71928-9

FILED
4-15-15
Court of Appeals
Division I
State of Washington

No. 71928-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FIDEL BAUTISTA-GONZALEZ,

Appellant.

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

The Honorable James D. Cayce

AMENDED BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. In violation of the right to due process protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution, the trial court erred in finding child witness W.C. competent to testify.

2. The improper admission of evidence under the guise of the child hearsay statute, RCW 9A.44.120, denied Mr. Bautista-Gonzalez a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment and article I, section 3 require that the evidence used to convict a person at trial be reliable. For this reason, incompetent persons are not permitted to testify. On appeal of a finding that a child witness was competent, the reviewing court decides whether, viewed in the light most favorable to the State, the State proved by a preponderance of the evidence that the witness understood the difference between truth and falsity. Where the child had severe physical and learning disabilities, in her child interview she was unable to understand the difference between the truth and lies, and the child's mother stated that she could not tell at times when the child was lying

or telling the truth, did the trial court err in finding the child witness was competent?

2. RCW 9A.44.120 permits the court to admit otherwise inadmissible hearsay statements by a child, but it only applies to statements by the child about sexual contact that was performed on that child, not what a child saw happen to someone else. The prosecution elicited hearsay statements repeating what one child claimed happened to her sister as well as statements about conduct that did not involve sexual contact. Did the inadmissible child hearsay statements impact the jury's deliberations?

C. STATEMENT OF THE CASE

Andrea C. is the mother of two young girls; L.C. who was seven years old, and W.C. who was 9 years old. 2/27/2014RP 37-39. The girls' father currently resides in Bolivia where Andrea was born and raised. 2/27/2014RP 41-43.

W.C. has significant disabilities. W.C. was diagnosed with static encephalopathy after having been exposed to alcohol in utero. 1/17/2014RP 20. While not having been diagnosed with Fetal Alcohol Syndrome (FAS) because she did not have the facial features characteristic of those suffering from FAS, she did suffer from

significant central nervous system damage and/or dysfunction which can have a wide range of effects. In W.C. those effects manifested themselves in her suffering from Attention Deficit Hyperactive Disorder (ADHD), and a severe language learning disability more than two standard deviations below the mean. *Id.* at 20-21. W.C. also suffered from difficulty in motor skills, balance and coordination. *Id.* at 21-22. As a result, W.C. has difficulty, understanding and processing language, causing very poor language skills. *Id.* at 23-24. She did have an average I.Q. *Id.* As a result of these infirmities, W.C.'s mother stated it was hard to tell when W.C. was lying and when she was telling the truth. 1/8/2014RP 159.

In 2008, while participating in Alcoholics Anonymous (AA), Andrea met Fidel Bautista-Gonzalez. 2/27/2014RP 46. The two began to date and in August 2009, Mr. Bautista-Gonzalez and Andrea moved in together with her two girls. 2/27/2014RP 48.

In November 2011, L.C. became ill and was diagnosed with Herpes Type 2. 2/27/2014RP 63. Andrea did not suspect Mr. Bautista-Gonzalez of doing anything inappropriate with the girls. 2/27/2014RP 66.

Due to the herpes diagnosis, the Kent Police and Child Protective Services (CPS) began investigations. 2/20/2014RP 34-35. The girls were interviewed by King County Prosecuting Attorney's Office child interviewer, Caroline Webster, in November 2011. 2/25/2014RP 38, 66. Neither girl alleged any sexual conduct and the investigation was terminated. 2/25/2014RP 69, 2/27/2014RP 120. Ms. Webster noted that W.C. was a very difficult interview; often W.C.'s answers did not correspond to the questions asked, and other times Ms. Webster had no idea what W.C. was talking about. 2/25/2014RP 72.

On February 5, 2013, the girls and their mother were in bed while Andrea read to them. 3/3/2014RP 5-6. At some point, L.C. noted the banana in the story was like Mr. Bautista-Gonzalez's penis. 3/3/2014RP 7. When Andrea asked L.C. how she knew, L.C. told her she saw it when Mr. Bautista-Gonzalez was having sex with her and her sister. 3/3/2014RP 8. Andrea began questioning L.C. further and L.C. made additional statements. 3/3/2014RP 12. Andrea reported the statements to the police. 3/3/2014RP 13-14.

The girls were scheduled for a second interview with the child interviewer. The day before these scheduled interviews, Andrea borrowed a video camera and made a video of her interrogating the

girls. 3/3/2014RP 16-17. This act of questioning the girls was in violation of the police admonition not to further question the girls. 3/3/2014RP 18. After the child interviews with the child interviewer, Andrea disclosed her actions to the police and provided them a copy of the video. CP Supp __, Sub No. 67, Exhibit 8; 3/3/2014RP 21-22. During this second child interview, both girls made statements that Mr. Bautista-Gonzalez had had sexual contact with them on several occasions. 2/25/2013RP 75-76.

Mr. Bautista-Gonzalez was subsequently charged with four counts of child rape in the first degree, two counts for each child. CP 228-29. The trial court held a pretrial hearing regarding the State's intent to admit the child hearsay of L.C. and W.C. as well as whether W.C. was competent to be a witness.[1] At the conclusion of the hearing, the court found W.C. to be competent and the child hearsay statements of L.C. and W.C. to be admissible at trial. 1/16/2014RP 415, 430.

Over Mr. Bautista-Gonzalez's objections, the videos of the two child interviews for each girl were admitted as well as the video of Andrea questioning the girls. 1/16/2014RP 418-19, 2/25/2014RP 4-5, 60-63, 77. Pediatrician Rebecca Wiester testified she examined both

[1] The parties agreed and the court found L.C. to competent. 1/16/2014RP 412.

girls and observed no signs of sexual abuse or sexual contact. 2/27/2014RP 94. The jury subsequently convicted Mr. Bautista-Gonzalez as charged. CP 252-55.

D. ARGUMENT

1. In violation of due process, the trial court erred in finding W.C. competent to testify.

a. The admission of an incompetent person's testimony in a criminal proceeding violates the due process right to a fair trial

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. XIV; *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Pulley v. Harris,* 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Generally, the mere failure to comply with state evidentiary rules does not violate due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). But, mere compliance with state evidentiary and procedural rules does not *guarantee* compliance with the requirements of due process. *Id., citing Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983), *cert. denied,* 469 U.S. 838 (1984). Due process *is* violated where the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. *Walters v.*

Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

Absent a finding of incompetence, every person is presumed competent to testify. RCW 5.60.020;[2] *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010). Those found to be incompetent cannot testify. RCW 5.60.050.[3]

Thus, a child witness is competent to testify if the child (1) understands the obligation to speak the truth on the witness stand, (2) had the mental capacity at the time of the occurrence to receive an accurate impression of the matter, (3) has a memory sufficient to retain an independent recollection of the matter, (4) has the capacity to express in words her memory of the occurrence, and (5) has the capacity to understand simple questions about the occurrence. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The burden of

---

[2] "Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding."

[3] "The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly."

proving incompetency is on the party challenging the competency of the witness. *S.J.W.*, 170 Wn.2d at 102

When determining if a child is competent to testify, the primary consideration is not the age of the child at the time of the alleged abuse, but rather the child's ability to demonstrate that she can relate events that occurred contemporaneously with the abuse. *In re Dependency of A.E.P.*, 135 Wn.2d 208, 225, 956 P.2d 297 (1998), *citing State v. Przybylski*, 48 Wn.App. 661, 665, 739 P.2d 1203 (1987). "Intelligence, not age, is the proper criterion to be used in determining the competency of a witness of tender years." *Allen*, 70 Wn.2d at 692. "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, *citing Przybylski*, 48 Wn.App. at 665.

A child who has a "long-standing, often-observed inability to distinguish what was true from what was not" may be found incompetent. *State v. Karpenski*, 94 Wn.App. 80, 106, 971 P.2d 553 (1999), *overruled on other grounds by State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). In order to determine if the child was competent at the time of the abuse, the trial court must establish when the abuse occurred. *A.E.P.*, 135 Wn.2d at 225.

Thus, in a child competency determination, the precise question is whether, "[t]aking the record in the light most favorable to the State, could a trial judge reasonably find it to be more likely true than not true that [the child] was capable of distinguishing truth from falsity?" *Karpenski*, 94 Wn.App. at 105-06. In reviewing this competency determination, appellate courts may examine the entire record. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

b. The evidence viewed in the light most favorable to the State did not support the determination that W.C. could distinguish truth from falsity, and therefore the trial court erred in finding her competent to testify.

W.C. testified both for purposes of the competency hearing and at trial. Additionally, W.C. participated in two videotaped interviews with Carolyn Webster, which the court observed as well.

At the competency hearing, W.C. had an extremely difficult time telling a lie from the truth:

Q: Okay. Now W.C., when you came into court this morning, the judge asked you to promise to tell the truth.

A: Okay.

Q: Okay. Do you understand what that means?

A: Yes.

Q: Okay. And is it good or bad to tell a lie?

A: Bad.

Q: Can you explain to me why it's bad?

A: Because -- I don't know.

Q: Okay. What would happen if you told a lie to your mom?

A; I did not lie.

Q: Okay. What if you did, though? What would happen to you?

A: I don't know.

Q: Okay. Do you think you would get into trouble?

A: No.

Q: No? Even if you told a lie?

A: No.

Q: Okay. Okay. W.C., you see I have a pen in my hand.

A: Okay.

Q: Okay. What if I told you that this pen was pink. Would I be telling the truth, or would I be telling a lie?

A: Telling the truth.

Q: I'd be telling the truth?

A: Yes.

Q: What color is this pen?

A: Blue.

Q: Okay. So if I said that it was pink, I said this pen is pink, would I be telling the truth?

A: Yes.

Q: Yes? Even though the pen is blue?

A: Yes.

1/8/2014RP 108-09.

W.C.'s February 8, 2013, interview with Caroline Webster showed even less of an understanding of being able to tell truth from lie.

C. WEBSTER: Is it good to tell the truth or is it good to tell a lie?

W.C.: Um, I . . .

C. WEBSTER: Okay is it good to tell a lie?

W.C.: A lie?

C. WEBSTER: Uh-huh.

W.C.: What's this?

C. WEBSTER: That's a microphone. It records our voices.

W.C.: Oh.

C. WEBSTER: Yeah, W.C., is it good to tell a lie?

W.C.: Yes.

C. WEBSTER: How come?

W.C.: Because, because, um, um, I forgot.

C. WEBSTER: Okay. W.C., when we talk today it's important that we don't tell any lies and that we only tell the truth, and we only talk about things that really happened. Okay? Do you promise that you will tell me the truth? Okay. W.C., tell me why you came to see me today.

W.C.: I forgot.

CP Supp __, Sub No. 67, Exhibit 7 at 6-7.

Further, Andrea testified that with W.C., sometimes it was difficult to tell when she was telling a lie and when she was telling the truth. 1/8/2014RP 159. This inability was front and center in W.C.'s December 9, 2011, interview, where she told incredulous stories:

C. WEBSTER: And you draw a, you drew a car?

W.C.: Yeah.

C. WEBSTER: Okay.

W.C.: So five minutes I died (unintelligible).

C. WEBSTER: Oh, say that again.

W.C.: You know, you know them stories I died years ago from the car 'cause there was an accident.

C. WEBSTER: You died years ago from a car?

W.C.: Yeah.

C. WEBSTER: Uh-huh. What happenend [sic]?

W.C.: I just died years ago . . .

C. WEBSTER: Uh-huh.

W.C.: . . . from the story. So when I just read the book . . .

C. WEBSTER: Uh-huh.

W.C.: . . . so is my, so is my picture. There was an accident today. So I died years ago.
. . .

So I died. I was a baby.

CC. WEBSTER: When you were a baby?

W.C.: Yeah.

CP Supp __, Sub No. 67, Exhibit 6 at 4-5.

Under the first *Allen* factor, a child must demonstrate "an understanding of the obligation to speak the truth on the witness stand." *Allen,* 70 Wn.2d at 692, 424 P.2d 1021. A child who has a "long-standing, often-observed inability to distinguish what was true from what was not" may not be found competent. *Karpenski*, 94 Wn.App. at 106.

The evidence from the various interviews and W.C.'s testimony at the competency hearing indicates that W.C. was not competent because she was unable to distinguish between telling the truth and telling a lie. *Karpenski*, which involved this first of the *Allen* factors, provides an example of a similar case where the facts strongly supported a finding the child witness was not competent to testify:

> At the outset of the competency hearing, Z took the oath and solemnly "promised to tell the truth about everything that happened." He also promised not to "make up any stories." Moments later, he was describing in vivid detail how he and his younger brother had been born at the same time. As the State notes on appeal, "This is impossible because Z is seven and his little brother is two." As the trial court noted, this is "impossible" because it is "beyond understanding" that Z was in the room when his little brother was born. No one suggests that Z was intentionally lying; it seems that he actually believed what he was saying, and that he was merely manifesting his long-standing, often-observed inability to distinguish what was true from what was not. The trial court expressly found that Z was "testify [ing] as to an event that he could not possibly have recalled;" that he was "confused" regarding "dream versus reality;" and that he was "not old enough to be able to separate that confusion." Inexplicably, however, it then concluded that Z was competent to testify. It is our opinion that the *only* reasonable view of this record is the one expressed by the trial court that Z lacked the capacity to distinguish truth from falsehood. Accordingly, we hold that the evidence is insufficient to support a finding that Z was capable of distinguishing truth from falsity, and that Z was incompetent to testify.

94 Wn.App. at 106 (internal footnotes omitted). The same can be said about W.C. here. At the child interviews, W.C. was unable to distinguish between truth and falsehood. As in *Karpenski*, it seems readily apparent that W.C. was not competent. Accordingly, the trial court erred in finding W.C. competent.

2. **The trial court's admission of W.C.'s and L.C.'s hearsay statements violated Mr. Bautista-Gonzalez's right to due process and a fair trial.**

a. The children's statements were inadmissible hearsay unless they fell within the child hearsay exception.

RCW 9A.44.120 governs the admissibility of a child's hearsay statements regarding sexual acts performed with or on the child.[4]

[4] RCW 9A.44.120 states:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A .04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Washington courts have identified several factors that are applicable in determining the reliability, and thus admissibility, of a child's hearsay statements under RCW 9A.44.120. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).[5]

The trial court considers the factors as a whole and no single factor is decisive. *State v. Young*, 62 Wn.App. 895, 902, 802 P.2d 829 (1991). To be admissible, the statements must substantially meet these factors. *State v. Woods,* 154 Wn.2d 613, 623-24, 114 P.3d 117 (2005). The final four factors "are not very helpful in assessing the reliability of child hearsay statements in most sexual abuse cases." *State v. Henderson*, 48 Wn.App. 543, 551 n. 5, 740 P.2d 329, *review denied*,

[5] These factors are :

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

109 Wn.2d 1008 (1987); *see also Karpenski*, 94 Wn.App. at 111 n. 131; *State v. Borland*, 57 Wn.App. 7, 15, 786 P.2d 810 (1990).

b. W.C.'s and L.C.'s hearsay statements failed to substantially meet the *Ryan* factors as they were not spontaneous.

W.C.'s and L.C.'s mother candidly admitted intensely questioning the girls after their disclosure, videotaping the entire session. CP Supp __, Sub No. 67, Exhibit 8; 3/3/2014RP 8, 16-17. This video was played for the jury at trial. Andrea used leading questions, and engaged in the videotaped session despite police admonitions not to further question the girls prior to the child interviewer questioning the girls. 2/20/2014RP 78; 3/3/2014RP 18. As a result, all of the girls' subsequent statements were tainted by Andrea's questioning, and under the *Ryan* factors, the questioning negated a finding that the statements were spontaneous and/or trustworthy.

In *Ryan*, the Supreme Court ruled that statements were not admissible where they were made in response to the mother's questions as was the case here:

> Applying the *Parris* factors to the circumstances of the present case, the statements cannot be deemed sufficiently trustworthy to deprive the defendant of his right of confrontation. First, there was a motive to lie, and each child initially told a different version of the source of the candy they were not supposed to have.

> Second, all the record reveals about the character of the children is the parties' stipulation that the children were incompetent witnesses due to their tender years. *Third, the initial statements of the children were made to one person, although subsequent repetitions were heard by others. Fourth, the statements were not made spontaneously, but in response to questioning. Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told. Their relationship to their children is understandably of a character which makes their objectivity questionable.*

Ryan, 103 Wn.2d at 176 (emphasis added), *citing State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982).

Further, other state's appellate courts have cautioned against the use of children's statements made to a mother in response to her questions because of the fear of fabrication. On facts bearing a close resemblance to Mr. Bautista-Gonzalez's alleged conduct, the New Mexico appellate court ruled:

> Defendant's suspicion of fabrication is not without substance. The record supports an inference that S.G. initially denied that anything had happened with Defendant, and she only changed her recollection after repeated questioning and blandishments on the part of her mother. Despite the police officer's request not to assist S.G. in recalling the events, S.G.'s mother did exactly the opposite, including what could be called exerting suggestive influence on her daughter's memory.

> The possibility of undue influence on S.G.'s testimony is troubling in this case. Consistent with the police officer's admonition, "the importance of *proper* interview techniques as a predicate for eliciting accurate and consistent recollection" from children cannot be denied. *State v. Michaels,* 136 N.J. 299, 642 A.2d 1372, 1378 (1994) (citing Gail S. Goodman et al., *Optimizing Children's Testimony: Research and Social Policy Issues Concerning Allegations of Child Sexual Abuse in Child Abuse, Child Development, and Social Policy* (Dante Cicchetti & Sheree L. Toth, eds.1992)). Many of the techniques allegedly used in questioning S.G. are subject to criticism. *See* American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, *Investigation and Prosecution of Child Abuse* 59-61, 67-75, 81 (2d ed.1993); *see also Michaels,* 642 A.2d at 1378. Although the problems of parental influence are arguably more pronounced in younger children, "[s]uggestibility is not simply a matter of age." 1 John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* § 1.10, at 36 (3d ed.1997). The impact of suggestibility on an individual's recall "depends on a host of situational, developmental, and personality factors." *Id.* Given the problems associated with improper questioning of children, the circumstances surrounding S.G.'s allegations raise legitimate concerns about the reliability of her allegations.

State v. Ruiz, 131 N.M. 241, 250, 34 P.3d 630, 639 (N.M.App.,2001).

Here, Andrea candidly admitted disobeying the police officer's admonition not to further question the girls, and videotaped the girls while she interrogated them about the statements. The subsequent statements made by the girls were simply not spontaneous and every statement after these initial statements were also the result of

questioning and were not spontaneous. The court erred in concluding they were.

c. L.C.'s hearsay statements about what she saw happening to W.C. were not admissible as they described alleged sexual contact on another.

The statute "does not by its terms apply to a statement by a child describing an act of sexual contact performed on a *different* child." *State v. Harris*, 48 Wn.App. 279, 284, 738 P.2d 1059, *review denied*, 108 Wn.2d 1036 (1987)(emphasis in original).

A similar error occurred in *State v. Hancock*, where one child testified about what the accused did to another child. 46 Wn.App. 672, 731 P.2d 1133 (1987), *aff'd*, 109 Wn.2d 760, 748 P.2d 611 (1988). The *Hancock* Court ruled the child's statement did not describe an act of sexual contact performed with or on that child; rather, it referred to an act performed on another child. "Thus, it does not fall within the purview of RCW 9A.44.120, and its admission was error." *Id.* at 678.

Here, in a similar vein, rather than limiting the use of child hearsay to L.C.'s claim of "sexual contact" performed on or with her, the prosecution used RCW 9A.44.120 to admit evidence involving wrongful acts that did not happen to L.C. but to W.C. As in *Hancock*, this was error.

In Caroline Webster's second interview with L.C., which was admitted at trial in its entirety over Mr. Bautista-Gonzalez's objection, L.C. was allowed to continually describe the sexual contact she saw happening to W.C.

> L. C.: Like my mom's friend did privates to my sister and me. He, he's been doing it to my sister and my, and me.
>
> C. WEBSTER: Uhmm.
>
> L.C.: And my mama said she's gonna call the cops and the cops are gonna call my mom's friend.
>
> C. WEBSTER: Uhmm.
>
> L.C.: And he was doing our butt and flower but it hurted when he did our butt but it didn't hurt when he did our flower.
>
> C. WEBSTER: Okay. Well I wanna hear some more about that okay? You said mom's friend Fidel did privates to you and your sister?
>
> L.C.: (shakes head yes).
>
> C. WEBSTER: How do you know he did it to your sister?
>
> L.C.: Because, because, because I just, she just told me everything about the true [sic] to her.
>
> . . .
>
> C. WEBSTER: He's a boy, okay. Have you seen Fidel do something to W.C.?
>
> L.C.: Um, yes.

C. WEBSTER: Okay what have you seen him do W.C. [sic]?

L.C.: It was the same thing.

C. WEBSTER: Even if it's the same go ahead and tell me, he did what to W.C.? What did you see him do?

L.C. I saw him do my sister's mouth. It's the same thing that he just did.

C. WEBSTER: Okay banana to mouth?

L.C.: (Shakes head yes).

C. WEBSTER: Okay did you see him do something else to W.C.?

L.C. I did that's all.

C. WEBSTER: Just banana to the mouth?

L.C.: (Shakes head yes).

. . .

C. WEBSTER: Oh I'm just a little confused. Did your sister tell you about things that Fidel did to her?

L.C.: When she was finished she told me he was doing ah to her.

C. WEBSTER: He was doing what?

L.C.: Oh.

C. WEBSTER: When she was finished she, she just said what?

L.C. She said Fidel was saying ah.

C. WEBSTER: Oh that Fidel was saying ah?

L.C.: Yeah he was doing the private stuff to my sister, too.

C. WEBSTER: Okay.

L.C.: He does it to my sister and me.

CP Supp __, Sub No. 67, Exhibit 5 at 9-10, 27-28, 31.[6]

Although Webster may have been trying to encourage L.C. to talk about things that happened to her sister as part of this forensic interview, this evidence was not admissible hearsay under RCW 9A.44.120. L.C.'s hearsay statements should have been limited to what happened to her, not what happened to her sister.

d. The trial court's error in admitting the children's statements was not harmless.

The error in admitting the hearsay statements infringed Mr. Bautista-Gonzalez's constitutionally protected right to a fair trial under the Due Process Clause. As a consequence, the error cannot be harmless unless the State can prove, beyond a reasonable doubt, the error *was* harmless. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot make that showing.

[6] Andrea testified she and the girls referred to sex as "ah" after the girls unexpectedly saw she and Mr. Bautista-Gonzalez having sexual intercourse and overheard the two.

There was no physical evidence of any sexual contact between Mr. Bautista-Gonzalez and W.C. The *only* evidence of the sexual contact was L.C. and W.C.'s hearsay statements in the video of the child interviews as well as their testimony at trial. Since the hearsay evidence was the overwhelming majority of the evidence against Mr. Bautista-Gonzalez involving W.C., the error in admitting the hearsay statements as to the counts where W.C. is the named victim could not be harmless. Mr. Bautista-Gonzalez is entitled to a new trial on the counts involving W.C.

E. CONCLUSION

For the reasons stated, Mr. Bautista-Gonzalez asks this Court to reverse his convictions involving W.C. and remand for a new trial.

DATED this 29th day of January 2015.

Respectfully submitted,

s/ THOMAS M. KUMMEROW (WSBA 21518) tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71928-9-I
v.	)	
	)	
FIDEL BAUTISTA-GONZALEZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **AMENDED 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:

[X] STEPHANIE GUTHRIE, DPA [paoappellateunitmail@kingcounty.gov] [stephanie.guthrie@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF APRIL, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710