Supreme Court No. 99129-4
(Court of Appeals No. 79924-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

M.D. (juvenile),

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

M.D. asks this Court to review the opinion of the Court of Appeals in *State v. M.D.*, No. 79924-0-I (June 22, 2020). M.D. filed a motion for reconsideration, which was denied July 24, 2020. Copies of the opinion and the order[1] denying reconsideration are attached in the appendix.

B. ISSUES PRESENTED FOR REVIEW

1. To determine if a child is a competent witness, the trial court must assess if the child is able to accurately recall events or circumstances that occurred before or contemporaneous with the incident in question. Here, Adam[2] was unable to accurately recall events and circumstances that occurred before and during the charging period. However, the Court of Appeals held Adam was competent because he gave consistent statements regarding the alleged molestation. This Court should accept review because the Court of Appeals' opinion conflicted with binding precedent from this Court and the Court of Appeals that a child's competency must be measured by their recall of prior and

[1] M.D. has filed a motion simultaneously with this petition for review requesting the Court of Appeals correct the title of the opinion and order to comport with the Court of Appeals' February 3, 2020 order correcting the case title to "*State v. M.D.*" The title of the opinion and order attached in the appendix have been redacted to remove reference to M.D.'s middle initial and date of birth, information not included in the official case title.
[2] M.D. and A.K. are referred by the pseudonyms Michael and Adam.

contemporaneous events and circumstances known to the court. RAP 13.4(b)(b)(1), (2).

2. Child hearsay statements are only admissible if they meet certain statutory criteria and the nine-factor reliability test from *State v. Ryan*, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984). Here, the trial court erroneously admitted several hearsay statements based on unsupported factual findings as well as flawed legal analysis. The Court of Appeals deferred to the trial court's factual findings despite the lack of substantial evidence in the record, and also misapplied the statutory requirements and the *Ryan* framework. Review is warranted because the Court of Appeals misapplied the complex legal and evidentiary standard to admit child hearsay. RAP 13.4(b)(1).

3. The State must prove every essential element of a crime beyond a reasonable doubt. Lack of a marital relationship is an essential element of first degree child molestation. As recognized by the Court of Appeals in *In re Personal Petition of Crawford*, 150 Wn. App. 787, 209 P.3d 507 (2009), evidence of the parties' familial relationship and relative ages is insufficient to satisfy this element. Here, the State presented no evidence that Michael and Adam were not married to each other, but the Court of Appeals held the State had met its burden because Washington law prohibits marriage between first cousins. In doing so, the Court declined

to follow *Crawford* and ignored that Washington recognizes the valid marriages of other jurisdictions. This Court should accept review because the decision below is in conflict with precedent that evidence of age and familial relationship is insufficient to prove the lack of a marital relationship in first degree child molestation cases. RAP 13.4(b)(1), (2).

3. As this Court held in *State v. Smith*, 150 Wn.2d 135, 153, 75 P.3d 934 (2003), the right to a jury trial must be analyzed in light of the law as it existed at the time the constitution was adopted. Juveniles were entitled to jury trials when the Washington constitution was adopted in 1881, but this right had been stripped away by 1937. In the years since, the distinctions between juvenile and adult proceedings have eroded. Michael's "adjudication" now carries all of the consequences of an adult conviction, including sex offender registration and the risk of involuntary commitment. This Court should accept review in order to address whether juveniles are entitled to jury trials, which presents a significant question of law as well as an issue of substantial public interest. RAP 13.4(b)(3), (4).

4. Community supervision conditions cannot be unconstitutionally vague. Here, Michael was ordered to not possess, use, access, or view material depicting simulated sex, which unnecessarily encompasses movies and television shows not created for sexual gratification. Conditions restricting access to material depicting simulated sex were held

unconstitutionally vague by this Court in *State v. Padilla,* 190 Wn.2d 672, 677, 416 P.3d 712 (2018), but the decision below did not distinguish this opinion. This Court should accept review because the decision below is in conflict with an opinion of this Court holding a prohibition on materials depicting simulated sex is unconstitutionally vague. RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

Michael and Adam are cousins and almost seven years apart. RP 49. Adam and Michael occasionally spent time together at their grandmother's house. RP 306–308. Their grandmother's son and stepson, who were between Michael and Adam in age, also lived at the house. RP 306–308. The four boys, who at all relevant times were between the ages of four and twelve, played a tag game they labeled "the rape game," in which one boy would run up behind the other, hump them with their clothes on, scream "rape," and run off. RP 310–11.

When Adam was six years old and visiting his father's house, he was accused by his female cousin of humping her while they were clothed. RP 69, 87. When confronted by his father, Adam said he was playing "the rape game" and started crying. RP 69, 71. Adam's father said he would tell Adam's mother about the incident when she came to pick him up. RP 72, 92. Adam "knew he was in trouble" and was "hesitant to go" with his

mother when she arrived. RP 73. His mother described him as "down, sad, distraught" when she picked him up. RP 107.

In the car, Adam's mother asked him if he knew what the word "rape" meant, and he said no. RP 108. His mother began to explain the mechanics of sex, stating that "the penis goes into…" RP 109. According to Adam's mother, he cut her off, interjecting, "[p]enis goes into the butt." RP 109. When his mother asked him why he would say such a thing, Adam allegedly stated, "[b]ecause [Michael] has done it to me." RP 109.

According to Adam's mother, Adam explained that he and Michael would go to the bathroom at their grandmother's house; that Michael would sit on the toilet; and that Michael would put "his penis on [Adam's] butt" while both of their pants were down. RP 111–12. Adam alleged this happened when he was five. RP 112–13.

Adam's mother went to the police. RP 123–24. The police scheduled an interview with a child interview specialist. CP 2. During the videotaped interview, Adam initially denied that anything happened. Ex. 3 at 20. Upon questioning, Adam eventually claimed that Michael "put his testicles in my bottom . . . That's another word for penis." Ex. 3 at 21; CP 2.

At police request, Michael's mother brought him to the police department, where he was grilled by two detectives about Adam's

allegations. Ex. 9; CP 3. Michael denied ever being sexually inappropriate with Adam or anyone else. Ex. 9 at 14–18, 20–25, 30–31, 33–35; CP 3. He explained the "rape game" was a game of tag he played with the other boys at his grandmother's house, and that it involved "thrusting" ones' hips into another person's body while clothed and standing up, and then running away. Ex. 9 at 10–13; CP 3.

Beyond interviewing Adam and Michael, the police did no further investigation. *See* CP 17 (Finding of Fact 25). There was no attempt to interview the grandmother or other boys in the home. RP 255. Adam was never given a medical exam for sexual assault. CP 17.

Michael was charged with one count of child molestation in the first degree. CP 5. The amended information alleged this happened sometime between May 3, 2016 and September 3, 2017, when Adam would have been mostly between five and six and a half and Michael would have been twelve and thirteen. *See id.*

The court held a multi-day trial in which several witnesses testified to hearsay statements Adam made about the alleged molestation. The court held a child competency hearing to determine Adam's competency and the admissibility of these statements. RP 179–92. Despite Adam's inability to recall basic information from the charging period, the court concluded Adam was competent to testify. RP 199–201; CP 21. The

court also concluded Adam's hearsay statements to his father about "the rape game," his subsequent statements to his mother in the car, and the entire child specialist interview were "sufficiently reliable to be admissible." RP 293; CP 23.

At trial, Adam testified no one had ever touched him in his "private parts." RP 205. However, he conversely testified Michael "put his penis in my butt," which he described as the "rape game," but said he never saw Michael's penis. RP 207. He testified that this had only ever happened once, and also that it happened more than once, "[m]aybe a little less than 30 times." RP 208, 211. He testified that this happened when he was "four" and "four to five." RP 212. Adam also denied ever playing the "rape game" with his female cousin, even though this was the impetus for the allegations. RP 213.

The court found Michael guilty of child molestation. RP 400; CP 15–19. The court acknowledged the investigation was "offensive," noting the lack of interviews, searches, and medical evidence. RP 398; *see also* CP 17 (Finding of Fact 25). The court stated it had "considered whether an investigation this bare was in and of itself a reasonable doubt," but

found Michael guilty based solely on Adam's uncorroborated testimony and hearsay statements. RP 399; *see also* CP 16.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals applied the wrong framework in concluding Adam was competent, warranting review.

In evaluating a child's competency to testify, the court weighs five "*Allen* factors"—whether the child:

> (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (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. Woods, 154 Wn.2d 613, 618, 114 P.3d 1174 (2005) (citing *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

The second *Allen* factor requires that a child have the mental capacity *at the time of the alleged occurrence* to receive an accurate impression of it. *See Allen*, 70 Wn.2d at 692. "A child's ability to receive just impressions at the time of the [alleged] abuse may be demonstrated by the child's ability to recall events or circumstances occurring *before* the [alleged] abuse or *during the time period* of the [alleged] abuse." *Woods*, 154 Wn.2d at 619 (citing *In re Dependency of A.E.P.*, 135 Wn.2d 208, 225, 956 P.2d 297 (1998) (emphases added)).

"If the child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well." *A.E.P.*, 135 Wn.2d at 225. A child's ability to supply details about the alleged abuse itself is not dispositive. *Id.* A child witness's memory and perception should be "tested against *objective facts* known to the court, rather than disputed facts and events in the case itself." *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987) (emphasis added). The third *Allen* factor similarly includes consideration of a child witnesses' ability to recall contemporaneous events in determining whether the child has a sufficient memory. *See State v. S.J.W.*, 149 Wn. App. 912, 925–26, 206 P.3d 355 (2009).

The dispositive question was whether Adam had the intelligence and ability to recall events or circumstances contemporaneous with the charging period. *See Woods*, 154 Wn.2d at 619; *A.E.P.*, 135 Wn.2d at 225; *S.J.W.*, 149 Wn. App. at 925–26. Based on the charging documents, this period was when Adam was between five and six and a half. CP 5. Adam was unable to demonstrate accurate recall of contemporaneous events and circumstances from this time period.

For example, Adam was repeatedly unable to recall the name of his kindergarten teacher, the teacher he had when he was five and six years old, during the charging period. RP 188; *see also* Ex. 4 at 41. Adam was

also unable to accurately recall the events of his fifth and sixth birthdays. *Compare* RP 190–91 *with* RP 141–42. He mistakenly claimed that his sister had not yet been born when he told his parents about the allegations in September 2017, although she was born in 2015. RP 143; Ex. at 45. Adam also repeatedly denied ever playing the "rape game" with his female cousin, although this was the impetus for the allegations against Michael. *See* Ex. 4 at 20; RP 213. He also denied ever talking to his grandmother about the allegations against Michael, even though she questioned him extensively the day he made the allegations. *See* Ex 4 at 48; RP 81, 333.

Taken as a whole, the record shows that Adam did not have the mental capacity during the charging period to receive accurate impressions or sufficient memory to retain independent recollections. *See Allen*, 70 Wn.2d at 692; *Woods*, 154 Wn.2d at 619. Accordingly, the second and third *Allen* factors were not satisfied.

The Court of Appeals concluded the second *Allen* factor was satisfied because Adam "consistently described how [Michael] molested him" and "the circumstances of the molestation on multiple occasions and in his testimony." Slip Op. at 9 (attached in the Appendix). The Court of Appeals also concluded the third *Allen* factor was satisfied in part because Adam "demonstrated a consistent recall about being molested and the

circumstances surrounding it." Slip Op. at 10. The Court concluded "[t]he discrepancies in [Adam's] testimony and his lack of recall regarding birthday parties and teachers' names go more to credibility than competency." *Id.*

This conclusion ran counter to binding precedent from this Court and the Court of Appeals that a child's mental capacity and memory must be measured against their recall of contemporaneous events, specifically "objective facts" that are known to the court, "rather than disputed facts and events in the case itself." *Przybylski*, 48 Wn. App. at 665; *Woods*, 154 Wn.2d at 619; *A.E.P.*, 135 Wn.2d at 225.

Because the Court of Appeals found the second and third *Allen* elements were satisfied due to Adam's consistent testimony regarding the alleged molestation itself and disregarded his inability to recall contemporaneous circumstances and events, review is warranted. RAP 13.4(b)(1), (2).

2. The Court of Appeals misapplied the complex legal framework for child hearsay in holding Adam's hearsay statements were properly admitted, warranting review.

Child hearsay statements are admissible in a criminal case when (1) a declarant under the age of ten describes actual or attempted sexual contact "performed with or on the child by another," (2) the declarant testifies, and (3) the court finds the hearsay statement to be reliable. RCW

9A.44.120. In determining whether a child's hearsay statement is reliable, the court analyzes nine 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 statements;"
> (4) "whether the statements were made spontaneously;"
> (5) "the timing of the declaration and the relationship between the declarant and the witness;"
> (6) "the statement contains no express assertion about past fact";
> (7) "cross-examination could not show the declarant's lack of knowledge";
> (8) "the possibility of the declarant's faulty recollection is remote";
> (9) "the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement."

State v. Ryan, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984). Here, the trial court concluded the *Ryan* criteria were met with regards to (1) Adam's statement to his father about playing the "rape game" with his cousin; (2) Adam's statements to his mother in the car shortly after; and (3) Adam's statements made during his child forensic interview. *See* CP 22–23.

The first hearsay statement to Adam's father was not admissible because it did not describe "any act of sexual contact performed with or on the child *by another*." *See* RCW 9A.44.120(1)(a)(i). Here, Adam was the perpetrator, not the recipient, of the sexual contact. However, the Court of Appeals disregarded the plain meaning of the statute in concluding the statement fit within the statutory definition. Slip Op. at 10–11.

The hearsay statement to Adam's mother did not meet the *Ryan* criteria. All of the evidence presented at trial supported the conclusion that Adam had a motivation to lie to his mother. The testimony presented indicated Adam was upset because he was in trouble and potentially faced discipline for his behavior. RP 72–73, 92, 107. Further, Adam made the allegations against Michael in direct response to questioning by his mother regarding the discipline-worthy behavior. RP 107–109. As this Court has noted, a "motive to lie" can be as innocent as a child having candy they are not supposed to have. *Ryan*, 103 Wn.2d at 176. Here, the stakes were much higher. A motivation to lie underlies several of the *Ryan* factors—including 1, 4, 5, and 9—and seriously cuts against reliability.

Regardless, the Court of Appeals affirmed the trial court's conclusion the statement to Adam's mother was reliable based largely on the trial court's erroneous finding that Adam had no motive to lie. Slip Op. at 12–16. In doing so, the Court ignored the maxim that a trial court's factual findings must be supported by substantial evidence, which exists "where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." *See State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

Concerning the hearsay statement Adam made to the forensic interviewer, the Court of Appeals concluded the statements were

admissible because they were made spontaneously, the fourth *Ryan* factor. Slip Op. at 16–17. In doing so, the Court disregarded the weight of evidence in the record that this admission was not made spontaneously, including the forensic interviewer's own testimony that getting to the topic of the alleged molestation "took longer than it often does." RP 151, 165. The Court also disregarded the other *Ryan* factors Michael challenged on appeal, including the first, eighth, and ninth factors. Because the Court of Appeals misapplied the *Ryan* test, review is warranted. RAP 13.4(b)(1).

In sum, the Court of Appeals disregarded the plain meaning of the child hearsay statute, ignored the lack of substantial evidence underpinning the trial court's factual findings, and misapplied the *Ryan* framework. Review is warranted. RAP 13.4(b)(1).

3. Review is warranted because the Court of Appeals declined to follow published case law on the evidence required to prove the lack of a marital relationship.

The State is required to prove all essential elements of a case beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. The lack of a marital relationship is an essential element of child molestation. RCW 9A.44.083(1). Here, the State presented *no* evidence Michael and his cousin Adam were not married, and thus failed to prove an essential element of the crime.

In *In re Pers. Restraint. of Crawford*, the Court of Appeals held in a published opinion that lack of a marital relationship cannot be proven by "speculation" based on the ages and familial relationship of the defendant and the alleged victim. 150 Wn. App. 787, 797–98, 209 P.3d 507 (2009). *Crawford* concerned the comparability of an out-of-state conviction, in which the petitioner was convicted of sexually molesting his 7-year old niece when he was 25 years old. *See id.* Although the State asserted it was "unaware of any jurisdiction in the United States that would allow a legal marriage between a 25-year-old male and a 7-year-old niece," the Court of Appeals held this was insufficient to prove the lack of a marital relationship. *See id.* The Court of Appeals in its opinion below determined Michael's comparison to *Crawford* was "not apt." Slip Op. at 18 n.61.

In addition to disregarding *Crawford*, the Court of Appeals further held that because Washington law prohibits marriage between first cousins, the State had satisfied its burden on the non-marriage element. Slip Op. at 1–2, 17–18. In doing so, the Court disregarded that Washington recognizes marriages entered into in other jurisdictions. *See In re Warren*, 40 Wn.2d 342, 243 P.2d 632 (1952).

Because the Court of Appeals' opinion conflicts with *Crawford* and *Warren*, this Court should accept review. RAP 13.4(b)(1), (2).

4. This Court should accept review in order to address a juvenile's constitutional right to a jury trial.

Both the state and federal constitutions recognize the enshrined right to a jury of one's peers. *Duncan v. Louisiana*, 391 U.S. 145, 151–56, 88 S. Ct. 1444, 20 L. Ed. 491 (1968); U.S. Const. amend. VII; Const. art. I, §§ 3, 21. This right "shall remain inviolate." Const. art. I, section 21. Despite these constitutional maxims, juveniles like Michael are denied their right to a jury trial pursuant to state statue. *See* RCW 13.04.021(2) ("Cases in the juvenile court shall be tried without a jury.").

In *State v. Smith*, this Court recognized that the state constitutional right to a jury trial must be analyzed in light of the law as it existed at the time the constitution was adopted. 150 Wn.2d 135, 153, 75 P.3d 934 (2003). When the Washington constitution was adopted in 1881, the law did not differentiate between juveniles and adults, and thus both were entitled to jury trials. Code of 1881, ch. 87, § 1078. When the juvenile courts were established, state law continued to provide the right to demand trial by jury. *See* Laws of 1905, ch. 18, § 2. However, this law was repealed in 1937, stripping juveniles of this constitutional right. Laws of 1937, ch. 65, § 1, at 211.

In *State v. Chavez*, this Court affirmed previous decisions holding that juveniles are not entitled to a jury trial. 163 Wn.2d 262, 269–72, 180

P.3d 1250 (2008) (collecting cases). However, in doing so, this Court did not address *Smith*'s maxim that the "extent of the [jury] right must be determined from the law and practice that existed in Washington at the time of our constitution's adoption in 1889." 150 Wn.2d at 151. Instead, the *Chavez* Court adopted the reasoning that, "while juvenile proceedings are similar to adult criminal prosecutions, enough distinctions still exist to justify denying juvenile offenders the right to a trial by jury." 163 Wn.2d at 269 (citations and quotation marks omitted). This is not the correct standard in light of *Smith*. But even if it were, Michael would still be entitled to a jury trial because the distinctions between juvenile and adult proceedings have eroded.

Michael was charged and convicted of a "crime," despite best efforts to construe juvenile convictions as "adjudications." *See* CP 5; *In re Juveniles A, B, C, D, E,* 121 Wn.2d 80, 87, 847 P.2d 455 (1993). Upon his arrest, Michael was required to provide fingerprints and a photograph, just like an adult arrestee. *See* RCW 43.43.735. He was also required to provide a DNA sample upon conviction, just like adults. RCW 43.43.754. Due to his conviction, he is now subject to sex offender registration, just like adults convicted of similar offenses, and is subject to public notification. *See* RCW 9A.44.130(1). He may also be subject to involuntary commitment predicated on his juvenile offense, similar to

adult sex offenders. *See* RCW 71.09; *In re Detention of Anderson*, 185 Wn.2d 79, 86–87, 368 P.3d 162 (2016). His conviction will factor into his offender score if he is ever convicted of another crime in the future, and will never "wash out." RCW 9.94A.525(2). Every time Michael applies for a lease or a job, his conviction will hinder him, as it is unlikely landlords and employers will distinguish between a juvenile "adjudication" and a criminal "conviction" for child molestation. *See* RCW 43.43.830(6).

"[N]o offense can be deemed so petty as to warrant denying a jury if it constitutes a crime." *Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1983). Here, Michael was not convicted of some "petty" crime, but a serious felony, carrying serious, life-long consequences. *See* RCW 9A.44.083. This Court should accept review in order to revisit *Chavez's* holding in light of the *Smith* standard. The right to a jury trial in juvenile proceedings is both a significant constitutional question and an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3), (4).

5. **This Court should accept review because the condition prohibiting material depicting "sexually explicit conduct" is unconstitutionally vague as recognized by this Court in *Padilla.***

In the juvenile context, community supervision is "an individualized program" tailored to the juvenile's specific crime and

individual rehabilitative needs. *See* RCW 13.40.020(5). However, due process requires that community supervision conditions not be vague. *See* U.S. Const. amend. XIV; *Rose v. Locke*, 423 U.S. 48, 49, 96 S. Ct. 243, 46 L. Ed. 2d 185 (1975); *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A supervision condition is unconstitutionally vague if "(1) it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *Padilla*, 190 Wn.2d at 677.

Pursuant to condition five, Michael is directed to "not possess, use, access, or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)." CP 50 (condition five). "Sexually explicit conduct" is defined by statute in turn as "actual or *simulated*" sexual intercourse, penetration, masturbation, and sadomasochistic abuse, *inter alia*. *See* RCW 9.68A.011(4) (emphasis added).

As this Court recognized in *Padilla*, a condition prohibiting the viewing of simulated sex "unnecessarily encompasses movies and television shows not created for the sole purpose of sexual gratification. Films such as *Titanic* and television shows such as *Game of Thrones*

depict acts of simulated intercourse." 190 Wn.2d at 681. Accordingly, this restriction "impermissibly extends to a variety of works of arts, books, advertisements, movies, and television shows," and is unconstitutionally vague. *Id.* at 681–82.

However, the Court below did not address *Padilla*, concluding the condition "provides sufficient specificity to warn [Michael] against viewing a movie produced for an 'unequivocally sexual' reason, such as an adult film's depiction of intercourse, as opposed to a sex scene in a James Bond movie." Slip Op. at 21. Because the Court of Appeals' decision conflicts with this Court's decision in *Padilla*, review is warranted. RAP 13.4(b)(1).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

DATED this 24th day of August, 2020.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. M.[redacted]D.,[redacted] Appellant.	)	No. 79924-0-I UNPUBLISHED OPINION

VERELLEN, J. — All witnesses are presumed competent to testify, and a party challenging the competence of a child witness must establish a compelling reason to rebut this presumption. Because M.D. fails to rebut the presumption of competence, the court did not abuse its discretion by letting A.K. testify.

A court also has considerable discretion when weighing the Ryan[1] factors and deciding to admit testimonial child hearsay under RCW 9.44.120. Because the court's findings of fact were, with an immaterial exception, supported by substantial evidence and the Ryan factors were substantially met, the court did not abuse its discretion by admitting A.K's hearsay statements.

M.D. contends the State failed to prove he and his victim, A.K., were not married. Because the evidence showed the boys were first cousins and first

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

cousins cannot be married in Washington, the State adequately proved the two were not married when M.D. molested A.K.

M.D. challenges as unconstitutional the statute limiting juvenile defendants to bench trials. Because our Supreme Court already resolved this challenge to the same statute, M.D.'s challenge fails.

M.D. challenges four conditions of community custody on vagueness grounds. Because the conditions restricting his access to controlled substances and materials depicting "sexually explicit conduct" provide sufficient guidance, they are not vague. But the conditions prohibiting M.D. from possessing "any weapon" and from being tardy to school could invite arbitrary enforcement and require clarification.

Therefore, we affirm M.D.'s conviction for first degree child molestation and remand for the court to reconsider two conditions of community custody.

FACTS

About one week before six-year-old A.K. was to start first grade, he and his cousin were playing together at A.K.'s father house. A.K.'s cousin complained to A.K.'s father that A.K. had climbed on top of and humped her. A.K.'s father reprimanded his son and demanded an explanation. A.K. said he was "playing the rape game."[2] Soon after, A.K.'s mother picked up her son, and A.K.'s father explained what A.K. had done.

[2] Report of Proceedings (RP) (Dec. 11, 2018) at 71.

To explain to A.K. why the rape game was bad, A.K.'s mother began to explain sex. When explaining the mechanics of sex, A.K. interrupted her and said, "penis goes into the butt."[3] A.K.'s mother had never spoken with him about sex before, heard him talk about sex, or heard anyone discuss sex around him. She asked, "Why would you say that?" and A.K. replied, "Because [M.D.] has done it to me."[4]

Until that day, M.D. and A.K. had regularly spent time together at their grandmother's apartment along with two older male cousins. M.D., who is seven years older than A.K., would visit his grandmother every few months. In addition to ordinary games, the four cousins would play the rape game, which meant running up behind someone and humping the other person while shouting "rape." Once, when A.K. was five years old, their grandmother caught them playing it and reprimanded the older boys.

A.K. explained to his mother that when he was five, M.D.'s penis had come into contact with his behind. He had accompanied M.D. to the bathroom because M.D., claiming to be afraid of an uncovered vent hole in the bathroom ceiling, demanded company from his younger cousins whenever he had to defecate. M.D. lowered his pants, told A.K. to do the same, and then M.D. put "his penis in [A.K.'s] butt."[5]

[3] Id. at 109.

[4] Id.

[5] Id. at 110; RP (Dec. 12, 2018) at 207.

After taking A.K. to his first day of first grade, his mother visited the police. About eight months later, M.D., who was then 14, was charged in juvenile court with first degree child molestation. The court conducted a bench trial, determined A.K. was competent to testify, and admitted A.K.'s hearsay statements pursuant to the child hearsay statute, RCW 9A.44.120. It found M.D. guilty and imposed conditions of community custody.

M.D. appeals.

ANALYSIS

As a threshold matter, the State argues we should not consider two defense exhibits M.D. relies on in his briefing. It argues the exhibits were not offered as evidence, not considered by the court, and should not be considered on appeal. The State is correct that M.D. did not introduce the exhibits until after the court's oral ruling on A.K.'s competence to testify. But the two exhibits, consisting of defense interviews, were used during trial for purposes of impeachment by prior inconsistent statement. RAP 9.1(a) provides that the record on appeal includes "exhibits." Even though the two exhibits were used only for this limited purpose, they are properly part of the record on appeal. Most importantly, the two exhibits and arguments based upon them do not change the outcome of this appeal. We decline to strike them from the record on appeal.

I. Testimonial Competence

M.D. challenges two of the trial court's findings of fact made to support its conclusion that A.K. was competent to testify. We review a trial court's findings of

fact for substantial evidence.[6] "'Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.'"[7] "Unchallenged findings of fact are verities on appeal."[8]

M.D. contends findings of fact 7 and 8 lack substantial evidence. Finding of fact 7 states, "There is no indication that A.K.'s ability to perceive the alleged incidents was deficient in any way. The incidents involved primarily what A.K. felt, but also what he saw and heard happening to him. His parents and other witnesses all testif[ied] that he was developmentally standard and would not have had any unusual gap[s] in these abilities."[9]

Unchallenged finding of fact 2 states A.K. was performing at grade-level in school. Unchallenged finding of fact 5 states when A.K. was in first grade, he "was able to describe in detail what he had done that morning, responding with sufficient vocabulary to an open-ended question" when interviewed by a child forensic interviewer about the molestation.[10] And after the court questioned A.K. to determine his competency, it found he "displayed [a] similar ability [with] other questions posed by the court and both parties."[11] No evidence indicated A.K. had any sensory or mental deficits. Because sufficient evidence existed to let the trial

[6] State v. Delbosque, 195 Wn.2d 106, 116, 456 P.3d 806 (2020).

[7] Id. (quoting State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

[8] State v. A.X.K., 12 Wn. App. 2d 287, 293, 457 P.3d 1222 (2020).

[9] Clerk's Papers (CP) at 21.

[10] Id.

[11] Id. (unchallenged finding of fact 5).

court conclude A.K. did not have any perceptual deficits at the time of the molestation or when called to testify, substantial evidence supports finding of fact 7.

Finding of fact 8 states, "A.K. accurately described where he had gone to school since kindergarten and his teachers this year and last."[12] At the time of trial, A.K. was in second grade. M.D. is correct that A.K.'s testimony and interview with defense counsel are not definite about the name of his first grade teacher. However, sufficient evidence existed for the court to conclude A.K. accurately described where he attended school.

M.D. also challenges the court's legal conclusions about A.K.'s competence. We review a trial court's determination about the competency of a witness for abuse of discretion.[13] A court abuses its discretion where its decision was based on untenable factual or legal grounds.[14]

Every witness, regardless of age, is presumed competent to testify.[15] A witness is not competent to testify when they "appear incapable of receiving just impressions of the facts" about which they are questioned "or of relating them truly."[16] To rebut the presumption of competence, the party opposing the proposed child witness's testimony must provide a "compelling reason"

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[12] Id.

[13] State v. S.J.W., 170 Wn.2d 92, 97, 239 P.3d 568 (2010).

[14] State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

[15] S.J.W., 170 Wn.2d at 100 (citing RCW 5.60.020; ER 601).

[16] RCW 5.60.050(2). A witness is also incompetent when "of unsound mind, or intoxicated at the time of production for examination." RCW 5.60.050(1).

challenging the child's competence to testify.[17] A trial court then relies on the standards in RCW 5.60.050 to determine competence and uses the Allen[18] factors to guide its determination.[19] The court considers whether the child:

> (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (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.[20]

No single factor is dispositive.[21] Inconsistencies in a child's testimony go to weight and credibility, not to competency.[22]

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[17] S.J.W., 170 Wn.2d at 101.

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

[19] S.J.W., 170 Wn.2d at 100. M.D. cites Jenkins v. Snohomish County Pub. Utility Dist. No. 1, 105 Wn.2d 99, 102-03, 713 P.2d 79 (1986), for the proposition that the Allen factors are an elemental test and any unmet element requires finding the child incompetent to testify. The Jenkins court's conclusion that "each element of the Allen test is critical" relied on the premise that "[t]he Legislature and the courts have recognized that child witnesses present special problems." 105 Wn.2d at 102. But the Jenkins court was evaluating a child's competence to testify based on former RCW 5.60.050 (1881), 105 Wn.2d at 101, which the legislature later amended to remove the suggestion that children under 10 may not be suitable witnesses. S.J.W., 170 Wn.2d at 100. Without this presumption against child witnesses, the Jenkins court's approach no longer aligns with how courts evaluate a child's competence to testify. See S.J.W., 170 Wn.2d at 98 (considering the standards for child testimonial competency and concluding "[n]either [In re Dependency of] A.E.P.[, 135 Wn.2d 208, 225, 956 P.2d 297 (1998),] nor Jenkins offers any guidance on the issue before us.").

[20] State v. Woods, 154 Wn.2d 613, 618, 114 P.3d 1174 (2005) (citing Allen, 70 Wn.2d at 692).

[21] See S.J.W., 170 Wn.2d at 100 (Allen factors merely "serve to inform the judge's [competency] determination").

[22] Kennealy, 151 Wn. App. at 878.

M.D. argues A.K. was unable to receive an accurate impression of the molestation. The purpose of the second Allen factor is to "ensure that the child has the mental capacity to perceive accurately the events to which the child is testifying."[23] The trial court "may infer the child's ability to accurately perceive events from the 'child witness's overall demeanor and the manner of [his] answers,' thus satisfying the second Allen factor."[24]

In State v. Woods, our Supreme Court upheld a trial court's determination that the second Allen factor was met and a four-year-old and a six-year-old were competent to testify where both victims gave accurate details about their abuser's apartment and about the general time period when the abuse occurred.[25] Because both witnesses were able to provide details of events and circumstances contemporaneous to the abuse and delivered consistent testimony about the molestation, both were competent to testify.[26]

Similarly, in State v. Kennealy, the court upheld the trial court's determination that a child sex abuse victim was competent to testify.[27] Despite the victim's diagnosed attention-deficit hyperactivity disorder and his confusion about

[23] Woods, 154 Wn.2d at 622.

[24] Id. at 621-22 (quoting State v. Sardinia, 42 Wn. App. 533, 537, 713 P.2d 122 (1986)).

[25] 154 Wn.2d 613, 620-22, 114 P.3d 1174 (2005).

[26] Id. at 621-22.

[27] 151 Wn. App. 861, 879, 214 P.3d 200 (2009).

many specific details, the court observed the victim testify consistently about the nature of the abuse and testify accurately about details in his life.[28]

Here, the court observed A.K. testify at the competency hearing. He consistently described how M.D. molested him.[29] He also related in multiple interviews and his testimony that he was abused while five years old, although he was unsure whether the abuse began at four or five. A.K. consistently described the circumstances of the molestation on multiple occasions and in his testimony. He also provided specific details about his grandmother's apartment. As in Woods and Kennealy, the court did not abuse its discretion by concluding the second Allen factor was satisfied.

M.D. argues the third Allen factor was not met because A.K. did not have a sufficient memory to independently recall the abuse when he testified. M.D. compares this case to State v. Swan,[30] where the court upheld a trial court's conclusion that a child witness was not competent to testify when the child did not know the day of the week or the color of her dress, failed to recognize her father or the defendants in the courtroom, and did not understand her obligation to tell the truth. Unlike the child witness in Swan, A.K. remembered details from years earlier, knew basic information about his life, understood his obligation to tell the

[28] Id. at 878-79.

[29] Compare State Ex. 3, at 21 (A.K. telling the forensic interviewer M.D. "put his testicles in my bottom" and that testicles is "a different word for penis."); RP (Dec. 12, 2018) at 207 (A.K. testifying M.D. "put his penis in my butt."); RP (Dec. 11, 2018) at 112 (mother testifying A.K. reported feeling M.D.'s penis on his butt).

[30] 114 Wn.2d 613, 645-47, 790 P.2d 610 (1990).

truth, and demonstrated a consistent recall about being molested and circumstances surrounding it. The discrepancies in A.K.'s testimony and his lack of recall regarding birthday parties and teachers' names go more to credibility than competency.[31] Because we presume all witnesses were competent to testify and M.D. has not provided a compelling reason to rebut that presumption, the court did not abuse its discretion by concluding A.K. was competent to testify.

II. Child Hearsay

M.D. challenges the court's decision to admit three sets of hearsay statements made by A.K to his father, his mother, and the child forensic interviewer.

Child hearsay statements are admissible under RCW 9A.44.120 in a criminal case when (1) the declarant was under the age of 10 and making a statement describing any actual or attempted act of sexual contact "performed with or on the child by another," (2) the declarant testifies, and (3) the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability."[32]

A. Statements to Father

M.D. argues the court erred by admitting A.K.'s statement to his father that he was "playing the rape game" with his cousin because the statement "did not describe 'any act of sexual contact with or on the child by another'" and so was not

[31] See Kennealy, 151 Wn. App. at 878.

[32] Other hearsay statements are admissible under circumstances not present here.

admissible under the child hearsay statute.[33] We review questions of statutory interpretation de novo.[34]

A.K. said he was "playing the rape game" with his cousin, which consisted of him approaching her from behind, humping her, and yelling "rape."[35] Rape is, even if simulated, inherently sexual, as is one person thrusting themselves upon another while shouting "rape." The statute does not allow admission of a child's statement reporting the performance of a sexual act by another with a different child,[36] but A.K., the child-declarant, reported his own performance of a sexual act with another. The statement was admissible.

B. Statements to Mother

M.D. argues the court erred when determining the reliability of two other sets of hearsay statements. We review a decision to admit child hearsay statements for abuse of discretion.[37]

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[33] Appellant's Br. at 28, 29 (quoting RCW 9A.44.120(1)(a)(i)). The State argues M.D. failed to object to this testimony and raises his objection for the first time on appeal. The record does not support the State's contention. The trial court blended the hearsay hearing and trial and told the parties it would listen to all testimony before ruling on the State's proffered child hearsay statements. RP (Dec. 11, 2018) at 27-29. After the State finished its case-in-chief, it moved to admit A.K.'s statement to his father, RP (Dec. 12, 2018) at 272, and the parties argued the motion, RP (Dec. 12, 2018) at 272-93. Under the procedures the trial court used here, M.D. did not need to object to A.K.'s father testimony when it was given because the court contemplated arguments regarding admission would be considered later. The objection was preserved.

[34] S.J.W., 170 Wn.2d at 97.

[35] RP (Dec. 11, 2018) at 71; RP (Dec. 12, 2018) at 310.

[36] State v. Harris, 48 Wn. App. 279, 284, 738 P.2d 1059 (1987).

[37] Kennealy, 151 Wn. App. at 879 (citing Woods, 154 Wn.2d at 623).

The Ryan test provides nine factors for a court to consider when deciding the reliability of child hearsay:

> (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.[38]

No single factor is dispositive, but a statement is not considered reliable until the factors are "substantially met."[39]

M.D. argues the court improperly admitted the statements A.K. made to his mother in the car when he first revealed M.D.'s abuse. He challenges the court's conclusions on the first, third, fourth, fifth, eighth, and ninth Ryan factors.

M.D. argues court's conclusion on the first Ryan factor was not supported by substantial evidence. According to M.D., A.K. had a motive to lie because he was afraid of being disciplined by his mother for playing the rape game. M.D. argues the ninth Ryan factor was not met for similar reasons. The trial court concluded:

> A.K. had a potential motive to lie, the possibility of getting in trouble with his mom, but there is no indication that that potential motive in any way influenced A.K. A.K. expressed no concern about getting in trouble with his mother, there is no indication he was afraid, [and] he
>
> never requested that anyone not report anything to avoid getting him in trouble. Quite simply, while this was a potential motive to lie

[38] Id. at 880 (citing Ryan, 103 Wn.2d at 175-76).

[39] Id. at 881.

> raised by the defendant, nothing factually supports a connection between the proposed motive and A.K.'s statement.[40]

To show he feared discipline, M.D. relies heavily on the fact that A.K. appeared "very quiet . . . down, sad, [and] distraught" before being picked up.[41] This single fact does not unsettle the court's conclusions. After A.K.'s father reprimanded him for playing the rape game and said he would tell A.K.'s mother, A.K. cried briefly and then played with his cousin again. After being picked up by his mother, A.K. was willing to speak with her about sex and the rape game, becoming "really upset" and "very reluctant" to speak only while revealing M.D.'s molestation.[42] Although A.K.'s father testified his son appeared "hesitant to go . . . [b]ecause he knew he was in trouble,"[43] A.K. did not know what "rape" meant,[44] allowing a reasonable inference he did not fear severe discipline for playing the rape game because he did not recognize the seriousness of his conduct.[45] No evidence suggests A.K. sought to avoid being disciplined or having his mother find out what he had done with his cousin. The court's finding of fact

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[40] CP at 22.

[41] Appellant's Br. at 30 (citing RP (Dec. 11, 2018) at 107).

[42] RP (Dec. 11, 2018) at 113.

[43] Id. at 73.

[44] Id. at 107-08.

[45] See State v. Johnson, 188 Wn.2d 742, 762, 399 P.3d 507 (2017) ("'When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.'") (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

was supported by substantial evidence. The court did not err by concluding the first and ninth Ryan factors were satisfied.

On the third Ryan factor, the court concluded "A.K. made multiple accounts that were all consistent, including similar language to describe the respondent's reactions."[46] Citing Ryan, M.D. contends the court misconstrued this factor because A.K.'s statements to his mother were made only to her. But cases after Ryan have held hearsay statements reliable where the initial statements were made only to one person and then repeated consistently to others soon after.[47]

Here, A.K. first revealed the abuse only to his mother and repeated the allegations consistently to others that same day. A.K. made the same allegations with additional details over a month later when he spoke with the forensic child interviewer. Because sufficient evidence in the record supports this finding of fact, it is supported by substantial evidence. The court did not err by concluding the third factor was met.

M.D. contends the fourth Ryan factor was not met because A.K. spoke with his mother while afraid of being punished for playing the rape game. But the court concluded A.K.'s fear of punishment did not affect what he told his mother, and that finding was supported by substantial evidence. More significantly, the court found A.K.'s initial statement to his mother, "the penis goes in the butt," was

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[46] CP at 22.

[47] See Swan, 114 Wn.2d at 650 (third factor indicated reliability where "more than one person heard similar stories of abuse" at different times); see also State v. Leavitt, 111 Wn.2d 66, 74-75, 758 P.2d 982 (1988) (hearsay statements were reliable when only one person initially heard the abuse allegations and they were corroborated by similar statements to others).

spontaneous.[48] That response prompted A.K.'s mother to ask additional questions, which the court concluded were open-ended. Substantial evidence supports these findings.[49] The court did not err by concluding the fourth factor was met.

M.D. argues the fifth Ryan factor was not met because "the timing of [A.K.'s] allegation suspiciously coincided with his anticipation of being in trouble with his mother."[50] But A.K. made the same allegations after the risk of discipline passed when speaking with a trained child forensic interviewer. The presence of a trained interviewer made the statements more reliable,[51] and, as discussed, the court found any possible fear of trouble with his mother did not affect A.K.'s revelations to her. M.D. fails to show the court misconstrued this factor.

M.D. contends the eighth Ryan factor, the risk of faulty recollection, was not met because A.K. was not competent to testify. This factor is satisfied when the record indicates a child has a normal memory and ability to perceive events.[52] Because, as discussed, the record showed A.K. had a normal memory, the ability

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[48] CP at 22.

[49] M.D. appears to argue no statement can be considered spontaneous if "made in response to questioning," Appellant's Br. at 32 (citing Ryan, 103 Wn.2d at 176), but our case law has held for over 30 years that a statement can be legally spontaneous for a Ryan analysis if made in response to open-ended questions. Swan, 114 Wn.2d at 649-50; Kennealy, 151 Wn. App. at 883; State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

[50] Appellant's Br. at 32.

[51] See State v. Young, 62 Wn. App.895, 901, 802 P.2d 829 (1991) (citing Henderson, 48 Wn. App. at 551) (presence of trained professionals, such as social workers, when child reveals sexual abuse enhances the statements' reliability).

[52] Woods, 154 Wn.2d at 624 (citing id. at 902).

to perceive events, and was competent to testify, the court did not err by concluding this factor was satisfied.[53]

Because the Ryan factors were substantially met, the court did not abuse its discretion by admitting A.K.'s hearsay statements to his mother.

C. Statements to the Child Forensic Interviewer

M.D. contends the court improperly admitted A.K.'s statements to the child forensic interviewer because his responses were not spontaneous or reliable.[54] M.D. argues the interviewer posed leading questions such as "I'd heard that you talked to your mom about, like, something that happened with your body. . . . I wanna learn about, um, about, if something happened, like, with your body. Tell me about that."[55] But this was an open-ended question because it did not suggest an answer or invite sexual details.[56] In its oral ruling, the court explained A.K.'s responses in the interview were spontaneous because he responded to "very open-ended questions [in] a very professional, well-done child interview."[57] The record supports this conclusion. Because A.K.'s statements were made in

[53] Competency to testify is neither necessary nor sufficient to satisfy this factor, Swan, 114 Wn.2d at 652, but, here, the analyses support each other.

[54] M.D. also argues the court improperly admitted irrelevant information because it admitted the entire interview. But, as the State notes, M.D. fails to explain what prejudice he suffered from admitting the entire interview. And, even if the admission was erroneous, M.D. waived any objection because he did not raise a relevance objection to admitting the entire interview. RAP 2.5(a).

[55] Appellant's Br. at 35-36 (citing State Ex. 3, at 21).

[56] See Kennealy, 151 Wn. App. at 883 (explaining questions were open-ended when they "did not suggest that the child respond with a statement about sexual contact.").

[57] RP (Dec. 12, 2018) at 291.

response to open-ended questions, they were legally spontaneous for the Ryan analysis.[58] M.D. fails to show the court abused its discretion by admitting A.K.'s statements to the child forensic interviewer.

III. Failure to Prove Essential Elements to Convict

To prove M.D. guilty of first degree child molestation, the State had to show, among other elements, that M.D. and A.K. were not married.[59] M.D. contends the State failed to prove this element. When a defendant challenges the sufficiency of the evidence, we review the evidence in a light most favorable to the State with all reasonable inferences drawn in the State's favor and against the defendant.[60]

It is clear from the evidence that A.K. and M.D. were first cousins. RCW 26.04.020(1)(b) prohibits marriages between first cousins. Because their marriage was a legal impossibility in Washington and such circumstantial evidence of their relationship rules out any marriage, the State presented sufficient evidence for the court to infer beyond a reasonable doubt that M.D. and A.K. were not married.[61]

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[58] Kennealy, 151 Wn. App. at 883. M.D. makes similar arguments about the first, eighth, and ninth Ryan factors being misapplied because A.K. had a motive to lie and a faulty memory. For the reasons discussed, these arguments again fail to show the trial court abused its discretion.

[59] RCW 9A.44.083(1).

[60] Johnson, 188 Wn.2d at 762 (citing Salinas, 119 Wn.2d at 201; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality op.)).

[61] Circumstantial evidence can prove that a defendant was not married to his victim. State v. Rhoads, 101 Wn.2d 529, 532, 681 P.2d 841 (1984) (citing State v. Shuck, 34 Wn. App. 456, 661 P.2d 1020 (1983)). For example, in Shuck, this court concluded the State presented evidence "more than sufficient to enable a rational trier of fact to infer beyond a reasonable doubt" that a statutory rapist

IV. Right to a Jury Trial

M.D. argues RCW 13.04.021(2) is unconstitutional because it prohibits jury trials for juvenile defendants. In State v. Chavez, our Supreme Court held RCW 13.04.021(2) does not violate a juvenile's right to a jury trial.[62] Pursuant to Chavez, we conclude RCW 13.04.021(2) is constitutional.

V. Community Custody Conditions

M.D. challenges four community custody conditions as unconstitutionally vague. A community custody condition is unconstitutionally vague when it (1) fails to sufficiently define the conduct it prohibits "so an ordinary person can understand the prohibition" or (2) does not provide "sufficiently ascertainable standards" to protect against arbitrary enforcement.[63] A condition "is not vague when a person 'exercising ordinary common sense can sufficiently understand' it."[64] We read

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was not married to his victims where both victims were in ninth grade and had known the rapist for only one month. Id. at 458.

M.D. compares this case to In re Personal Restraint of Crawford, 150 Wn. App. 787, 796, 209 P.3d 507 (2009). In Crawford, the foreign trial court had no evidence of the defendant's relationship with his victim when it found him guilty, so Division II of this court concluded the State failed to show the defendant's foreign conviction for child molestation also satisfied the comparable Washington statute for purposes of sentencing. Id. at 797. Here, the trial court could infer M.D. and A.K. were first cousins. The comparison is not apt.

[62] 163 Wn.2d 262, 272, 180 P.3d 1250 (2008).

[63] State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

[64] Id. at 679-80 (quoting Gibson v. City of Auburn, 50 Wn. App. 661, 667, 748 P.2d 673 (1988)).

each condition in a commonsense manner and understand them within the context of other conditions.[65]

The court prohibited M.D. from possessing or using "non-prescribed drugs and/or alcohol."[66] He argues this is vague because it includes ordinary, over-the-counter drugs like Tylenol and ibuprofen. But, as the States notes, we understand this condition in the context of related provisions, including the prohibition on M.D. possessing or consuming "alcohol or any controlled substance except by doctor's prescription."[67] Read together, the ban on "non-prescribed drugs" is limited to "any controlled substance except by doctor's prescription." RCW 69.50.101(g) defines a "controlled substance" as "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules." Over-the-counter drugs, like acetaminophen or ibuprofen, are not controlled substances.[68] There is sufficient specificity to guide M.D.'s decisions and avoid arbitrary enforcement. The condition is not vague.

M.D. contends the community custody condition prohibiting him from possessing sexually explicit material must be stricken for vagueness. Condition 5 states M.D. may not "possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as

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[65] State v. Wallmuller, 194 Wn.2d 234, 245, 449 P.3d 619 (2019); State v. Nguyen, 191 Wn.2d 671, 679, 425 P.3d 847 (2018).

[66] CP at 50.

[67] CP at 25.

[68] See RCW 69.50.202-.212 (schedules of controlled substances).

defined by RCW 9.68A.011(4) unless given prior approval by [his] sexual deviancy provider."[69] M.D. challenges only the prohibition on material depicting "sexually explicit conduct" and does not argue the prohibitions on "sexually explicit" or "erotic" materials are vague.

Our Supreme Court's decision in State v. Nguyen held that the phrase "sexually explicit material" contained in a condition of community custody was not unconstitutionally vague.[70] The court did not address a prohibition on materials depicting "sexually explicit conduct."[71] However, in State v. Bahl, the court considered a vagueness challenge to a community custody condition prohibiting an offender from visiting businesses dealing in "sexually explicit" materials.[72] The court explained a business selling "sexually explicit" material primarily sold "'clearly expressed sexual' materials or materials that are unequivocally sexual in nature."[73] Within the context of the condition, the offender could tell he was prohibited from visiting "adult bookstores, adult dance clubs, and the like."[74] The court concluded the condition was not vague.[75]

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[69] CP at 50.

[70] 191 Wn.2d 671, 670-81, 425 P.3d 847 (2018).

[71] The State also argues State v. Peters, 10 Wn. App. 2d 574, 594, 455 P.3d 141 (2019), and State v. Casimiro, 8 Wn. App. 2d 245, 250, 438 P.3d 137 (2019), resolved this challenge. Like Nguyen, these cases address challenges to prohibitions on only "sexually explicit material" and do not resolve the issue here.

[72] 164 Wn.2d 739, 743, 193 P.3d 678 (2008).

[73] Id. at 759.

[74] Id.

[75] Id. at 760.

M.D.'s challenge is similar, except the court here provided additional guidance by defining "sexually explicit conduct" by referring to RCW 9.68A.011(4). Read with the commonsense definition of "sexually explicit" from Bahl, the trial court prohibited M.D. from possessing, using, accessing, or viewing unequivocally sexual materials depicting the actual or simulated conduct specified in RCW 9.68A.011(4). This provides sufficient specificity to warn M.D. against viewing a movie produced for an "unequivocally sexual" reason, such as an adult film's depiction of intercourse, as opposed to a sex scene in a James Bond movie. The condition is not vague.

M.D. argues the community custody conditions prohibiting him from possessing a "firearm/weapon" or "any weapon" are vague. In State v. Casimiro, the court upheld a community custody condition prohibiting an offender from "owning or possessing dangerous weapons such as hunting knives or a bow and arrow."[76] The court concluded the term "dangerous weapon" was not vague because the custody condition included an illustrative list of prohibited weapons.[77] The dilemma here is that the dictionary definition advocated by the State is broad enough to include, for example, a wide variety of knives not limited to the "dangerous weapons" addressed in Casimiro. M.D. could be found to have

[76] 8 Wn. App. 2d 245, 250, 438 P.3d 137 (2019).

[77] Id.

violated this condition by going fishing and taking a fillet knife to clean his catch. This condition fails to provide sufficient guidance and is vague.[78]

M.D. argues two related conditions about school attendance that use different terms create an ambiguity. The order on disposition requires that M.D. attend school "with no suspensions, expulsions, behavioral referrals, tardies, or unexcused absences,"[79] and community custody condition 2 requires that he "[m]aintain regular school attendance with no unexcused absences, tardies, or behavioral referrals, suspensions, and work to a level commensurate with ability."[80] M.D. contends it is ambiguous whether being tardy to school would violate his conditions of community custody. The State argues M.D. would receive an excused absence if he arrived late to school with an appropriate excuse.

But a tardy is not an absence. When read together, the conditions plainly prohibit any tardy, whether excused or not. And the adjective "unexcused" does not apply to every item listed in custody condition 2.[81] Neither the order on disposition nor custody condition 2 allow excused tardies. But both allow excused absences, and an absence from school is generally more serious than merely arriving late. Because these requirements appear to create an illogical incentive

[78] We also note this condition fails to define "possession" as actual or constructive, creating additional ambiguities that could allow arbitrary enforcement.

[79] CP at 44 (emphasis added).

[80] CP at 50 (emphasis added).

[81] See PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue, 9 Wn. App. 2d 775, 781, 449 P.3d 676 (2019) ("series-qualifier" rule of grammar does not apply when a modifier does not make sense with all items in a series), review granted, 194 Wn.2d 1016, 455 P.3d 134 (2020).

for M.D. to skip school and seek an excused absence any time he might arrive late, the court should clarify this condition on remand.

Therefore, we affirm M.D.'s conviction and remand for clarification of the two conditions of community custody.

WE CONCUR:

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

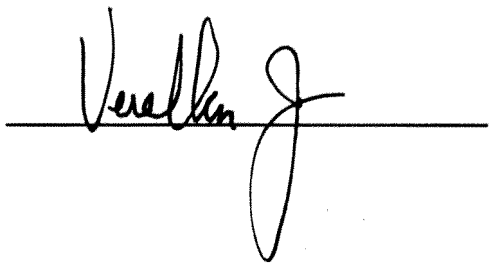
STATE OF WASHINGTON, Respondent, v. M.[redacted]D.,[redacted] Appellant.	)	No. 79924-0-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the opinion filed June 22, 2020. The panel has considered the motion and determined it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE PANEL:



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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. 79924-0-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:

☒ respondent Donna Wise, DPA
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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 24, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

August 24, 2020 - 4:33 PM

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