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COA No. 70799-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable David A. Kurtz

REPLY BRIEF

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A. REPLY ARGUMENT[1]

1. THE RYAN FACTORS WERE NOT SUBSTANTIALLY MET BASED ON THE TRIAL COURT'S OWN FINDINGS.

The Respondent's argument that the child hearsay in this case satisfied Ryan under the abuse of discretion standard should be rejected. Hearsay, the untestable statement of another repeated in court by someone else, is unreliable and inadmissible. ER 801; ER 802. The purpose of RCW 9A.44.120 is to allow certain evidence to be considered even though it is objectionable as hearsay. 5C Tegland, Washington Practice: Evidence § 807.4 (2007 ed.). This exception to the rule requires a showing that these statements, by virtue of being able to satisfy a multi-criteria though non-exclusive analysis, carry such indicators of reliability as is necessary to overcome the normal objection that bare hearsay such as it, is not proper evidence in court. RCW 9A.44.120; State v. Ryan, 103 Wash.2d 165, 691 P.2d 197 (1984)).

The proponent of child hearsay evidence, as must every party proponent of evidence, must establish its admissibility. State v. Karpenski, 94 Wn. App. 80, 107-08, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) (child

[1] Mr. Lee relies on his Appellant's Opening Brief as to all assignments of error and issues argued therein.

victim was competent); compare State v. Smith, 148 Wn.2d 122, 59 P.3d 74, 79 (2002) (the Confrontation Clause requires the proponent of the statement to demonstrate that the declarant is unavailable and that the statement bears adequate indicia of reliability under State v. Ryan.[2]

The trial court in this case concluded that M.N. had an apparent motive to lie. AOB, at p. 16. The State agrees on appeal. BOR, at pp. 9-10. The trial court found that the child's general character did not support Ryan admissibility. AOB, at p. 17. The State agrees on appeal. BOR, at pp. 9-11. The trial court found that the surrounding circumstances suggested the child misrepresented the defendant's involvement. AOB, at p. 21. The State agrees on appeal. BOR, at pp. 9-11.

Of the six remaining Ryan factors, two (factors six and seven) are

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[2] The Washington courts recognize that the statutory exception for child hearsay, effected through the Ryan factors, is a legislative attempt to address the fact that

> child abuse is one of the most difficult crimes to detect and prosecute, largely because there are often no witnesses to the act except the victim and the perpetrator. Concerns were raised in the state legislature that child abuse cases were not prosecuted because the limitations of traditional hearsay exceptions prevented the admission of otherwise reliable statements made by child victims. The legislature recognized that children are often ineffective witnesses at trial because they are intimidated by the accused, who is often a parent or relative, by the trial process, or both.

State v. C.J., 148 Wn.2d 672, 680-81, 63 P.3d 765 (2003). Of course, these concerns are minimally present in this case, which involves a child complainant who was not simply a person who told untruths, but a conceded false accuser of sexual allegations who was wholly unfazed by the behavior of accusing adults of crime; and a claim by the mother that she witnessed one of the acts and questioned the defendant about it *en scene*.

essentially neutral and are always present in a hearsay scenario, leaving a mere four factors that supported admissibility, if one rejects the arguments raised by Mr. Lee on appeal which he adheres to in reliance on his Appellant's Opening Brief – in particular, factor 5. As to Factor 5 (the timing of the declaration and the relationship of the child and the hearsay witness), two witnesses testified that various abuse allegations made by M.N. were in immediate response to the mother's inquiry to M.N. about why she was acting badly and possibly stealing things in the home. And M.N. hated Mr. Lee after he entered into the family. AOB, at p. 20; 7/5/13RP at 29-30, 41-42, 59-61. Factor 5 should be added to the list of those that showed lack of reliability. Further, it is when the witness is in a position of trust with the child, that the second aspect of this factor shows reliability. See State v. Swan, 114 Wn.2d 613, 650, 790 P.2d 610 (1990). Here, neither the State's forensic interviewer nor the neighbor, Ms. Grant, was in a position of trust with M.N. Compare State v. Chadderton, 119 Wn.2d 390, 398, 832 P.2d 481 (1992) (nursing aid was in a position of trust).[3] Factor 5 further demonstrated lack of reliability under Ryan.

But even the Ryan factors that the trial court below concluded

[3] Additionally it must be pointed out that, on Factor 3, the fact that M.N.'s allegations were heard by multiple people simply carries *de minimis* weight if it is satisfied at all, because the child was known to have persisted with repeatedly making false allegations against others. Her tendency to make multiple false allegations against multiple people, including Mr. Lee, was a central aspect of the case below, and did not

supported reliability were a mere plurality of the Ryan factors at best. Mr. Lee does not suggest that the question of admissibility under RCW 9A.44.120 and Ryan is one to be answered mathematically. But under the facts of this case, the child's alleged statements to others carried so many Ryan indicators that were contrary to reliability, that no court could tenably hold that they overcame the hearsay bar through RCW 9A.44.120.

This was not enough, even under the abuse of discretion standard. The reliability assessment is based on an evaluation of all the Ryan factors, and no single factor is determinative. State v. Kennealy, 151 Wn. App. at 881. And, it is true that "not every" factor listed in Ryan needs to be satisfied before a court can find a child's hearsay statements reliable under the statute -- however, the factors must be "substantially met." State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990); see also State v. Kennealy, 151 Wn.App. 861, 881, 214 P.3d 200 (2009) (citing State v. Griffith, 45 Wn. App. 728, 738–39, 727 P.2d 247 (1986) (the factors must be "substantially met before a statement is demonstrated to be reliable.")).

Thus, if the proponent of the child hearsay can demonstrate that this hearsay – despite hearsay being inherently unreliable – carries attributes that substantially meet the Ryan factors, the evidence may qualify for this statutory exception from the usual rule of hearsay

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support Ryan reliability. AOB, at p. 21; 7/5/13RP at 45, 56, 116-17.

inadmissibility. For example, in State v. Woods, 154 Wn.2d 613, 625, 114 P.3d 1174 (2005), the Ryan factors were substantially met where eight of the nine factors were satisfied. Here, the Ryan factors were not met and supported inadmissibility of the hearsay. As argued in the Opening Brief, the error was not harmless, because admission of the child's numerous statements to others made M.N. seem consistent, and thus reliable, in the eyes of the jury. AOB, at p. 23. Reversal is required.

2. THE EVIDENCE OF THE PENNY CREEK SCHOOL'S POLICY WAS RELEVANT AND ADMISSIBLE AND NOT A COMMENT ON CREDIBILITY.

The Respondent defends the exclusion of the Penny Creek Elementary School's institution of a policy that no school staff could be alone with M.N. on ground that it was an opinion on credibility. But this evidence was highly relevant under ER 401. The mere fact that one might try to divine from this evidence, among many other things, that the school believed M.N. was likely to accuse adults of sexual crime, does not defeat the relevance of the evidence.

The Respondent correctly states that, generally, no witness may offer an opinion regarding the defendant's guilt or veracity. BOR, at p. 20 (citing State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995)). However, testimony that is not a direct comment on the defendant's guilt

or veracity, is helpful to the jury, and is based on inferences is not improper opinion. Seattle v. Heatley, 70 Wn. App. 573, 577-80, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011, 869 P.2d 1085 (1994).

Further, the prosecutor's argument that this evidence cannot be harmful error, because there was already evidence that M.N. had made false allegations, must be rejected. This evidence represented the determination of an institution that M.N. – truthfully or otherwise matters not -- did have a tendency to allege sexual offenses against adults with whom she came in contact. The evidence would have helped the jury determine the entire context of M.N.'s behavior in which the allegations against the defendant arose. Reversal is required.

3. THE PROSECUTOR'S STATEMENT THAT HE DOES NOT GO TO "CENTRAL CASTING" IMPROPERLY STATED TO THE JURY THAT HE HAD NO CHOICE BUT TO GO FORWARD WITH THE VICTIM'S CASE EVEN THOUGH SHE WAS NOT SYMPATHETIC.

As argued in the Opening Brief, the prosecutor's comment – to which the defense objected – violated the prohibitions, *inter alia*, against a prosecutor offering a personal opinion on M.N.'s credibility, and a similar pronouncement on the defendant's guilt, predicated on inside information. AOB, at pp. 30-36. Thus in the case of State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993), this Court of Appeals reversed because the

prosecutor in closing argument, along with other misconduct, told the jury:

> Our system has incredible safeguards that would not allow a case like this to come to court if somehow the police acted improperly. So the question of probable cause is something the judge has already determined before the case came before you today.

State v. Stith, 71 Wn. App. 14, 17, 856 P.2d 415 (1993). The defense objected and the trial court sustained the objection. Stith, 71 Wn. App. at 18. This Court reversed the defendant's conviction because the argument was "flagrantly improper." Stith, 71 Wn. App. at 22.

> The second comment concerning "incredible safeguards" and the court's prior determination of probable cause not only constituted "testimony" as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court.

State v. Stith, 71 Wn. App. at 21-22. In the present case, the prosecutor essentially told the jury that he was obliged to select complainants on the basis of the case, not on the basis of whether the complainant meets traditional criteria for a sympathetic victim. The Respondent correctly cites State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996), and State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 443 (2011), for the rules that a prosecutor improperly vouches for a witness when he expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports their testimony.

BOR, at p. 24. Here, the prosecutor, by his remark that he does not go to "central casting" for victims, very effectively informed the jury that he felt obligated to prosecute this case because he selects cases on the basis of the accuracy of the allegations, not the virtuousness of the victim:

> I don't pick the folks who come here and talk about the things that have been done to them. I don't go to central casting and try to find cute seven-year-old kids who have no trauma – who have no previous trauma in their lives. I don't go to central casting.
>
> MS. HARDENBROOK: Objection, Your Honor. The first person is improper. Personal opinion is not allowed in argument.
>
> THE COURT: No personal attributions by either counsel are appropriate. Given the context, Mr. Cornell, I will have you continue with your argument.

7/17/13RP at 119-20. The Respondent describes the prosecutor's statement as "no more than an acknowledgement that M.N. had a difficult life and therefore had some personal problems, but that they should not preclude the jury from believing her testimony." BOR, at pp. 24-25. If this had been what the prosecutor had merely said, there would have been no objection and there would be no misconduct. But this is not what the prosecutor said.

Importantly, the Respondent incorrectly states that the prosecutor's argument can be deemed proper on ground that it was responsive to argument of defense counsel. However, as the very arguments of the defense cited by the Respondent indicate, the defense merely pointed out

the understood factual frailties in the State's case that the parties had been litigating in front of the jury for the entire trial – the fact that M.N. had woven a web of false accusations of sexual offenses against other adults which were known to be untrue, and the defense argued that her "acting out" and other poor behavior predated Mr. Lee's entrance into the family, rather than being caused by him. BOR, at p. 26 (citing 7/7/12RP at 66-116. The prosecutor did respond to the defense's arguments about the case's weaknesses – by telling the jury he had prosecuted Mr. Lee (despite the lack of an angelic victim) because his office was presented with a victim who had a rightful case.

Notably, the State cites a portion of the Brett case, noting that closing argument does not constitute improper vouching unless it is clear and unmistakable that the prosecutor is expressing a personal opinion, but leaves out that the contrast is where a prosecutor is properly arguing an inference from the evidence. State v. Brett, 126 Wn.2d at 175; see BOR at pp. 26-27. Here, it is not an inference from any evidence at trial that the prosecutor in his many charging decisions had to select this victim's case, despite the fact that M.N. was not from "central casting" because she was an unsympathetic person. The prosecutor's argument asked the jury to rely on his earlier process of selection of this case -- a case he told the jurors he was obliged to pursue -- to wave away all the problems of

credibility that M.N. carried with her.

This improper argument deeply prejudiced Mr. Lee. The core of the case was M.N.'s credibility. The prosecutor did an 'end-around' that issue by telling the jury he did not get to go to "central casting" to choose complainants – rather, he had to prosecute cases, like this, in which the allegations were true, not just those cases graced with a sympathetic victim. This argument to the jury -- that this victim was telling the truth in this case and that's why the case went forward despite her -- cut through the jury's difficult job and close question of whether M.N.'s accusations were true, and gave the jury an inside assurance that they were. As argued in the Opening Brief the misconduct was so incurably prejudicial that it requires reversal, under the standard of State v. Stith, 71 Wn. App. at 22-23.

4. THE PLETHYSMOGRAPH CONDITION OF COMMUNITY CUSTODY WAS NOT PROPER WHERE NOT RESTRICTED TO TREATMENT PURPOSES.

In the case of State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), this Court of Appeals addressed a community custody condition that inspecifically required the defendant to "[p]articipate in urinalysis, breathalyzer, polygraph and plethysmograph examinations as directed by your Community Corrections Officer." Here, despite the language in

community custody condition 14 regarding approval by a therapist, the condition nonetheless allows the procedure at the direction of the CCO, and allows that it may be ordered for purposes of monitoring other community custody conditions. But this intrusion at the direction of the CCO, regardless of requiring approval by a therapist, is expressly not limited to treatment and allows use of the procedure for general compliance purposes. This is prohibited and the condition must be vacated. State v. Land, 172 Wn. App. at 606.

B. CONCLUSION

Based on the foregoing, and on his Opening Brief, Charles Lee respectfully argues that this Court should reverse the jury's verdict of guilty as to Count 1, and strike the conditions of community custody.

Respectfully submitted this 10 day of September, 2014.

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Washington Appellate Project – 91052
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

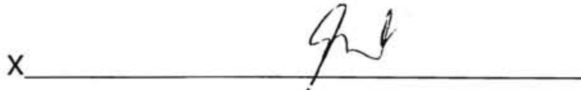
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70799-0-I
	)	
	)	
CHARLES LEE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **REPLY 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:

[X]	MARY KATHLEEN WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 11TH DAY OF SEPTEMBER, 2014.



X_______________________________

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