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COA No. 71466-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

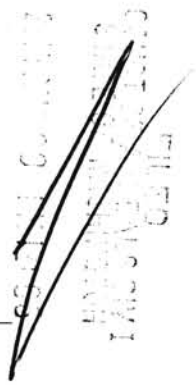
STATE OF WASHINGTON,

Respondent,

v.

K.G.,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY
JUVENILE DIVISION

The Honorable Thomas J. Wynne

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

UNITED STATES SUPREME COURT CASES

COURT RULES AND STATUTES

A. SUMMARY OF APPEAL

K.G.'s father's girlfriend claimed that her 5 year-old son, C.S., said that 12 year-old K.G. touched him sexually. This was during a time when K.G. had recently been alleging to Child Protective Services that he had been abused in the home, where he also said there was drug abuse by the adults. C.S.'s mother falsely claimed that the Harborview nurse who examined C.S. told her there had been trauma, penetration, and injury. C.S.'s tendency to be untruthful, and his inability to independently recall or accurately describe the allegations, was demonstrated in his forensic interviews and his testimony. The juvenile court abused its discretion because C.S. was incompetent to testify, and his hearsay statements were inadmissible. It was further error to allow the child interview specialist, Gina Coslett, to be in the courtroom for the entire fact-finding hearing for the purpose of assisting with C.S. as a witness, particularly where Coslett interjected herself into the oath-taking process when the juvenile court judge was unable to get C.S. to swear to tell the truth to the court.

B. ASSIGNMENTS OF ERROR

1. In 12 year-old K.G.'s juvenile court fact-finding hearing on a charge of rape of a child and child molestation, the juvenile court

erred in finding the five year-old complainant C.S. competent to testify under State v. Allen.[1]

2. The trial court applied an incorrect and incomplete legal standard in finding C.S. competent.

3. In the absence of substantial evidence, the juvenile court erred in entering Allen competency finding of fact 1 that C.S. understood his obligation to speak the truth.

4. In the absence of substantial evidence, the juvenile court erred in entering Allen competency finding of fact 2 that C.S. had an accurate recollection at the time of the occurrence and the ability to retain the recollection.

5. In the absence of substantial evidence, the juvenile court erred in entering Allen competency finding of fact 3 that C.S. had the ability to describe the events and understand simple questions about them.

6. The juvenile court erred in denying K.G.'s motion to exclude witnesses.

7. K.G.'s Due Process rights and Article 1, section 6 of the State constitution were violated when C.S. was permitted to testify following an inadequate, and inadequately obtained, oath to tell the

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[1] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

truth in the proceeding.

8. The juvenile court erred in admitting hearsay statements of C.S. under RCW 9.94A.120 and State v. Ryan.[2]

9. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 4 that there was no evidence that C.S. had an apparent motive to lie.

10. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 5 that there was no evidence that C.S. had a reputation for dishonesty.

11. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 7 that "[a]ll statements were spontaneous under the law."

12. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 8 which implied that C.S. disclosed with timing that showed reliability.

13. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 10 that C.S. recalled the incidents and was able to be cross examined.

14. In the absence of substantial evidence, the juvenile court erred in entering Ryan child hearsay finding of fact 11 that there

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[2] State v. Ryan, 103 Wn.2d 165, 173, 691 P.2d 197 (1984).

was no indication that C.S.'s recollection was faulty or that he misrepresented the Respondent's involvement.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. C.S. tricked the child interview specialist with false answers in his forensic interview, and at his pretrial hearing, he would not promise to tell the truth and nothing but the truth to the judge during the proceeding. The State's interview specialist interjected herself into the process and asked C.S. if he would tell the truth. C.S. then admitted that he was sometimes dishonest, and expressly denied ever tricking the interview specialist in the prior interviews. Did the juvenile court abuse its discretion in finding C.S. competent to testify under State v. Allen?

2. Did the trial court apply an incorrect and incomplete legal standard in finding C.S. competent by merely asking if he understood the importance of telling the truth, without specifically focusing on the question whether C.S. understood the importance of his obligation to speak the truth on the witness stand?

3. C.S. did not show an ability to accurately perceive the claimed event, or an independent ability to recall it. He could not respond to questions asking him to describe the alleged event except with answers that were mostly silly or non-sensical. Did the

juvenile court abuse its discretion in finding C.S. competent to testify under State v. Allen?

4. Did the trial court apply an incorrect and incomplete legal standard in finding C.S. competent by merely asking if C.S. had a recollection of the event, rather than asking if C.S. had the ability to accurately perceive the event at the time, and the ability to independently recall it?

5. Did the juvenile court abuse its discretion in denying K.G.'s motion to exclude witnesses when it allowed the State to have Gina Coslett, the child interview expert, in the courtroom so that she could "assist" the State with the difficult, distractible, and unfocused child complainant?

6. C.S. did not respond to the juvenile court judge's efforts to swear him in, and instead Gina Coslett interjected herself into the process and elicited a "yes" answer from C.S. to her inadequate question whether he promised to tell the truth. Was Due Process, and Article 1, section 6 of the State constitution violated, when C.S. was permitted to testify following an inadequate oath to tell the truth to the judge in the proceeding?

7. Did the juvenile court err in admitting the hearsay statements of C.S. to his mother Jennifer Purely and to Gina

Coslett under RCW 9.94A.120 and State v. Ryan, where the record failed to substantially meet the criteria for reliability?

D. STATEMENT OF THE CASE

(1). Charging and consolidated pre-trial and fact-finding hearings. After various placements with his biological mother, his uncle, and other caretakers, K.G., age 12, was living with his father Newton Gibson in Arlington in the Fall of 2013, along with his father's girlfriend, Jennifer Pursley. Also in the home was Pursley's 5 year-old son C.S., and Pursley's older sons. Supp. CP ___, Sub # 5 (affidavit of probable cause); Supp. CP ___, Sub # 32 (State's fact-finding memorandum). In recent months, K.G. had made multiple complaints of beatings and drug abuse by these adults to Child Protective Services, and CPS had assigned a caseworker to his family. Supp. CP ___, Sub # 5; Supp. CP ___, Sub # 32; CP 37 (Defense fact-finding brief); see also Supp. CP ___, Sub # 43 (dispositional report).

On September 28, 2013, Ms. Pursley telephoned police and reported that K.G. had run away. The police quickly located K.G., and Ms. Pursley met with police in the neighborhood a short time later, to pick him up. Pursley complained at some length to police about K.G.'s behavior problems and her desire that he not return to

the home. Then, she asserted that her son C.S. had told her that morning that K.G. had "put his penis in [C.S.'s] bottom." Supp. CP ___, Sub # 5; Supp. CP ___, Sub # 32; 12/16/13RP at 70-71.

K.G. was interviewed by several Arlington police officers the next day. 12/18/13RP at 169, 187, 210-11; Supp. CP ___, Sub # 5. He completely denied the allegations, and remarked that he thought it was possible that his father or other adults had offered C.S. money to lie so K.G. would get in trouble. Supp. CP ___, Sub # 5 (affidavit of probable cause); 12/18/13RP at 200-11, 212 (fact-finding hearing testimony of Officer J. Ventura and Detective M. Phillips); Supp. CP ___, Sub # 29 (Exhibit list, exhibit 12 [CD of police interview with respondent]).

The State charged K.G. with rape of a child, and subsequently amended the information to also charge the alleged conduct as child molestation. CP 52-53, CP 55-56; 12/16/13RP at 2-8.

At the fact-finding hearing, K.G. affirmed his statements to the police that he had not done anything to C.S. 12/18/13RP at 230-31. K.G. admitted he had been a "troubled kid" who had difficulties. But K.G. said that he had heard his father and his uncle apparently offering Jennifer Pursely's older sons $100 if they would

make up some lie about him that would get him taken out of the home by police. 12/18/13RP at 233-37. K.G. had overheard this same sort of conversation several times. 12/18/13RP at 234. He testified that his father got drunk a lot, but blamed K.G. for ruining his marriage with K.G.'s birth mother. 12/18/13RP at 235-36.

Jennifer Pursley indicated that C.S. had developmental delay issues and was in special education classes. 12/16/13RP at 80. She testified that C.S. told her that "there was an incident in the bathroom where [K.G.] had pulled down [C.S.'s] pants, and then stuck his penis in his bottom." 12/16/13RP at 71. Despite the fact that she only mentioned it to police after other complaints about K.G. and her desire that he be out of the house, she claimed that C.S. said this on the day that K.G. ran away. 12/16/13RP at 70-72.

C.S. was taken for a medical exam that night and later taken to give statements to the Sheriff's interview expert, Gina Coslett. 12/16/13RP at 74-75. At trial, Pursley insisted that Sherry Allen, the Harborview nurse who examined C.S., specifically told her that the exam showed there had been entry into C.S.'s anus, and that there was ripping in the inside area of his anus. 12/16/13RP at 84.

But Nurse Allen examined C.S. and clearly testified that C.S. showed no signs of penetration or trauma in that area. 12/16/13RP

at 145, 149. Furthermore, Nurse Allen absolutely never told or even intimated to Ms. Pursley that C.S. showed any signs of entry into his anus, or any ripping or injury or trauma. 12/16/13RP at 153. Nurse Allen's testimony regarding what C.S. told her was admitted by stipulation under the medical treatment exception; to her, C.S. said simply that K.G. did gross stuff. 12/16/13RP at 148.

Gina Coslett, the expert at child abuse interviews, testified that C.S. told her in a forensic interview that K.G. was "humping" which meant "touching his butt with his hands."[3] 12/16/13RP at 106-07. At other times C.S. stated that K.G. tried to hump his "blanket," and then stated that K.G. did not touch him, because humping was only "like being gross." 12/16/13RP at 39, 59-60. The two-part interview, which was taped and transcribed and considered for purposes of C.S.'s competency and the child hearsay issue, showed grave limitations in C.S.'s truth-telling, his ability to recall and describe the event claimed, and deficiencies in other factors to be analyzed under Ryan and Allen. See Part D., infra.

C.S. was never properly sworn, but he testified at the combined fact-finding hearing and competency/hearsay hearing,

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[3] According to Ms. Pursley, Newton Gibson had used the term "humping"

and was found competent. Among many non-answers and responses indicating that he did not know, were brief statements in which C.S. stated that K.G., at a time when he lived with them, did "gross stuff" and his wiener touched his butt or was in his butt. 12/16/13RP at 35-36. He stated that K.G. touched his butt with his hands. 12/16/13RP at 38. He also stated that K.G. "humped me." 12/16/13RP at 40. When asked if K.G. talked to him, C.S. stated, "Why would he talk to me? He is a little midget." 12/16/13RP at 41.

C.S. testified repeatedly that he did not tell his mother about the claimed incident, and said that he told defense counsel and his investigator the truth, but sometimes he doesn't tell the truth, and sometimes he doesn't do "that stuff." 12/16/13RP at 51, 54, 63. C.S. repeatedly asked to go to lunch, or recess, rather than answer the questions of counsel in direct examination. 12/16/13RP at 41, 54. C.S. also denied that he had tricked Gina Coslett when he falsely answered some of her questions in the forensic interview. 12/16/13RP at 54. He specifically stated, "I didn't trick anything." 12/16/13RP at 56-57. This was demonstrably false. Supp. CP ___, Sub # 32 (State's Fact-Finding Memorandum, Child Hearsay

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before. 12/16/13RP at 122.

and Witness Competency, attachments: transcripts of child forensic interviews with CIS Gina Coslett, pp. 2-3); see Part D.1., infra.

(2). Disposition. The juvenile court found C.S. guilty of child molestation. 12/18/13RP at 275; CP 29-33. K.G. was sentenced to a standard juvenile term. CP 16-28. He timely appeals. CP 2.

E. ARGUMENT

1. THE JUVENILE COURT ERRED IN FINDING THAT C.S. WAS COMPETENT TO TESTIFY AT A CRIMINAL PROCEEDING.

a. K.G. may appeal. K.G. moved to disallow any testimony by the complainant, arguing that C.S. was incompetent. The court reviewed the child's forensic interviews with Gina Coslett, and his live testimony. 12/16/13RP at 15-67; Supp. CP ___, Sub # 32; Supp. CP ___, Sub # 29 [Exhibit list, exhibits 10 and 11[4]]); 12/16/13RP at 66-67 (ruling). K.G. may appeal. RAP 2.5.

b. Allen hearing and ruling. Gina Coslett's interviews of C.S. provided the initial indications of whether C.S. had a conception of the obligation to tell the truth in a legal proceeding.

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[4] Exhibits 10 and 11 are the recordings of Gina Coslett's interview with C.S., which were attached in transcript form to the State's child competency briefing. The interview was conducted in two sessions; the second session is identified in the State's brief as "Second half of interview after a break." See Sub

Supp. CP ___, Sub # 32 (attachments: forensic interview transcripts). The interview commenced with C.S. twice answering "no" when asked if he knew what he ate for breakfast, but then stating that he did know, and that it was cereal. When asked this a third time, C.S. then stated he had been "tricking" Ms. Coslett. Sub # 32 (transcript pp. 2-3).

Thereafter, C.S. reacted to Coslett's questioning with seemingly little ability to recall or describe whatever it was he was claiming. C.S. spent the bulk of the interview talking about the dog in the interview room, Coslett's eyeglasses, her eyeballs, the dog's leash, the doggie bags, and the room they were in (stating nonsensically, "I don't know where are you." Sub # 32 (transcript pp. 3-5). When specifically questioned about what he was there to talk to her about, C.S. stated that his mother woke up screaming because she got hurt and had to swallow her pills, then he asked again about the dog in the room, and asked about the electrical outlet. Sub # 32 (transcript pp. 8-10).

Eventually C.S. answered a question about why he went to the doctor by stating that "[K.G.] was humping me and doing that stuff." Sub # 32 (transcript pp. 10-11).

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32 (transcript (second half) p. 1).

c. The juvenile court applied an incorrect, incomplete legal analysis. Under RCW 5.60.050(2) and the test set forth in State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), the court did not apply a correct legal standard in ruling on C.S.'s competency, in two material ways. The standard on review of a competency determination is abuse of discretion. State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873 (1989). Discretion is abused when it is exercised on untenable grounds or for untenable reasons, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), and this includes error occurring where a court uses an incorrect legal standard in making a discretionary determination. State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

Pursuant to Allen, a child witness demonstrates competency to testify by showing, *inter alia*, an understanding of the obligation to speak the truth on the witness stand, and the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it. Allen, 70 Wn.2d at 692; see also Part D.1.(d), infra. First, as shown by the juvenile court's written findings, the court did not accurately and completely apply the relevant test because it asked only if C.S. "understood his

obligation to speak the truth." CP 29-33. The court did not specifically employ the standard that the witness must understand his obligation to speak truthfully on the witness stand, in a legal proceeding. For example, as shown by the unsuccessful efforts of the judge when attempting to swear in C.S. with a proper oath to tell the truth to the court, this standard was not applied. 12/16/13RP at 33. See Part D.1.(d) and (e), infra.

Second, the juvenile court merely asked whether C.S. had "an accurate recollection at the time of the occurrence and the ability to retain the recollection." CP 29-33. This is not a complete application of this Allen criteria, under which the court must determine that the child witness has the

> mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it and an independent memory of it.

Allen, at 692. This criteria demands that the child be assessed for an ability to receive an accurate impression of the alleged incident at the time, and recall it independently. The court's different formulation was a divergence from the required analysis, and resulted in the court finding this aspect of competence to be satisfied in the absence of C.S. showing the ability to receive an accurate and independent impression of the incident that allegedly

occurred.

Importantly, regardless of whether the court's ultimate written findings properly applied the correct competency analysis, the court abused its discretion by holding that C.S. was competent.

d. Competence is presumed but persons who are incapable of relating accurate facts truly are not competent.

ER 601 presumes all persons are competent to testify. But persons are not competent to testify if they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2). The trial court has the discretion to determine a witness's competency, and on appeal, the appellate courts give deference to the court's decision; the court's findings and conclusions "will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion." State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (quoting Allen, 70 Wn.2d at 692).

Under the established test in Allen, a child witness demonstrates competency to testify by showing:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to

> express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d at 692; State v. Karpenski, 94 Wn. App. 80, 100, 971 P.2d 553 (1999).

In this case the juvenile court abused its discretion because C.S. was incompetent to testify at trial, in particular because he completely failed to understand his obligation to tell the truth in a legal proceeding. The witness must be shown to understand his obligation to speak the truth as a witness in a court proceeding. Allen, 70 Wn.2d at 692

Additionally, C.S., as shown by the number of attempts and persuasive efforts that were required to elicit his meager statements describing what allegedly occurred, did not demonstrate an ability to accurately recall the claimed incident, or to relate it, much less an "independent" recollection of the alleged conduct. State v. Guerin, 63 Wn. App. 117, 123, 816 P.2d 1249 (1991) (citing Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102, 713 P.2d 79 (1986)).

e. C.S. dramatically lacked an understanding of the obligation to speak truthfully at a criminal proceeding.

Satisfaction of each of the Allen competency criteria is essential to

a determination that a child may properly testify. Jenkins v. Snohomish County PUD No. 1, 105 Wn.2d at 102-03; see also State v. S.J.W., 170 Wn.2d 92, 98, 239 P.3d 568 (2010) (citing Jenkins). The requirement that the child have "an understanding of the obligation to speak the truth on the witness stand" is a crucial factor to be analyzed under the competency analysis. Allen, 70 Wn.2d at 692; Karpenski, 94 Wn. App at 100. This Court should find that the juvenile court abused its discretion in finding C.S. competent, because of the failure of this criteria alone. Jenkins, 105 Wn.2d at 102-03.

Prior to his testimony at the competency hearing, C.S. did not respond when the juvenile court attempted to administer the oath to tell the truth in court. 12/16/13RP at 33. Instead, the child interview specialist, Coslett, had to interject:

> THE COURT: Okay.
>
> Good morning. We are going to ask you to raise your right hand. Can you do that for me? The other right hand. That's right. Put it back up.
>
> Do you swear that the testimony you will give in this proceeding today will be the truth, the whole truth, and nothing but the truth?
>
> MS. GINA COSLETT: Do you promise to tell the truth?
>
> THE WITNESS: Yes.

12/16/13RP at 33. Coslett's inquiry did not in fact solicit a promise, to the judge, to tell the truth in the courtroom setting. 12/16/13RP at 33; ER 603.[5]

Even under the deferential abuse of discretion standard, this silence in the face of a simple request for an oath defeats the crucial requirement that the witness accusing K.G. of child rape or molestation understand the importance of telling the truth as a witness in a legal proceeding. Allen, supra.

C.S. then went on to testify that he sometimes tells the truth -- and sometimes does not tell the truth. 12/16/13RP at 54. C.S. also did not answer when asked if he had been told in his interviews before trial "how important it is to tell the truth," then he stated that K.G. and his mother and father told him that, but said he

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[5] Evidence Rule 603 demands that witnesses be sworn by an oath in which the witness promises to testify truthfully:

> Evidence Rule 603. OATH OR AFFIRMATION
>
> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

ER 603.

did not remember being told that it was important to tell the truth when interviewed.[6] 12/16/13RP at 52-53.

C.S. did not seem to understand the significance of making a claim of wrongful conduct to others, including in court. In this same testimony, C.S. unaccountably testified at various times that he had, and had not, told his mother about the claimed event. 12/16/13RP at 42, 51. C.S. strangely answered that he could not, and did not, "know what it is," when asked if he had gone over the fact that he would testify in the courtroom. 12/16/13RP at 47.

None of this should have been surprising. C.S.'s lack of understanding of the truth obligation in a legal proceeding, much less as a witness taking the stand in a criminal case, had already been demonstrated in the forensic interview. This made his subsequent apparent lack of understanding of the importance of telling the truth in the courtroom exponentially troubling. In the forensic interview, he made false statements and "tricked" the interviewer. After twice stating that he did not have breakfast, C.S.

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[6] C.S.'s mother Jennifer Pursley described C.S. in terms of whether he was a truth-teller, in her initial testimony taken for the incorporated competency and Ryan hearsay hearings. She answered "Mm-hmm" when asked if C.S. did "get" it when his mother would tell him, "if you lie, the truth will set you free." 12/16/13RP at 73. Pursley also testified that C.S. had an average memory for a five year-old. 12/16/13RP at 76. On appeal of a conviction in which the complainant's competence to testify was challenged, the reviewing court

stated what he did have for breakfast, and announced that he had "tricked" Coslett. Sub # 32 (transcript pp. 2-3).[7]

This falsity was apparently either an amusement to C.S., or a matter whose importance he did not recognize, even when urged to recognize it. When interviewer Coslett tried, twice, to get C.S. to promise not to trick her again like that "if I ask you a question;" C.S. instead turned his attention to the dog in the room. Sub # 32 (transcript p. 3).[8]

Then, remarkably, in his subsequent competency testimony, C.S. answered that he did not trick Gina Coslett when she interviewed him. 12/16/13RP at 54. He specifically stated, "I didn't trick anything." 12/16/13RP at 56-57.

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examines the entire record. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (citing State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995)).

[7] C.S.'s two interview sessions with Coslett were specifically placed before the juvenile court by the prosecutor for purposes of the competency determination. Supp. CP ___, Sub # 32 (State's Fact-Finding Memorandum, Child Hearsay and Witness Competency, attachments: transcripts of child forensic interviews with CIS Gina Coslett).

[8] After the first interview session, when a detective asked those present in the room if he should bring C.S. when he came back, the prosecutor answered:

> I wouldn't press it to [sic] hard really cause there are already issues with you, he tricked you and there is going to be stuff with that, I mean you were great at getting him to finally talk about it, but I wouldn't push it too hard (unintelligible)

Sub # 32 (transcript p. 15).

The abuse of discretion standard in the competency realm is deferential to the lower court which has the opportunity to view and assess the child. See, e.g., State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995); State v. Sardinia, 42 Wn. App. 533, 536, 713 P.2d 122 (1986). However, a trial court's decision is manifestly unreasonable, and thus an abuse of discretion, if the court adopts a view that no reasonable person would take. In re Det. of Duncan, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009). C.S.'s lack of understanding of the importance of telling the truth in a proceeding was seen in his forensic interviews, attested to when the court attempted to swear him in, and demonstrated in his testimony. 12/16/13RP at 33. This cannot be adequate for competency at a criminal proceeding in which the State proposed to have 12-year-old K.G. convicted of a grave sexual offense. This particular Allen criteria fails, even under deferential appellate review, and is fatal to competency. Jenkins, supra.

f. C.S. did not demonstrate an independent recollection of the incident based on accurate perception, and he lacked the independent ability to describe the claimed events in words that made adequate sense. In addition to not understanding his obligation to tell the truth in a proceeding, the

record did not allow the juvenile court to deem C.S. competent, even under the abuse of discretion standard.

C.S., as shown by his forensic interviews and his competency hearing testimony, did not have an independent recollection of the claimed incident, rather than occasional, vague and fragmentary statements that were elicited at great pain and effort by the professional adults concerned to pursue the matter. Allen, 70 Wn.2d at 692. The requirements of competency under Allen must each be satisfied. Jenkins, 105 Wn.2d at 102-03.

(i). C.S. did not answer simple questions with clear descriptions that showed he had perceived, or independently remembered, the alleged incident.

The child witness need not be asked about the incident at issue in his competency hearing testimony. However, here, the police department's interview specialist, Coslett, did attempt to obtain a description of the event, as did the prosecutor at the competency hearing. In both instances, the child's vague and at times nonsensical description of some alleged incident, was not reflective of any independent ability to recall or describe the purported incident.

In the forensic interviews, Coslett attempted to obtain indications of whether C.S. had an ability to provide the basic

descriptive ability that Allen demands as part of basic competence. When Coslett told C.S. it was "really important that you sit on the couch and talk to me," C.S. said, "What." Sub # 32 (forensic interviews transcript, at p. 7). When Coslett asked him again if he would talk to her, C.S. again answered "What." Sub # 32 (forensic interviews transcript, at p. 7). When she told him that she wanted to ask him about "how come you came to talk to me today," C.S. said, "I don't know." Sub # 32 (forensic interviews transcript, at p. 9). When Coslett again said that it was "really important that you tell me about how you come [sic] to talk to me today," C.S. responded, "Well, I don't know, can a dog hide behind there (points behind the couch)." Sub # 32 (forensic interviews transcript, at p. 9).

C.S. repeatedly said "I don't know" and "hey, I don't know what I did," when Coslett asked why his mother was worried that "something happened to you." Sub # 32 (forensic interviews transcript, at pp. 9-10). When Coslett asked C.S., "tell me about how come your mom is worried," C.S. responded, "I don't know that's all." Sub # 32 (forensic interviews transcript, at p. 10.). It was only then, when Coslett told C.S. that she heard he went to

see the doctor, that C.S. responded by saying "and that's gross." Sub # 32 (forensic interviews transcript, at pp. 10-11).

These statements that Coslett was finally able to elicit failed to reflect an incident that seemed to be accurately perceived, much less a clearly independent recollection, or show an ability to answer simple questions – except when the answer was that C.S. simply did not know.

C.S.'s few descriptive statements were made as a result of insistent prodding, not an independent recollection. Even after extended questioning in his competency testimony, C.S. still frequently stated that he just did not know, when asked what K.G. supposedly did to him. 12/16/13RP at 57-58.

In the interview, at the juncture at which C.S. finally stated that K.G. was "humping" him, Coslett had the detective walk C.S. out of the room so he could have a break, go to his mom, and "come back and answer some questions for me after we have a break." Sub # 32 (transcript p. 14). Before C.S. left, Coslett also instructed him:

> CIS Coslett: and I really need to learn more about what humping is okay
> [C.S.] yeah
> CIS Coslett: and that other gross stuff.

Sub # 32 (transcript pp. 14-15).

After taking a break and coming back, C.S. mainly responded to questioning by talking about the dog and his tail, and his goldfish crackers. Sub # 32 (transcript (second half) pp. 1-4). During continued questioning, C.S. said he did not remember what room he was in when there was "humping," talked about coloring and drawing, and stated he had told his father about K.G. doing gross stuff. Sub # 32 (transcript (second half) pp. 4-6.

Similarly, in his competency hearing testimony, after having said that K.G. was humping, C.S. was asked if that meant that K.G. was touching his butt, and C.S. stated, "No, I said it was like being gross." 12/16/13RP at 59-60. He was asked if he remembered saying before that it was touching him with his hands, and replied, "Yeah, but sometimes I don't." 12/16/13RP at 59.

(ii). C.S. could not describe the alleged event, including by placing it in time.

C.S.'s interview statements were extremely distracted, in the generous assessment of the child interview specialist; he did not answer many questions, often he simply asked about what time it was, when he would be able to go to lunch, or when he would to recess, or remarked about the dog. 12/16/13RP at 35, 41, 49, 54; Remarkably, C.S. also stated he did not know what part of his body

got touched, stated he did not tell his mother about it, and stated he had a bedroom in his bathroom. 12/16/13RP at 40, 51, 62.

C.S. lacked the capacity to clearly express, in understandable words that made sense, the memory of the incident that the party plaintiff asserted he possessed. Allen, 70 Wn.2d at 692. This is therefore inadequate for competency. The young child must have had the ability to perceive the events at the time it allegedly occurred. See In re Dependency of A.E.P., 135 Wn.2d 208, 225, 956 P.2d 297 (1998). Thus, for example, in State v. Pham, 75 Wn. App. 626, 630, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995), the court found a young child showed the ability to perceive the event at the time it occurred because he could also recollect details about a concurrent automobile accident in Canada which occurred a short time before the alleged incident. If the child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well. A.E.P., 135 Wn.2d at 225.

Here, examination of the entirety of C.S's forensic interviews and his testimony shows that these brief factual assertions were the rare instance in amongst repeated non-answers, and nonsensical answers, given by him in response to repeated efforts by Coslett to

obtain factual descriptions of the charged conduct. C.S. could not in fact place the alleged event squarely in time. As his mother testified, C.S., because of his developmental delays, did not know the difference between a month or a couple of days or a week. 12/16/13RP at 78, 80. Gina Coslett confirmed this in her own testimony. 12/16/13RP at 95.

All of this was inadequate to meet the Allen requirement of an ability to independently recall, and sensibly describe, the alleged event as an incident occurring at a particular time. Allen, supra; A.E.P., 135 Wn.2d at 225. All of these are essential requirements of competency. Allen, supra; Jenkins, supra; State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). The Allen criteria were not satisfied, and the juvenile court abused its discretion.

g. Reversal is required. Without C.S.'s incompetent trial testimony, it cannot be said beyond a reasonable doubt that K.G. would have been convicted. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed.2d 297 (1973) (Due Process requires that evidence used to convict a person must meet elementary requirements of fairness and reliability).

Further, as K.G. specifically argued below in his written briefing and oral argument to the court, absent a competent

complainant, the juvenile court's assessment of the hearsay issue – both under Ryan, and under Crawford v. Washington's Sixth Amendment confrontation guarantee, would have been entirely different, likely resulting in exclusion of any hearsay of C.S. CP 44-45; Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend. 6. This Court should reverse K.G.'s conviction.

2. THE COURT ERRONEOUSLY ADMITTED THE IMPROPERLY SWORN TESTIMONY OF C.S.

a. K.G. unsuccessfully objected to Gina Coslett being permitted to be in the courtroom to "assist" with the difficult child witness, and thus failed to prevent Coslett from interjecting herself into the attempt to take a proper oath from C.S. before he testified. Gina Coslett was permitted to be in the courtroom to assist the State with C.S., over defense objection. 12/16/13RP at 8-12. The defense did not accept the prosecutor's claim that Coslett should properly be allowed to remain under the rubric that she was the State's 'managing witness.'

Defense counsel moved to exclude witnesses, and specifically challenged the State's contention that the prosecution should be allowed to have the child interview expert in court on the

basis that C.S. was difficult, distractible, and had difficulty focusing. The prosecutor argued:

> As we have been talking about, this witness might be somewhat difficult. He is easily distractible. He is kind of hard to keep on focus. So I just figured that Ms. Coslett's expertise would be the most benefit to me.

12/16/13RP at 12; see 12/16/13RP at 8 (defense motion to exclude Coslett from courtroom). K.G.'s counsel responded that he had never seen such a trial witness as Coslett to be allowed to remain in court for the State's case, and continued with his objection. 12/16/13RP at 8, 12.

This motion to exclude Coslett should have been granted by the court. Allowing a State's witness to be present in courtroom during the entire case risks many dangers, including, but not limited to, the danger that the witness will be able to tailor his or her testimony to the testimony of witnesses appearing beforehand, by focusing on factual matters and inadequacies in the eyes of the fact-finder. See State v. Skuza, 156 Wn. App. 886, 235 P.3d 842, review denied, 170 Wn.2d 1021 (2010); Egede–Nissen v. Crystal Mountain, Inc., 93 Wn.2d 127, 138, 606 P.2d 1214 (1980). ER 615 allows a party to seek to exclude witnesses, without limitation on the reason therefore, and provides:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

ER 615. The Washington courts follow the rule that the exclusion of witnesses until they testify is a matter within the trial court's discretion which will not be disturbed except for manifest abuse. Even when this exclusionary rule is invoked, it is nevertheless customary to exempt one "managing" witness to sit at counsel table with the prosecutor during the trial. State v. McGee, 6 Wn. App. 668, 669-70, 495 P.2d 670 (1972) (citing State v. Weaver, 60 Wn.2d 87, 90, 371 P.2d 1006, 1008 (1962)).

However, in this case where the defense objected to the presence of Coslett to assist the State with eliciting his expected accusatory testimony, the trial court abused its discretion. The State's desire to have in the courtroom a trial witness who it believed could benefit the prosecution by assisting in keeping the complainant focused is not a proper basis to allow that trial witness to remain in the courtroom.

In denying K.G.'s motion to exclude Coslett, the court stated that the lead detective is usually the managing witness, but ruled that there was no reason to deny the State's motion to have Coslett "assist during trial." 12/16/13RP at 12.

But the prosecutor below was not describing a person who would serve the proper function of a "managing witness." Coslett was not akin to a case's lead police officer who could reasonably be deemed important to the prosecution's mustering and ordering of the various witnesses in the case, i.e., persons who were originally identified by law enforcement in its investigation. Instead, Gina Coslett was a witness whose testimony about C.S.'s statements, their alleged consistency, and the child's ability to relate facts, among many other considerations, was pivotal regarding the child's competency and the Ryan issues.

Furthermore, this witness was one who, to varying extents of success, had honed her ability to elicit inculpatory claims from the child in two pre-trial interviews. The unfairness of having such a witness present from the commencement of the adjudicatory hearing, where the trial was held in a consolidated manner with the Allen and Ryan hearings, rendered it an abuse of discretion to deny K.G.'s motion to exclude Coslett. Nothing made it reasonable or

tenable in this case to deny the defense motion that the role of managing witness be filled, as it normally is in this exception to the traditional rule excluding witnesses, by the lead investigating police officer, not the State's child interview expert. The trial court abused its discretion.

Reversal is required. The interview specialist who had previously been able to draw inculpatory statements from C.S. in the forensic interview sessions, and who had developed some rapport with C.S., should not have been in the courtroom at any time other than her own testimony. Within reasonable probabilities, given the other indices that C.S. would not tell the truth even when repeatedly urged to recognize the importance of doing so, the outcome would have been different had this State's witness not been permitted to be in the courtroom and to affect the proceedings taking place before her testimony.

a. The improper obtaining of an inadequate oath merely to tell the truth, secured not by the juvenile court, but instead procured by an interested State's witness who should have been excluded from the courtroom, requires reversal. Subsequently, the very reason for defense counsel's vigorous objection to the State being allowed to have Coslett present during

trial to assist with the "difficult" child complainant, showed itself to be directly on point and no mere abstract grievance. When C.S. said nothing in response to the juvenile court's effort to get him to swear to tell the truth in the legal proceeding, Coslett indeed assisted. She interjected and obtained from C.S. a vague promise to tell the "truth," albeit not with language showing C.S. was so swearing with an understanding of the obligation to tell the truth in the courtroom. This was not an oath. See State v. Moorison, 43 Wn.2d 23, 29, 259 P.2d 1105 (1953) (describing the nature of an oath as recognizing that it is both a moral and a legal wrong to swear falsely).

It is true that the defense did not repeat its earlier objection when "managing witness" Coslett did exactly what K.G. had earlier argued it was impermissible to allow her to do – "assist" with the difficult witness. But here, by inserting herself in lieu of the oath-administering attempt by the court, and assisting with procuring this inadequate promise to tell the truth, the very harm the defense attempted to preclude came to fruition. Cf. State v. Dixon, 37 Wn. App. 867, 876, 684 P.2d 725 (1984) (failure to object to satisfaction of oath requirement prior to trial testimony of child witness constituted waiver of the error). Coslett's presence for this

'assistive' purpose was the exact reason the State was improperly allowed to have Coslett present in the courtroom, over K.G.'s specific objection and argument. 10/16/13RP at 8-12. The error of the inadequate, and improperly obtained, oath was fully preserved for appeal by counsel's earlier objection. RAP 2.5; see also State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (losing party is deemed to have standing objection where judge made earlier, final ruling *in limine*).

Further, the absence of a proper oath obtained by the court under the requirements of ER 603 and the state constitution, was manifest constitutional error under RAP 2.5(a)(3). See U.S. Const. amend. 14 (providing that no state shall "deprive any person of life, liberty, or property, without due process of law"); Wash. Const. art. 1, section 3 (our state's guarantee of due process). The State Constitution provides at Article 1, section 6:

> The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom the oath, or affirmation, may be administered.

Wash. Const. art. 1, section 6. It was a violation of the guarantee of the basic fairness of the proceeding under Due Process, and the State Constitution's oath requirement. This constitutional error

arose when the juvenile court did not obtain an adequate oath from the witness, but the witness was allowed to testify nonetheless. RAP 2.5(a)(3); U.S. Const. amend. 14; Wash. Const. art. 1, section 6; In re M.B., 101 Wn. App. 425, 3 P.3d 780, review denied, 142 Wn.2d 1027 (2000).[9]

In M.B., the Court stated: "R.T.'s counsel did not object to the unsworn testimony. We nonetheless review this issue under the manifest constitutional error doctrine." M.B., at 425 (citing RAP 2.5(a)(3) and State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992)). Subsequently, the Court of Appeals in State v. Avila, 78 Wn. App. at 735, supra, stated that the failure to administer a proper oath to a child witness violates ER 603, and left open the possibility that testimony in the absence of a proper oath may also be error that is not just constitutional, but also manifest, where the record demonstrates identifiable prejudicial under the State v. Lynn test. Avila, 78 Wn. App. at 735.

That standard is met in this case. The Avila Court addressed the prejudice standard for taking review of un-objected-to errors, and for reversal, on the basis of the RAP 2.5(a)(3) and

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[9] In In re M.B., a contempt order entered against a juvenile on the basis of unsworn statements was deemed to have violated the evidence rules and the right to due process of law under the Fourteenth Amendment.

"manifest" constitutional error analysis. The Court noted that Mr. Avila had not shown the prerequisite demonstrable prejudice, where the record allowed the reviewing court to be confident that the failure to obtain a proper oath from the child did not affect the outcome. Avila, 78 Wn. App. at 738-39; Lynn, 67 Wn. App. at 345 ("manifest" constitutional error is error that shows practical and identifiable consequences in the record).

Those assurances in Avila included the testimony of a witness who had seen the child sitting on the defendant's lap in a room while the defendant watched an R-rated movie and had his hand on the child's thigh, the fact that the child interview specialist testified that the child's interview was overall "consistent with abuse," and the child's "statement at the pretrial hearing that she understood it was important to tell the judge the truth[.]" (Emphasis added.) Avila, 78 Wn. App. at 738-39.

Such assurances are not present in the record here. After C.S. was inadequately sworn to tell the truth he was never elsewhere asked during his testimony if he promised to tell the truth, and he in fact admitted to sometimes not telling the truth. The constitutional errors in this case in violation of the federal and state Due Process guaranties, and Article 1, section 6 of the state

constitution, are reviewable, and in addition to these events' significance for Allen competency, independently require reversal of K.G.'s juvenile adjudication.

3. THE JUVENILE COURT ERRED IN ADMITTING THE HEARSAY STATEMENTS OF C.S. UNDER STATE V. RYAN.

a. Ryan ruling. The juvenile court ruled that C.S.'s statements to his mother and to interview specialist Gina Coslett were admissible under RCW 9.A.44.120. The court stated that:

> • there was no apparent motive to lie, because C.S. made the statements to his mother when K,G had run away, and he made the statements to Gina Coslett and there was no indication that C.S. was "particularly prone to lying or making up things;"
> • the statements were made to more than one person, although there were differences in terms of facts;
> • the statements were made spontaneously and not in response to leading questions;
> • the timing of the disclosure and "the relationship between [C.S.] and [K.G.]" did not establish negative connotations for admissibility;
> • the cross-examination of C.S. showed nothing that gave reason to believe that his "recollection is faulty, although there are questions in terms of what time it may have occurred;" and
> • there was no reason to suppose that C.S. misrepresented K.G.'s involvement.

12/16/13RP at 115-17; see CP 29-30 (Ryan written findings of fact).

b. The child hearsay was inadmissible where the *Ryan* factors were not substantially met. A hearsay statement is one made by a declarant not testifying at trial, offered in evidence to

prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay. ER 802.

For cases alleging acts of sexual contact involving children under the age of 10, the Legislature has established a particular exception to the evidence rule barring hearsay. Under RCW 9A.44.120, certain child hearsay may be admitted 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].

RCW 9A.44.120. First, the trial court erred under Ryan to the extent it found that C.S. was competent to testify, and thus properly testified and was able to be cross-examined. State v. Ryan, 103 Wn.2d at 173-76, 691 P.2d 197 (1984); RCW 9A.44.120; U.S. Const. amend. 6; Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004).[10]

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[10] Prior to admitting child hearsay, it must be shown that the child was competent at the time the statements were made. C.S. was not competent under this initial statutory criteria, without which he could not be available to be cross-examined – another Ryan criteria. In addition, his lack of competence raises Crawford hearsay/confrontation clause issues, as defense counsel argued. CP 43-46; 12/16/13RP at 30-32. RCW 9A.44.120; State v. Ryan, 103 Wn.2d at 173, 176. During the combined hearings on December 16, held on the issues of competency and hearsay, the court ruled that C.S. was competent to testify, and

Second, the trial court answers the RCW 9.94A.120 question of whether there are "sufficient indicia of reliability" under the statute by applying the test set forth in State v. Ryan, 103 Wn.2d at 173. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1176 (2005).

In Ryan, the Supreme Court established a non-exclusive list of nine factors to consider when analyzing the reliability of child hearsay. Ryan, 103 Wn.2d at 175-76. Ryan instructed trial courts to consider: (1) whether the child had an apparent motive to lie; (2) the child's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness; (6) whether the statements contained express assertions of past fact; (7) whether the child's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the child's recollection being faulty; and (9) whether the surrounding circumstances suggested the child misrepresented the accused's involvement. Ryan, 103 Wn.2d at 175-76.

In this case, analysis of the Ryan factors demanded that the court not find any reliability basis to avoid the standard hearsay bar.

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later ruled that the child's hearsay was admissible under Ryan. 12/16/13RP at

When answered, these questions of character, motive, trustworthiness, timing, and other circumstances showed a *lack of* reliability under Ryan. 7/5/13RP at 82.

(i) Whether the child had an apparent motive to lie.

C.S. certainly had an apparent motive to lie. Although Ms. Pursley described the situation as normal, the accuser and K.G. had a significant sibling rivalry in which they fought for Mr. Louis Newton's attention. The two children engaged in squabbles, and they did not get along. 12/16/13RP at 72. Ms. Pursley herself had reported to police that K.G. was physically assaultive with his younger step-brothers, a reason alone for the sexual allegations against him by C.S. to be fabricated, and unreliable. CP 37, 40.

(ii) The child's general character.

C.S. tricked the interview specialist by lying to her. Sub # 32 (transcript pp. 2-3). He then lied about doing so. 12/16/13RP at 56-57. He was silent when the court sought to swear him to tell the truth in the courtroom. 12/16/13RP at 33. C.S.'s character for honesty, which the juvenile court did not expressly analyze, was bad.

66, 115.

(iii) Whether more than one person heard the statements.

Repeatedly making consistent claims to different people favors Ryan reliability. State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). But the range of utterances by C.S. in this case was anything but consistent. He briefly stated to Gina Coslett that K.G.'s wiener touched or was in his butt, but then stated that humping involved only hands, or that K.G. tried to hump his "blanket," and then stated that K.G. did not touch him, because humping was only "like being gross." 12/16/13RP at 39, 59-60, 106-07. He only told the Harborview nurse that K.G. did "gross stuff," although, according to his mother, who herself falsely claimed that the nurse told her there was penetration, C.S. said that he was penetrated. 12/16/13RP at 71, 84. The child's mere 'multiplicity' of a this wide variety of statements to others, does not support Ryan admissibility.

(iv) The spontaneity of the statements.

The trial court found that this factor favored the State because the child's statements were spontaneous under the law. But C.S.'s first statement to his mother, or so claimed by her, was less factually spontaneous than the way the court described it. In

fact, according to Ms. Pursley, after C.S. made a statement in the car about K.G., she questioned him vigorously for several hours. 12/16/13RP at 73. Further, the drawn-out coaxing and urging that Gina Coslett needed to get C.S. to make any factual statements at all, does not fit even the most generous definition of spontaneous under Ryan. See State v. Borland, 57 Wn. App. 7, 15, 786 P.2d 810 (1990) (spontaneous for purposes of the Ryan analysis includes responses to questions that are neither leading nor suggestive), review denied, 114 Wn.2d 1026 (1990).

(v) Whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness.

The timing of C.S.'s statement to his mother, in so far as it appeared Ms. Pursley only told police about the matter belatedly after first telling officers about the behavioral problems that made her not want K.G. back at the home after he ran away, did not suggest trustworthiness. Further, K.G.'s claims of bad conduct including cruelty and abuse gave great reason to suggest that the child's supposed allegations, first communicated to others by Ms. Pursley, did not indicate any trustworthiness.

Importantly, the juvenile court also abused its discretion by applying an incorrect legal standard – here, inquiring about the

relationship between the declarant, C.S., and the accused, K.G.12/16/13RP at 116-17.

(vi). *The remoteness of the possibility of the child's recollection being faulty.*

The record showed that C.S. was a person of poor trustworthiness generally. His different statements regarding the matter were in difficult if not impossible for any of the professionals involved to elicit with any sense or clarity. The mother told strange and concerning untruths regarding what she was told by the Harborview nurse. The affirmative facts of this case – including C.S.'s own admitted dishonesty, and his dishonesty in the forensic interview, did not allow the juvenile court to conclude that there was merely a remote possibility that C.S. was mis-recalling or misstating his account as to what, if anything, happened.

(vii) Whether the surrounding circumstances suggested the child misrepresented the accused's involvement.

Given all the foregoing circumstances, the circumstances do not show the hearsay testimony of Coslett or Ms. Pursley to be testimony that offered reliable statements of C.S. The trial court abused its discretion. The introduction of child hearsay, specifically, is dependent on a trial court's tenable finding that the statements are sufficiently reliable. See Junker, 79 Wn.2d at 26. A

trial court need not determine that every Ryan factor is satisfied before admitting child hearsay, but the evidence before the trial court must show that the Ryan factors are "substantially met." State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). They were not substantially met here. Rather, the Ryan factors weighed in favor of unreliability, and thus in favor of applying the general rule – hearsay is barred. Ryan, 103 Wn.2d at 175-76.

The trial court abused its discretion where its ruling lacked evidentiary support, was untenable, and was based on an erroneous interpretation of the law. Junker, supra; State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Further, a court's evidentiary ruling is likewise an abuse of discretion if it is based upon facts that are not supported by the evidence. State v. Ramires, 109 Wn. 747, 757, 37 P.3d 343 (2002); see Quismundo, 164 Wn.2d at 504. The court abused its discretion.

c. The error requires reversal. A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is not prejudicial where, within reasonable probabilities, the outcome would have differed but for the error. Bourgeois, 133 Wn.2d at 403.

Absent this error, young K.G. would have been found not

guilty of any charge. The hearsay, offered at trial through concerned and caring responsible professional adults, and in particular the taped interview of C.S. by Gina Coslett, in which the child's allegations were elicited by a 'professional interviewer,' stood at trial as the most important evidence undergirding the claims. Reversal is required for the Ryan error.

F. CONCLUSION

Based on all of the foregoing, K.G. respectfully argues that this Court should reverse the juvenile court's judgment.

Respectfully submitted this 20 day of August, 2014.

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

STATE OF WASHINGTON, Respondent/Cross-appellant, K.G., Appellant-Cross-respondent.	))))))))	NO. 71466-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	K.G. (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	( ) ( ) (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON, THIS 28TH DAY OF AUGUST, 2014.

X_____

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