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Court of Appeals
Division I
State of Washington

NO. 71467-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

EMYLL MATOS-RAMOS,

Appellant.

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

The Honorable Bill Bowman, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of prior misconduct to show a lack of accident under ER 404(b).

2. The court erred in concluding the purpose for admitting the prior acts was to show lack of accident.

3. The court erred in concluding the prior acts were relevant to show a lack of accident.

4. The court erred in concluding there was no unfair prejudice from admitting the prior acts.

5. The court erred in concluding the prior acts were admissible in the State's case in chief under ER 404(b).

6. The court erred in admitting unreliable child hearsay.

7. The court erred in denying appellant's request for a hearing with live testimony on the child hearsay issue.

8. The court erred in entering finding of fact 11 that there were sufficient indicia of reliability under the Ryan¹ factors to admit the child hearsay statements. Supp. CP ___ (Sub no. 259, Findings of Fact/Conclusions of Law, filed June 10, 2014).

9. The court erred in concluding the Ryan factors were substantially satisfied.

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

10. The court erred in concluding there was no motive for the child to lie.

11. The court erred in concluding the child was of a generally truthful character.

12. The court erred in concluding the child's statements were in response to open-ended and non-leading questions.

13. The court erred in concluding no one told the child what to say.

14. The court erred in concluding there was no evidence the child was repeating what others had told him.

15. The court erred in concluding the circumstances of the child's statements did not give reason to believe he had misrepresented appellant's involvement.

16. The court erred in finding the complaining child witness competent to testify and denying the defense motion for a competency hearing.

17. The trial court's failure to properly instruct the jury deprived appellant of a fair trial and a constitutionally unanimous jury verdict.

18. The court erred in finding that domestic violence was pled and proved.

Issues Pertaining to Assignments of Error

1. Under ER 404(b), prior acts are admissible to show lack of accident when the defendant admits he caused an injury but claims he did so accidentally. Appellant told police he did not see what happened and the child must have injured himself by accident. Did the court err in admitting evidence to show a lack of accident when appellant did not admit that he caused the child's injuries?

2. Witnesses are not competent to testify when they are too young to understand the obligation to tell the truth on the witness stand or do not have independent recall of the events. Did the court err in denying a competency hearing and permitting the seven-year-old complaining witness to testify when he stated under oath that he did not know the difference between the truth and a lie, several times testified he did not recall what happened, told an obvious falsehood about his sleeping patterns, and ultimately gave an account of what happened in response to leading questions by the prosecutor?

3. Out-of-court statements by children relating to abuse are not admissible unless the circumstances show the statements are reliable by substantially meeting the factors listed in State v. Ryan. Did the court err in admitting the complaining witness's out-of-court statements when there was no live testimony at the hearing on this issue, the witness had a

motive to lie, the testimony demonstrates a history of lying to stay out of trouble, and some of the statements were made under police questioning?

4. The constitutional right to a jury trial requires that the verdict be the product of deliberations that are the common experience of all jurors. Was appellant's right to a fair trial and a unanimous jury verdict violated when the court failed to instruct the jury it could not deliberate unless all twelve were present?

5. Under the Sixth Amendment right to a jury trial, any fact that increases a criminal sentence must be proved to a jury beyond a reasonable doubt. The designation of an offense as "domestic violence" results in increased sentences for any future offenses so designated. Here, the question of whether the offense was committed against a family or household member was not submitted to the jury. Did the court err in including, on the judgment and sentence, a finding that domestic violence was pled and proved?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Emyll Matos-Ramos with assault of a child in the second degree with a domestic violence designation. CP 1. The court granted the prosecutor's motion to admit child hearsay and denied the defense motion for a competency hearing for the

complaining witness. RP 252-58; Supp. CP ____ (Sub no. 259, Findings of Fact/Conclusions of Law, June 10, 2014). The court also denied the defense motion to exclude evidence of prior acts under ER 404(b). RP 278-80; Supp. CP ____ (Sub no. 260, Findings of Fact/Conclusions of Law filed June 10, 2014). The jury found him guilty as charged, and the court imposed a standard range sentence and community custody. CP 57, 59. The court also found that domestic violence was pled and proved. CP 57. Notice of appeal was timely filed. CP 65.

2. Substantive Facts

- a. *Matos-Ramos called 911 after his rambunctious stepson apparently fell and broke his leg.*

For approximately two years, Matos-Ramos was stepfather to a very rambunctious child. RP 587-88, 936. His girlfriend Amica S. claimed her son A.S.² had no behavioral issues. RP 594, 614. She claimed her visits to the family doctor for these issues were only so that Matos-Ramos could see that A.S. is not the person he wants him to be. RP 615, 658-60. However, Amica has seen A.S. engage in self-harming behaviors such as scratching his own face when very upset. RP 659. He had jumped off of a table at pre-school, was injured a couple of times while with Matos-Ramos, and had gotten burned while with his grandmother. RP 660, 682.

² A.S. and his mother Amica S. share the same last name. This amended brief refers to A.S. by his initials only and Amica by her first name to avoid confusion and protect their privacy. No disrespect is intended.

In recent years, the issues have been substantial enough that A.S. has been prescribed medication for attention deficit/hyperactivity disorder. RP 692. The pediatrician testified A.S. was brought to him because he had been out of control at preschool, was jumping off tables, and was asked to leave the preschool. RP 936-37. This was in February 2011, a little over six months after the incident in this case. RP 936. Another pediatrician at the same office referred A.S. to a child behavior specialist. RP 1204.

Matos-Ramos' relationship with A.S. had its ups and downs; Amica testified Matos-Ramos had strict ideas about child behavior. RP 694. But he would take A.S. to the park, make him meals, and baby-sit when he could not go to daycare. RP 593. Everything changed the day four-year-old A.S. told a police officer that his broken leg happened because his dad kicked him. RP 500, 699, 767.

Matos-Ramos told the police and firefighters that he did not see what had happened. He was playing video games, when he heard A.S. fall behind him, and heard a crack. RP 1024, 1169. A.S. was on the floor and could not get up. RP 525, 1037. Matos-Ramos believed he must have been running back to the table from the bathroom hallway and tripped on the carpet and struck the dining room table. RP 1024. The table was approximately 30 inches high; A.S.'s head would be at table height. RP 920-21. He explained that A.S. was a hyperactive child who often ran into things and had

accidents. RP 759-60. He immediately called 911 and the child's mother. RP 523, 1037.

Dr. Robert Kregenow testified A.S. transverse fracture was likely the result of force being applied to both ends of the bone, like breaking a stick. RP 867-68. He said far more common in toddlers is a spiral fracture, such as from a jump that lands awkwardly or a fall. RP 866. He felt the explanation of running and tripping was inconsistent with the injury he observed, which would be consistent with non-accidental trauma such as a kick. RP 869-70, 902. He testified a transverse fracture could result from a fall from six or eight feet, or, less likely, even a fall from as low as four feet. RP 897.

- b. *The child alternated between saying he ran into a table and saying his dad kicked him.*

Officer Stacy Eckert accompanied A.S. out of the apartment into the back of the ambulance. RP 765. There, in a conversation overheard by the firefighters and AMR ambulance staff, she asked him what happened. RP 765, 767. A.S. told her he ran into the table. RP 352. Next, she asked if anyone gave him any "owies." RP 767. A.S. told her his dad kicked him for not reading. RP 767. Genessa Rose, an EMT who overheard the conversation, testified A.S. said he wasn't supposed to tell and was supposed to say that he ran into the table. RP 354. Eckert testified he kept repeating

the word “eagle” but she did not understand why. RP 767-68. Rose testified that “eagle” was the word A.S. had been unable to read. RP 355.

Just before arrival at the hospital, A.S. asked ambulance driver James Conley if what happened could be their secret. RP 446. Conley told him no, he would have to tell the hospital what he had said. RP 445. Once inside the hospital, A.S. told Doctor Robert Kregenow he was running toward a table. RP 447, 860. When pressed for more information, A.S. would not answer. RP 860. Then later, he said that his dad kicked him in the leg. RP 860. When the orthopedic surgeon arrived, he told her that he had been running towards a table. RP 831-32.

A.S. was sent for a forensic interview with a child interview specialist. RP 1067-69. In that interview, he was asked whether it was real or pretend that it was snowing in the interview room. RP 1126; Ex. 29; Ex. 31 at 12.³ He initially said it was real. RP 1126; Ex. 29; Ex. 31 at 12. When asked if he would promise to tell the truth, he burped out loud and then excused himself before promising. RP 1126; Ex. 29; Ex. 31 at 18.

When the interviewer asked what happened, A.S. said, “I was running to the table.” Ex. 29; Ex. 31 at 19. After some distraction about drawing, she asked again what happened to his leg and he again said, “I was running to the table.” Ex. 29; Ex. 31 at 21. But then he continued, “And

³ The recording of A.S.’s forensic interview is exhibit 29. For ease of reference, this brief also cites to exhibit 31, the transcript.

then I was gonna be ready to leave. And my dad didn't let me eat and my dad kicked me right here." Ex. 29; Ex. 31 at 21. However, a few minutes later, the interviewer asked what happened right after running to the table, and A.S. said, "Nothing, nothing else." Ex. 29; Ex. 31 at 24. Then he talked about how both his mom and his dad gave him spankings a lot, and added that his dad "kicked me right here and right here." Ex. 29; Ex. 31 at 28.

This case went to trial three years later when A.S. was seven. RP 480. Amica testified A.S. was a child who would lie not to get in trouble. RP 704. She also testified he would pick up on the details of what was said by others so that it was hard to tell what was true. RP 705. She testified he knew the difference between the truth and a lie, but sometimes would stick with his lie even after being confronted. RP 709, 712.

A.S. testified he did not remember how his leg got broken. RP 480, 492. He was also asked whether he knew the difference between the truth and a lie. RP 484. He said, "No." RP 484.⁴ He also told the jury he does not actually sleep; he just stays up all night faking sleep. RP 517. Ultimately, he was able to remember that when his leg got broken, he lived with Matos-Ramos, who made him do push-ups when he did something wrong. RP 496-499. He testified that he had to do pushups the day his leg

⁴ Defense counsel asked the question again on cross-examination, and this second time A.S. answered, "yeah." RP 541. He could not explain why he had answered "No" earlier in the day. RP 542.

was broken. RP 519-20. He said “I was rolling to the table leg and it – and my leg hit it. That’s all I can remember.” RP 521. The prosecutor asked how he was rolling, and A.S. said, “I was doing push-ups and Emyll stepped on me.” RP 521. Then he testified that as he rolled, “I turned around and he kicked me.” RP 522. He explained the kick was “on the waist to make me roll.” RP 522. At trial, A.S. did not recognize Matos-Ramos in the courtroom. RP 528-29.

Additional facts will be discussed in the pertinent argument sections below.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING EVIDENCE OF OTHER MISCONDUCT TO SHOW A LACK OF ACCIDENT WHEN MATOS-RAMOS DID NOT ARGUE HE COMMITTED THE OFFENSE BY ACCIDENT.

On the day of his broken leg, several witnesses saw abrasions or bruising on A.S.’s forehead and chin. RP 362, 453, 769, 860. A.S. said his dad held him down because he was “throwing a fit and fighting back, just screaming.” RP 769, 860. Matos-Ramos argued the evidence was inadmissible under ER 404(b)’s ban on evidence of other acts used to show action in conformity with the prior conduct, i.e. to show bad character or criminal propensity. RP 263-64. Nevertheless, the court admitted the evidence, under the exception for evidence that is relevant to showing a

“lack of accident.” RP 278-79; Supp. CP ____ (Sub no. 260 Findings of Fact/Conclusions of Law, June 10, 2014). This ruling was in error.

The “lack of accident” exception applies only when a defendant admits engaging in the criminal conduct, but claims he lacked the requisite mental state because his conduct was accidental. State v. Bowen, 48 Wn. App. 187, 193-94, 738 P.2d 316 (1987). Without a claim of accidental conduct by the defendant, the only possible inference the jury could draw is the forbidden inference of criminal propensity or bad character. Here, there was no claim of accidental conduct by Matos-Ramos, and improper evidence of overly vigorous discipline of the child was likely to unfairly weigh into the jury’s decision.

- a. The “Lack of Accident” Exception Applies Only When the Defendant Claims He Committed the Offense But Did So Accidentally.

Evidence of prior bad acts is not admissible to show a criminal propensity or bad character. ER 404(b). Although logically relevant, evidence of prior misconduct is generally deemed too powerful, creating a strong likelihood that jurors will find an accused person guilty based on bad character, rather than proof of the charged crime beyond a reasonable doubt. State v. Slocum, 183 Wn. App. 438, 442, 333 P.3d 541 (2014). Thus, such evidence is only admissible when it is relevant to some specific purpose other than mere propensity. ER 404(b) lists several non-propensity purposes

for which prior bad acts may be admissible. One of these is “lack of accident.” ER 404(b).

But the mere invocation of the word “accident” does not render prior acts admissible. The “lack of accident” question is only relevant when the defendant *admits* he engaged in the criminal act but claims he did so accidentally. See State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999) (“Evidence of prior misconduct is generally admissible to show intent and the absence of accident when a defendant admits doing the act, but claims that he did not have the requisite state of mind.”); see also State v. Hieb, 39 Wn. App. 273, 284, 693 P.2d 145 (1984) (“Generally, evidence is admissible for this purpose only where the defendant admits doing the act, but claims he did not have the requisite state of mind to commit the offense charged.”), rev’d on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982) and 2 J. Wigmore, Evidence § 302, at 245 (Chadbourn rev. 1979)).

For example, evidence of prior assaults was relevant to show lack of accident where the defendant claimed he put his hand over the victim’s mouth as he helped her undress for bed. State v. Baker, 162 Wn. App. 468, 474, 259 P.3d 270 (2011). Similarly, prior acts were admissible to rebut a defendant’s claim that he dropped the child by accident. State v. Womac, 130 Wn. App. 450, 457, 123 P.3d 528 (2005), aff’d in part, rev’d in part, 160

Wn.2d 643, 160 P.3d 40 (2007).⁵ In Hieb the prior acts were admissible because the defense of excusable homicide was defined in part as homicide committed by accident. 39 Wn. App. at 284. Each of these defenses involved the defendant admitting to engaging in the criminal conduct while claiming he lacked the requisite mental state to make his actions criminal.

In these cases, there is a non-propensity inference based on the doctrine of chances, which underlies most of the ER 404(b) exceptions, particularly lack of accident or mistake. State v. Lough, 70 Wn. App. 302, 322, 853 P.2d 920 (1993). The doctrine of chances refers to statistical probability that, while once may be an accident, repeated commission of the same offense is less likely to be so. Id. at 321-22. This statistical inference does not rest solely on the bad character demonstrated by the prior acts. But the doctrine of chances “only applies when the act itself is assumed to have been performed by the defendant.” Eric D. Lansverk, Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b), 61 Wash. L. Rev. 1213, 1236 (1986) (citing Wigmore at § 302).

⁵ But see State v. Bouchard, 31 Wn. App. 381, 384-86, 639 P.2d 761 (1982) abrogated by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009) (permitting evidence of prior sexual abuse to show lack of accident when defendant claimed child’s hymen must have been broken in accidental fall).

b. The Exception Does Not Apply Here Because Matos-Ramos Never Claimed to Have Accidentally Injured A.S.

The “lack of accident” exception does not apply in this case because Matos-Ramos did not claim that he accidentally inflicted injury on A.S.. See Bowen, 48 Wn. App. at 193-94. In Bowen, the trial court admitted evidence of prior acts to show that Bowen’s touching of the victim’s private parts was not an accident or mistake. Id. at 193. The Court of Appeals, however, rejected this rationale and determined the trial court had abused its discretion in admitting the evidence. Id. at 193-95. The court explained that Bowen’s defense was general denial, “he denied touching [the victim’s] private parts, even accidentally.” Id. at 193. The court concluded that, in the absence of a defense of accidental touching, the State could not introduce prior acts to show lack of accident. Id. at 193-94 (citing State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984)).

Like Bowen, Matos-Ramos’ defense was general denial. In statements to police and firefighters, he said A.S. must have injured himself by accident, and he, Matos-Ramos, only heard the accident. RP 758-60, 1024. This defense does not trigger the “lack of accident” exception. Bowen, 48 Wn. App. at 193-94. The fact that Matos-Ramos may have slightly injured A.S. in overly vigorous discipline in the past does not make it more or less likely that the child injured himself while running around the

small apartment. The only inference to be drawn from the prior incident is that since Matos-Ramos was the type of person to have caused a mild abrasion in the past, he must also be the type of person to break a child's leg. This is precisely the propensity/character inference that the rule forbids.

The court erred in relying on State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998), to apply this exception when there was only a general claim of accident rather than a specific admission that the defendant caused the injury accidentally. RP 278-79. In Norlin, the court held that, in a child abuse prosecution, evidence of prior intentional injuries to the child is admissible under ER 404(b) "only if the State connects the defendant to those injuries by a preponderance of the evidence." 134 Wn.2d at 572.

The Norlin court did not specifically address what type of "accident" claim would be required to trigger the exception to ER 404(b). The court quoted the trial court's ruling that no specific claim of accident was required, but that aspect of the ruling was not at issue on appeal. Norlin, 134 Wn.2d at 574. Norlin argued only that, before admitting the prior injuries, the court must find by a preponderance of the evidence that the defendant caused them. Id. at 576. The court held that such a connection must, indeed be proved. Id. at 581. The court engaged in no analysis or reasoning whatsoever on the question of what type of "accident" must be claimed to trigger the "lack of accident" exception to ER 404(b).

Norlin also does not support the court's ruling because in Norlin there was an implicit claim of accidental conduct by the defendant. Norlin involved a three-month-old infant who had been injured repeatedly while solely in the care of the defendant. 134 Wn.2d at 573-75. A three-month-old infant has a limited to non-existent ability to cause serious accidents all on his or her own. When an infant is solely in the care of one person, any accident can reasonably be assumed to be the result of the caregiver's conduct, rather than the child's. Thus, a claim of accident in the case of injury to such a small infant largely amounts to a claim that the injury was caused by an act of the defendant.

The same is not true when the injured child is four years old. A.S. was quite capable of running, climbing, pulling, pushing, and doing all manner of things that could cause serious damage to himself or others. RP 725, 936-37. Matos-Ramos' claim that A.S. must have somehow injured himself while running around a small apartment does not, without more, amount to an admission that he caused A.S.'s injury. Without an admission to the underlying conduct, the "lack of accident" exception does not apply. Hernandez, 99 Wn. App. at 322.

A trial court abuses its discretion when its decision is based on a misunderstanding of the law. Slocum, 183 Wn. App. at 448. That is the case here. The court believed that the "lack of accident" exception applied

merely because the defense claimed the child must have been injured accidentally. RP 278-79; Supp. CP ____ (Sub no. 260, Findings of Fact/Conclusions of Law, June 10, 2014). This is incorrect as a matter of law. Hernandez, 99 Wn. App. at 322. The exception applies only when the defendant admits the criminal conduct and the jury must decide whether the act was accidental on the part of the defendant. Id. Because that is not the case here, the court abused its discretion in applying the “lack of accident” exception from ER 404(b) to admit the prior injuries.

The jury’s verdict was likely impacted by hearing accusations that A.S. had previously suffered abrasions to the face when Matos-Ramos pinned him to the ground as a disciplinary measure. As mentioned above, the problem with other bad acts evidence is that the jury is likely to give it too much weight. Slocum, 183 Wn. App. at 442. The remaining evidence in the case was far from overwhelming. As will be discussed in greater detail in the following sections of this brief, A.S.’s statements were contradictory and his memory was likely to be faulty, since he was only four years old at the time of the incident and seven at the time of trial. RP 580, 595-96. The admission of prior bad acts portraying Matos-Ramos as having a bad character is error that requires reversal of his conviction.

2. THE RECORD SHOWS A.S. WAS NOT COMPETENT TO TESTIFY.

Only one person could give any evidence laying the blame for A.S.'s injuries on Matos-Ramos. That one person was a seven-year-old child who told the court he did not know the difference between the truth and a lie. RP 484. Matos-Ramos' conviction should be reversed because the court erred in finding A.S. competent to testify.

No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt. RCW 9A.04.100(1). The trial court has a threshold obligation to ensure witnesses are competent to testify. State v. Maule, 112 Wn. App. 887, 891, 51 P.3d 811 (2002). A proposed witness is presumed competent to testify unless the defense establishes incompetency by a preponderance of the evidence. State v. Brousseau, 172 Wn.2d 331, 341-342, 259 P.3d 209 (2011). By statute, certain individuals are deemed incompetent 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 5.60.050.

The test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the

witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Satisfaction of each element is critical to a determination of competency. Jenkins v. Snohomish County Public Util. Dist. No. 1, 105 Wn.2d 99, 102-03, 713 P.2d 79 (1986).

Although a trial court determines competence pretrial, this Court examines the entire record to review that determination. State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). The trial court's determination of competency is reviewed under the abuse of discretion standard. Allen, 70 Wn.2d at 692.

The court abused its discretion in finding A.S. competent to testify when he told the court he did not know the difference between the truth and a lie, and then repeatedly stated he did not remember the events surrounding his broken leg. RP 484, 492, 499, 500. He also told the jury obvious falsehoods such as that he stays awake all night without sleeping. RP 517. On cross-examination, A.S. claimed he did know the difference between the truth and a lie, but when asked why he had earlier said he did not, he did not understand the question and could not answer. RP 541-42. This testimony

demonstrates that A.S. fails the first of the Allen factors – he did not understand the obligation to tell the truth on the witness stand.

A.S. also demonstrated he did not have sufficient memory to have an independent recollection of events. He stated twice under oath that he did not remember how his leg was broken. RP 492, 499. When asked who he lived with at the time, he mentioned only his mother and sister. RP 495. When asked if anyone else lived with them, he said he could not remember. RP 495. When the prosecutor against asked if he lived with anyone else, he said he did not think so. RP 496. Only when prompted did he recall that Matos-Ramos even lived with them at the time. RP 496. This testimony demonstrates A.S. also failed the third Allen factor, memory sufficient to retain an independent recollection of the occurrence.

A.S.'s trial testimony shows failure on two of the four Allen factors, all of which are critical to a finding of competency. The court erred in finding A.S. competent to testify. RP 226-30, 729. Given the centrality of A.S.'s testimony, this error requires reversal of Matos-Ramos' conviction.

3. THE COURT ERRED IN ADMITTING UNRELIABLE CHILD HEARSAY.

The prosecution of Matos-Ramos in this case rests almost entirely on statements by A.S., most of them made three years before trial, when he was only four years old. Matos-Ramos' conviction should be reversed because

the court misapplied the factors from State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), and improperly admitted child hearsay.

The child hearsay statute provides that out-of-court statements by a child under the age of ten who testifies at the trial may be admitted if the court finds sufficient indicia of reliability. RCW 9A.44.120(1), (2)(a). Ryan, 103 Wn.2d at 172; In re Dependency of A.E.P., 135 Wn.2d 208, 226-27, 956 P.2d 857 (1998). A child need not be competent to testify when the out-of-court statements were made, but the circumstances surrounding the making of the statements must render them inherently trustworthy. State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765, 771 (2003); Ryan, 103 Wn.2d at 173. Child hearsay must manifest “particularized guarantees of trustworthiness.” Ryan, 103 Wn.2d at 170. The statements must be characterized by such a degree of inherent trustworthiness as will serve as a substitute for cross-examination. Id. at 175. In assessing trustworthiness, the court considers the factors set forth in Ryan.

In Ryan, the Supreme Court set forth nine separate factors for determining the admissibility of a child’s statements under RCW 9A.44.120:

- (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) whether the statement contained assertions about past fact;
- (7) whether cross examination could establish that the

declarant was not in a position of personal knowledge to make the statement; (8) how likely is it that the statement was founded on faulty recollection; and (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement.

103 Wn.2d at 175-76. Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).⁶ Moreover, the analysis focuses on the statements themselves. Adequate indicia of reliability must be found in the circumstances surrounding the making of the out-of-court statement, not from subsequent corroboration of the criminal act. State v. Stevens, 58 Wn. App. 478, 486, 794 P.2d 38 (1990) (quoting Ryan, 103 Wn.2d at 174).

A court's decision to admit child hearsay statements must be reversed when the court abuses its discretion in weighing the Ryan factors. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). A court abuses its discretion when its decision is manifestly unreasonable, or when discretion is exercised on untenable grounds, or for untenable reasons, such

⁶ At least three of the factors have been deemed irrelevant or duplicative. For example, the seventh factor, the possibility that cross-examination would show lack of knowledge, is irrelevant if the child testifies. State v. Keneally, 151 Wn. App. 861, 880, 214 P.3d 200 (2009); State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Factor nine (no reason to suppose that the declarant misrepresented the defendant's involvement) is redundant of the issues contained in the first five factors. In re Dependency of S.S., 61 Wn. App. 488, 499, 814 P.2d 204 (1991). Factor six, whether the statement is an assertion of past facts, has been found unhelpful and can be ignored "so long as other factors indicating reliability are considered." State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991).

as misapplication of the legal standard. State v. Dixon, 159 Wn.2d. 65, 75-76, 147 P.3d 991 (2006) (quoting State v. Rohrich , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The court erred in its assessment of several key Ryan factors here.

First, the court determined A.S. had no motive to lie to Eckert in the back of the ambulance. RP 243-44; Supp. CP ____ (Sub no. 259, Findings of Fact/Conclusions of Law, June 10, 2014). But the record at trial shows A.S. bore animosity toward Matos-Ramos because he was “always scaring me like putting me in a box and dumping my head in cold water and making me do pull-ups on the shower bar.” RP 501. This information was revealed for the first time at trial, rather than at the hearing on the child hearsay statements, because the court denied Matos-Ramos’ request for live testimony at that hearing. RP 87-89, 505-06.

The “motive to lie” factor also encompasses the diminished reliability that occurs when a child has made different, and inconsistent statements. Ryan, 103 Wn.2d at 176. That is the case here. A.S. initially said he fell while running and hit the table. RP 767. Once he arrived at the hospital, he initially returned to this version of events, telling a doctor the same thing. RP 831-32. In every situation except the forensic interview, A.S. was switching back and forth between two different versions of events.

RP 201. These inconsistent statements weigh against admission of child hearsay.

The record also does not support the court's finding on the second factor, general character. This factor refers to the child's reputation for truthfulness or lack thereof. State v. Keneally, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). The court concluded A.S.'s general character did not include a tendency to lie or invent stories. RP 244-46; Supp. CP ____ (Sub no. 259, Findings of Fact/Conclusions of Law, June 10, 2014). The court relied on statements by A.S.'s mother and grandmother, as well as Matos-Ramos himself indicating they could not imagine why A.S. would make up a story like this. RP 190, 215, 245-46. But testimony from A.S.'s mother showed he had a history of lying to avoid getting in trouble. RP 704. She also told police that he would often pick up on details of what others were saying, so that it would be hard to tell if what he said was true. RP 705. His mother testified that, even when confronted, he would stick with a lie. RP 712. Some of this information was available to the court pre-trial, and the rest could have been presented pre-trial if the court had permitted live testimony for the child hearsay hearing. RP 200; Pre-trial ex. 23.

A.S.'s disclosure to Eckert was also not truly spontaneous. A statement is spontaneous for purposes of the Ryan factors as long as the questioning that elicited the statement was not leading or suggestive.

Keneally, 151 Wn. App. at 883. Unfortunately, by asking again what happened, Eckert suggested to A.S. that his first answer was wrong. The first time she asked him what happened, A.S. said he hit himself on the table while running. RP 767. It was only after Eckert asked again, thereby indicating she was unsatisfied with his first answer, that A.S. said that his dad kicked him. RP 767. This information was available to the court via the pre-trial testimony at the CrR 3.5 hearing. RP 132. The court erred in finding A.S.'s statements to Eckert were spontaneous. RP 247-48; Supp. CP ____ (Sub no. 259, Findings of Fact/Conclusions of Law, June 10, 2014).

The court also found that no one told A.S. what to say. RP 244-45; Supp. CP ____ (Sub no. 259, Findings of Fact/Conclusions of Law, June 10, 2014). This appears to be incorrect based on the statement Genessa Rose overheard, which was that he was supposed to say he ran into a table. RP 354; Pre-trial Ex. 16. Assuming the truth of that statement, A.S. indeed said what he was "supposed to" say on several occasions, both to Eckert and later at the hospital.

The timing and relationship factor also is at best neutral towards reliability of A.S.'s statements. A relationship of trust increases reliability. Keneally, 151 Wn. App. at 884. While the statements were made shortly after the events, A.S. had no prior relationship with Eckert; she identified herself as Officer Stacy. RP 131. All he knew was that he was speaking

with a police officer. RP 131. This would be likely to trigger a readiness to lie to avoid getting in trouble, and a willingness to say what the officer apparently wanted to hear after she was not satisfied with his first answer.⁷

The only Ryan factor that clearly supports admissibility is that more than one person heard the statement. This is insufficient when the Ryan factors must be “substantially met.” Swan, 114 Wn.2d at 652. The court abused its discretion in admitting A.S.’s statement to Eckert in the back of the ambulance.

Regarding A.S.’s forensic interview, the Ryan factors considering motive to lie and general character are the same as for his statements to Eckert. He still had a motive to lie and a motive to stick with the story he had told before. The mere absence of suggestive questioning by a police officer is not sufficient to remedy the failings in the first two Ryan factors. The court also erred in admitting A.S.’s forensic interview.

Even when hearsay statements are admitted in error, no prejudice exists if the inadmissible evidence is ““of minor significance in reference to the overall, overwhelming evidence as a whole.”” State v. Sanford, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). But an evidentiary error that “within reasonable probabilities” would materially affect the outcome of the

⁷ But see Keneally, 151 Wn. App. at 884 (concluding children likely trusted police officers because of their authoritative position in the community).

proceedings is prejudicial and warrants reversal. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Here, A.S.'s testimony at trial was vague and reluctant. RP 484, 492, 499. His own initial statement that he did not know the difference between a truth and a lie damaged his credibility. RP 484. He twice claimed not to remember how his leg was broken. RP 492, 499. Moreover, he was only four years old when this incident occurred; with trial three years later, almost half his lifetime, it is reasonable that such a small child would not have a good independent memory of events. It cannot be said that his out-of-court statements at the time were of minor significance. Improper admission of the child hearsay statements requires reversal.

4. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY DELIBERATIONS MUST INCLUDE ALL TWELVE JURORS AT ALL TIMES DEPRIVED MATOS-RAMOS OF A FAIR TRIAL AND A UNANIMOUS JURY VERDICT.

By failing to instruct that deliberations must involve all twelve jurors collectively at all times, the trial court violated Matos-Ramos' right to a fair trial and a unanimous verdict. This Court should therefore reverse and remand for a new trial.

The Washington Constitution guarantees criminal defendants a jury trial and a unanimous verdict. Const. art. I, §§ 21 & 22⁸; State v. Ortega–Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element of the right to a unanimous verdict is that the deliberations leading to those verdicts be “the common experience of all of them.” State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional “unanimity” is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

⁸ Article I, section 21 of the Washington Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Article I, section 22 of the Washington Constitution provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

The Washington Supreme Court recently affirmed its agreement with the California Supreme Court that a unanimous jury verdict must be the result of shared deliberations, “The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them.” State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693). The court went on to explain, “It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11.” Id. The court explained that the verdict must be the result not just of each juror’s individual opinion, followed by a vote, but of the interactions between the jurors during deliberations: “Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member’s viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint.” Id.

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of the right to a unanimous jury verdict and

requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they “‘must not discuss with anyone any subject connected with this trial,’ and ‘must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.’” Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) (“court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch.”). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your

internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61.

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. “No discussion” also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises jurors, “DON’T talk about the case with anyone while the trial is going on. Not even other jurors.” Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however, is that any deliberations must involve all twelve jurors. Thus, for example, in a four-count criminal trial, the pattern instructions do not prohibit the presiding juror from assigning three jurors to decide each count, with the understanding that the other nine jurors will adopt the conclusion of those three on that count for purposes of the unanimous verdict requirement. Such a process violates the constitutional requirement that deliberations leading to verdicts be “the common experience of all of [the jurors].” Fisch, 22 Wn. App. at 383.

Here, what instructions the court provided to the jury on the record failed to make clear the constitutional unanimity requirement that deliberations occur only collectively when all twelve jurors are present. The written and oral instructions given to the jury at the end of the trial do not mention the requirement of collective deliberations. RP 1277-90; CP 35-54.

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present and deliberating collectively constituted manifest constitutional error. Lamar, 180 Wn.2d at 585-86. This error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. Id. at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is “[w]hether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined.” State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here because the prosecution cannot meet its burden to show harmlessness.

The minutes show the jury deliberated for approximately three hours, from 11:17 a.m. until 2:19 p.m., presumably including the lunch break that the court informed them they could take. Supp. CP ____ (Sub

no. 241A, Clerk's Minutes, Oct. 30, 2013).⁹ There is also the very likely scenario of one or more jurors leaving to briefly use a bathroom. Nothing informed jurors they could not deliberate in small groups over lunch, or while one or two were absent using the bathroom. The jury was essentially ignorant of how to reach a constitutionally unanimous verdict.

There was nothing provided to inform them their verdict must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one juror was deprived of deliberations shared by the other eleven, then the resulting verdict is not "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. This Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

5. THE DOMESTIC VIOLENCE DESIGNATION MUST BE STRICKEN BECAUSE IT INCREASES PUNISHMENT FOR FUTURE OFFENSES BUT WAS NOT FOUND BY A JURY.

The judgment and sentence states that, in this case, domestic violence was pled and proven. CP 57. This finding must be stricken because the jury was not asked to decide whether this crime meet the statutory definition of domestic violence.

Under the Sixth Amendment right to a jury trial, any fact, other than the fact of a prior conviction, that increases the punishment that may be meted out for a criminal offense must be found by a jury beyond a

⁹ A second supplemental designation of clerk's papers was filed on May 19, 2016.

reasonable doubt. Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016) (citing Apprendi v. New Jersey, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The maximum penalty a defendant can receive is that which he or she would receive if punished according to the facts reflected in the jury verdict alone. Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (citing Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)). This rule includes plea bargains, sentencing guidelines, criminal fines, and mandatory minimum sentences. Id. (citing Blakely, 542 U.S. 296; United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); Southern Union Co. v. United States, 567 U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012); Alleyne v. United States, 570 U.S. ___, ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013); Ring, 536 U.S. at 608, n. 6.)

It should also include the designation that domestic violence has been pled and proved. This designation is a specific fact pertaining to the case that will increase the punishment by law for any future domestic violence offenses by increasing the offender score. RCW 9.94A.525(21).

RCW 9.94A.525(21) governs calculation of the offender score for all felony domestic violence offenses. It provides that for such offenses, any prior adult conviction where domestic violence was pled and proved counts

two points instead of one in the offender score. Id. To trigger this doubling provision, both the current offense and the prior offense must be pled and proved to be domestic violence as defined in RCW 9.94A.030. This increase in the offender score will result in increased sentences under Washington's sentencing grid for any future domestic violence offenses. RCW 9.94A.525; RCW 9.94A.510.

Past cases have held that the designation of a case as a domestic violence case does not increase the punishment and thus does not trigger the right to a jury trial under Blakely and Apprendi. See, e.g., State v. Winston, 135 Wn. App. 400, 144 P.3d 363 (2006); State v. Felix, 125 Wn. App. 575, 578, 105 P.3d 427 (2005). But these cases are no longer dispositive because they were decided before the 2010 law requiring doubling of the offender score for prior domestic violence offenses.

In Winston, the only consequences flowing from the domestic violence designation were, "(1) a requirement that he receive a domestic violence evaluation and follow-up treatment; (2) an additional \$100 fine to cover the cost of the evaluation; and (3) a no contact order that results in reduced earned early release time." Winston, 135 Wn. App. at 405. The court determined these consequences did not amount to an exceptional sentence, and thus the fact of domestic violence need not be proved to the jury beyond a reasonable doubt. Id. at 406-09.

In Felix, the court noted that the mere designation of a case as domestic violence did not authorize the court to impose an exceptional sentence. 125 Wn. App. at 578. As in Winston, the court rejected the idea that enhanced recording and enforcement of no-contact orders amounted to increased punishment. Id. at 578-80. The court also held that the resulting revocation of the right to bear arms did not amount to increased punishment warranting a jury trial right. Id. at 580-81.

But the situation in Washington has changed since the days of Winston and Felix. RCW 9.94A.525(21); Laws of 2010, ch. 274. The Sentencing Reform Act now provides for increased offender scores based on the designation of a crime as domestic violence. Id. The multiplication of prior offenses in the offender score increases the standard range, and thus increases the sentence that may be imposed. RCW 9.94A.525(21); RCW 9.94A.510; RCW 9.94A.505.

The designation on Matos-Ramos' judgment and sentence that "domestic violence" was "pled and proven" will increase his sentence for any future offenses that are so designated. RCW 9.94A.525(21). Therefore, the fact of domestic violence must be pled and proved to a jury beyond a reasonable doubt. Hurst, ___ U.S. at ___, 136 S. Ct. at 621. Because there was no such jury finding, the designation of domestic violence on his

judgment and sentence violates his Sixth Amendment right to a jury trial and must be stricken.

6. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Matos-Ramos indigent and entitled to appointment of appellate counsel at public expense. Supp. CP ____ (sub no. 251E, Order Authorizing Appeal at Public Expense, filed Jan. 23, 2014). If Matos-Ramos does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Matos-Ramos’ ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. RP 1269-70. The finding of indigency

made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Matos-Ramos has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

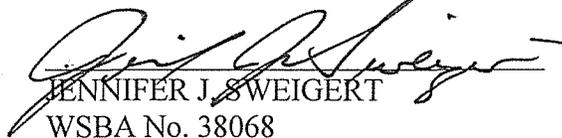
D. CONCLUSION

For the foregoing reasons, Matos-Ramos requests this Court reverse his conviction.

DATED this 19th day of ~~May~~ ^{September}, 2016.

Respectfully submitted,

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