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Court of Appeals  
Division I  
State of Washington

No. 72523-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

TANNER J.  
(DOB 10/17/1999),

Appellant.

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ON APPEAL FROM THE JUVNENILE COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred by finding Tanner J. guilty of child molestation in the first degree.

2. The juvenile court erred by concluding that Tanner had sexual contact with M.A. Conclusion of Law 1.

3. Appellant assigns error to Finding of Fact 4.

4. Appellant assigns error to Finding of Fact 5.

5. Appellant assigns error to Finding of Fact 11.

6. Appellant assigns error to Finding of Fact 12.

7. Appellant assigns error to Finding of Fact 19.

8. The trial court erred by admitting M.A.'s hearsay statements to his mother and Randi Cate.

9. The trial court erred by admitting M.A.'s hearsay statements to Deborah Ridgeway.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A juvenile may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. Tanner was found guilty of child molestation in the first degree for having sexual contact with M.A. M.A. testified that he did not have sexual contact with Tanner, but the juvenile court relied upon M.A.'s hearsay

statements to his mother and her friend who interrogated M.A. about pulling his pants down with a peer and later statements to the prosecutor's interviewer. The court reasoned that it appeared to her that M.A. did not want to talk about the subject in court, but he was also terse and reluctant to talk when he made the out-of court statements. Viewing the evidence in the light most favorable to the State, must Tanner's first degree child molestation conviction be dismissed in the absence of proof beyond a reasonable doubt that he had sexual contact with M.A.?

2. Hearsay statements of a child witness may not be admitted as evidence if they are unreliable. The juvenile court found that M.A.'s statements (1) to his mother and her friend and (2) to an interviewer from the prosecutor's office were reliable and admissible. Where M.A. had a motive to lie to get out of trouble and lied to put the blame on another, shared his mother's resentment of Tanner's father and resented Tanner for unsupported thefts of his property, had a complicated developmental history and lied like other children his age, and the statements were the product of adult interrogation, did the juvenile court improperly admit unreliable out-of-court statements?

### C. STATEMENT OF THE CASE

Tanner was convicted of first degree child molestation of M.A. after a juvenile court fact-finding hearing at which M.A. testified that Tanner did not have sexual contact with him. SuppCP \_\_\_\_ (Findings of Fact and Conclusions of Law, sub. no. 90, 11/4/14) (Findings of Fact 10-11) (hereafter Findings of Fact);<sup>1</sup> 9/9/14RP 114-15.

Tanner and M.A. lived in the same home from February to April 2013 when Tanner's father and M.A.'s mother were in a brief romantic relationship. 9/8/14RP 89-90, 100; 9/9/14RP 52-53. Tanner was 13 and M.A. turned six while he lived there. Finding of Fact 20; 9/8/14RP 90-91. M.A.'s mother, Elizabeth Dellinger-Frye, and his half-sister Brooklyn were also living in the home.<sup>2</sup> 9/8/14RP 5.

The relationship between Ms. Dellinger-Frye and Tanner's father Van Johnson ended with fights and bad feelings. 9/8/14RP 108. Ms. Dellinger-Frye referred to Mr. Johnson as her "psycho stalker," and Mr. Johnson believed she threw garbage in his yard. *Id.* at 77, 82-83. Ms. Dellinger-Frye believed that Mr. Johnson kept some of her

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<sup>1</sup> A copy of the Findings of Fact and Conclusions of Law is attached as an appendix.

<sup>2</sup> An older half-brother D.J. was not living with his mother at that time.

furniture when she moved out of the shared home. Id. at 111. She also accused Mr. Johnson of stealing items from her mother's home, including an Xbox belonging to her son D.J. and video equipment. Id. at 112-13. The animosity was also expressed on Facebook, including a lengthy post that Ms. Dellinger-Frye believed was written by Tanner. Id. at 109-10. M.A. was present when, according to Ms. Dellinger-Frye, Mr. Johnson called her a "worthless whore" and she yelled back. Id. at 151-52.

From October to December 2013, M.A. and his mother lived with her friend Randi Jean Cate. 9/8/14 RP 56, 93. Four adults and seven children lived in Ms. Cate's three-bedroom home and an adjacent trailer. Id. at 54-55, 93. They included Ms. Cate, her husband Jason, and her sons Shawn, Logan, and Andrew; Ms. Dellinger-Frye and her children M.A., Brooklyn, and D.J.; and Ms. Dellinger-Frye's boyfriend Terry Coggins and his two children Brianna and Corbin.<sup>3</sup> Id. at 54, 93. M.A. shared a bedroom with Andrew and Logan. Id. at 55. M.A. and Andrew were both six years old, and Logan was younger. Id. at 137.

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<sup>3</sup> According to M.A., an additional person named John also lived there. 9/8/14RP 28,

In November 2013, Logan told his mother that M.A. and Andrew were pulling down their pants and kissing each other's butts.<sup>4</sup> 9/8/14RP 59, 94. A few weeks earlier, M.A. and Andrew had pulled down their pants, and a few days earlier they had encouraged Logan to pull down his pants in front of a Brianna; Mrs. Cate had told them not to do that. Id. at 60-61, 68-70. The last time they called their behavior "the sex game." Id. at 70.

Mrs. Cate was angry and decided it was time to "get to the bottom of it." Id. at 60, 70. Mrs. Cate called Ms. Dellinger-Frye and made M.A. and Andrew sit on a couch and wait for her to come home. Id. at 59, 70.

Ms. Dellinger-Frye arrived home about 20 to 25 minutes later, and the two women questioned the boys in the Cate's bedroom. 8/1/14RP 12; 9/8/14RP 59-60, 61. When asked what they were doing, the boys said they were taking down their pants and kissing each other's butts. Id. at 61-62.

Mrs. Cate wanted to know where the boys learned this behavior. 9/8/14RP 70-72. M.A. said that it was Andrew's idea, but Andrew said

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<sup>4</sup> Mrs. Cate was taking care of the boys but she did not see what they did. 8/1/14 RP 12.

it was M.A.'s idea. Id. at 62-63. Mrs. Cate repeatedly assured her son Andrew that he was not in trouble, he already had his punishment, and she just wanted to know where he learned what he was doing. Id. at 62-6, 72.

Eventually, M.A. said that he learned the behavior when his family was living with Tanner and his father. 9/8/14RP 72, 95. According to Mrs. Cate, M.A. said he would go into Tanner's bedroom to watch him play his x-box and Tanner would tell M.A. to pull down his pants and sit on top of him, and say, "Let's play have sex." Id. at 63. Mrs. Cate could not remember what words M.A. used, but she testified that he said something about Tanner's "pee pee" touching or going in his butt. Id. at 64. Ms. Dellinger-Frye's testimony about what M.A. said was contradictory. Id. at 96, 99. Mrs. Cate told Ms. Dellinger-Frye to stop asking M.A. questions and call the police. Id. at 64, 82.

M.A. was later interviewed by Deborah Ridgeway, a former police officer who was employed by the prosecutor's office. 9/8/14RP 154. During a lengthy discussion, M.A. said that he went to Tanner's bedroom to watch him play Xbox, and Tanner would tell him to pull down his pants and sit on his lap. Id. at 163, 166-67. M.A. said that

Tanner touched his penis and his “butt” was on Tanner’s “pee-pee.” *Id.* at 167-68.

When M.A. underwent a medical examination, the doctor did not find any physical evidence of trauma. 9/8/14RP 132-33.

M.A. lived a number of different homes with different adults and children both before and after he lived with Tanner and his father. In 2012, M.A. and his mother and siblings lived with M.A.’s maternal grandmother and then with his mother’s boyfriend Terry Coggins. 9/8/14RP 100-01. After living with Mr. Johnson and Tanner, the family moved back in with Ms. Dellinger-Frye’s mother and then to the Cates. *Id.* at 92-93, 102.

From Ms. Cate’s home, M.A. and his family moved back to Ms. Dellinger-Frye’s mother’s home. 9/8/14RP 59. They lived with one of Ms. Dellinger-Frye’s friends, Papa Ed, along with Mr. Coggins and his children for a couple of weeks. *Id.* at 102-03. Mr. Coggins and Ms. Dellinger-Frye then found a home where they had been residing with their children for a month or two before the fact-finding hearing. *Id.* at 88, 102.

Older and younger children M.A. lived with or knew were the victims of child sexual abuse. M.A.’s sister, his older brother D.J., and

Mr. Coggin's son all reported they had been sexually assaulted by teenage boys, including a family cousin. 9/8/14RP 128, 130-31. D.J. had also been sexually assaulted by an older boy when the boy invited him to play a video game. Id. at 133. DJ had gotten into trouble at school for making a comment about sex and for putting his hand up a girl's shirt. Id. at 134. D.J. had seen a counselor but his parents could not afford to continue the treatment. Id. at 133-34. In addition, Ms. Dellinger-Frye learned about Bikers Against Child Abuse from a friend whose children had used the organization for support. Id. at 143,

M.A. also had a complicated developmental and behavioral history. CP 81. M.A.'s mother was attempting to have him evaluated to determine if he had Autism or Asperger's syndrome. 9/8/14RP 103-05. M.A. had also been evaluate for Attention Deficit Disorder. 9/8/14/RP 107. Ms. Dellinger-Frye reported that M.A. was delayed in speech, had difficulty pronouncing words, and had problems with bedwetting. Id. at 105-06. These problems began before M.A. lived with Tanner. Id. at 77, 61-62.

D. ARGUMENT

1. **Tanner's child molestation conviction must be dismissed because the State did not prove sexual contact beyond a reasonable doubt.**

To convict Tanner of child molestation in the first degree, the State had to prove beyond a reasonable doubt that he had contact with a sexual part of M.A.'s body for the purpose of sexual gratification. M.A. testified under oath that no such contact occurred. Tanner's conviction should therefore be dismissed.

a. The State must prove every element of the crime beyond a reasonable doubt.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The conviction can only be affirmed if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Tanner was convicted of child molestation in the first degree, RCW 9A.44.083. The State was required to prove that he had sexual contact with a child under the age of 12 who was not married to him and was at least 36 months younger than him. RCW 9A.44.083(1); CP 28. “Sexual contact” is defined as the touching of the sexual or other intimate parts of a person done for the purpose of sexual gratification. RCW 9A.44.010(2). The State was thus required to prove that Tanner touched M.A.’s sexual or intimate parts for the purpose of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1).

b. M.A. testified that Tanner did not molest him.

After swearing to tell the truth, M.A. testified that Tanner did not touch his body. 9/8/14RP 18, 31-36, 48-49; Findings of Fact 10-11. M.A. told the court that when they lived in the same house, he would occasionally go to Tanner’s room and watch Tanner play Xbox games. 9/8/14RP 30-31, 33. M.A. would sit on the floor, and not on Tanner’s lap. *Id.* at 31, 33. M.A. and Tanner did not take their clothes off or pull their pants down. *Id.* at 33, 34, 35.

M.A. testified that Tanner never told him to do anything that he did not like. *Id.* at 36, 38. On cross-examination M.A. added that Tanner never touched his body:

Q: And so, has Tanner ever – well, done anything to hurt you or hit you?

A: No.

Q: Has he ever touched your body in some way?

A: No.

9/8/14RP 48-49.

The juvenile court, however, concluded that Tanner was nonetheless guilty based upon M.A.'s out-of court statements and his demeanor in the courtroom. As will be shown below, this information was not sufficient to overcome M.A.'s clear trial testimony.

c. The juvenile court's determination that M.A.'s sworn fact-finding testimony was not credible because he seemed to be avoiding the subject is not supported by the evidence.

The juvenile court apparently concluded that M.A. was not telling the truth when he testified under oath, but was telling the truth in out-of-court statements. The court justified this decision on M.A.'s demeanor on the witness stand, finding that that he "acted as though he was trying to shut down the subject quickly." Finding of Fact 11. This Court defers to the trial court's evaluation of witness credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The inferences drawn by the lower court, however, must be logical.

M.A. testified he was excited about coming to court and he would receive presents from his mother and Laura if he was “good” in court.<sup>5</sup> 9/8/14RP 39-40. The fact-finding hearing was in juvenile court, not in the regular courthouse, and there was no jury. M.A.’s friends from Bikers Against Child Abuse were present in the courtroom to support him while he testified. Id. at 6-7; 142-47. M.A. never expressed discomfort about answering questions about the alleged molestation. The trial court decision to ignore M.A.’s sworn testimony that he Tanner did not touch him was improperly based on M.A.’s demeanor.

Instead, the juvenile court based its guilty finding upon M.A.’s statements to Ms. Ridgeway and to his mother and Mrs. Cate. Findings of Fact 6, 14-15, 19. M.A. was not interested in talking about the alleged incident at those interviews either. Ms. Ridgeway held the interview in an environment designed to be child-friendly and she assured him the room was safe. 9/8/14RP 155; 9/9/14RP 11.

Nonetheless, M.A. was sometimes hard to interview because he did not always want to talk. 9/8/14RP 173-74. As in court, M.A.

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<sup>5</sup> Laura was the friend of M.A.’s mother whose children were also involved with Bikers Against Child Abuse. 9/8/14RP 143.

frequently answered her inquiries by stating that he did not remember or did not know. 9/8/14RR 163; see 9/8/14RP 180, 182, 185-86, 187; 9/9/14RP 14. M.A. even asked to leave the interview room. 9/9/14RP 9.

Additionally, M.A. told Ms. Ridgeway that he did not want to talk to her when she questioned him again three months later, and M.A. said he did not remember what happened with Tanner or who Tanner was. 9/14RP 23, 27, 35.

M.A. was also reluctant to talk when he was first questioned by his mother and Mrs. Cate. While he could not deny that he had been doing something wrong, he blamed his friend Andrew. 9/8/14RP 62-63. Ms. Cate described M.A.'s demeanor as "all over the place," changing between calms and fidgety and then cowering behind his mother. 9/8/14RP 65-66; Finding of Fact 7. According to his mother, M.A. was fidgety and scared, like he was going to get into trouble. 9/8/14RP 96.

Thus, M.A.'s hesitancy about talking occurred in both his pre-trial interviews and at the fact-finding hearing and is thus not indicative that he was more truthful in one and not the other.

- d. Several Findings of Fact are not supported by substantial evidence or misrepresent the evidence presented.

This Court reviews factual findings to determine if they are supported by substantial evidence. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. at 129. The following factual findings are not supported by substantial evidence.

- i. Findings of Fact 4 and 5.

The juvenile court found that M.A. and Mrs. Cate's son had been acting out "for about three weeks sexually by pulling down their pants and doing the sexing game or having sex game." Finding of Fact 4. The court then found that Mrs. Cate and M.A.'s mother described the "game" as "taking down their pants and playing leapfrog" or "taking down their pants and sitting on each other." Finding of Fact 5. These factual findings are not supported by the evidence.

Mrs. Cate testified that a couple of weeks before the conversation with M.A. and Andrew, the two boys were running around the house without their pants; she did not describe this as sexual acting out. 9/8/14RP 68. It was three days before the conversation,

when they were wagging their penises in Brianna's face, that the boys said they were playing a sex game. Id. at 68-70. Mrs. Cate did not see what M.A. and Andrew were doing the day; it was communicated to her by other children. Id. at 59; 8/1/14RP 11, 14. Ms. Dellinger-Frye was not present when the boys inappropriately, so her description was based upon what others told her. 9/8/14RP 94, 96-97.

ii. Finding of Fact 12.

The juvenile court found that M.A. testified he did not like to see Tanner because of what happened when they lived together; M.A. did not like what happened and it made sad. Finding of Fact 12; 9/8/14RP 37. Immediately after M.A. said that, the prosecutor asked M.A. what happened that made him sad. M.A. explained that Tanner's father stole his grandmother's Wii and his Xbox. 9/8/14RP 37, 48. Later M.A. said that he was sad because Tanner and his father sat in front of him and his family at court, and Mr. Johnson was mean. Id. at 43, 45.

M.A. also complained in court that it was not fair that Tanner had a chair in his room and no one else did. 9/8/14RP 45-46. M.A. told the child interview specialist and a defense investigator that Tanner was the only one in the house with a chair in his room. Id. at 186;

9/9/14RP 75-76. M.A. added that Tanner stole the chair from his family, although Tanner's father bought the chair for his son seven years earlier. 9/9/14RP 68, 75-76.

M.A. supplied reasons why it made him sad to see Tanner that were unrelated to any sexual activity. The trial court's factual finding is not supported by substantial evidence and should be stricken.

iii. Finding of Fact 19.

Finding of Fact 19 contains the juvenile court's conclusion that Tanner had sexual contact with M.A. The finding includes the court's finding that Tanner instructed M.A. to "sit with his penis in his butt." Finding of Fact 19. M.A., however never explained what he meant when he said "in his butt" in his interview with Ms. Ridgeway or when being questioned by his mother and Mrs. Cate.

When talking to the child interview specialist, M.A. said that he sat on Tanner with their heads facing each other. 9/8/14RP 166-67. M.A. said his butt was "on" Tanner's "pee-pee." Id. at 167. When the interviewer asked M.A. "how it happened," he responded, "In my butt." Id. at 167-68. The interviewed never asked M.A. about the difference between "in" and "on" or what he meant by "in my butt."

The trial court's finding is not based upon substantial evidence and should be stricken.

e. Tanner's juvenile adjudication should be dismissed.

The trial court erroneously concluded that Tanner's in-court testimony was not reliable because it appeared he was just avoiding the questions. Tanner was in the safe environment of juvenile court with supportive friends, and he did not express any discomfort at testifying. Moreover, he was just as reluctant to speak in during the interviews that produced the hearsay statements relied upon by the court. M.A.'s testimony create a reasonable doubt that Tanner was guilty, and the juvenile court's reasons for ignoring M.A.'s sworn in-court testimony are illogical.

The State did not prove beyond a reasonable doubt that Tanner had sexual contact with M.A. His first degree child molestation conviction must be dismissed. See State v. Powell, 62 Wn. App. 914, 918, 816 P.2d 86 (1991), rev. denied, 118 Wn.2d 1013 (1992).

**2. The admission of M.A.'s unreliable hearsay statements violated Tanner's right to due process.**

Due process is violated if the evidence used to convict a respondent of a crime is not reliable. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const.

amend. XIV; Const. art. I, § 3; see State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence that was helpful and relevant to the accused’s defense, based upon the State’s interest in excluding unreliable evidence). The juvenile court based Tanner’s conviction solely on M.A.’s hearsay statements admitted pursuant to RCW 9A.44.120. Because M.A.’s hearsay statements were not sufficiently reliable to be introduced as evidence against Tanner, his conviction should be reversed.

a. Child hearsay statements may only be admitted as evidence if they are reliable.

RCW 9A.44.120 provides that the hearsay statements of a child under the age of 10 may be only admitted as evidence if the court finds “that the time, content, and circumstances of the statement provide sufficient indicia of reliability” and (1) the child testifies, or (2) the child is unavailable and there is corroborative evidence of the act at issue. RCW 9A.44.120.

The Washington Supreme Court has identified nine factors to be considered in determining if child hearsay statements are sufficiently reliable to be admitted at trial:

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;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;
7. Whether the declarants lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declaration misrepresented the defendant's involvement.

State v. C.J., 148 Wn.2d 672, 683-84, 63 P.3d 765 (2003) (citing State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984)). A child's out-of-court statement lacks reliability if the Ryan factors are not substantially satisfied. State v. Griffith, 45 Wn. App. 728, 738-39, 727 P.2d 247 (1986).

The juvenile court did not individually analyze M.A.'s statements to his mother and Mrs. Cate in November 2013 separately from his responses in the child interview specialist's interview.

8/1/14RP 92-96. Concerning both sets of statements, the court found that they were admissible because (1) M.A. had no motive to lie about Tanner; (2) M.A.'s veracity was normal for his age; (3) three people heard consistent statements; (4) the statements were relatively spontaneous and no one suggested that Tanner was the perpetrator; (5) M.A.'s relationship with the witnesses who are testifying enhanced the statements' reliability; (6) it was unlikely that M.A.'s recollection was faulty given the short time frame; and (7) the circumstances do not show that M.A. had a motive to misrepresent Tanner's involvement. Id. The court found that the timing of the statements did not support or undercut reliability. Id. at 95. As will be shown below, the Ryan factors do not establish the reliability of M.A.'s out-of-court statements.

b. The juvenile court abused its discretion by admitting M.A.'s statements to his mother and Mrs. Cate.

M.A. had a motive to lie when he was confronted by Mrs. Cate and his mother about his play with Andrew. Mrs. Cate was angry, and the boys knew they were in trouble. 8/1/14RP 21, 25; 9/8/14RP 60, 70. M.A. first blamed their behavior on Andrew, and then on Tanner. Id. at 62-62, 72.

M.A. was aware of the hostilities between his mother and Tanner's father, which continued long after the two families separated. CP 101; 8/1/14RP 28, 34. The two had fought and shouted at each other in M.A.'s presence. 8/1/14RP 34; 9/8/14RP 151-52. M.A.'s mother believed that Tanner's father had wrongfully kept some of her furniture and household items when she moved out and that Mr. Johnson had burglarized her mother's home and stolen an Xbox and video equipment. 8/1/14RP 27-28. M.A. adopted this view, as he believed that Tanner had taken his Xbox. 9/8/14RP 36, 37-38. He also resented Tanner for being the only person in the house with a chair in his room, and he even believed that the chair in Tanner's bedroom belonged to M.A.'s family. *Id.* at 45-47; CP 120-21. The juvenile court's incorrectly found that M.A. had no motive to lie.

The juvenile court also found that M.A.'s character supported the reliability of his hearsay statements. M.A. was only six years old, and he lied like other children his age. He also had developmental issues that were still being studied. CP 81. Moreover, the juvenile court found that M.A. was lying when he testified under oath that Tanner did not molest him. This undercuts the reliability of his unsworn statements in other forums.

The juvenile court also found that M.A. made essentially the same statement to three different people. M.A.'s statements, however, were not consistent and this factor does not weigh in favor of reliability.

The juvenile court also found that M.A.'s statements were relatively spontaneous and were admissible because no one suggested Tanner's name to him. All of M.A.'s statement, however, were the product of interrogation, first by his mother and her friend, and then by the prosecutors' interrogator. Although none suggested Tanner's name, M.A. was well aware of his mother's animosity towards Tanner's father and even Tanner. Tanner's name was one M.A. knew would be acceptable to her.

The juvenile court also incorrectly found that M.A.'s relationship with the witnesses showed the reliability of his out-of-court statements. M.A. was close to his mother and Mrs. Cate, who had been providing his family housing and child care, but he was in trouble with them for his behavior. His close relationship to the interrogators does not support the statements' reliability in that circumstance.

The juvenile court was required to find that the circumstances surrounding the making of M.A.'s hearsay statements rendered them

“inherently trustworthy.” C.J., 148 Wn.2d at 684 (citing State v. Rice, 120 Wn.2d 549, 565-66, 844 P.2d 416 (1993)). An analysis of the Ryan factors, however, show that M.A. had motive to lie to escape punishment, that he was aware of his mother’s anger and resentment towards Tanner’s father. While M.A. had a difficult developmental history, and he did lie like other children his age. His statements were also the product of questioning and were not spontaneous. The trial court abused its discretion by admitting M.A.’s hearsay statements in the absence of a showing of their reliability.

c. Tanner’s conviction should be reversed.

M.A. testified at Tanner’s fact-finding hearing that Tanner did not touch sexual or intimate parts of his body. The juvenile court’s determination that Tanner was guilty of child molestation was thus based upon .A.’s hearsay statements. This Court cannot conclude that, had the error not occurred, the outcome of the fact-finding hearing would not have different. The juvenile court’s error in admitting M.A.’s statements is not harmless, and Tanner’s conviction must be reversed.

E. CONCLUSION

The complaining witness testified at Tanner's fact-finding hearing testified that Tanner did not have sexual contact with him, but the juvenile court found Tanner guilty based upon M.A.'s out-of-court statements. The juvenile court incorrectly reasoned that M.A. was trying not to talk about the abuse, but the same was true for his hearsay statements. Tanner's conviction for first degree child molestation should be reversed and dismissed.

The juvenile court also abused its discretion by admitting M.A.'s hearsay statements because the circumstances of the making of the statement do not establish their reliability. In the alternative, Tanner's conviction should be reversed and remanded for a new fact-finding hearing.

DATED this 27<sup>th</sup> day of April 2015.

Respectfully submitted,

s/Elaine L. Winters  
Elaine L. Winters – WSBA #7780  
Washington Appellate Project  
Attorneys for Appellant

1  
2 SUPERIOR COURT OF WASHINGTON  
3 COUNTY OF SKAGIT  
4 JUVENILE COURT

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5 In reference to:

NO. 14-8-00003-5

6  
7 TANNER JOHNSON,  
8 DOB: 10/17/99.

Findings of Fact and  
Conclusions of Law

9  
10 THE COURT having heard the testimony of M.A., Randi Cate, Elizabeth  
11 Dellinger-Frye, Detective Ben Haggland, and Deborah Ridgeway and having considered  
12 the evidence and arguments of counsel, makes and enters the following:

13 **I. FINDINGS OF FACT**

- 14 1) The Court has jurisdiction over the parties and the subject matter.
- 15 2) All incidents testified to in this case occurred in Concrete, Washington.
- 16 3) The Respondent and M.A. lived together between January 2013 and May of  
17 2013 with Van Johnson, the Respondent's father and Elizabeth Dellinger-  
18 Frye, M.A.'s mother in a house in Concrete, Washington.
- 19 4) In October of 2013, M.A. and his mother, Ms. Dellinger-Frye, had moved out  
20 of that house and were then living with a friend, Randi Cate, and her family.  
21 M.A. and one of Randi's sons had been acting out over the course of about  
22 three weeks sexually by pulling down their pants and doing the sexing game  
23 or having sex game.
- 24 5) The game was described by M.A.'s mother as taking down their pants and  
25 playing leapfrog. It was also described as taking down their pants and sitting  
26 on one another.
- 27 6) When asked by Ms. Cate and Ms. Dellinger-Frye where they learned this,  
28 M.A. originally indicated Ms. Cate's son had taught him. Upon further  
questioning, M.A. said that it had been done to him by the Respondent, Mr.  
Johnson. He said it would happen while he went in to watch the Respondent  
play Xbox when they lived together and that the Respondent would have M.A.  
sit on his lap and then put his pee-pee in his butt.

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- 7) His demeanor while describing this was alternatively fidgety and then calm and somewhat cowering and afraid and leaning into his mother.
- 8) Ms. Cate indicated she didn't really know Van Johnson before this and didn't know the Respondent at all. She also testified she suggested to the boys that perhaps what they were doing something they had seen or heard about on television but M.A. did not take her up on that suggestion and ultimately went on to disclose that the Respondent taught him how to do this.
- 9) M.A.'s mother testified that after the disclosure, M.A. became more timid and shy and had night terrors, which he described as nightmares of being chased by Van Johnson and the Respondent. She also said his bed-wetting became worse and that he would wet the bed and have nightmares after seeing the Respondent at school.
- 10) On the stand, M.A. testified essentially that nothing ever happened between he and the Respondent. He did indicate that while he lived with the Respondent and the Respondent's father, he would go into the Respondent's room and watch him play hunting and racing games on the XBOX. He said that Mr. Johnson would sit in his chair and M.A. would sit on the floor. He did say that he heard about playing sexing games from Mr. Johnson and that he learned it from Mr. Johnson when he was living with him.
- 11) When asked about sexual contact between himself and Mr. Johnson on the stand, M.A. denied that. His demeanor when a question even bordered on the topic of sexual contact between he and the Respondent was that he began to almost shut down, became very quiet, withdrew and answered questions so fast that the prosecutor could hardly get the questions out of her mouth before M.A. would say no. He acted as though he was trying to shut down the subject quickly.
- 12) M.A. testified he did not like to see Mr. Johnson because of what happened when they lived together and that it made him sad and it was something he didn't like.
- 13) M.A. testified several times that he learned the sexing game at Mr. Johnson's house and repeated it even on cross-examination. He would not describe what the sexing game was on the stand.
- 14) Deborah Ridgeway testified that she interviewed M.A. regarding the allegations. When he was first asked why he had come to speak with her, M.A. said he didn't know. He then disclosed that whenever he was in Mr. Johnson's room, Mr. Johnson would tell him to pull his pants down and get on him.

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- 15) The details he disclosed to her was that it was hot out when it happened, that it happened while living with Mr. Johnson and his dad, it happened in Mr. Johnson's bedroom while Mr. Johnson was playing Xbox and M.A. would come in and watch him play. He said he was wearing pants and underwear and a T-shirt and that his pants and underwear were pulled down. He said the front of Mr. Johnson's pants were pulled down and that Mr. Johnson was sitting in his chair and that M.A. was sitting on Mr. Johnson. The chair was described as light blue with a footstool and Mr. Johnson's pee-pee was described by M.A. as being soft and with hair on it. M.A. also told Ms. Ridgeway that it felt weird, that Tanner did not say anything, that one time, he heard someone coming and it stopped and M.A. said that his butt was on Mr. Johnson's pee-pee and Mr. Johnson would put his hands on M.A.s pee-pee. He also said that he and Ms. Cate's son had done the same thing but not the sucking on the peepee.
- 16) M.A. had a second interview with Ms. Ridgeway and was asked if he felt safe in his house now. M.A. responded yes that he never sees him. When asked if he meant Mr. Johnson, he replied that he never sees anybody. Ms. Ridgeway asked again where the incidents with Mr. Johnson occurred and he said at Mr. Johnson's house when they were living together, though he didn't supply any further details about the incidents.
- 17) M.A. has described Mr. Johnson's room as being white (it was not), and he described the chair in the room, a bunk bed with no bottom bunk, and a closet.
- 18) The incident in the bedroom occurred between January 1, 2013 and May 9, 2013.
- 19) The contact that occurred was done for the purposes of Mr. Johnson's sexual gratification and the sexual contact involved Mr. Johnson instructing M.A. to pull down his pants and underwear and climb on top of Mr. Johnson while he had the front of his pants down and had M.A. sit with his penis in his butt.
- 20) M.A.'s birthdate is March 5, 2007. Mr. Johnson's birthday is October 17, 1999.
- 21) M.A. was not married to the Respondent.

**II. CONCLUSIONS OF LAW**

- 1) On or about and between January 1, 2013 and May 9, 2013, Mr. Johnson, had sexual contact with M.A.
- 2) At the time, M.A. was less than twelve years old at the time and was not married to the Respondent.

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- 3) M.A. was and is at least twenty four months younger than the Respondent.
- 4) The act occurred in the State of Washington, County of Skagit, City of Concrete.

**III. VERDICT**

NOW THEREFORE, the court hereby rules as follows:

- 1) Tanner Johnson is guilty of Child Molestation in the First Degree as charged in Count I.

Dated this 4 day of <sup>Nov</sup> ~~October~~, 2014.

Susa K Cool  
JUDGE

Presented by:

Approved as to Form  
Notice of Presentment Waived

MELANIE STUM, WSBA #36260  
Deputy Prosecuting Attorney

Kathy Prunty, WSBA # 18412  
Attorney for Respondent

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

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|                      |   |               |
|----------------------|---|---------------|
| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) |               |
| v.                   | ) | NO. 72523-8-I |
|                      | ) |               |
| T.J.,                | ) |               |
|                      | ) |               |
| Juvenile Appellant.  | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27<sup>TH</sup> DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                   |                                     |
|-----|--|-------------------|-------------------------------------|
| [X] | ERIK PEDERSEN, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | T.J.<br>39921 WILLARD LANE<br>CONCRETE, WA 98237   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF APRIL, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
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