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Division I
State of Washington

NO. 71467-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EMYLL S. MATOS-RAMOS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in admitting evidence of prior injuries the defendant previously inflicted on the four-year-old victim under ER 404(b) to rebut the defendant's claim that the child's injury resulted from an accidental fall while running?

2. Did the trial court properly exercise its discretion in finding the then-seven-year-old victim competent to testify at trial?

3. Did the trial court properly exercise its discretion in admitting out-of-court statements under the child hearsay statute?

4. Does WPIC 1.04 properly communicate the requirement that a unanimous verdict result from the jurors' common deliberations?

5. Should the case be remanded to the trial court to correct a scrivener's error in the judgment and sentence?

6. Should this Court reject the defendant's request to preemptively prohibit any award of appellate costs to the State?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Emyll S. Matos-Ramos, with one count of assault of a child in the second degree. CP 1. A jury found Matos-Ramos guilty as charged. CP 55. The trial court imposed a high-end standard range sentence of 41 months in prison, which Matos-Ramos

had already served in pretrial electronic home monitoring.¹ CP 57-59; RP² 1269. Matos-Ramos timely appealed. CP 65.

2. SUBSTANTIVE FACTS.

In July 2010, Matos-Ramos lived in an apartment in Federal Way with his then-girlfriend, Amica S.,³ their 18-month-old daughter, C.S., and Amica's four-year-old son from a prior relationship, A.S. RP 582, 586-87, 592. Matos-Ramos and Amica had been dating since A.S. was around two years old. RP 610. Although Matos-Ramos was the only father figure A.S. had ever known, his relationship with A.S. was rocky, and grew worse after C.S. was born. RP 593, 610-11. On one occasion prior to July 2010, Matos-Ramos had become very angry while physically disciplining A.S., resulting in the police being called. RP 681.

One day in late July 2010, A.S. was home alone with Matos-Ramos while Amica was at work. RP 598. A.S., who at four years old was already beginning to spell and read, was sitting at the dining table working on those activities. RP 523, 604. Matos-Ramos became upset when A.S. made a mistake on the word "eagle." RP 355, 441. He made

¹ The provision of RCW 9.94A.505 which prohibits giving credit for pretrial electronic home monitoring to offenders convicted of violent offenses did not yet exist at the time of Matos-Ramos's sentencing. LAWS of 2015, ch. 287, § 10.

² The eleven volumes of the verbatim report of proceedings are consecutively paginated, and will be collectively referred to as "RP."

³ Amica and other family members who share A.S.'s last name will be referred to by first name to avoid confusion and to protect the juvenile victim's privacy.

A.S. do pushups, and then stepped on A.S. RP 523. When A.S. tried to get away, Matos-Ramos kicked A.S. in the upper leg, causing him to roll into the table leg and breaking A.S.'s femur. RP 523, 834.

Matos-Ramos called Amica at work to report that A.S. had likely broken his leg. RP 598. When she asked what had happened, Matos-Ramos put the call on speakerphone and had A.S. speak. RP 598. During a conversation in which Matos-Ramos interrupted A.S. several times to stop him from talking, A.S. told his mother that he had hurt himself while running from the kitchen to do a worksheet. RP 670, 680, 699. Amica noted that A.S. sounded "robotic," and not how one would expect a young child with a broken leg to sound. RP 598.

Matos-Ramos called 911, and soon thereafter, several firefighter emergency medical technicians ("EMTs") and a police officer arrived at the apartment. RP 753-54, 910-11. A.S. was lying on his back near the dining table, with his right leg extremely swollen. RP 754-57. Matos-Ramos, who was on the phone when the EMTs and officer arrived, appeared indifferent. RP 758. When asked what had happened, he said at various times that A.S. had tripped and fallen on the carpet, that A.S. had run into the dining table, and that he did not know what had happened. RP 758-59, 983, 1024-25. When asked again what happened, Matos-Ramos simply said, "It happened. It happened. I looked at it," and opined that

A.S. “probably has ADHD”⁴ and was prone to accidents. RP 760. The first responders noted that the top of the table was too high to have struck A.S.’s thigh; it was at roughly the height of A.S.’s face. RP 352, 917, 921.

When the EMTs asked A.S., in Matos-Ramos’s presence, what had happened, he said that he had run into the table. RP 920. After A.S.’s leg was immobilized and he was carried out of the apartment, Officer Stacy Eckert spoke to him in the back of the ambulance, within hearing of two EMTs and two employees of the ambulance company. CP 351, 765.

Matos-Ramos remained in the apartment with another officer. RP 765. When Eckert asked what had happened, A.S. at first stated, “I hit myself on the table, running.” RP 766-67. Eckert then asked, “Did anyone give you owies today?” and A.S. responded, “Yes, my dad just kicked me,” and pointed to the swollen upper area of his right leg. RP 354, 440-41, 767, 923, 987. At some point, A.S. stated that he wasn’t supposed to tell anyone, and was supposed to say that he ran into a table. RP 354. When Eckert asked why Matos-Ramos had kicked him, A.S. explained that Matos-Ramos had kicked him for not reading the word “eagle” properly. RP 355, 441, 767, 923.

During the ambulance ride to the hospital, an ambulance employee asked A.S. again how his injury had occurred, and A.S. stated that he had

⁴ Attention Deficit Hyperactive Disorder.

been kicked. RP 442. When they arrived at the hospital, the ambulance employee told A.S. that he would be informing the hospital about what had happened. RP 445. A.S. responded, "Can it just be our secret?" but the ambulance employee told him that it could not. RP 446.

At the hospital, A.S. became noticeably less talkative. RP 464. When asked by emergency room physician Dr. Robert Kregenow how his leg had gotten injured, A.S. initially stated that he had been running toward a table, but then stopped talking and would not answer additional questions about whether he had tripped or fallen. RP 860, 884. Later in the interaction, Dr. Kregenow asked again how the injury had occurred, and A.S. disclosed that Matos-Ramos had kicked him in the leg. RP 860, 884. When pediatric orthopedic surgeon Dr. Victoria Silas saw A.S. later in the day and asked what had happened to him, A.S. again initially stated that he had been running toward a table, and then stopped speaking. RP 831. Dr. Silas had the impression that A.S. was withholding something, but did not ask any further questions. RP 831-32.

X-rays confirmed that A.S. had suffered a "transverse" fracture of his upper right femur, meaning a fracture straight across through the bone. RP 834, 863. Dr. Kregenow testified that a transverse fracture occurs if there is a significant amount of force applied to both ends of a bone or to the side of the bone. RP 867. Unlike spiral fractures, transverse fractures

are not a common type of femur fracture seen among children of A.S.'s age, and fractures as high on the femur as A.S.'s injury are also unusual. RP 865, 869. A transverse fracture is very unlikely to occur to a child of A.S.'s age in a fall while running or a fall from even four feet above the ground. RP 868, 896-97. Although A.S.'s injury was not consistent with tripping and falling while running, it was consistent with being kicked in the leg by an adult. RP 869-70, 902. Dr. Silas testified that A.S.'s injury was not consistent with a simple fall, but was consistent with being kicked. RP 835, 846.

The day after his injury, A.S. was interviewed by forensic child interviewer Susanna Marshall. RP 1067-69. After initial questions to verify that A.S. understood the difference between truth and lies and understood the importance of telling the truth, Marshall asked A.S. to talk about what happened the day before. Trial Ex. 31 at 10-19. Once again, A.S. disclosed that Matos-Ramos had kicked him. Trial Ex. 31 at 21.

During the next month, as A.S. recovered, his grandmother Venus S. cared for him during the day. RP 724. At one point during the first or second week, Venus asked A.S. what had happened to his leg. RP 737. A.S. stated that Matos-Ramos had broken it. RP 737.

At trial in late 2013, the jury watched the video of the child forensic interview and heard testimony regarding the above facts from

A.S., Amica, Venus, Officer Eckert, Dr. Kregenow, Dr. Silas, three EMTs, and two ambulance employees. Matos-Ramos did not testify, but presented testimony by two pediatricians who had seen A.S. for checkups and issues unrelated to his broken leg. They testified about their discussions with Amica between 2009 and 2012 regarding A.S.'s hyperactivity and occasional behavioral issues at daycare and at home. RP 933-39, 1192-99. The defense argued in closing that Matos-Ramos had been playing videogames in the living room when he heard what sounded like A.S. falling and heard a crack, and that when he got up A.S. was lying on the floor with a broken leg. RP 1223.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF PRIOR BAD ACTS UNDER ER 404(b) TO SHOW A LACK OF ACCIDENT.

Matos-Ramos contends that the trial court's admission under ER-404(b) of injuries he had previously inflicted on A.S. to show a lack of accident was improper because the "lack of accident" exception is available only when a defendant admits causing the victim's injury but argues that it was an accident. This claim should be rejected. Numerous prior Washington State cases have held that such evidence is admissible to

rebut a claim that the victim's injury was an accident in which the defendant played no role.

a. Relevant Facts.

On the day A.S. broke his leg, witnesses observed that A.S. also had abrasions or bruises on his forehead and chin that were not new. RP 361, 769, 833, 860. When asked how he had gotten them, A.S. explained that Matos-Ramos had "pinned me down on the carpet" because he was "throwing a fit and fighting back, just screaming." RP 362, 769, 860.

During pretrial motions, the parties litigated the admissibility of that evidence under ER 404(b).⁵ The State argued that the prior injury was admissible to rebut the defendant's claim of accident and to show the defendant's intent and recklessness in kicking A.S. Supp. CP __ (sub 243 at 4-6). The trial court engaged in the four-part ER 404(b) analysis, ultimately finding the proffered evidence admissible. CP 89. As part of its analysis, the court found that Matos-Ramos's claim that A.S.'s broken leg was the result of an accident rendered evidence of prior injuries inflicted by Matos-Ramos relevant to show a lack of accident, citing State v. Norlin, 134 Wn.2d 570, 951 P.2d 1131 (1998). CP 89; RP 279. The

⁵ The pre-trial motion also addressed the admissibility of an earlier disciplinary incident in which Matos-Ramos beat A.S. with a slipper or flip flop, leaving bruises on A.S.'s back, but the State ultimately chose not to offer that evidence at trial. CP 87-90. The State did not attempt to offer prior injuries that could not be definitively tied to Matos-Ramos, such as the fact that healing fractures were noted in A.S.'s x-ray report. RP 263.

trial court also ruled that evidence Matos-Ramos wanted to introduce about A.S. injuring himself and engaging in risky behaviors on other occasions was admissible to support Matos-Ramos's claim of accident. CP 90; RP 281. The trial court did not address the State's argument that the evidence was also admissible to prove that Matos-Ramos had the mental state required for the charged crime. CP 89-90; RP 277-81.

b. The "Lack Of Accident" Exception Applies When, As Here, The Defendant Claims That A Young Child In His Care Injured Himself Accidentally.

Although evidence of prior bad acts is inadmissible to prove the character of a person in order to show conformity therewith, such evidence may be admissible for other purposes, including proving the absence of mistake or accident. ER 404(b); State v. Lough, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995). To admit evidence of prior bad acts, the trial court must: (1) find by a preponderance of the evidence that the acts occurred, (2) identify the purpose for which the evidence is admitted, (3) find that the evidence is related to that purpose, and (4) determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. State v. Kilgore, 147 Wn.2d 288, 292, 5 P.3d 974 (2002). An appellate court reviews a trial court's interpretation of an evidentiary rule, such as ER 404(b), de novo. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, once the rule is correctly

interpreted, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Id.

Matos-Ramos challenges the trial court's ER 404(b) analysis on a single point: whether, as a matter of law, evidence of prior injuries inflicted by the defendant can be admissible to rebut a defendant's claim that a child in his care injured himself on accident without any involvement by the defendant. Br. of Appellant ("BOA") at 11-16. However, as this Court has noted, numerous prior Washington State cases "clearly demonstrate that a material issue of accident arises where the defense is denial and the defendant affirmatively asserts that the victim's injuries occurred by happenstance or misfortune." State v. Roth, 75 Wn. App. 808, 819, 881 P.2d 268 (1994). In Roth, the defendant was charged with murdering his wife, but claimed that her drowning was an accident in which he played no part. 75 Wn. App. at 810-11. This Court held that evidence regarding the circumstances of Roth's ex-wife's death was admissible under ER 404(b) to rebut Roth's claim that his current wife's death was an accident. Id. at 819.

In Roth, this Court cited the following cases to support its conclusion that ER 404(b)'s "lack of accident" exception applies even where the defendant denies any role in the claimed accident: State v. Fernandez, 28 Wn. App. 944, 953, 628 P.2d 818 (1980) (prior acts

admissible to rebut defendant's claim that wife's injuries resulted from motor vehicle crash outside his presence); State v. Gogolin, 45 Wn. App. 640, 646, 727 P.2d 683 (1986) (prior acts admissible to rebut defendant's claim that wife's injuries resulted from a fall down the stairs where defendant denied causing the fall); and State v. Bell, 10 Wn. App. 957, 961, 521 P.2d 70 (1974) (prior injuries suffered by child victim properly admitted to rebut claim that child had injured herself by falling from crib). Roth, 75 Wn. App. at 819.

These cases are not the only support for Roth's holding; numerous other cases involving child victims also make it clear that prior injuries inflicted by the defendant upon a child are admissible to rebut a claim that the child's subsequent injury resulted from an accident in which the defendant played no part. E.g., State v. Norlin, 134 Wn.2d 570, 572-83, 951 P.2d 1131 (1998) (prior injuries properly admitted to rebut claim that child's current injury resulted from falling off a couch so long as prior injuries tied to the defendant by a preponderance of the evidence);⁶ State v. Terry, 10 Wn. App. 874, 883, 520 P.2d 1397 (1974) (evidence of child

⁶ Matos-Ramos's attempt to distinguish Norlin on its facts is ineffective. Contrary to Matos-Ramos's claim, there was no "implicit claim of accidental conduct by the defendant" in Norlin. Br. of Appellant at 16. Norlin's claim that the infant rolled off a couch is not legally distinguishable from Matos-Ramos's claim that A.S. fell while running—both defenses denied any involvement in the accident beyond perhaps a failure to adequately supervise the child, and both, if believed by the jury, would have relieved the defendant of any criminal liability.

victim's prior injuries admissible to rebut claim that child fell down the stairs); see also Estelle v. McGuire, 502 U.S. 62, 65-70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (evidence of prior injuries "helps to prove that the child died at the hands of another and not by falling off a couch" as defendant claimed).

Matos-Ramos's attempt to distinguish Norlin on its facts is ineffective. BOA at 16. Contrary to Matos-Ramos's claim, there was no "implicit claim of accidental conduct by the defendant" in Norlin. Br. of Appellant at 16. Norlin's claim that the infant rolled off a couch is not legally distinguishable from Matos-Ramos's claim that A.S. fell while running—both defenses denied any involvement in the accident beyond perhaps a failure to adequately supervise the child, and both, if believed by the jury, would have relieved the defendant of any criminal liability.

None of the other cases cited by Matos-Ramos support his contention that the "lack of accident" exception applies only when a defendant admits the physical contact alleged but claims it occurred accidentally. BOA at 11. In State v. Bowen, the defendant never claimed any type of accident, and instead denied that the alleged contact with the victim's breast occurred at all. 48 Wn. App. 187, 193, 738 P.2d 316 (1987), abrogated in part on other grounds by Lough, supra, 125 Wn.2d 847. The court of appeals correctly held that prior bad acts could not be

introduced to show a lack of accident under such circumstances, but offered no opinion on whether the lack of accident exception might apply in a case where an injury indisputably occurred, and the only question was whether the jury should believe the defendant's claim that the victim injured himself on accident. Id. at 193-94.

In State v. Hernandez, the defendant admitted some involvement in his girlfriend's death, but claimed that it was an accident. 99 Wn. App. 312, 322, 997 P.2d 923 (1999). The court of appeals properly observed that evidence of prior misconduct is generally admissible to prove the absence of accident in such circumstances, but again offered no opinion on whether the lack of accident exception would also apply in a case like Matos-Ramos's. Id.

In State v. Hieb, a single judge opined that prior injuries inflicted on a child are "generally" admissible to prove the absence of accident "only where the defendant admits doing the act, but claims he did not have the requisite state of mind to commit the offense charged." 39 Wn. App. 273, 284, 693 P.2d 145 (1984) (J. Ringold, writing only for himself), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). Not only did that statement not garner the support of a majority of the panel, and not only did Judge Ringold go on to conclude that the prior injuries were admissible despite the defendant's denial of any involvement in the

claimed accident, but the case Judge Ringold relied on for support, State v. Saltarelli,⁷ in no way states that a defendant's admission of involvement in an accident is absolutely necessary to render prior acts admissible to disprove the claim of accident. Hieb, 39 Wn. App. at 284.

Instead, the Saltarelli court merely noted that a case where the defendant "admits the acts and denies the necessary intent because of mistake or accident" is an example of a situation "where the proof of defendant's intent is ambiguous," thus rendering prior bad acts admissible to prove that the defendant acted with the requisite intent. 98 Wn.2d 358, 366, 655 P.2d 697 (1982) (quoting People v. Kelley, 66 Cal.2d 232, 242, 424 P.2d 947 (1967)). At no point did the court address a scenario where a child's injury indisputably occurred in the defendant's presence, and the only question is whether the defendant inflicted the injury while acting with the required level of intent or the child accidentally inflicted the injury on himself. Id.

In sum, a long line of precedent firmly establishes that evidence of prior injuries inflicted on the victim by the defendant are admissible under ER 404(b) to rebut a defendant's claim that the victim's current injury resulted from an accident for which the defendant was not responsible. The trial court thus properly interpreted ER 404(b) as permitting the

⁷ 98 Wn.2d 358, 655 P.2d 697 (1982).

admission of evidence regarding the prior injuries inflicted by Matos-Ramos on A.S. to rebut Matos-Ramos's claim of accident. The trial court properly exercised its discretion in admitting the evidence.

- c. Even If This Court Decides That The Evidence Was Not Admissible To Prove Lack Of Accident, No Error Occurred Because The Evidence Was Also Admissible To Prove That Matos-Ramos Acted With The Required Intent.

This Court may uphold the trial court's ruling that evidence of the prior injuries was admissible on any grounds that are supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003); see also Bowen, 48 Wn. App. at 194 (“[T]he trial court's admission of evidence on an incorrect basis does not constitute error if a proper, although unrecognized, basis exists for admitting the evidence.”). The State argued that there were two proper purposes for admission of the ER 404(b) evidence: to show lack of accident, and to show that Matos-Ramos acted with the required mental state. Even if this Court were to determine that the “lack of accident” exception is inapplicable, Matos-Ramos's conviction should nevertheless be affirmed because the evidence was also admissible to prove his intent and recklessness.

In order to prove that Matos-Ramos committed the charged crime of assault of a child in the second degree, the State had to prove that he “intentionally assault[ed]” A.S. “and thereby recklessly inflict[ed]

substantial bodily harm.”⁸ CP 46. Even in the absence of a claim of accident, A.S.’s description of the incident generated a material issue as to whether Matos-Ramos kicked him intentionally and with recklessness.

“In appropriate cases, evidence of prior crimes may be relevant to the issue of intent.” Saltarelli, 98 Wn.2d at 365. Our supreme court has made clear that “where the [charged] acts, if committed, indisputably show an evil intent and the defendant does not specifically raise the issue of intent,” such as is the case with many allegations of nonconsensual sexual contact, the defendant’s intent is not “an essential point which the state [is] required to establish,” and prior bad acts against the victim are not admissible to prove intent. Id. at 366 (internal quotation marks omitted). However, where the doing of the act itself does not inherently establish the required intent, a defense of general denial puts the defendant’s intent materially at issue. See id. at 365.

Kicking a child is not an act that, if committed, indisputably shows the level of intent required for assault of a child in the second degree.

A.S.’s somewhat disjointed account of the incident never addressed how hard Matos-Ramos had kicked him, and did not inherently establish that

⁸ The jury was instructed that “A person . . . acts recklessly when he or she knows of and disregards a substantial risk that substantial bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.” CP 50.

Matos-Ramos kicked him intentionally and in conscious disregard of the risk that A.S. would be injured as a result. RP 521-25. Jurors could question whether Matos-Ramos had indeed only kicked A.S. “to make [him] roll,” as A.S. at one point mentioned, or whether Matos-Ramos was aware of the risk of substantial injury. As such, prior physical discipline that had left visible injuries on A.S. was admissible to establish that Matos-Ramos was aware of the consequences of using physical force against a child of A.S.’s age. State v. Daniels, 87 Wn. App. 149, 157-58, 940 P.2d 690 (1997) (prior physical discipline resulting in bruising was properly admitted to prove defendant’s conduct in charged incident was reckless as to risk of substantial bodily harm).

Because the challenged evidence was admissible to prove that Matos-Ramos acted with the required level of intent, independent of any issue of accident, the trial court properly exercised its discretion in admitting the evidence.

- d. Even If The Evidence Of The Prior Disciplinary Incident Had Not Been Admissible For Any Reason, Admitting It Was Harmless In Light Of The Other Unchallenged Evidence Admitted At Trial.

The erroneous admission of ER 404(b) evidence is a non-constitutional error, and is therefore harmless unless there is a reasonable probability that the result of the trial would have been different had the

error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Here, there is no reasonable probability that the jury would have reached a different verdict had evidence of the abrasions on A.S.'s face, and their cause, not been admitted. The jury would still have heard all of the most significant evidence that contradicted Matos-Ramos's assertion that A.S. had merely fallen while running: A.S.'s initial reluctance to tell people how his injury had occurred, his statement that he wasn't supposed to say what had happened and was just supposed to say he ran into a table, his eventual repeated consistent disclosures that Matos-Ramos had kicked him in his right thigh, his request to ambulance personnel to keep his disclosures a secret, and, most importantly, unrebutted expert testimony that A.S.'s injury was not consistent with the explanation provided by Matos-Ramos, but was consistent with A.S.'s numerous statements that Matos-Ramos had kicked him.

Moreover, the jury would still have heard unchallenged testimony by Amica about Matos-Ramos's questionable behavior toward A.S. unrelated to the facial abrasions. Amica testified without objection that Matos-Ramos had an increasingly poor relationship with A.S. around the time of the incident, that Matos-Ramos was a strict disciplinarian, and that she had seen Matos-Ramos get very angry while physically disciplining A.S. prior to the charged incident. RP 611, 681, 694. She also testified,

without objection or prior 404(b) analysis, that Matos-Ramos had been caring for A.S. in 2009 when A.S. suffered a laceration to his chin that Matos-Ramos claimed resulted from A.S. jumping out of his sister's crib. RP 658. Amica testified that A.S. had sounded "robotic" when describing both that incident and the charged incident, but had never sounded that way after injuries obtained when his mother was home. RP 697. She also described how, when Matos-Ramos had A.S. explain to her over the phone how the charged leg injury had occurred, Matos-Ramos had repeatedly cut in to keep A.S. from speaking and repeatedly cautioned A.S. not to lie. RP 670-71, 699.

Finally, the incident involving the facial abrasions was relatively minor. All the jury heard was that Matos-Ramos had held A.S. down on a carpeted floor because A.S. was, by his own admission, "throwing a fit," "fighting back," and "screaming." RP 134, 362. There was no clear indication that the facial abrasions resulted from excessive force by Matos-Ramos rather than excessive attempts by A.S. to escape. Had the jurors been disposed to acquit Matos-Ramos based on the other evidence admitted at trial, there is no reasonable probability that the facial abrasions would have swayed them to instead convict him. Any error by the trial court in admitting testimony about the abrasions and their cause was therefore harmless.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING A.S. COMPETENT TO TESTIFY.

Matos-Ramos contends that the trial court abused its discretion in finding A.S. competent to testify. This claim should be rejected. Because the record demonstrates that the two challenged factors—A.S.’s understanding of the obligation to speak the truth and his independent recollection of the relevant timeframe—were met, Matos-Ramos failed to meet his burden to establish A.S.’s incompetency, and the trial court properly exercised its discretion in finding A.S. competent.

a. Relevant Facts.

During pretrial motions in November 2013, Matos-Ramos questioned A.S.’s competency to testify, and argued that the trial court should require A.S. to testify in an evidentiary hearing in order to determine whether he was competent. RP 226-30. Without citing any evidence that A.S. was currently incompetent, Matos-Ramos expressed concern that seven-year-old A.S. might not have an independent recollection of the events in question given that A.S. had been only four years old at the time. RP 229. Matos-Ramos also pointed to certain statements that A.S. made to the child forensic interviewer back in 2010, in which A.S. “express[ed] an understanding of some of the concepts” and

yet answered “in ways that were incorrect.”⁹ Matos-Ramos suggested that such statements called into question A.S.’s “willingness . . . to speak the truth” and ability at the time of the incident to receive an accurate impression of the events. RP 228.

The trial court reviewed numerous exhibits, including witness statements about communication with A.S. at the time of the incident, the child forensic interview DVD, the defense interview of A.S.’s grandmother, and the police interview of A.S.’s mother. RP 255 (stating trial court review same exhibits for competency issue as for child hearsay issue); CP 81-82 (listing exhibits reviewed for child hearsay determination¹⁰). The trial court ruled that a pretrial competency examination was not warranted because Matos-Ramos had not made the required threshold showing that A.S. was incompetent. RP 256-58.

The court noted that neither the passage of time nor subsequent difficulty in remembering specific details constitutes affirmative evidence of incompetence. RP 256. The court also observed that after watching the DVD of the child forensic interview, it was clear that the statements that

⁹ Matos-Ramos appeared to be referring to A.S.’s statement during the interview that if the interviewer said it was snowing inside the interview room, that would be “real” rather than “pretend,” despite A.S. subsequently correctly stating that it would be “pretend.” Trial Ex. 31 at 12.

¹⁰ These exhibits have recently been designated for appellate review, with the exception of pretrial exhibits 6 and 8, which are identical to the previously-designated trial exhibits 29 and 31, respectively.

Matos-Ramos believed called A.S.'s competency into question were simply examples of A.S. being "playful," and specifically found that neither A.S.'s statements in the interview nor his sometimes nonresponsive statements to first responders at the scene indicated any lack of competency even back in 2010.¹¹ RP 257-58. The trial court denied the motion for a testimonial competency hearing, but stated that the parties could re-raise the issue at any time. RP 258.

When A.S. testified before the jury, he was one month shy of eight years old. RP 480. He promised to tell the truth, and appropriately answered questions about his age, birthday, family members, school, and favorite activities. RP 479-84. The following exchange then occurred:

- Q: [A.S.], do you know the difference between a truth and a lie?
A: No, [inaudible] idea.
Q: What's that? No?
A: Nope.
Q: If I said my hair is green, what would you say?
A: It's not green.
Q: What color is it?
A: I don't know.
Q: You don't know?
A: No.
Q: Is it purple?
A: No.
Q: Is it red?
A: No.

¹¹ During the child forensic interview, A.S. correctly completed the "truth vs. lie" and "morality" tasks, indicating that he knew the difference between truth and lies and understood that telling lies was bad. Pretrial Ex. 18; Trial Ex. 31 at 15-18.

Q: Is it orange?
A: No.
Q: If I said my hair is orange, is that true?
A: No.
Q: Is that a lie?
A: Yeah.

After correctly naming parts of his body, A.S. talked about the fact that he once broke his leg, and described his treatment in considerable detail, including getting an x-ray and being put to sleep before a cast was put on at the hospital, being cared for by his grandmother while he was in the cast, and getting the cast off at the end of summer. RP 487-90. A.S. even remembered small details such as the colors of the different casts he had, an EMT's Toy Story-themed backpack that he and the EMT had discussed during the ambulance ride, and the fact that a female EMT drove the ambulance while the male EMT rode in the back with A.S. RP 487, 492-94. Testimony by A.S.'s mother and other witnesses confirmed that A.S. had testified truthfully and accurately about those details. RP 582-86, 605.

Despite his detailed memory of the events following his leg injury, A.S. demonstrated a reluctance to discuss the events that led up to the injury, denying any memory of how his leg was broken the first several times the prosecutor asked about that portion of the incident. RP 492, 499, 500. Eventually, however, A.S. began to recount details of the events

leading up to the injury, first mentioning that he had been “spelling words” with Matos-Ramos “right before I broke my leg,” then mentioning that he had to do pushups. RP 519. After again answering “I don’t know” in response to a question about what else he did before he broke his leg, A.S. affirmed that his broken leg had not resulted from falling down or tripping. RP 520-21. A.S. then began giving more and more details about the events leading up to his injury, culminating in the statement that, while A.S. was sitting at the dining table working on spelling,

A: [Matos-Ramos], uh, said to get down of the chair and then, uh, he, uh, made me—he—he said to do pushups; uh, then I did. Then, uh—then he stepped on me. Then, uh, I—I tried to get away, and then, uh, he kicked me and—and, uh—and I rolled to the table leg.

Q: And then what happened?

A: Uh, then called [sic] the ambulance.

RP 523.

On cross-examination, A.S. was asked again whether he knew the difference between a truth and a lie, and answered, “Yeah.” RP 541.

When asked why he had told the prosecutor that he did not, A.S. indicated that he did not understand defense counsel’s question; defense counsel did not attempt to rephrase the question or otherwise give A.S. an opportunity to explain his earlier answer. RP 542.

At one point during direct examination, after the prosecutor observed that A.S. looked tired, A.S. spontaneously asserted that he is never tired, and stays up until sunrise, although he pretends to be asleep. RP 517. A.S. clarified on cross-examination that he only does this on weekends. RP 557. The record does not indicate whether A.S.'s claim was true or not; however, testimony by two of his pediatricians indicated that A.S. did in fact have trouble going to sleep at night, and that he had been referred to a sleep specialist. RP 944, 1200.

After both A.S. and his mother had testified, Matos-Ramos again raised concerns about A.S.'s competency to testify. RP 729-30. He acknowledged that Amica's testimony indicated that A.S. had known the difference between truth and a lie at age four, but argued that some of A.S.'s statements on the stand, such as incorrectly stating that he currently lives with his grandparents and denying that he liked the TV show "Dora the Explorer" when he was four years old, raised concerns "about his ability to testify truthfully." RP 730. The State pointed out that A.S. had correctly clarified that he does not currently live with his grandparents, and argued it was understandable that A.S.'s current belief that "Dora the Explorer" was a show "for girls" affected his willingness to admit that he used to watch it. RP 564, 731.

The trial court found that, despite some conflicting details within A.S.'s testimony and between his testimony and his mother's, A.S. had demonstrated "a pretty impressive ability to recall" events from the relevant time period. RP 732. The court ruled that any conflict within A.S.'s testimony or inability to recall details went "to the weight of the testimony rather than to the competence of the child." RP 732. The court also found that "the testimony up to this point has been clear that the child does understand the difference between the truth and a lie, although sometimes the child may choose to lie, and sometimes the child may choose to tell the truth. That's certainly the same with any witness and goes to the credibility of the witness." RP 732-33. The trial court concluded that it was "convinced" A.S. was competent to testify. RP 733.

- b. The Trial Court Properly Exercised Its Discretion In Finding That A.S. Understood The Obligation To Speak The Truth On The Witness Stand And Had A Memory Sufficient To Retain An Independent Recollection Of The Occurrence.

Every person, regardless of age, is presumed competent to testify. State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010); RCW 5.60.020; ER 601. The party challenging a potential witness's competency bears the burden of establishing that the potential witness is "of unsound mind, or intoxicated at the time of their production for examination," or "appear[s] incapable of receiving just impressions of the facts, respecting which they

are examined, or of relating them truly.” RCW 5.60.050; S.J.W., 170 Wn.2d at 102.

A trial court’s determination of a witness’s competency will not be reversed on appeal absent a manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). Although a trial court determines competency pre-trial, on appeal this Court examines the entire record to review that determination. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

Five factors, first set out in Allen, inform a trial court’s determination of whether a child is incapable of receiving just impressions of the facts or of relating them truly. S.J.W., 170 Wn.2d at 102. Those factors examine whether the child has: “(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.” Allen, 70 Wn.2d at 692.

Matos-Ramos challenges the trial court's findings on the first and third Allen factors. BOA at 19-20. However, the record establishes that the trial court did not abuse its discretion in finding those factors satisfied.

- i. The record supports the trial court's finding that A.S. understood the obligation to speak the truth.

All that is required to meet the first Allen factor is a witness's on-the-record promise to tell the truth or acknowledgement of the importance of telling the truth in court. State v. S.J.W., 149 Wn. App. 912, 925, 206 P.3d 355 (2009) (factor satisfied because witness responded affirmatively when asked whether he promised to tell the truth), aff'd on other grounds, 170 Wn.2d 92, 239 P.3d 568 (2010); State v. Avila, 78 Wn. App. 731, 736, 899 P.2d 11 (1995) (factor satisfied because five-year-old witness "responded affirmatively when the prosecutor asked her if it is important to tell the judge the truth about things"). Here, the evidence strongly supports the trial court's finding that A.S. understood the obligation to speak the truth on the witness stand. The child forensic interview established that, even at the age of four, A.S. understood the difference between the truth and a lie, and understood that lying was bad. Trial Ex. 31 at 10-18. At trial, A.S. was sworn in like every other witness, and affirmatively promised to tell the truth. RP 479.

Furthermore, A.S.'s testimony about his current daily life and the events following his leg injury was confirmed to be true by his mother's testimony. RP 582-86, 605. The only part of A.S.'s testimony that cast any doubt on whether the first Allen factor was satisfied came when A.S. initially answered "no" when asked if he knew the difference between a truth and a lie. RP 484. However, A.S. later clarified that he did know the difference, which he had already demonstrated by correctly identifying false statements about the color of the prosecutor's hair as lies. RP 484-85, 541. While Matos-Ramos contends on appeal that A.S.'s testimony about staying up all night on weekends was an "obvious falsehood," the record does not support that conclusion. BOA at 19. Furthermore, the fact that A.S. repeatedly denied remembering how he broke his leg before finally testifying to what occurred indicates only that A.S. was reluctant to discuss the issue, and not that he was unable to understand the obligation to tell the truth on the witness stand.

The trial court, which had the benefit of observing A.S. on the stand, did not feel that testimony in any way indicated an inability to tell the difference between a truth and a lie, and noted that any witness may choose to lie in response to some questions and tell the truth in response to others, with such inconsistency going to the witness's credibility rather than his competency to testify. RP 732-33. As this Court has noted,

There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness. The trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation but are not reflected in a written record.

State v. Borland, 57 Wn. App. 7, 11, 786 P.2d 810 (1990), abrogated on other grounds by State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997).

In light of the abundant evidence that A.S. understood the obligation to speak the truth on the witness stand and the necessary deference to the trial court's observations, this Court should conclude that the trial court properly exercised its discretion in finding that the first Allen factor was met.

- ii. The record supports the trial court's finding that A.S. possessed a memory sufficient to retain an independent recollection of the occurrence.

The third Allen factor is satisfied if a witness "demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue." State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). There is no requirement that a witness's memory of the incident be perfect; so long as he or she is capable of accurately remembering events from around the same time as the relevant incident, any inaccuracies or inconsistencies in the testimony go to the weight that

should be given to the testimony rather than its admissibility. Id. at 665-66.

Here, A.S. testified accurately and in great detail about events contemporaneous with the charged incident, such as his ambulance ride, his treatment at the hospital, the color of his two different casts, and who cared for him while he was recovering. He also eventually testified about how his leg injury occurred, and those details that could be corroborated, such as his description of his chair at the dining table, were verified by his mother. This established that A.S.'s memory was sufficient to retain an independent recollection of the occurrence.

Contrary to Matos-Ramos's contention on appeal, the fact that A.S. initially testified that he did not remember how his leg was injured did not demonstrate that he was incapable of retaining an independent memory of the event. BOA at 20. If such were the case, every reluctant adult witness who denied remembering an aspect of an event would be incompetent.

Instead, it merely demonstrated that A.S. was reluctant to testify about what he remembered—a fact that was confirmed when A.S. eventually did testify about what had occurred, consistent with his statements shortly after the incident.

Matos-Ramos's contention that A.S.'s initial failure to include Matos-Ramos among the people he lived with at the time of the incident

demonstrates his inability to retain an independent recollection of the incident is similarly without authority and ill-founded. BOA at 20. Such a failure of memory is merely an example of the kind of inaccuracy or inconsistency that Washington courts have declared goes to the weight to be given to the testimony rather than the witness's competency. See Przybylski, 48 Wn. App. at 665-66.

Because the record supports the trial court's finding that the Allen factors were satisfied, the trial court properly exercised its discretion in allowing A.S. to testify. Even if this Court were to determine that the trial court abused its discretion in finding A.S. competent to testify, the error was harmless beyond a reasonable doubt, because A.S.'s testimony about the incident was cumulative of his out-of-court statements that were properly admitted under the child hearsay statute.¹²

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING A.S.'S OUT-OF-COURT STATEMENTS UNDER THE CHILD HEARSAY EXCEPTION.

Matos-Ramos contends that the trial court erred in admitting A.S.'s out-of-court statements about the cause of his broken leg under the child

¹² While A.S.'s incompetency would have slightly altered the child hearsay analysis, the result would have remained the same. The un rebutted expert testimony that A.S.'s injury was consistent with a kick and inconsistent with a fall provided the minimal corroborative evidence that RCW 9A.44.120(2)(b) requires when a child declarant is unavailable as a witness. See State v. Hunt, 48 Wn. App. 840, 849, 741 P.2d 566 (1987) (corroboration requirement is analogous to rule requiring independent evidence of *corpus delicti* before confession is admitted).

hearsay exception because the first, second, fourth, and fifth Ryan¹³ factors were not satisfied. This claim should be rejected. Because the record supports the trial court's finding that each of the relevant Ryan factors was satisfied, the trial court properly exercised its discretion in admitting the hearsay statements.

a. Relevant Facts.

During pretrial motions, the parties litigated the admissibility of statements about being kicked by Matos-Ramos that were made to first responders, Dr. Kregenow, the forensic child interview specialist, and A.S.'s grandmother. RP 184-214, 241-53. After taking testimony from Officer Eckert and reviewing numerous exhibits summarizing the expected testimony of other witnesses, the trial court went through each of the Ryan factors to determine whether the content and circumstances of each set of hearsay statements bore sufficient indicia of reliability. RP 241-53; CP 81-82-86; Pretrial Ex. 7, 9-18, 20-26; Trial Ex. 29, 31.¹⁴ The court found that most or all of the factors weighed in favor of admissibility for each group of hearsay statements, and ruled that nearly all of the statements were admissible. RP 241-53; CP 81-82, 86. The trial court excluded two statements that A.S. made to his grandmother years after the

¹³ State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

¹⁴ Pretrial exhibits 6 and 8, which were considered by the trial court, were later renumbered as trial exhibits 29 and 31. Supp. CP __ (sub 249, 250).

incident on the grounds that the Ryan factors were not substantially met because the statements were heard by only one person and trustworthiness was not suggested by the timing of the statements. RP 251-53; CP 85.

b. The Trial Court Properly Exercised Its Discretion In Ruling That The Ryan Factors Were Substantially Satisfied.

RCW 9A.44.120 governs the admissibility of a child abuse victim's hearsay statements. It states, in relevant part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. This statute was enacted "to give trial courts greater discretion in determining the trustworthiness of a child victim's out of court statement," in recognition of the fact that the typical lack of

witnesses other than the victim and perpetrator makes the abuse of children one of the most difficult crimes to detect and prosecute. State v. C.J., 148 Wn.2d 672, 680-81, 63 P.3d 765 (2003).

In evaluating a Confrontation Clause challenge to RCW 9A.44.120 in a case where the child victim did not testify, our supreme court in State v. Ryan identified nine factors that it felt were useful in evaluating the reliability of a hearsay statement. 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Since then, this Court has recognized that only the first five of those factors are truly helpful in evaluating the admissibility of a child's hearsay statements about abuse. Borland, 57 Wn. App. at 20. The first five Ryan factors are: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; and (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness. C.J., 148 Wn.2d at 683-84; Ryan, 103 Wn.2d at 175-76.

Not every Ryan factor need be satisfied in order for a child victim's hearsay statement to be admissible under RCW 9A.44.120. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). A trial court's ruling

on the admissibility of child hearsay statements under RCW 9A.44.120 will not be overturned absent an abuse of discretion. Id. at 665.

Matos-Ramos challenges the trial court's findings that the first and second Ryan factors were met as to all of the admitted hearsay statements. BOA at 23-26. He also challenges, with respect to the statements made to first responders in the ambulance, the trial court's findings that the fourth and fifth factors were met. BOA at 24-26. However, a review of the record establishes that the trial court properly exercised its discretion in finding that the Ryan factors were met.

- i. First Ryan factor: whether the declarant, at the time of making the statement, had an apparent motive to lie.

The trial court ruled that the first Ryan factor, whether the declarant had an apparent motive to lie at the time the statement was made, weighed in favor of admitting the hearsay statements about being kicked by Matos-Ramos. RP 243-44. The trial court found that there was no evidence that A.S. would have gotten in trouble for his injury had it truly been an accident, nor any evidence that A.S. had anything to gain from saying that Matos-Ramos kicked him. RP 243-44. The court noted that, to the contrary, there was evidence A.S. had been instructed to state that he had run into the dining table. RP 244, 354. This indicated that

A.S. actually risked punishment, rather than avoided it, by stating that Matos-Ramos kicked him. RP 244.

The trial court's findings were supported by the record. The only evidence Matos-Ramos cites in challenging them is the fact that A.S. made inconsistent statements about how his injury occurred, and the fact that A.S. testified at one point that he was scared of Matos-Ramos because Matos-Ramos would do things like put him in a box, dump cold water on his head, and make him do pull-ups.¹⁵ RP 501. However, there was no evidence to suggest that A.S. was aware, at the time he made the hearsay statements, that making the statements would have any effect on Matos-Ramos's continued presence in A.S.'s life.

Additionally, A.S.'s inconsistent statements regarding the cause of his injury do not suggest, as Matos-Ramos claims, that A.S. had a motive to falsely blame Matos-Ramos for the injury. Instead, the inconsistent statements followed a pattern that was consistent with a motive to conceal Matos-Ramos's role in the injury. With each new person A.S. spoke to immediately after the incident, he initially gave the explanation he had been instructed to give: that he had run into, or been running toward, a table. After becoming comfortable with the person, A.S. would then

¹⁵ In response to an objection by Matos-Ramos, the trial court struck this statement and instructed the jury to disregard it. RP 501, 517.

disclose that Matos-Ramos had kicked him. Once A.S. made that disclosure to a given individual, he never again told that individual that he had run into a table.

The trial court thus properly exercised its discretion in finding that the first Ryan factor was met as to all of the admitted hearsay statements.

- ii. Second Ryan factor: whether the declarant's general character suggests trustworthiness.

The trial court ruled that the second Ryan factor, whether the declarant's general character suggests trustworthiness, also weighed in favor of admitting the hearsay statements about being kicked by Matos-Ramos. RP 244-46. The trial court noted that there was substantial evidence that A.S. did not have a history of lying and that lying about being kicked by Matos-Ramos would be out of character for him. RP 245. It cited statements by A.S.'s grandmother, mother, and Matos-Ramos indicating that A.S. generally told the truth and had no reason to lie about being kicked. RP 245-46; Pretrial Exhibits 4 at 40, 12 at 95, 23 at 18.

The trial court noted that there was evidence that A.S. had on one occasion refused to admit he'd done something in an attempt to avoid getting in trouble, and some evidence that A.S. would sometimes pick up things said by others and "make them his own story." RP 244, Pretrial Ex. 23 at 17-18. However, the trial court found that there was no evidence

that either phenomenon was occurring in the present case, as there was no indication A.S. had done anything around the time of his injury that he would feel a need to lie about, nor was there any indication that A.S. had merely heard and adopted someone else's statement about being kicked by Matos-Ramos. RP 244-45. The trial court thus concluded that, for purposes of the admissibility of A.S.'s hearsay statements in this case, A.S.'s general character suggested his statements were trustworthy. RP 244-46.

The trial court's findings were supported by the record and were thus a proper exercise of discretion. On appeal, Matos-Ramos contends only that the mother's statements that A.S. would occasionally lie in an attempt to avoid getting in trouble and would sometimes adopt things he heard other people say rendered the trial court's finding of a general character for truthfulness an abuse of discretion. BOA at 24. However, he does not dispute the trial court's finding that there was no evidence or suggestion that A.S. reported being kicked by Matos-Ramos in an attempt to avoid getting in trouble, nor that A.S. had heard someone else suggest he'd been kicked by Matos-Ramos before A.S. first reported that fact. The trial court thus properly exercised its discretion in finding that the second Ryan factor was met as to all of the admitted hearsay statements.

- iii. Fourth Ryan factor: the spontaneity of the statement.

A child's statement that volunteers information in response to a question that is neither leading nor suggestive qualifies as "spontaneous" in the context of the Ryan factors. State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987); Borland, 57 Wn. App. at 15; see Swan, 114 Wn.2d at 649-50. The trial court ruled that the fourth Ryan factor, the spontaneity of the hearsay statement, weighed in favor of admitting A.S.'s statements about being kicked by Matos-Ramos, because the questions asked by the various witnesses were open-ended and not leading or suggestive. RP 247-49.

Matos-Ramos challenges this finding as to the questions asked by Officer Eckert. BOA at 24-25. He does not dispute that Eckert first asked A.S. what had happened to his leg, got the response that A.S. had run into a table, and then asked whether anyone had given A.S. any "owies" that day, at which point A.S. stated that Matos-Ramos had just kicked him and pointed toward his injured upper right leg. RP 132. Instead, he argues that Eckert's second question suggested to A.S. that his first answer was wrong, rendering all of A.S.'s subsequent statements unspontaneous. BOA at 25. However, Matos-Ramos offers no authority for the proposition that simply because the question "did anyone give you owies

today?” was Eckert’s second attempt to obtain information about A.S.’s injury, it was inherently leading or suggestive.

To the contrary, Eckert’s second question did not suggest a particular answer, and certainly did not suggest the specific answer A.S. gave. The trial court therefore properly exercised its discretion in finding that A.S.’s statements to Eckert were spontaneous within the meaning of the fourth Ryan factor.

- iv. Fifth Ryan factor: whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness.

Matos-Ramos challenges the trial court’s finding that the fifth Ryan factor, whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness, weighed in favor of admitting A.S.’s statements to Officer Eckert. RP 250; BOA at 25-26. The trial court based its finding on the facts that Eckert was a professional witness and the statements were made very shortly after the incident, reasoning that there was no concern about a lack of objectivity on Eckert’s part and no opportunity for the child’s account of the incident to have been influenced by outside sources. RP 250.

Matos-Ramos asserts that this was an abuse of discretion because A.S. had no prior relationship with Eckert, and would have been swayed

by her status as an officer to more readily lie to avoid trouble or give the answer he thought she wanted to hear. BOA at 25-26. However, Washington courts have held that because police officers occupy natural positions of trust, the fifth Ryan factor weighs in favor of admitting statements made to them. State v. Kennealy, 151 Wn. App. 861, 884, 214 P.3d 200 (2009); see also Swan, 114 Wn.2d at 650 (relationship of trust between child declarant and witness weighs in favor of statement's admissibility). Given that, and the timing of A.S.'s statements to Eckert, the trial court properly exercised its discretion in finding that the fifth Ryan factor was weighed in favor of admitting the statements to Eckert.

Because the trial court properly exercised its discretion in finding that each of the Ryan factors weighed in favor of admitting the challenged hearsay statements, the admission of the statements under the child hearsay exception was proper.

c. Any Error Was Harmless.

Even if this Court were to find that the trial court abused its discretion in admitting A.S.'s out-of-court statements under the child hearsay exception, such error was harmless in light of the fact that the out-of-court statements were cumulative of A.S.'s in-court testimony and the fact that many of the out-of-court statements were also admissible as statements for purposes of medical diagnosis and treatment. Where a

child witness testifies, any error in admitting his hearsay statements is not of constitutional magnitude, and thus is harmless absent a reasonable probability that the outcome of the trial would have been different had the error not occurred. See State v. Ashurst, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986); State v. Luckett, 73 Wn. App. 182, 184, 869 P.2d 75 (1994).

Even if none of A.S.'s out-of-court statements had been admitted, the jury would still have heard A.S. testify that Matos-Ramos stepped on him and kicked him immediately before the ambulance was called. The jury would have observed A.S.'s initial reluctance to discuss how his leg had been injured, and heard his mother's testimony about Matos-Ramos's deteriorating relationship with A.S. at the time of the incident and Matos-Ramos's prior anger and excessive discipline. The jury also would have heard the unrebutted expert testimony that A.S.'s injury was consistent with A.S.'s account of being kicked, but was not consistent with Matos-Ramos's claim that the injury resulted from an accidental fall.

Moreover, even if the out-of-court statements had not been admitted under the child hearsay exception, the statements to the EMTs and Dr. Kregenow would have been admissible as statements for purposes of medical diagnosis or treatment. ER 803(a)(4); State v. Sims, 77 Wn. App. 236, 239, 890 P.2d 521 (1995) (statement by a child abuse victim attributing fault to a household member is admissible under ER 803(a)(4))

as a statement for purposes of medical diagnosis or treatment). Given all of that, there is no reasonable probability that the outcome of the trial would have been different had A.S.'s out-of-court statements not been admitted under the child hearsay exception.

4. THE TRIAL COURT PROPERLY INSTRUCTED THE JURORS ON THE REQUIREMENT THAT ANY VERDICT BE THE UNANIMOUS RESULT OF COMMON DELIBERATIONS.

Matos-Ramos contends that the trial court violated his constitutional right to a unanimous verdict by not specifically instructing the jurors that deliberations must involve all 12 jurors at all times. This claim should be rejected. The Washington State Supreme Court has already determined that WPIC 1.04, which was given in this case, is sufficient to apprise the jury of the need to deliberate together in the manner required by the constitutional right to a unanimous verdict.

a. Relevant Facts.

The State proposed a set of jury instructions that included WPIC 1.04, which states:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence

solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

Supp. CP __ (sub 245 at 7). Despite Matos-Ramos's agreement during pretrial motions that he would either propose his own jury instructions or affirmatively adopt the State's, the trial court record does not contain any instructions proposed by Matos-Ramos, nor did he formally adopt the State's instructions on the record. RP 103, 1209-12. However, after reviewing the instructions the trial court eventually gave the jury, which included WPIC 1.04 as Instruction 2, Matos-Ramos stated that he had no objections or exceptions. RP 1212; CP 40.

At no point did Matos-Ramos request an instruction more specifically stating that deliberations must involve all 12 jurors at all times. RP 1209-12. There is no evidence in the record that the jury ever deliberated without all 12 jurors present. When polled, each member of the jury affirmed that the verdict announced was both the juror's individual verdict and the collective verdict of the jury. RP 1293-95.

- b. The Trial Court Was Not Required To Explicitly Instruct Jurors That Deliberations Must Include All Twelve Jurors At All Times.

Criminal defendants have a constitutional right to a unanimous verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This requires not only that all 12 jurors

reach the same ultimate verdict, but that they “reach their consensus through deliberations which are the common experience of all of them.” State v. Lamar, 180 Wn.2d 576, 583-88, 327 P.3d 46 (2014) (quoting People v. Collins, 17 Cal.3d 687, 693, 552 P.2d 742 (1976)).

For the first time on appeal, Matos-Ramos challenges the trial court’s failure to explicitly instruct the jury that deliberations must involve all 12 jurors at all times as a violation of his constitutional right to unanimity. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O’Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. Not every alleged constitutional error is a manifest constitutional error. State v. Lynn, 67 Wn. App. 339, 343-44, 835 P.2d 251 (1992) (“[I]t is important that ‘manifest’ be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.”). A manifest error is an error that is unmistakable, evident or indisputable and that causes “actual prejudice” by having “practical and identifiable consequences in the trial of the case.” State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). The burden of demonstrating actual prejudice falls on the defendant. Id.

As explained below, the trial court’s jury instructions were sufficient to ensure that the right to unanimity was preserved, so no

constitutional error occurred. Matos-Ramos has also not made the required showing that lack of a more explicit unanimity instruction had practical and identifiable consequences in the trial of his case. This Court should therefore decline to allow Matos-Ramos to raise the issue for the first time on appeal. Even if this Court reaches the merits of the claim, it should conclude that no error occurred.

Matos-Ramos relies on Lamar for his contention that the requirement of shared deliberations is violated if the trial court does give an instruction beyond WPIC 1.04 to more specifically instruct the jury that deliberations must involve all 12 jurors at all times. However, he overlooks the fact that Lamar resolves that issue against him.

In Lamar, the instructions given to the original 12 jurors included WPIC 1.04.¹⁶ Lamar, 180 Wn.2d at 580. During deliberations, one of the jurors was replaced with an alternate, and the trial court instructed the reconstituted jury that the 11 remaining original jurors should bring the alternate “up to speed” as to what had already occurred and the jury should then resume its deliberations from there. Id. at 579. On appeal, Lamar challenged the trial court’s failure to instruct the reconstituted jury that it must begin deliberations anew as required by CrR 6.5. Id.

¹⁶ The Lamar opinion does not identify the relevant instruction as WPIC 1.04, but a comparison of WPIC 1.04 and the instruction given in Lamar confirms that the two are identical. Lamar, 180 Wn.2d at 580; WPIC 1.04.

Our supreme court held that WPIC 1.04 properly instructed the original jurors “to deliberate together in the constitutionally required manner,” but that a violation of the right to unanimity subsequently occurred when the trial court later contradicted that instruction by directing the reconstituted jury to deliberate together on only those aspects of the case not yet addressed by the original jurors. *Id.* at 585. Matos-Ramos’s jurors were instructed on their duty to deliberate together in an effort to reach a unanimous verdict in exactly the same manner as the original 12 jurors in *Lamar*. *Id.* at 580; CP 40. No juror was replaced with an alternate. The supreme court’s ruling that Lamar’s original jurors were properly instructed “to deliberate together in the constitutionally required manner” is therefore binding in this case. *Lamar*, 180 Wn.2d at 585.

Moreover, the *Lamar* court’s holding that WPIC 1.04 properly instructs a jury on the requirement of a unanimous verdict resulting from common deliberations makes good sense. WPIC 1.04 specifically instructs jurors that they must “discuss the case with one another,” “deliberate in an effort to reach a unanimous verdict,” and decide the case “only after you consider the evidence impartially with your fellow jurors.” Such an instruction cannot reasonably be interpreted to permit jurors to split into small groups and divide the issue between them, as Matos-

Ramos contends, and no authority supports Matos-Ramos's claim that a more explicit instruction regarding the duty to deliberate together was required. The trial court therefore properly exercised its discretion in not giving a more explicit instruction.

Even if there were some question as to the clarity or sufficiency of WPIC 1.04, the polling of the jury affirmatively indicates that the verdict against Matos-Ramos was unanimous. RP 1293-95; Lamar, 180 Wn.2d at 587-88 (polling is evidence of jury unanimity unless "the record affirmatively shows a reason to seriously doubt that the right has been safeguarded").

5. THE STATE AGREES THAT THE DOMESTIC VIOLENCE DESIGNATION SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE.

The information charging Matos-Ramos with assault of a child in the second degree included an allegation that the crime was one of domestic violence, committed against a family or household member. CP

1. However, that allegation was not submitted to the jury. CP 35-54. At sentencing, paragraph 2.1(h) of the judgment and sentence mistakenly indicated that "[d]omestic violence as defined in RCW 10.99.020 was pled and proved for count(s) 1."¹⁷ CP 57. The State concedes that this was a

¹⁷ It appears that the error went unnoticed by the parties and the trial court, as there was no discussion of it at sentencing. RP 1259-72.

scrivener's error, and agrees that the case should be remanded to the trial court for an order to correct the error.

6. THE IMPOSITION OF APPELLATE COSTS IS APPROPRIATE IF THE STATE PREVAILS IN THIS APPEAL.

Matos-Ramos asks this Court to rule that, should the State prevail on appeal, Matos-Ramos may not be required to repay appellate costs on the grounds that he is currently indigent. This claim should be rejected. It is a defendant's future ability to pay costs, rather than his present ability, that is most relevant in determining whether it would be unconstitutional to require him to pay appellate costs. Because the record contains no information from which this Court could reasonably conclude that Matos-Ramos has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

Matos-Ramos obtained an order authorizing him to appeal at public expense after presenting a declaration regarding his current financial circumstances. CP 74-80. The declaration contained no information about Matos-Ramos's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding Matos-Ramos's likely future ability to pay financial obligations. CP 74-80.

An indigent defendant does not have a right to an appeal at public expense if he can afford to pay for that appeal by the time the State enforces collection or sanctions the defendant for nonpayment. State v. Caver, No. 73761-9-I, ___ P.3d ___, 2016 WL 4626243, slip op. at 11 (Wash. Ct. App. Sept. 6, 2016) (citing State v. Nolan, 98 Wn. App. 75, 80, 988 P.2d 473 (1999), and State v. Blank, 131 Wn.2d 230, 250, 930 P.2d 1213 (1997)). This Court has thus declined to waive appellate costs for indigent defendants as a matter of course. Id., slip op. at 11 -12. “A defendant’s present ability to pay is one factor in this Court’s decision whether to impose costs, but it is not the only factor, nor is it necessarily an indispensable factor.” Id., slip op. at 12.

Where the record indicates that a defendant has been deemed currently indigent, but contains no information about the defendant’s likely future ability to pay, the fact that the defendant’s age and length of sentence suggest a future opportunity to work provides a “realistic possibility” that the defendant will be able to pay costs in the future, and the denial of costs is therefore not appropriate. See id., slip op. at 12-13. Here, Matos-Ramos was only 34 years old at the time of sentencing in January 2014, and he was immediately released from confinement because he had already served his entire 41-month sentence on pretrial electronic home monitoring. CP 4, 59; RP 1269. There is thus a substantial

likelihood that Matos-Ramos will be able to obtain employment and pay appellate costs in the future. This Court should therefore decline to prohibit an award of appellate costs in this case.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Matos-Ramos's conviction and remand the case to the trial court solely for correction of the scrivener's error in paragraph 2.1(h) of the judgment and sentence.

DATED this 9th day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

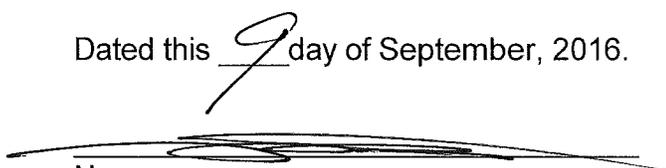
By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Sweigert, the attorney for the appellant, at Sweigertj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. Emyll S. Matos-Ramos, Cause No. 71467-8, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of September, 2016.


Name:
Done in Seattle, Washington