NO. 47736-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER KNIGHT,

Appellant.

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

The Honorable Scott Collier, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting hearsay statements made by the complaining witness which were not admissible pursuant to RCW 9A.44.120 and *State v. Ryan.* [1]

2. Insufficient evidence was presented to prove beyond a reasonable doubt that appellant Alex Knight had sexual contact with M.P., an essential element of the offense of child molestation in the first degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in admitting the hearsay statements made by the complaining witness M.P. under RCW 9A.44.120 and *State v. Ryan,* to law enforcement and to her mother, where the child's statements were recorded by members of law enforcement for purposes of the criminal case, and were therefore in no way spontaneous, where there was a reasonable possibility that the witness had a motive to lie before and after the police were contacted, and where, under all the facts, the circumstances surrounding the utterance of the statements failed to establish reliability required by *Ryan*? Assignment of Error 1.

2. The due process provisions of the Fourteenth Amendment to

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

the United States Constitution and of Article I, section 3 of the Washington Constitution require the State to prove beyond a reasonable doubt every essential element of the crime charged. The appellant was convicted of child molestation in the first degree. An essential element of the crime of child molestation in the first degree is sexual contact. Where, as here, the alleged sexual contact was over M.P.'s clothing, the State is required to establish the contact was for the purpose of sexual gratification. In the absence of evidence to establish sexual gratification, was Mr. Knight's right to due process violated when he was convicted of child molestation in the first degree? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural facts:

Alex Knight was charged in Clark County Superior Court by information with one count child molestation in the first degree. RCW 9A.44.083. Clerk's Papers (CP) 1. Mr. Knight's first trial before the Honorable Scott Collier occurred in November, 2014. 2-4RP at 194-537. [2] The court

[2]The record of proceedings consists of eight volumes and is designated as follows:
1RP July 11, 2014, (arraignment), November 17, 2014, (RCW 9A.44.120 hearing, CrR 3.5 hearing);
2RP November 18, 2014, (first jury trial);
3RP November 18, 2014, (first jury trial);
4RP November 19, 2014, (first jury trial);
5RP December 2, 2014, December 5, 2014, December 31, 2014, March 10, 2015,

declared a mistrial after the jury was unable to reach a unanimous verdict. 4RP at 535.

The court heard pre-trial motions on November 17, 2014, pertaining to the State's motion to admit M.P.'s statements made to her mother and also to law enforcement in a recorded interview. The court also heard testimony pursuant to CrR 3.5 regarding Mr. Knight's statements to Detective Julie Carpenter and Officer Mark Brinksi. 1RP (11/17/14) at 13-142.

a. CrR 3.5 hearing:

The court heard argument pertaining to CrR 3.5 on November 17, 2014. 1RP at 116-42. Officer Brinski stated that while responding to a call regarding a possible molestation he contacted a person in the yard of Mr. Alexander's house, and told that person he was looking for Mr. Knight. Mr. Knight came out of the house and spoke with the Detective while standing in the driveway. 1RP at 119, 122. Detective Brinski asked Mr. Knight if he wanted to make a written statement and he agreed to do so. 1RP at 123. Mr. Knight completed a written statement. 1RP at 123. The detective testified that he was wearing his uniform when he talked with Mr. Knight. 1RP at

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(motion hearings);
6RP April 13, April 14, 2015, (second jury trial),
7RP April 14, 2015, (second jury trial);=,
8RP April 15, 2015, (second jury trial); May 29, 2015, (sentencing).

123. He stated that he did not advise him that he was under arrest and did not tell him that he was free to leave. RP at 119.

Officer Brinski testified that later that day he interviewed M.P. again, spoke with another neighbor, and then returned to Mr. Knight's house and placed him under arrest. 1RP at 125.

After he was arrested, Mr. Knight was transported to the Vancouver Police Department, where he was questioned by Detective Watkins. 1RP (11/17/14) at 129. Detective Julie Carpenter read Mr. Knight his *Miranda* warnings and then was questioned. 1RP (11/17/14) at 130-34. When asked if he wanted to talk, Mr. Knight stated: "I don't know now. Yes and no. I just—I don't—I guess, yeah. It will help you guys." 1RP (11/17/14) at 134.

After hearing testimony, the Court found that Mr. Knight's statements to Officer Blinski at his house and his statement to Detective Carpenter at the police station were voluntarily made and were admissible. 1RP (11/17/14) at 142. No written findings of fact and conclusions of law have been entered.

b. RCW 9A.44.120 hearing:

The court heard the State's motion to introduce M.P.'s statements to her mother and her recorded statement to Detective Deanna Watkins and Detective Carpenter. 1RP at 31-106. Defense counsel did not challenge

M.P.s competency to testify. 1RP at 94.

Truly Parsons testified that she is the mother of M.P., who was born March 8, 2005. 1RP at 15. She stated that at approximately 3:00 p.m., June 28, 2014, M.P. returned home after playing at her friend K.K.'s house. She stated that about 45 minutes later K. and a man came to her front door. 1RP at 17. The man was identified as Alex Knight, who is K.K.'s uncle. 1RP at 17. K.K. wanted to ask M.P. a question and M.P. said 'no." 1RP at 17. Mr. Knight and K.K. then left. 1RP at 18. Ms. Parsons stated that M.P. said that Mr. Knight "touched [her] butt" and that he tried to kiss her. 1RP at 18. M.P. testified that when she was playing at her friend K.'s house. 1 RP at 25. She stated that K.'s dad, Chris Knight, went to the store, leaving her with his brother Alex Knight, who had come over to visit. RP at 25. She said that he touched her behind and that he asked her to give him a kiss. 1RP at 26.

M.P. said the she left the house and went back to her house and Mr. Knight and K.K. came to her house later that afternoon. 1RP at 27.

The court admitted all of the child hearsay witnesses over objection by defense counsel who agreed that the *Ryan* factors had not been met. 1RP at 114.

b. Second trial, conviction, and sentencing:

Following Mr. Knight's second trial before the Honorable Scott Collier in April 2015, a jury found Mr. Knight guilty of first degree child molestation as charged. 8RP at 922; CP 17.

Counsel for Mr. Knight unsuccessfully argued for judgment notwithstanding the verdict based on insufficient evidence to support the elements of the offense, referencing his previous augment made at the conclusion of the State's case in chief. 8RP at 928.

The parties agreed that Mr. Knight had an offender score of "3," with a standard range of 67 to 89 months. 8RP at 939. After hearing argument, the court imposed a standard range sentence of 89 months, with credit for 201 days served, and four "crime-related prohibitions" contained in Appendix F of the Judgment and Sentence. 8RP at 946; CP 130.

Timely notice of appeal was filed on June 26, 2015. CP 156. This appeal follows.

2. <u>Trial testimony</u>:

M.P. lived with her mother in a duplex in Vancouver, Washington. 6RP at 647. M.P.'s mother stated that her daughter would frequently go to her neighbor Chris Knight's house to play with his daughters, A.K. and K. K. 1RP at 648, 649.

Brandy Jennings, a neighbor of M.P., stated that on June 28, 2014, she

saw M.P. running out of a duplex and going back toward her own house. 6RP at 629. Ms. Jennings said that she also saw a man run out of the same duplex—while calling after her and using hand gestures—and that he tried to talk to M.P. 6RP at 630-31. She stated that M.P. did not appear to want to stop and talk to him. 6RP at 631. She said that M.P. briefly paused but that she was unable to hear what the man said to M.P. 6RP at 632.

Ms. Jennings she later texted with M.P.'s mother about the incident after she saw police cars in front of the house where M.P. lived with her mother. 6RP at 634. Exhibits 16 and 17. She identified the man she saw on June 28 as Alex Knight. 6RP at 637.

Ms. Jennings stated it was not unusual to see M.P. running in the neighborhood, but that she had not previously texted M.P.'s mother on those occasions. 6RP at 639, 644.

M.P. testified that she played with her friend K. and A. at their father's house the previous summer. 6RP at 673-74. She said while she was there with K. and K.'s father and Alex Knight, who is the uncle of K. and A. 6RP at 674. She said that Chris Knight left the house and that she was alone with Alex Knight in the living room. 6RP at 676. She said that he picked her up and put her on his lap and "started rubbing on her butt." 6RP at 678. When asked where he rubbed, she stated "I don't remember where exactly,

but he was, like, getting closer and closer to my perineum." 6RP at 678. M.P. explained that the perineum is the area "between your private area and your butt." 6RP at 678. She stated that she learned the term when she and her mother looked it up on the internet. 6RP at 678.

M.P. testified that she did not remember how long this contact took place and how many times his hand had moved. 6RP at 679. She stated that he then asked her to kiss him and that she hopped off his lap at that point. 6RP at 679. She testified that she did not kiss him. RP at 680. After that she sat alone on the couch in the living room and waited for Chris Knight to return. 6RP at 680. She walked home and on the way and she stopped because Alex Knight was calling her name. 6RP at 682. After he returned she stopped briefly but did not talk to him, and then continued to her house. 6RP at 682.

When she got home she sat on the couch. Later she heard a knock and saw Alex Knight and K. at the door to their house. She said that she was asked if she wanted to go outside and play and she told her mother "no." 6RP at 685.

Truly Parsons, M.P.'s mother testified that on June 28 M.P. went to play at K.'s house. 6RP at 649. M.P. came back after an hour and sat on the couch and watched television. 6RP at 651. Approximately 45 minutes later

Mr. Knight and K. came to their house and asked if M.P. was there. 6RP at 654-57. She stated that K. wanted to ask M.P. a question, and she said that she said "no," that she did not want to talk. 6RP at 657. K. and Mr. Knight walked away from the house. 6RP at 657. After they left, her mother asked what was going on, and M.P. said that Chris Knight's brother touched her on the rear and tried to kiss her. 6RP at 659.

Ms. Parsons called the police who arrived ten to fifteen minutes later. 6RP at 660. M.P. was subsequently taken to the police station where she was interviewed by detectives. 6RP at 660.

Police interviewed M.P. on June 28, 2014.[3] M.P. told police that she was visiting her friend K.K, who was three years old at the time. 7RP at 721, 723. She said that K. and her father went to the store, leaving her with K.'s uncle, Alex Knight. 7RP at 721. She said that as she was leaving, Alex Knight called her over and asked if they could still be friends." 7RP at 738. She said that when K. when to her room to change, Mr. Knight touched her and then then told her to kiss him. 7RP at 721, 729, 732. She said that he pulled her onto his lap and rubbed her on her bottom with his hand. 7RP at 734-35. She told police that this lasted for about ten seconds. 7RP at 739.

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[3]A recording of the interview with M.P. was played to the jury on April 14, 2015. 7RP at 718-752.

After he told her to kiss him, she got off his lap and went to sit on the couch until K.'s father returned from the store. 7RP at 736. After K.'s father got back, she said that she had to go home to help her mother with shopping. 7RP at 737. M.P. said that Mr. Knight lived several blocks away from K.'s house, and that he would occasionally babysit, but that it was the first time that she had been left alone with him. 7RP at 723. M.P. told police that during the incident that as Mr. Knight moved his hand it got closer and closer to her "perineum," which she described as the area between the anus and vaginal area. 7RP at 723. She said that she returned to her house and sat in the living room on the couch with K. and Mr. Knight came to the house. 7RP at 724. After Mr. Knight left, M.P. told her mother that he had touched her. 7RP at 725-26.

At the conclusion of the State's case in chief, the defense moved to dismiss the charge, arguing that the State failed to prove that any touching of M.P. was for the purpose of sexual gratification. 7RP at 761. The court ruled that the buttocks can considered a "sexual part of the body." 7RP at 762.

Chris Knight, Alex Knight's brother, testified that M.P. is his neighbor and that she is close friends with his daughters A. and K. 7RP at 785. He testified that on June 28, 2014, M.P. came over to his house to see his daughter K., and Alex arrived later. 7RP at 786. Chris Knight left to

drive to a nearby convenience store, while his brother, K. and M.P. remained at the house. 7RP at 786. He said that he bought only cigars, and that there was no line and he was able to pay for the items immediately. 7RP at 787. He testified that the store was located two to three blocks from his house and that he was gone from the house for a total of two to three and a half minutes. 7RP at 787, 790, 791. After he returned from the store, K., M.P. and his brother were in the living room, just as they had been when he left. 7RP at 788. K. did not appear to have had a bath, as M.P. had stated to police. RP at 788. Chris Knight stated that after he returned from the store, M.P. left and went back to her own house. 7RP at 789. He stated that nothing seemed unusual or out of the ordinary. 7RP at 789.

Alex Knight testified that he walked from his house to his brother's house on June 28, 2014, between 11 a.m. and noon. 7RP at 793. He said that M.P. and K. were playing and running in and out of the house while he was playing games on a computer in the living room. 7RP at 794. Chris left to go to the convenience store and he and K. and M.P. were in the living rom. 7RP at 794. K. was not in the bath tub and she did not take a bath while Chris was gone. 7RP at 794. Mr. Knight stated that the girls were both running around and he was laughing and joking with them and he tickled M.P. when they were playing. 7RP at 795. He said that M.P. kissed him, and that after that

he immediately stepped back and told her that it was inappropriate and that she should not be kissing anyone except people in her family. 7RP at 795, 800. He said that after she kissed him and admonished her, he sent her home. 7RP at 800. He denied that the touched M.P.'s bottom. He said that his brother was gone not more than three to four minutes and probably less than that. 7RP at 796. He said that the store was nearby and that he could walk there in five minutes. 7RP at 796. He said that after he told her go home, M.P. was pulling on her shoes and getting ready to leave when Chris returned from the store in his pickup truck. 7RP at 797, 801. Approximately half an hour to 45 minutes after M.P. left, Alex Knight walked with K. to M.P.'s house. 7RP at 797-98. He testified that K. wanted to invite M.P. to go for a walk because it was a nice day. 7RP at 798. He said that his brother suggested that they go to a nearby park to walk. 7RP at 799. Mr. Knight and K. walked to M.P.'s house. At her house, M.P. first stood behind her mother and then went and sat on a couch. 7RP at 799. When asked, she said that she did not want to come out and that she did not like Mr. Knight. 7RP at 800. He denied that he asked M.P. if they were still friends when he went to her house later that day. 7RP at 802.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS

DISCRETION IN ADMITTING M.P.'S HEARSAY STATEMENTS UNDER RCW 9A.44.120 AND *STATE V. RYAN*.

a. The trial courts erroneous ruling resulted in the introduction of otherwise admissible testimony.

Hearsay by a child under age ten describing sexual contact is admissible if the time, content and circumstances of the statements bear sufficient indicia of reliability. RCW 9A.44.120(a)(1); *State v. Ryan,* 103 Wn.2d 165, 174, 691 P.2d 197 (1984). See *also In re Dependency of A.E.P.,* 135 Wn.2d 208, 226, 956 P.2d 297 (1998).

A child need not be testimonially competent in order for her out-of-court statements to be reliable; the analysis is different. *State v. C.J.*, 672, 681, 63 P.3d 765 (2003). The competency determination looks forward to see if the child will be able to participate fully in cross examination. The hearsay exception, on the other hand, looks back to the making of the statement for evidence the statement is trustworthy. *C.J.*, 148 Wn.2d at 683.

This finding of reliability is required because the child hearsay statute is not a firmly rooted hearsay exception, thus, the Confrontation Clause concerns mandate a showing that the statements have particularized guarantees of trustworthiness. *State v. Slider,* 38 Wn. App. 689, 696, 688 P.2d 538 (1984). See also *State v. Stevens,* 58 Wn. App. 478, 486, 794 P.2d

38 (1990) (admission of hearsay without sufficient indicia of reliability violates defendant's right of confrontation). Following a pre-trial hearing, the trial court ruled that M.P.'s hearsay statement was admissible under *State v. Ryan.* 1RP at 108-114.

The child's mother and Detective Carpenter were permitted to testify to hearsay statements pursuant to the court's hearsay ruling. Truly Parsons testified that M.P. told her that Mr. Knight touched her rear with his hand and told her to kiss him. 6RP at 659-60. Detective Carpenter testified that she and Detective Watkins interviewed M.P. at the Vancouver Police Station on June 28, 2014. 1RP at 43, 53. Detective Carpenter stated that M.P. said that Mr. Knight "was tickling her, and he lifted her, put her on his lap, and proceeded to use his hand to rub her bottom," and that he asked her to kiss him. 7RP at 717. A portion of the interview was played to the jury. 7RP at 718-752. Exhibit 14.

When the State seeks to introduce an alleged child sex offense victim's hearsay statements under RCW 9A.44.120, the trial court must determine if the time, content, and circumstances of the statements provide sufficient indicia of reliability. RCW 9A.44.120(1). The statute requires a showing that the statements manifest reliability. RCW 9A.44.120 provides in part:

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 . . ., not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . 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[.]

RCW 9A.44.120.

b. <u>The trial court's ruling must be reviewed under the criteria established in *State v. Ryan*.</u>

Ryan and subsequent cases identify nine nonexclusive factors that aid the trial courts in making the "reliability" determination required by under RCW 9A.44.120(1).

The nine *Ryan* factors, which are derived from *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982), and *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970) are: (1) apparent motive to lie; (2) child's general character; (3) number of witnesses to the statement; (4) whether the statement was spontaneous or elicited in response to questions; (5) timing of the statement and witness's relationship to the child; (6) whether the statement asserts past facts; (7) whether cross-examination could show the child's inability to understand the alleged act; (8) likelihood that the child's recollection is faulty;

and (9) whether the circumstances suggest the child misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76. See *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *Dutton v. Evans,* 400 U.S. 74, 88-89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970). The trial court need not find that every factor supports reliability; however, the court must conclude that these factors are substantially met. *State v. Swan,* 114 Wn.2d at 652.

This Court reviews a child hearsay ruling for abuse of discretion. *Woods*, 154 Wn.2d at 623. The court's findings must be based on substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Not every factor need be satisfied, but they must be "substantially met." *Woods*, 154 Wn.2d at 623-24. The statement's reliability must be evident in the record. *State v. Stevens*, 58 Wn. App. 478, 487, 794 P.2d 38 (1990).

In this case, the nine *Ryan* factors weigh in favor of excluding M.P.'s statements, because the time, content, and circumstances of the statements do not provide sufficient indicia of reliability. Competency to testify is not a prerequisite to the admission of statements by a witness under the child hearsay rule, but it is a factor in determining the reliability and hence the admissibility of such statements. *State v. Przybylski*, 48 Wn. App. 661, 739 P.2d 1203 (1987). An incompetent child is not available within the meaning of the statute

and therefore evidence corroborating the abuse is required in order to admit the hearsay statements. *State v. McKinney,* 50 Wn. App. 56, 747 P.2d 1113 (1987), *review denied,* 110 Wn.2d 1016 (1988). Here, the court accepted counsel's concession that M.P. was competent, stating that M.P. is a competent witness. "[W]e start with the presumption of competency, and there's no doubt in this Court's mind that she's competent." 1RP at 108. The court's hearsay analysis in this case was not conducted with the consideration of competence.

The first *Ryan* factor—the child's apparent motive to lie—weighs in favor of excluding the child's statements. M.P. stated that Mr. Knight asked him to kiss her. Mr. Knight, however, stated that M.P. was in trouble at the house—she was asked to leave because, as he testified, she had kissed him while they were playing. According to Mr. Knight, M.P. behaved inappropriately and therefore had motive to lie about the alleged incident. Under these circumstances, M.P. may have felt motivated to shift the blame for her action of kissing Mr. Knight—as he testified—back to Mr. Knight. *See, e.g, Dependency of A.E.P.,* 135 Wash.2d 208, 229, 956 P.2d 297 (1998). The second *Ryan* factor (general character), is not directly implicated, although the record suggests that M.P. was vague or asserted that she did not remember certain facts during cross examination. In the absence of additional evidence M.P.'s general character, the second *Ryan* factor weighs against admission of her

statements. The third factor also weighs in favor of exclusion. As in *Ryan,* "the initial statements of the [child] were made to one person, although subsequent repetitions were heard by others..." *Ryan, at* 176. The fourth factor (spontaneity) weighs in favor of exclusion of M.P.'s statements to the detectives were not made spontaneously. Hearsay statements made to governmental employees with an interest in the case, such as a police officer gathering evidence for a criminal matter, begs the question of reliability, because such statements and utter lack the spontaneity that is the touchstone of hearsay reliability. See, e.g., *State v. Flett*, 40 Wn. App. 277, 286, 699 P.2d 774 (1985). Under *Ryan,* the child's statements therefore lacked any degree of spontaneity, and this factor of the analysis was manifestly not met. *Ryan,* 103 Wn.2d at 175-76.

The fifth factor (timing and relationship) also favors exclusion. M.P.'s disclosure was made after she got in trouble by Mr. Knight, and may have been prompted to fabricate an accusation because she was concerned about getting in trouble at her house. The eighth factor supports exclusion. There is some possibility that M.P.'s recollection is faulty, as evidenced her testimony during cross-examination, which was selective.

There is evidence to show that M.P. has motive to misrepresent Mr. Knight's involvement (under the ninth factor)because she was asked to leave

the house and not able to see her friend K., although both K. and Mr. Knight came to her house later to see if she wanted go to the park.

Given these criteria, there was more than merely a remote possibility that M.P.'s recollection was, at the very least, inaccurate. *Ryan,* 103 Wn.2d at 175-76. The circumstances of the M.P. reporting to her mother, and then to the detectives, raise concerns for reliability by virtue of the possibility that M.P., fearing that she was in trouble from an adult, initially lied to her mother when she went home early from the Mr. Knight's house, and compounded the issue when questioned in a formal setting by police officers.

M.P.'s testimony at the child hearsay hearing made clear that her allegations arose in response to questioning by an mother when she returned home early and did not want to stay outside during the afternoon . 1RP at 27.

Finally, the trial court did not discuss each of the *Ryan* factors. The court did not enter written findings reflecting the *Ryan* factors to support a finding of reliability as to each of the out-of- court statements offered by the prosecutor. The trial court abused its discretion because, although it referred to some, it did not refer to each of the *Ryan* factors to insure reliability of M.P.'s out-of-court declarations. RCW 9A.44.120(1) mandates a finding of reliability. Accordingly, Mr. Knight's child molestation conviction must be reversed and the charge remanded.

According to *State v. McKinney,* 50 Wn.App. 56, 61, 747 P.2d 113(1987):

> "In exercising this discretion, *Ryan* requires that the trial court consider nine factors bearing on the reliability of a hearsay statement. *State v. Ryan,* 103 Wash. 2d 165, 175-76, 691 P.2d 197 (1984). These factors must be "substantially met before a statement is demonstrated to be reliable". *State v. Griffith,* 45 Wn.App. 728, 738-39, 727 P.2d 247 (1986)."

The totality of the circumstances of these statements indicates it was an abuse of discretion to admit them as trial evidence under the *Ryan* factors. The circumstances surrounding M.P.'s statements were not conducive to reliability, and the trial court abused its discretion in admitting them under the child hearsay statute. RCW 9A.44.120.

c. <u>The erroneous admission of the hearsay evidence requires reversal because the hearsay witnesses provided a substantial part of the evidence against Mr. Knight.</u>

The *Ryan* errors described above require reversal of the defendant's conviction. M.P. did testify at both trials. However, there was no physical evidence, and there was no indirect evidence of abuse, such as any precocious knowledge of sexual activity. See *Swan*, 114 Wn.2d at 623.

Where a child's hearsay statements are erroneously admitted, such error is reversible if, within reasonable probabilities, the outcome of the trial would have been affected if the error had not occurred. *State v. Smith,* 106 Wn.2d

772, 780, 725 P.2d 951 (1986). In this case, it was through hearsay testimony that the jury gained corroboration of the child's claim. M.P.'s testimony was not sufficiently detailed with respect to establishing proof of the offense beyond a reasonable doubt, and the cumulative testimony from the hearsay witnesses, together provided a substantial part of the evidence. The hearsay testimony therefore created reversible prejudice. See *Traver v. State,* 568 N.E.2d 1009, 1013-14 (Ind.1991) (child hearsay statements admitted in absence of the required foundation was reversible error because the sum of the hearsay testimony was a significant part of the evidence at trial).

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT FINDING BEYOND A REASONABLE DOUBT THAT MR. KNIGHT COMMITTED CHILD MOLESTATION IN THE FIRST DEGREE.

a. The State was required to produce sufficient evidence to prove beyond a reasonable doubt the required elements of the crime of child molestation in the first degree.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to

the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green,* 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Mr. Knight was convicted of child molestation in the first degree. Reversal and dismissal is required because the State presented insufficient evidence to establish Mr. Knight had sexual contact with M.R., and failed to prove that he touched M.P. for the purpose of sexual gratification. Under RCW 9A.44.083(1):

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.010(2) provides:

> "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

Such "intimate parts of a person" can be either clothed or unclothed. *State v. Howe,* 151 Wn.App. 338, 346, 212 P.3d 565 (2009) (citing *State v. Jackson,* 145 Wn.App. 814, 819, 187 P.3d 321 (2008)).

To convict Mr. Knight of child molestation in the first degree, the

State must prove beyond a reasonable doubt that he had sexual contact with M.P. RCW 9A.44.083. The sufficiency of evidence to establish "sexual contact" depends on the totality of the facts and circumstances. *State v. Harstad,* 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Where, as here, the touching occurred over clothing, the State must present additional evidence that the touching was for the purpose of sexual gratification. *State v. Veliz,* 76 Wn. App. 775, 778, 888 P.2d 189 (1995).

Sexual gratification is not an element of the crime but defines the term "sexual contact" and requires a showing of purpose or intent. *State v. French*, 157 Wn.2d 593, 610-11, 141 P. 3d 54 (2006). A showing of sexual gratification is required "because without that showing the touching may be inadvertent." *State v. T.E.H.,* 91 Wn.App. 908, 916, 960 P.2d 441 (1998).

Sexual gratification may not be inferred from "touching of intimate parts of the body other than the primary erogenous areas;" in such cases, "courts have required some additional evidence of sexual gratification." *State v. Powell*, 62 Wn.App. 914, 917-18, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

It is well-established in Washington that a purpose of sexual gratification can be inferred from the plain act of touching a child's sexual or other intimate parts by a person who is not acting in a caretaking function.

State v. Wilson, 56 Wn. App. 63, 68, 782 P.2d 224 (1989*), rev. denied* 114 Wn.2d 1010 (1990); See also *State v. Ramirez,* 46 Wn. App. 223, 730 P.2d 98 (1986); *State v. Whisenhunt,* 96 Wn. App. 18, 980 P.2d 232 (1999). However, when the touching is through clothing, or of parts other than the primary erogenous areas, additional evidence of sexual gratification is required. *Powell,* 62 Wn. App. at 917; see also *State v. Camarillo,* 115 Wn.2d 60, 63, 794 P.2d 850 (1990)(rubbing zippered area of boy's pants for a full five to ten minutes); *State v. Johnson,* 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence an unrelated male with no caretaking function wiped a 5-year-old girl's genitals with a washcloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him.

The evidence of touching may be insufficient when the touching occurred while a related adult was performing a caretaking function.

> Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.

State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1992).

The additional evidence is also insufficient where the touching was fleeting, inadvertent, or subject to innocent explanation. For instance, in

Powell, the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. 62 Wn. App. at 916-17. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. 62 Wn. App. at 918. The touching was described as "fleeting" and the evidence of the defendant's purpose was "equivocal." 62 Wn. App. at 917–18. The court determined that the evidence was insufficient to support the inference that the defendant touched the child for the purpose of sexual gratification. 62 Wn. App.at 918. The Court found this evidence insufficient, and ruled:

> [I]n those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification. . .
>
> Here, the evidence of Mr. Powell's purpose in both touchings is equivocal. According to Windy, while she was sitting on his lap he hugged her about the chest and later touched her bottom while lifting her off his lap. The record suggests it was a fleeting touch. The evidence he touched her underpanties "in the front part [sic]." She did not remember how he touched her. She said, "Hey. Stop it." and he said, "Oops" and stopped. His touching her thighs, which occurred in his truck is also susceptible of innocent explanation. She was clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests not to tell were made.

62 Wn. App. at 917-18.

The additional evidence of sexual gratification must be unequivocal. In

State v. Price, this Court affirmed the defendant's conviction for child molestation in the first degree, based on a four year-old girl's allegations that the defendant pinched her vagina over her clothes, and the mother's observation that the girl's vaginal area was bright red and swollen. 127 Wn. App. 193, 196, 110 P.3d 1171 (2005).

In *State v. Whisenhunt,* the court affirmed the defendant's conviction for child molestation in the first degree, which was based on the testimony of a five year-old girl that on three separate occasions the defendant sat in a seat ahead of her on a bus, reached his arm over the seat, and touched her "privates." 96 Wn. App. 18, 20, 980 P.2d 232 (1999). The Court noted, "Unlike in *Powell,* this touching was not equivocal or fleeting in the sense the purpose of the contact was not open to innocent explanation." 96 Wn. App. at 24. See also *State v. Camarillo,* 115 Wn.2d 60, 794 P.2d 850 (1990) (sufficient additional evidence of sexual gratification where defendant placed the child on his lap and rubbed the zipper area of the child's pants for prolonged period on two separate occasions and on a third occasion, the defendant put his hand down the child's pants and fondled him); *Harstad,* 153 Wn. App. at 22-23 (sufficient additional evidence of sexual gratification when defendant reached under child's blanket while she was alone, rubbed child's inner thigh over her clothing, and breathed heavily).

Here, no presumption arises that the touching described by M.P. was for the purpose of sexual gratification. *See State v. Price,* 127 Wn.App. 193, 202, 110 P.3d 1171(2005), *aff'd,* 158 Wn.2d 630, 146 P.3d 1183 (2006); *Powell,* 62 Wn.App. at 917. When Mr. Knight was visiting his brother's house the girls were running around and he was "laughing and joking with them." 7RP at 795. He stated that while playing with them he tickled them, and that M.P. kissed him on the lips him during the tickling and horseplay when Chris Knight left the house for a very short period of time and drove to the store. 7RP at 795, 796.

There was no additional evidence establishing that any touching was for the purpose of sexual gratification. None of the indicia of sexual gratification are present in the case. Rather, the evidence established only that the touching was inadvertent, equivocal, reasonably explained, and that it occurred while Mr. Knight was acting in a *de facto* caretaking role as "adult in charge" while his brother was gone. See *State v. Powell,* 62 Wn. App. at 917 (Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.)

As Mr. Knight explained, he was engaged in tickling with the girls when they were playing. 7RP at 795. The record supports the inference that

he may have accidentally touched J.R. while tickling her. In contrast to *Whisenhunt,* this contact was innocently and reasonably explained. There was no evidence the touching occurred on separate occasions, as in *Camarillo,* and no evidence of threats, bribes, or requests not to tell, as referenced in *Powell.* The totality of facts and circumstances establish that, the rubbing of her buttock described by M.P. occurring while he was tickling her.

b. The State did not prove the "rubbing" of her buttock by Mr. Knight described by M.P. was done for sexual gratification.

M.P. testified that Mr. Knight touched her left buttock with his hand in a forward and backward motion outside of her clothing. 6RP at 679. She stated that as he rubbing, his was getting "closer and closer to my perineum." 6RP at 679. M.P. said Mr. Knight asked her to kiss him. 6RP at 679. This evidence does not prove that Mr. Knight had sexual contact with M.P. for purposes of the child molestation statute. As noted above, "sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party of a third party." RCW 9A.44.010(2). However, when the touching is over the child's clothing or not in a primary erogenous area, additional evidence of sexual gratification is required. see *Powell,* 62 Wn. App. at 917.

Cases upholding convictions for child molestation for contact over

clothing also demonstrate that the evidence necessary to prove the purpose of sexual gratification is not present in Mr. Knight's case. In *Harstad* this Court addressed convictions for molesting two sisters occurring when the defendant was residing in their mother's home. *State v. Harstad*, 153 Wn. App. 10, 15-16, 218 P.3d 624 (2009). The defendant moved his hands around one child's "private area" while they were under a blanket on the couch, and he was "breathing hard" while he touched her. The child also described the defendant apparently masturbating in the kitchen and said he asked to see her vagina. *Id.* at 19-20. This Court upheld the child molestation conviction even though there was no evidence Harstad touched the child under her clothing. "While the evidence does not show that Harstad touched [the child] under her clothing, Harstad's moving his hand back and forth and his heavy breathing, 'like a whole bunch,' support an inference of sexual purpose to satisfy the sexual contact element of first degree child molestation." *Id.* at 22-23. The defendant also rubbed the other girl's inner thigh very close to her vagina while she was wearing underwear. This evidence was supplemented by her statements that she saw the defendant play with his penis, he wanted her to touch his penis, and he asked to see her "pussy." *Harstad,* 153 Wn. App. at 16, 18 19. This Court concluded the evidence also supported the jury's conclusion that the touching was intended to promote his sexual gratification. *Id.* at 22. See *also State v. Young,* 123 Wn.

App. 854, 99 P.3d 1244 (2004)(attempted child molestation conviction affirmed when defendant put his hand underneath child's pants to try to feel her buttocks, repeatedly tried to place money in her belt, told her "you know what you have to do for it," and tried to undo her belt), *aff'd* 160 Wn.2d 799, 161 P.3d 967 (2007); *State v. Price,* 127 Wn. App. 193, 196-97, 110 P.3d 1171 (2005) (pinching a 4-year-old's vagina on the outside of her clothing was not fleeting or inadvertent when it caused redness and swelling), *aff'd,* 158 Wn.2d 630, 146 P.3d 1183 (2006).

Sexual gratification cannot be inferred from the mere touching itself, due to Mr. Knight's *de facto* caretaking role at the time when his brother left the house and there were no other adults, but must be based on some additional proof. Here, the State presented no evidence that Mr. Knight was sexually aroused or excited, or that he was breathing hard or that he touched himself. M.P.'s allegation that he asked her to kiss him, which Mr. Knight denied, may be viewed by a finder of fact as part of the horse play and tickling that occurred.

c. <u>The proper remedy is reversal of the conviction.</u>

Mr. Knight's conviction for child molestation in the first degree was based on insufficient evidence of "sexual contact." A conviction based on insufficient evidence cannot stand. *State v. Enlow,* 143 Wn. App. 463, 469,

178 P.3d 366 (2008). To retry Mr. Knight for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). The State presented evidence of touching of a short duration that took place outside M.P.'s clothing and that he asked her to kiss him. In the context of the ticking and playing that occurred with the girls, This evidence does not prove beyond a reasonable doubt that the contact was sexually motivated. The only other evidence presented by the State was that, after the incident, Mr. Knight went with his niece to M.P.'s house and that she did not want to come outside to walk in the park with K. and Mr. Knight, which the State argued was an unusual reaction because K. and M.P. were friends. This evidence does not provide the additional support needed to prove Mr. Knight acted with the purpose of sexual gratification. In the absence of sufficient evidence to establish the essential element of "sexual contact," his conviction for child molestation in the first degree must be reversed and the charge dismissed.

E. CONCLUSION

For the foregoing reasons, Mr. Knight respectfully requests that the court reverse his conviction.

DATED: February 26, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

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Of Attorneys for Alexander Knight

CERTIFICATE OF SERVICE

The undersigned certifies that on February 26, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 26, 2016.

PETER B. TILLER

APPENDIX A

RCW 5.60.050

Who are incompetent.

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.

RCW 9A.44.083

Child molestation in the first degree.

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.120

Admissibility of child's statement—Conditions.

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.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

TILLER LAW OFFICE

February 26, 2016 - 4:09 PM

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