No. 47282-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JAMES ROWLEY, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 08-1-00002-8

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The doctrine of res judicata applies to criminal cases. Prior to Rowley's first trial in this case the trial court held a full child hearsay hearing and correctly ruled that the child-victim's child hearsay statements were admissible as evidence. The order for a new trial was based on a violation of the public trial right during the jury trial and did not relate to the pretrial child hearsay hearing. Therefore, where no relevant facts had changed, the trial court did not abuse its discretion when it declined to hold a new child hearsay hearing before conducting a second jury trial.

2. Rowley alleges several instances of ineffective assistance of counsel. But in one instance Rowley has failed to show that his attorney's conduct was not a legitimate trial tactic, and in each instance Rowley has failed to show that his attorney's performance fell below an objective standard of reasonableness and has failed to show a reasonable probability that but for the alleged errors the outcome of the trial would have been different.

B. FACTS AND STATEMENT OF THE CASE

On or about January 1, 2008, Rowley was spending the night at his parents' house in Mason County after celebrating the arrival of the New Year. RP 134-35, 154-55, 157-58, 172, 276-77. During the night he came down from his room upstairs and found his nine-year old niece, A.K.R., sleeping on a couch. RP 299, 389, 393-94. Rowley pulled down her pajamas and touched her private parts. RP 393-95, 398-99, 411. The

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room was slightly filled with light as the morning daylight entered partially open windows, and A.K.R. saw Rowley. RP 399, 403, 406, 412-13. A.K.R. immediately reported the incident to her parents. RP 396-97, 413.

A.K.R.'s parents, who were asleep in another room when the incident occurred, testified that A.K.R. told them about the incident immediately after it happened and that she was upset and crying when she came into their room. RP 168, 170, 301, 305, 331-32, 350-52, 363-64, 374. A.K.R. also made statements to other witnesses who then testified about A.K.R.'s statements wherein she described Rowley touching her privates. RP 140, 170, 171, 258, 261-64, 266-70, 281, 418, 444; Ex. 24 (Video DVD). These witnesses included Detectives Luther Pittman and Shellee Stratton, Dr. Joseph Hoffman, and nurse Nancy Young. RP 170, 171, 258, 261-64, 266-70, 281. The trial court held a complete child hearsay hearing and ruled the child hearsay statements admissible under RCW 9A.44.120. (*See*, Vol. XI of the verbatim report or proceedings prepared and submitted in Rowley's first appeal, No. 38016-1-II).

The State charged Rowley with one count of child molestation in the first degree. RP 130-31. A Mason County jury convicted him, and he

appealed in court of appeals No. 38016-1-I. In a ruling from a motion on the merits, a court of appeals commissioner affirmed Rowley's conviction and denied his appeal.

Following his direct appeal, Rowley then filed a personal restraint petition in this Court, which this Court then transferred to Division I of the Court of Appeals, where it was assigned case no. 71367-1-I. Following consideration of Rowley's personal restraint petition, the Court of Appeals ordered a new trial for Rowley, finding that his appellate counsel was ineffective for not raising a public trial violation on direct appeal. *See*, Unpublished Opinion, No. 71367-1-I.

On remand, the State filed an amended information which again charged Rowley with one count of child molestation in the first degree. CP 63-64. The Court of Appeals decision in Rowley's personal restraint petition ordered only a new trial based solely on his appellate counsel's failure to raise an open trial issue because some of the jurors at trail were interviewed outside of the public's view. *See*, Unpublished Opinion, No. 71367-1-I. Because the remand for a new jury trial did not upset any other stage of the proceedings, such as pretrial motions and rulings, the trial

court declined to hold a new child hearsay hearing. RP 42-43, 100-01, 126, 127-28, 246-48.

Following retrial, the jury returned a guilty verdict. RP 571-72. Rowley appeals, assigning error to the 2008 findings of fact and conclusions of law (contemporaneously with the filing of this brief the State has moved to supplement the record with these findings and conclusions) and contending that the trial court erred by failing to hold a new child hearsay hearing after remand. Additionally, Rowley contends that his trial counsel was ineffective.

C. ARGUMENT

1. The doctrine of res judicata applies to criminal cases. Prior to Rowley's first trial in this case the trial court held a full child hearsay hearing and correctly ruled that the child-victim's child hearsay statements were admissible as evidence. The order for a new trial was based on a violation of the public trial right during the jury trial and did not relate to the pretrial child hearsay hearing. Therefore, where no relevant facts had changed, the trial court did not abuse its discretion when it declined to hold a new child hearsay hearing before conducting a second jury trial.

Rowley contends that the trial court erred by relying on the previous child hearsay hearing rather than to hold a new child hearsay hearing prior to his second trial. Br. of Appellant at 3-13. Rowley also

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assigns error to the 2008 findings of fact and conclusions of law admitting the child hearsay at issue in this case, but Rowley does not identify or explain the errors he alleges. Br. of Appellant at 1 (Assignments of Error). It appears, therefore, that Rowley's assignments of error on this topic are offered in support of his contention that the trial court erred by not conducting a new hearing prior to the second trial.

The admissibility of a child's hearsay statements about a sexual assault perpetrated against the child is controlled by RCW 9A.44.120. The parts of the statute that are relevant to the issue of the instant case read as follows:

> 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... 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.

RCW 9A.44.120.

Here, the victim made statements "when under the age of ten describing any act of sexual contact performed" against her by Rowley. RP 140, 170, 171, 258, 261-64, 266-70, 281, 418, 444; Ex. 24 (Video DVD). Thus, the victim's hearsay statements were properly admissible at the trial, provided that the other factors required by RCW 9A.44.120 were also present. Notably, the statute says nothing about the age of the victim when testifying, but instead, refers only to the age of the child-victim when he or she makes the hearsay statements. *Id.*

Here, the child-victim was available as a witness and testified at trial; thus, subsection (2) of RCW 9A.44.120 is satisfied on these facts. And, subsection (1) of RCW 9A.44.120 is satisfied because in 2008 prior to Rowley's first trial, the trial court did in fact hold a hearing outside the presence of the jury and did find that "the time, content, and circumstances of the statement provide sufficient indicia of reliability[.]" (*See*, Vol. XI of appeal No. 38016-1-II). Notably, RCW 9A.44.120(1) addresses facts that existed at the time the statement was made rather than facts or circumstances at the time of the hearing. The trial court considered the circumstances that existed at the time the victim made the hearsay

statements and considered the factors mandated for consideration by *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), and the court then found that the that the victim was competent and available to testify and that the statements were admissible. RP Vol. XI (No. 38016-1-II) at 120-25 (May 29, 2008, child hearsay hearing).

RCW 9A.44.120 says nothing about whether a child is or is not competent to testify at trial. In fact, "a child's competence to testify at trial is not relevant to the issue of whether her hearsay statements are admissible." *State v Borboa*, 157 Wn.2d 108, 120, 135 P.3d 469 (2006); *see also*, *State v. C.J.*, 148 Wn.2d 672, 684-85, 63 P.3d 765 (2003) (a separate finding of testimonial competence is not required for admission of child hearsay under RCW 9A.44.120). In summary, "[a]dmissibility under [RCW 9A.44.120] does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable." *C.J.* at 685.

It follows that the victim's age at the time of testifying is irrelevant, because the victim's age at the time of testifying can add nothing to the analysis of whether "the time, content, and circumstances of

the statement provide sufficient indicia of reliability" as required by RCW 9A.44.120(2). Here, Rowley did not assert below that there was any new or different information to offer, other than the victim's age after the passage of time. Thus, there was nothing to be gained by holding a new child hearsay hearing.

But notwithstanding the fact that the statements were otherwise admissible under RCW 9A.44.120, Rowley contends that the trial court erred because it "did not engage in an ER 403 analysis during the second trial regarding child hearsay." Br. of Appellant at 6. Rowley does not provide any citation to the record where he raised an objection based on ER 403, and review of the record does not reveal any such citation.

ER 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Id. The State contends that the victim's child hearsay statements that were introduced into evidence in this case were prejudicial only because they tended to show Rowley's guilt in this case. ER 403 restricts "unfair prejudice" but does not restrict incriminating evidence merely because it is prejudicial because it is incriminating. Still more, ER 403 restricts

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evidence only when "its probative value is *substantially* outweighed by the danger of unfair prejudice." (Emphasis added).

Here, Rowley does not explain how the probative value of the victim's child hearsay statements could on these facts be *substantially* outweighed by the danger of *unfair* prejudice. For this proposition, however, Rowley cites *State v. Bedker*, 74 Wn. App. 87, 871 P.2d 673 (1994). *Bedker* supports a proposition that child hearsay statements may be excluded under ER 403 where the statements constitute a needless presentation of cumulative evidence. *Id.* at 93.

The State contends that any repetition in the instant case was not needless because the State bore the burden of proof and was required to prove the offense beyond a reasonable doubt against a vigorous defense. The facts of the instant case more closely resemble the facts of *State v. Dunn*, 125 Wn. App. 582, 587-89, 105 P.3d 1022 (2005), where the court found that ER 403 was not offended by the repetition of various child hearsay statements. The statements in the instant case were few. The victim testified, was subjected to cross-examination, and corroborated the facts. Rowley has not shown any undue prejudice. "[T]he admission of merely cumulative evidence is not necessarily prejudicial error." *Dunn* at

589, citing *State v. Todd,* 78 Wn.2d 362, 372, 474 P.2d 542 (1970)(further citation omitted).

Rowley also contends that the trial court erred by not holding a new child hearsay hearing after the Court of Appeals granted his PRP in No. 71367-1-I and ordered a new trial. Rowley asserts that the Court of Appeals ordered a new trial based on "both ineffective assistance of [trial] counsel and appellate counsel." Br. of Appellant at 11. But the Court of Appeals found only that Rowley's appellate counsel was ineffective and that the ineffectiveness was based on the fact that appellate counsel did not raise an open courts issue in the direct appeal. Unpublished Opinion, No. 71367-1-I. The open courts issue pertained only to jury selection at the trial itself; the pretrial, child hearsay hearing that was held outside the presence of the jury was untainted by this error.

These facts may be analogized to the case of *State v. Rainey*, 180 Wn. App. 830, 327 P.3d 56 (2014), where a public trial violation occurred due to a post-trial closure of a motion for a new trial. The court ruled that "a new trial is not necessary and remand for a new hearing on the motion for a new trial is the appropriate remedy." *Id.* at 843. Applying these facts by analogy to the instant case, the correct remedy here was a new

jury trial based on the closure of jury selection, but the trial court was not required to re-do all parts of the trial even though those parts were not disturbed by the public trial violation.

When an appellate court reverses a trial court, on remand the case stands in exactly the same procedural posture as it stood before the trial. *Wilson v. Horsley*, 137 Wn.2d 500, 511 n.5, 974 P.2d 316 (1999); *State v. Bange*, 170 Wn. App. 843, 852, 285 P.3d 933 (2012). This rule is sometimes referred to as the "law of the case," but "[t]he law of the case doctrine" generally gives "binding effect to a prior appellate ruling or jury instructions given without objection." *State v. Guttierrez*, 92 Wn. App. 343, 348, 961 P.2d 974 (1998). Thus, the doctrine probably has no application to whether the trial court's prior child hearsay hearing remained valid after remand. *Id.*

Instead, the terminology that applies here is probably the res judicata rule or the collateral estoppel rule. The facts here are closely akin to those applicable to *State v. Mannhalt*, 68 Wn. App. 757, 763-64, 845 P.2d 1023 (1992), except that *Mannhalt* involved a federal habeas corpus action rather than a state personal restrain petition. Nevertheless, *Mannhalt* and the instant case both involved collateral relief that resulted

in remand, and both involve the issue of whether such a remand requires that all issues be litigated anew following remand. *Id.* Here, the remand ordered by No. 71367-1-I did not affect the trial court's original child hearsay hearing; thus, the trial court's original order remained valid.

A retrial following reversal on appeal is a continuation of the original action. *State v. Belgarde,* 119 Wn.2d 711, 715, 837 P.2d 599 (1992); *State v. Hawkins*, 164 Wn. App. 705, 713, 265 P.3d 185 (2011). The doctrine of res judicata "relates to a prior judgment arising out of the same cause of action between the parties." *State v. Dupard*, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). "It has been long established that the doctrines of res judicata and collateral estoppel do apply in criminal cases." *State v. Peele*, 75 Wn.2d 28, 30, 448 P.2d 923 (1968); *Dupard* at 274.

Here, the only fact that changed between the trial court's original ruling admitting the child-victim's hearsay statements and the second trial was that the child-victim had grown older, a fact that was irrelevant to the admissibility of the child hearsay. There was no change in the child-victim's competency, either when the statements were made or when she testified at trial. And there was no change in the reliability of her

statements when she made them; nor was there any change in the admissibility of the statements under RCW 9A.44.120. Thus, the trial court's ruling was governed by the rule of res judicata, and the trial court did not err by declining to relitigate this issue.

2. Rowley alleges several instances of ineffective assistance of counsel. But in one instance Rowley has failed to show that his attorney's conduct was not a legitimate trial tactic, and in each instance Rowley has failed to show that his attorney's performance fell below an objective standard of reasonableness and has failed to show a reasonable probability that but for the alleged errors the outcome of the trial would have been different.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, Rowley must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster,* 140 Wn.

App. 266, 273, 166 P.3d 726 (2007). Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

Rowley first contends that his trial counsel was ineffective because she did not argue that the remand flowing from collateral review "required the trial court to abandon all prior trial proceeding rulings." Br. of Appellant at 14. But as argued above, the State contends that the child hearsay ruling was not affected by the open courts violation. Thus, the ruling was res judicata and was, in any event, not an erroneous ruling. It follows that even if trial counsel had made the argument, there is no probability that the result of the trial would be different.

Rowley next contends that his trial counsel was ineffective for not demanding that the court engage in an ER 403 analysis prior to admitting the child-victim's child hearsay statements at issue in this case. Br. of Appellant at 14. But as argued by the State above, admission of the child-victim's child hearsay statements was not substantially more prejudicial than probative; therefore, there is little likelihood that had counsel made this objection the outcome of the trial would have been different.

In support of this argument, Rowley cites and quotes *State v. Bedker*, 74 Wn. App. 87, 871 P.2d 673 (1994), which quotes *State v.*

Jones, 112 Wn.2d 488, 493-94, 777 P.2d 496 (1989). Br. of Appellant at 16-17. The quoted language from *Jones* supports the State's argument here, as follows:

> In addition, children's memories of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements children make outside the courtroom, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses.

Jones at 494. Still more, these are not just any statements; instead, these statements are subjected to the rigorous reliability tests outlined in RCW 9A.44.120 and *State v. Ryan,* 103 Wn.2d 165, 691 P.2d 197 (1984).

Rowley next contends that ineffective assistance of counsel occurred when Rowley's trial counsel failed to move for a mistrial when his "mother implied that he was a repeat child molester." Br. of Appellant at 14. But the witness's statement was in response to Rowley's cross-examination, and what the witness (Rowley's mother) actually said was: "I love my son. I don't like what he does, you know, but I also love my grandchildren. It was a mess." RP 180.

From this statement, Rowley perceives that his mother revealed that he was a repeat child molester. But the jury did not have the background knowledge possessed by Rowley, and it is unlikely that

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without this background knowledge the jury would have jumped to the conclusion that Rowley was a repeat child molester based on this vague, ambiguous statement. Thus, the State contends, trial counsel was wise to avoid any objection or motion to strike. Such a motion would have merely highlighted the statement and might have caused the jury to search for a sinister meaning even if they had merely been momentarily puzzled or had ignored the statement initially.

Therefore, counsel's failure to object or move to strike was a legitimate trial tactic, and legitimate trial tactics are not deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Still more, there is no showing, and there is little likelihood, that the outcome of the trial would have been different had Rowley's trial counsel objected to this statement.

D. CONCLUSION

The trial court in this case held a full child hearsay hearing and properly applied the *Ryan* factors and RCW 9A.44.120. Following the hearing, the trial court found that the nine-year old child-victim's child hearsay statements were admissible as evidence. After receiving the

evidence, a jury convicted Rowley of the crime of child molestation in the first degree. Rowley appealed the conviction, but the conviction was affirmed on appeal.

Thereafter, Rowley filed a personal restraint petition alleging, in addition to other allegations, that his appellate counsel was ineffective for not raising the issue on appeal that the public was excluded when some of the jurors at his trial were interviewed by the parties in the judge's chambers. Based solely on the issue of ineffective assistance of appellate counsel, the Court of Appeals granted Rowley's personal restraint petition and ordered a new trial. The child hearsay hearing was done outside the presence of the jury, and it was unaffected by the trial court's partial closure of jury voir dire.

Prior to conducting the new trial, the trial court declined to hold a new child hearsay hearing. The only thing that had changed between the time of the child hearsay hearing and the time of the second trial was that the child-victim had become several years older. But the reliability of the child-victim's statements *when they were made*, as described by RCW 9A.44.120 and the *Ryan* factors, had not changed. The status of the victim at the time of testifying is irrelevant to the admissibility of the child

hearsay (except when the status might affect availability, which is not the case here). Also, there is no showing that these child hearsay statements were in any way substantially more prejudicial than probative, requiring exclusion under ER 403. Thus, the doctrine of res judicata applied and the trial court did not abuse its discretion when it declined to hold a new child hearsay hearing prior to the second jury trial.

Finally, Rowley has not shown that his attorney's performance fell below an objective standard of reasonableness or that but for the alleged ineffective assistance of counsel there is a reasonable probability that the outcome of the trial would have been different.

DATED: February 29, 2016.

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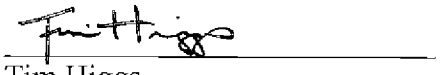

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