No. 92440-6
COA No. 71928-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FIDEL BAUTISTA-GONZALEZ,

Petitioner.

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

The Honorable James D. Cayce

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Fidel Bautista-Gonzalez asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Fidel Bautista-Gonzalez*, No. 71928-9-I (September 21, 2015). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

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. Is as significant question of law under the United States and Washington Constitutions involved 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, thus the trial court erred 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?

D. 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 320, 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.

On appeal, the Court affirmed Mr. Bautista-Gonzalez's convictions rejecting his arguments that W.C. was not competent to testify and the admission of the hearsay statements of both girls violated his rights to due process and a fair trial.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

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

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; *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.

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

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. *In re Dependency of A.E.P.*, 135 Wn.2d 208, 225, 956 P.2d 297 (1998).

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).

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.

Additionally, the Court of Appeals noted that the trial court found that there were problematic aspects to W.C.'s testimony, yet both the trial court and the Court of Appeals minimized these problems in finding W.C. competent.

This Court should accept review to further clarify when a child is not competent to testify.

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.

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

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*, 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).

a. 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 320, 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.

This Court should accept review to clarify the meaning of the term "spontaneous" as it applies to RCW 9.44.120 and find the statements of the children here were not spontaneous because of the mother's questioning.

b. 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., L.C. was allowed to continually describe the sexual contact she saw happening to W.C.

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 inadmissible 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.

The Court of Appeals sidestepped the issue, instead concluding that even if it was error to admit L.C.'s comments about W.C., the error was clearly harmless. Decision at 12. This Court should accept review and find the admission of the comments by L.C. about W.C. was erroneous.

F. CONCLUSION

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

DATED this 16th day of October 2015.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71928-9-I
Respondent,	)	DIVISION ONE
v.	)	
FIDEL BAUTISTA-GONZALEZ,	)	UNPUBLISHED
Appellant.	)	FILED: September 21, 2015

Cox, J. – A jury found Fidel Bautista-Gonzalez guilty of four counts of rape of a child in the first degree. On appeal, he fails to demonstrate that the trial court abused its discretion in finding that one of the child victims was competent to testify. He also fails to establish any reversible evidentiary error. We affirm.

Andrea C. began a relationship with Bautista-Gonzalez in 2009. For several years, Andrea and her two young daughters, L.C. and W.C., lived intermittently with Bautista-Gonzalez. Bautista-Gonzalez would watch the girls while Andrea attended her regular evening AA meetings.

In late November 2011, Andrea noticed that four-year-old L.C. had painful blisters around her vagina and anus. L.C.'s physician diagnosed her with herpes simplex type 2. A follow-up examination at Seattle Children's Hospital indicated that L.C. was experiencing a primary outbreak and had been exposed to the virus in recent weeks or months through anal contact.

Andrea and a hospital social worker contacted the police and Child Protective Services (CPS). Andrea also arranged a herpes test for all of the men

in her family. Andrea did not suspect that Bautista-Gonzalez might have been involved. But Bautista-Gonzalez was the only man who tested positive for herpes. Andrea also learned that she had herpes.

As part of the CPS investigation, child interview specialist Carolyn Webster interviewed L.C. and W.C. in December 2011. Neither child disclosed any sexual abuse, but Webster and witnesses to the interview noted that L.C. refused to talk about Bautista-Gonzalez. At CPS's insistence, Andrea moved out of Bautista-Gonzalez's home and moved into her mother's home. At that point, CPS closed the case.

In 2012, Andrea purchased her own home. At some point, Andrea resumed her relationship with Bautista-Gonzalez. Bautista-Gonzalez regularly spent the night at Andrea's house and cared for the two children while Andrea attended her AA meetings. In November 2012, the couple broke up for the last time, although Bautista-Gonzalez continued to visit Andrea to help out and babysit the children. In early 2013, Andrea asked Bautista-Gonzalez to cover the windows with insulating plastic. Bautista-Gonzalez also watched the children at the same time. Andrea had no contact with Bautista-Gonzalez after January 19, 2013.

In early February 2013, Andrea was lying in bed and reading to the girls. L.C. was five years old and W.C. was eight. W.C. asked Andrea, "mama, do you have what boys have?"[1] In response to Andrea's question, W.C. said, "boys

[1] Report of Proceedings (March 3, 2014) at 6.

have the bananas and girls have the flowers."[2] L.C. added, "just like Fidel has."[3] Andrea asked L.C. if she had seen Bautista-Gonzalez's penis. L.C. replied, "when he used to do uh-uh-uh to us," a term that L.C. and W.C. used for having sex.[4] L.C. explained that "it only hurt when he did it on my butt, not when he did it on my flower."[5] W.C. indicated that Bautista-Gonzalez had also done "uh-uh-uh" to her and that it only hurt "when he would do it in my butt."[6]

On the following day, Andrea reported the conversation to the police. Child interview specialist Carolyn Webster scheduled interviews with L.C. for two days later. But before the interview, Andrea became concerned that the children might not report the abuse, as had happened during the 2011 interview. Ignoring the police request that she not question L.C. and W.C. further before the interviews, Andrea borrowed a video camera. Andrea then filmed the girls after asking them to repeat what they had told her about Bautista-Gonzalez. During the interview, L.C. added that one of the incidents of abuse occurred on the day that Bautista-Gonzalez had put plastic on the windows. Andrea gave the video recording to the police. In videotaped interviews, both L.C. and W.C. told Webster that Bautista-Gonzalez had sexually abused them on several occasions.

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[2] Id.
[3] Id.
[4] Id. at 8.
[5] Id. at 12.
[6] Id.

The State charged Bautista-Gonzalez with four counts of rape of a child in the first degree, two counts involving L.C. and two counts involving W.C. Following a hearing, the trial court found both L.C. and W.C. competent to testify.

L.C. and W.C. testified at trial. The trial court also admitted the video recordings of Webster's interviews with the children and Andrea's video recording of her interview. Bautista-Gonzalez testified that he was surprised when he tested positive for herpes and believed that Andrea had infected him. He denied sexually assaulting L.C. and W.C. or having any inappropriate contact with them.

The jury found Bautista-Gonzalez guilty as charged. The court imposed concurrent standard range indeterminate sentences of 318 months to life.

Bautista-Gonzalez appeals.

Competency

Bautista-Gonzalez contends that the trial court violated his due process right to a fair trial when it found W.C. competent to testify. He argues that the State failed to establish that W.C. could distinguish truth from falsity.

In Washington, all persons are presumed competent to testify regardless of their age.[7] The party challenging the competency of a child witness bears the burden of rebutting this presumption with evidence establishing one of the statutory grounds for incompetency set forth in RCW 5.60.050, including an inability "of receiving just impressions of the facts, respecting which they are

[7] State v. S.J.W., 170 Wn.2d 92, 102, 239 P.3d 568 (2010).

examined, or of relating them truly."[8] The factors set forth in State v. Allen continue to guide the trial court's determination of a child witness's competency:

> (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.[9]

"The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence."[10] Consequently, an appellate court reviews the trial court's determination of competency for a manifest abuse of discretion.[11]

On appeal, Bautista-Gonzalez challenges only the first Allen factor – W.C.'s understanding of the obligation to tell the truth. In particular, he points to testimony at the competency hearing, during which W.C. said that she would not get in trouble if she told a lie to her mother and responded that the deputy prosecutor would be telling the truth if she said that the blue pen she was holding in her hand was pink.

Bautista-Gonzalez also relies on W.C.'s apparent confusion during the two pre-trial interviews with Caroline Webster. During the February 2013 interview

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[8] RCW 5.60.050(2); see also S.J.W., 170 Wn.2d at 102.

[9] In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998) (quoting, State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

[10] State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

[11] Id.

with Webster, W.C. responded "yes" when asked if it is good to tell a lie and then said, "I forgot," when asked to explain further. During the December 2011 interview, W.C. repeatedly referred to a story and an "accident" in which she apparently "died years ago."[12]

Bautista-Gonzalez contends that the record established W.C.'s long-standing inability to understand the difference between telling the truth and telling a lie and that the trial court therefore erred in finding her competent to testify.

As the trial court recognized, W.C.'s testimony during the pre-trial interviews and competency hearing must be considered in context. During the competency hearing, the court heard extensive testimony about the results of W.C.'s evaluation in August 2013 for fetal alcohol syndrome. Dr. Julia Bledsoe, a pediatrician at the University of Washington, diagnosed W.C. with static encephalopathy and alcohol exposed, a condition involving significant central nervous system damage and dysfunction. W.C. also has Attention Deficit Hyperactive Disorder. Although W.C. has a normal I.Q., her condition has resulted in a significant language learning disability.

Dr. John Thorne, a speech language pathologist, explained that W.C.'s language disabilities could cause her some difficulties when attempting to correct miscommunications. He also noted that such impairment causes difficulties with words that involve finer distinctions, such as the distinction between "often" and "frequently." Thorne commented that although W.C. was more likely to have

[12] Report of Proceedings (March 6, 2014) at 42.

difficulties with expressing her memory of any event in words than other children, "even children with very severe language impairments communicate their message most of the time."[13]

During her testimony at the competency hearing, W.C. testified in detail about her school and her teacher. She described how she had celebrated Christmas and described the presents she received. W.C. was not responsive to all questions and could not explain precisely why it was bad to tell a lie. But she repeatedly acknowledged that it was important to tell the truth:

> Q. Now, [W.C.], do you understand that it's important that you tell the truth today? Do you?
>
> A. Yes.
>
> Q. Okay. And can you tell me why that's important?
>
> A. Because we got to tell the truth.
>
> Q. Okay. And do you understand that when you – [W.C.], can you put your bear down, please? Do you understand when you come to court that it's important to tell the truth?
>
> A. Yes.
>
> ...
>
> Q. How often have you talked to your mom about why you're in court today?
>
> A. Because we're here to tell the truth.
>
> ...
>
> A. [Andrea] doesn't make stories about Fidel.
>
> Q. Okay. Did she tell you to make up a story?
>
> A. No.

[13] Report of Proceedings (January 9, 2014) at 290.

Q. Okay. And are you making up the story about Fidel?

A. No.

Q. Now, do you know what a lie is? Do you know that word?

A. Yes.

Q. Okay. Can you tell me what it means?

A. It means when you lie, it's not even nice to lie.

Q. Okay. It's not nice to lie?

A. (Pause.)

Q. Okay. Now, did your mom tell you to lie in court today?

A. No.

Q. No? What did she tell you?

A. She tell me to tell the truth.

Q. Okay. And are you telling the truth today?

A. Yes.[14]

After considering the testimony at the competency hearing and viewing W.C.'s pre-trial interviews, the trial court found that she was competent to testify. The court acknowledged that there were problematic aspects to her testimony, but concluded that based on her testimony at the competency hearing, she was able to recall past events and experiences. The court expressly noted the progress in W.C.'s ability to respond to questions that occurred between her first interview in 2011 and her testimony in early 2014 at the competency hearing.

[14] Report of Proceedings (January 8, 2014) at 110-22.

Despite aspects that merited cross examination, the court found that W.C. was able to understand the obligation to tell the truth in court.[15] The evidence supports that determination.

Bautista-Gonzalez's reliance on State v. Karpenski[16] is misplaced. In Karpenski, the court reversed the child rape and child molestation convictions after concluding that the child victim was incapable of distinguishing truth from falsity. But the seven-year-old child victim in that case had taken an oath and promised to tell the truth and not make up any stories. He then described in "vivid detail" how he and his two-year-old brother had been born at the same time. The testimony at the competency hearing "merely manifest[ed] his long-standing, often-observed inability to distinguish what was true from what was not."[17]

Here, when asked in simple terms, W.C. usually described past events and circumstances accurately. Andrea acknowledged that when W.C. was younger, her language disability sometimes made it difficult to determine whether she was telling the truth or lying. But Andrea explained that this usually involved "little lies" and that W.C. was generally truthful in more serious situations. W.C. had no history of fabrication remotely comparable to the child victim in Karpenski. The trial court did not abuse its discretion in finding W.C. competent to testify.

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[15] See State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d 536 (1991) (inconsistencies in a child's testimony go to weight and credibility, not competency).

[16] 94 Wn. App. 80, 971 P.2d 553 (1999), overruled on other grounds in State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003).

[17] Id. at 106.

Child Hearsay

Bautista-Gonzalez contends that the trial court erred in admitting the video recording that Andrea made of her interview of L.C. and W.C. shortly after they initially disclosed the abuse. He argues that the girls' hearsay statements were not spontaneous and therefore not admissible as child hearsay under RCW 9A.44.120.

Hearsay statements of a child under the age of 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child, the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability, and the child testifies at the proceedings.[18] When determining the reliability of child hearsay, the trial court considers the nine Ryan[19] factors:

> (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.[20]

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[18] RCW 9A.44.120; see State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009).

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

[20] Kennealy, 151 Wn. App. at 880 (footnote omitted).

We review the admission of evidence under RCW 9A.44.120(1) for abuse of discretion.[21]

Bautista-Gonzalez's arguments rest on a brief statement in Ryan for the proposition that the girls' statements in the interview were not spontaneous because they were "in response to questioning."[22] Bautista-Gonzalez maintains that "the questioning negated a finding that the statements were spontaneous and/or trustworthy"[23] and that all statements "after these initial statements were also the result of questioning and were not spontaneous."[24]

It is well established, however, that the Ryan spontaneity factor is not undermined merely because the hearsay statement is in response to questioning. "For purposes of a child hearsay analysis, spontaneous statements are statements the child volunteered in response to questions that were not leading and did not in any way suggest an answer.[25] Bautista-Gonzalez's arguments provide no meaningful analysis of Andrea's questioning or any support for his conclusory assertion that the children's hearsay statements were not spontaneous for purposes of RCW 9A.44.120. We therefore decline to address further the alleged error.[26]

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[21] State v. Swan, 114 Wn.2d 613, 665, 790 P.2d 610 (1990).
[22] Ryan, 103 Wn.2d at 176.
[23] Brief of Appellant at 17.
[24] Id. at 19-20.
[25] Carlson, 61 Wn. App. at 872; see also Swan, 114 Wn.2d at 649.
[26] See State v. Tinker, 155 Wn.2d 219, 224, 118 P.3d 885 (2005) (appellate court will decline to review an issue that is unsupported by cogent argument and briefing).

Bautista-Gonzalez also contends that the trial court erred in admitting portions of L.C.'s second interview with Webster, in which L.C. referred to his sexual contact with W.C. He asserts that the child hearsay describing sexual abuse of another is not admissible under RCW 9A.44.120.[27]

But the record fails to support Bautista-Gonzalez's assertion that Webster's second interview with L.C. was "admitted . . . in its entirety."[28] Rather, the trial court granted defense counsel's request that the video recording be redacted to delete references to sexual abuse of W.C. Consequently, the majority of the statements that Bautista-Gonzalez challenges on appeal were not admitted at trial. The only challenged statements admitted at trial were L.C.'s statements that Bautista-Gonzalez "did privates" to L.C. and W.C. and that Bautista-Gonzalez "was also doing our butt and our flower, but it hurted when he did our butt. But it didn't hurt when he did our flower."[29]

Even if the trial court erred in admitting these comments, the error was clearly harmless. L.C.'s two brief comments regarding sexual contact with W.C. were essentially identical to other evidence admitted without objection at trial, including W.C.'s trial testimony. Under the circumstances, there is no reasonable

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[27] See State v. Harris, 48 Wn. App. 279, 284, 738 P.2d 1059 (1987) (RCW 9A.44.120 "does not by its terms apply to a statement by a child describing an act of sexual contact performed on a *different* child").

[28] Brief of Appellant at 21.

[29] Report of Proceedings (February 26, 2014) at 18.

likelihood that the outcome of the trial would have been different had the error not occurred.[30]

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

[30] State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (evidentiary error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred").

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71928-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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