factor, so long as the court evaluates the other factors indicating reliability in the context of the facts of the particular case before it. State v. Jackson, 46 Wn. App. 360, 730 P.2d 1361 (1986) (reversible error to admit the statements without finding the requisite indicia of reliability whether the child testifies or not). see also State v. Sammons, 47 Wn. App. 762, 764, 737 P.2d 684 (1987).

Here, the court's error in failing to weigh the nine Ryan factors to determine the reliability of the child's statements to either Tina Bennett or Linda Olson cannot be harmless error since there were major inconsistencies

between Christina's testimony at trial and the statements that Ms. Bennett and Ms. Olson said Christina initially made to them.<sup>1</sup>

II VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, NO RATIONAL TRIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT

In reviewing the sufficiency of the evidence in a criminal prosecution, the court must view the evidence in a light most favorable to the prosecution. State v. Alexander, 64 Wn. App. 147, \_ P.2d \_ (1992); State v. Scoby, 117 Wn.2d 55, 810 P.2d 1358, 815 P.2d 1362 (1991). Evidence is insufficient if no rational trier of fact, after viewing the evidence most favorably toward the prosecution, could find the elements of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).<sup>2</sup>

In State v. Alexander, supra, the defendant was charged with two counts of first degree child rape. At trial, the child's testimony

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<sup>1</sup> Examples of inconsistencies are indicated in the argument below.

<sup>2</sup> RCW 9A.44.083. Child Molestation in the First Degree.  
(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.  
(2) child molestation in the first degree is a class A felony.

was inconsistent with what she had apparently previously told the prosecutor. The State alleged that the two counts of rape occurred during the period of May 1, 1989 to June 1, 1989. The child testified that two incidents occurred in February and one in May. The child was also equivocal regarding the way in which she was touched or whether she was touched at all. Although the court recognized that the victim need not pinpoint the exact dates of oft-repeated incidents of sexual contact, the court found that the inconsistencies in the child's testimony were extreme because it left unclear when the abuse occurred and whether the previously described incidents occurred at all. Thus, the child's testimony was too confusing to allow the jury to find Alexander guilty beyond a reasonable doubt. Alexander at 157-158.

Similar to Alexander, the child's testimony in the instant case was inconsistent with previous statements alleging the misconduct. Although the State charged that the sexual contact occurred during the period of June 1, 1991 and August 31, 1991, there does not appear to have been any indication from anyone that Christina was with her father at any time during the month of June 1991. Ms. Bennett testified that she brought

Christina by ferry from Oregon to Washington on about July 14, 1991, and that Christina did not come home until the third week of August 1991. However, it was established by several witnesses that Christina and Jason were in Pendleton with Chris at the Forth family reunion on July 7, 1991. They went to Puyallup with Chris on July 11 and stayed there only until Chris returned them to Pendleton on July 17, 1991, so the children were not with him in Puyallup any time during the month of August 1991. According to Ms. Olson, the timing of the alleged incident was never really established in the interview, but Christina said she believed the incident occurred in the summer of 1991.

In addition to the inconsistencies regarding timing, there were inconsistencies and embellishments in Christina's testimony as to the circumstances of the alleged incident. For example, the bathroom scene her mother said Christina described and the scene described by Christina at trial were not only inconsistent but either version was virtually impossible given the size of the bathroom. RP II 16-17; 28-29; RP III, 45-47; RP IV, 22-24. In addition, at trial Christina for the first time stated that she

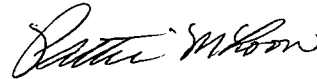
remembered dreaming of dinosaurs and going to her father's bedroom in Puyallup. Then she remembered he ordered her to go back to bed, only to call her back to his bedroom later and improperly touched her. RP IV, 18-20. All of this allegedly occurred when 9 to 11 people were sleeping on every available bed and the floors in a 1,000 square foot trailer.

Considering the circumstances of this case, no rational trier of fact could have found guilt beyond a reasonable doubt.

#### CONCLUSION

For the above reasons, the decision by the trial court should be reversed.

Respectfully Submitted,



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Attorney for Appellant

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RCW 9A.44.120 Admissibility of child's statement--  
Conditions.

<D<45622>> CITESEARCH </D>

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 or describing any attempted act of sexual contact with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under <D<4252>> Title 13 </D> 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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

[1991 c 169 1; 1985 c 404 1; 1982 c 129 2.]

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