

FILED
Feb 18, 2016
Court of Appeals
Division I
State of Washington

NO. 73912-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

T. T.,

Appellant.

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Charge, verdict, and disposition</u>	1
2. <u>Child hearsay hearing</u>	2
3. <u>Court's ruling on child hearsay</u>	8
4. <u>Trial testimony</u>	9
C. <u>ARGUMENT</u>	12
THE TRIAL COURT MISAPPLIED THE <i>RYAN</i> FACTORS IN ADMITTING A.W.'S EXTENSIVE HEARSAY STATEMENTS.	12
1. <u>Applicable law and standard of review</u>	13
2. <u>The court erred when it found <i>Ryan</i> factors supported admission of A.W.'s hearsay statements.</u>	15
3. <u>The error materially affected the juvenile court's verdict</u>	20
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Dependency of A.E.P.</u> 135 Wn.2d 208, 956 P.2d 297 (1998).....	13
<u>In re Dependency of S.S.</u> 61 Wn. App. 488, 814 P.2d 204 (1991).....	14
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	15
<u>State v. Cunningham</u> 93 Wn.2d 823, 613 P.2d 1139 (1980).....	15, 21
<u>State v. Dixon</u> 159 Wn.2d. 65, 147 P.3d 991 (2006).....	15
<u>State v. Henderson</u> 48 Wn. App. 543, 740 P.2d 329 (1987).....	18
<u>State v. Keneally</u> 151 Wn. App. 861, 214 P.3d 200 (2009).....	14, 19
<u>State v. Pham</u> 75 Wn. App. 626, 879 P.2d 321 (1994).....	14
<u>State v. Rohrich</u> 149 Wn.2d 647, 71 P.3d 638 (2003).....	15
<u>State v. Ryan</u> 103 Wn.2d 165, 691 P.2d 197 (1984).....	1, 12-21
<u>State v. Sanford</u> 128 Wn. App. 280, 115 P.3d 368 (2005).....	15
<u>State v. Stevens</u> 58 Wn. App. 478, 794 P.2d 38 (1990).....	14, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Swan</u> 114 Wn.2d 613, 790 P.2d 610 (1990).....	14
<u>State v. Woods</u> 154 Wn.2d 613, 114 P.3d 1174 (2005).....	14
<u>State v. Young</u> 62 Wn. App. 895, 802 P.2d 829 (1991).....	14

FEDERAL CASES

<u>Idaho v. Wright</u> 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).....	17
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	9

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.44.010	2
RCW 9A.44.073	1
RCW 9A.44.120	13

A. ASSIGNMENT OF ERROR

The trial court misapplied the Ryan¹ factors in admitting the hearsay statements of a testifying child complainant.

Issue Pertaining to Assignment of Error

The trial court misapplied the Ryan factors and admitted the hearsay statements of the child complainant in error. The admission was prejudicial. Is reversal of the appellant's juvenile adjudication required?

B. STATEMENT OF THE CASE²

1. Charge, verdict, and disposition

The State charged with T.T. with first degree rape of a child occurring between August 2 and 5, 2013. CP 1-3; RCW 9A.44.073.³ The complainant was 12-year-old T.T.'s cousin A.W.,⁴ who was seven years old at the time. CP 1.

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

² This brief refers to the verbatim reports as follows: 1RP – 6/8 and 6/9/2015; 2RP – 6/10, 6/15 and 6/16/2015; and 3RP – 6/17, 7/2, and 7/24/2015. The transcripts are consecutively paginated.

³ “A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” RCW 9A.44.073(1).

⁴ The information identifies the complaining witness as “B.W.” CP 1. However, the supporting documents and the remainder of the record make clear that the complainant's initials are “A.W.”

Following a fact-finding hearing, the court found T.T. guilty as charged.⁵ 3RP 448-53; CP 15-19. The court sentenced her to a standard range disposition. 3RP 475; CP 23. T.T. timely appeals. CP 30.

2. Child hearsay hearing

The court held a hearing on the admissibility of hearsay statements made by complainant A.W. to various individuals in August of 2013. The most detailed statements, by far, were (1) A.W.'s late-night disclosure to her mother, following intense questioning by the mother, and (2) a recorded interview with the prosecutor's child interview specialist that occurred less than 48 hours after the interrogation by the mother.

A.W., who was seven years old during the charging period, first disclosed the allegations to her mother, "B." B. is the younger half-sister of T.T.'s mother, making her T.T.'s maternal aunt. 1RP 52. B. testified at the hearing. She described A.W. as a bright child who loved to read. 1RP 44. In 2013, B. and A.W. lived in an apartment in SeaTac. 1RP 46.

T.T. had been living with her mother in Florida until 2011. 1RP 55. Upon her return to the Seattle area, however, she was placed at Ryther, a children's mental health facility. B. began visiting T.T. at

⁵ The court found T.T. guilty based on the definition of "sexual intercourse" defining that term as sexual contact between the sex organs of one person and the mouth or anus of another. CP 18 (Conclusion of Law no. 2); RCW 9A.44.010(1)(c).

Ryther. 1RP 55. After leaving Ryther, T.T. went to live with her father. 1RP 53. Starting in 2013, B. began inviting T.T. to spend occasional weekends with B. and A.W. 1RP 55, 69. B. testified she did so because she felt sorry for T.T., who had had a difficult childhood. 1RP 55.

The weekend of August 2-4, 2013, T.T. stayed with B. and A.W. T.T.'s father was late picking her up Sunday night, and he did not arrive until 10:45 or 11:00 p.m. 1RP 58-59. Meanwhile, B.'s 18-year-old nephew came over to watch a program on cable television. 1RP 59, 72. B. drove him home after the show was over. 1RP 59. B. and A.W. returned to their apartment shortly after midnight. 1RP 60.

B. testified she had had a strange feeling about T.T. from the moment she arrived on Friday.⁶ 1RP 71. She had also noticed A.W.'s bedroom door was frequently closed, even though she had ordered the girls to keep it open.⁷ 1RP 71-72, 76. B. therefore began asking A.W. a series of questions about T.T. 1RP 60. B. prefaced the questions by telling A.W. it was not okay for anyone to touch A.W.'s private areas. 1RP 60. B. then asked A.W. if someone had touched her. 1RP 60.

⁶ B. testified it felt as if a demon had jumped on her shoulder and was telling her that "something wasn't right." 1RP 71.

⁷ On one such occasion, she found the girls on the floor of the bedroom, wrapped in a blanket. 1RP 79.

According to B., A.W. did not want to talk. She said, “I’m tired, I want to go to sleep.” 1RP 61. However, according to B., A.W. had an uncomfortable, “shifty” look. 1RP 62.

B. refused to let A.W. go to bed and pressed on with her questioning. 1RP 64. B. began asking A.W. more specific questions. She asked if T.T. had ever touched A.W.’s private area. 1RP 62. A.W. initially said no, but eventually said yes. 1RP 62, 75. B. asked if T.T. had ever put her fingers inside A.W.’s private parts. A.W. said yes. 1RP 62, 63. B. asked A.W. if T.T. had ever kissed her. A.W. said yes. 1RP 62, 67. She asked if T.T. had asked A.W. to touch T.T.’s private parts. A.W. said yes. 1RP 62. B. asked where the incidents had occurred, and A.W. said they had occurred in her bedroom. 1RP 62-63. B. asked whether the girls were clothed, and A.W. said they did not have clothes on. 1RP 63. B. also asked if the touching had occurred more than once. A.W. said yes. 1RP 63. B. asked if it happened more than twice. A.W. again said yes. 1RP 63. B. asked A.W. why she did not tell B. sooner. 1RP 63-64. A.W. said T.T. told her not to tell. 1RP 64.

Distraught, B. called her boyfriend and some friends of T.T.’s father. 1RP 65. After the conversations, B. asked A.W. additional questions. B. asked if T.T. had licked A.W.’s private area, and whether T.T. had had A.W. do the same. A.W. said yes to both. 1RP 67. B. asked

if T.T. had kissed A.W. with open mouth and tongue. A.W. said yes. 1RP 67.

B. testified that she let A.W. go to sleep, but she stayed up all night. 1RP 65. The next morning, August 5, B. and A.W. drove to T.T.'s father's home. B. confronted T.T. 1RP 67. A.W. was present for the confrontation. 1RP 76.

B. took A.W. to the SeaTac police department later that day. 1RP 13. According to Detective Robin Fry, B. was very agitated, and a deputy asked for Fry's assistance in calming B. 1RP 13, 15, 30. A.W. and her mother were separated. A.W. stayed with Fry and colored, while B. spoke with the deputy in another room. 1RP 13-14. A.W. was calm but concerned for her mother. 1RP 15. Fry asked A.W. some general questions about why she was there. 1RP 16. A.W. told Fry she was going to the doctor because she had been molested.⁸ 1RP 16. A.W. said her cousin T.T. had touched her private parts, and it made her feel uncomfortable. 1RP 17. But A.W. said she didn't want her cousin to get in trouble. 1RP 20.

The following day, August 6, A.W. was interviewed by the State's child interview specialist Carolyn Webster. 1RP 105-06. A DVD of the

⁸ A.W. appeared to have difficulty remembering the word "molested." 1RP 16.

interview was played for the court. 1RP 125; Ex. 1 (DVD of interview, also marked as pretrial exhibit 3); Pretrial Ex. 4 (transcript of interview).

A.W. made the following statements to Webster: A.W. said she knew she was at the interview to talk about her cousin having touched her. 1RP 132-33. The touching occurred more than once, and possibly four times, at A.W.'s apartment. 1RP 133. A.W. did not remember the specifics of the first incident. 1RP 133, 147. The last time it occurred, however, was during T.T.'s last visit to A.W.'s home. 1RP 133.

According to A.W., she and her mother retrieved T.T. at her house. 1RP 159. They went to a nail salon first, but they did not get their nails done. Instead, they got pho. 1RP 134. Back at B.'s apartment, the girls watched television in A.W.'s room. 1RP 135-36. After some time passed, T.T. asked A.W. to lick her private parts⁹ and lick her "boob." 1RP 134. T.T. also kissed A.W., putting her tongue in A.W.'s mouth. 1RP 134. A.W. told Webster she did not want to engage in those activities, but T.T. suggested they put a blanket up so no one could see them. A.W. ultimately agreed. 1RP 136. After they put the blanket up, the girls were on the floor. 1RP 136.

⁹ A.W. indicated on a body diagram the location of "private parts." 1RP 148.

A.W. later clarified that, on the occasion with the blanket, T.T. had only licked A.W.'s private parts. 1RP 137. It felt "weird." 1RP 141. A.W. explained that she was the one who initially asked T.T. to lick her private parts, because T.T. had told A.W. do the same to her, and otherwise it wouldn't be fair. 1RP 138. A.W. said she kept her clothes on but pushed them down or out of the way. 1RP 138-39, 142-43.

A.W. told Webster that no additional touching occurred that weekend. 1RP 136. After T.T. left, however, B. started asking A.W. questions. 1RP 136-37. B. said, "[T]here's something going on" and asked A.W. if T.T. had touched her. 1RP 160.

A.W. repeatedly denied that T.T. had done anything. 1RP 160. But B. said, "I know that she is, so tell me." 1RP 160. A.W. continued to deny that anything had occurred because A.W. did not want T.T. to get in trouble. 1RP 160. Then, B. told A.W. she could not go to bed unless she told B. what had happened. 1RP 146, 161. According to A.W., her mother said "we can do this all night." 1RP 146. A.W. told Webster, "I [didn't] feel like staying up all night; I wanted to go to bed. So, I had to tell her. I really had no other choice." 1RP 146. In addition, A.W. explained, her mother had promised that A.W. would not get in trouble if she told, and her mother did not break promises. 1RP 161.

A.W. was present the next morning for the confrontation between B. and T.T., during which B. threatened to hit T.T. with her belt. 1RP 144.

The court also considered A.W.'s statements to Harborview staff, where she underwent a sexual assault exam on August 5. Pretrial Ex. 7. A.W. did not give details but told staff her cousin T.T. had "touched" her. 2RP 280, 312.

3. Court's ruling on child hearsay

The court ruled that A.W.'s hearsay statements were admissible. 1RP 213.

The court first noted that the central inquiry was the reliability of the statements.¹⁰ 1RP 210, 212-13. The court found that A.W. had no motive to lie; in fact, she did not want to get T.T. in trouble. 1RP 211. The court acknowledged that B. told A.W. she was not allowed to go sleep until she answered her questions. 1RP 211. But the court downplayed the significance of such pressure, observing only that B. had a good reason to be suspicious, based on the fact that she repeatedly found A.W.'s bedroom door closed. 1RP 211. The court also noted that B. had no motive to accuse her niece T.T., whom B. had been trying to help. 1RP 210, 212.

¹⁰ A.W. testified at the fact-finding hearing. 2RP 382.

The court also observed that, while the statements to B. were not spontaneous, the statements to Webster and Fry were “spontaneous” for purposes of child hearsay analysis. In particular, Webster asked only open-ended questions. 1RP 211.

The court also found it significant that A.W. told the same story to each of the adults she spoke to. 1RP 212.

Finally, the court stated “the biggest thing for me” was that A.W.’s statements were consistent with B.’s memory of events surrounding the disclosure. 1RP 211-12. That included B.’s memory of having found the girls under a blanket on the floor of A.W.’s bedroom. 1RP 212.

4. Trial testimony

The case proceeded to the fact-finding phase of the bench trial. T.T.’s father testified that B. showed up at his house early the morning of August 5. 2RP 255. He did not hear the details of B.’s conversation with T.T., but B. seemed very upset. 2RP 257, 264. During the conversation, T.T. looked sad and confused. 2RP 259.

Detectives went to T.T.’s home the following day. 1RP 34; 2RP 260. T.T. and her father agreed to go to the police station for an interview. After T.T. was read her Miranda¹¹ warnings, her father decided she should

¹¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

not speak to police unless an attorney was present. 1RP 37. Detective Fry testified T.T.'s father left the interview room for a moment with another detective. 1RP 38-39. T.T. then made a number of spontaneous statements. She asked who made the allegations, and said she thought it was her "auntie." According to Fry, T.T. laid her head on the table, began to cry, and explained that her auntie had she was going to "take all [T.T.'s] teeth out." 1RP 40.

A Harborview social worker testified that she spoke with A.W. 2RP 280. The social worker asked A.W. if she knew why she was at the hospital. A.W. said, "I've been touched, and I need to be checked out." 2RP 280. A.W. said her cousin, T.T., had touched her. 2RP 280. An attending physician ordered a sexual assault exam. 2RP 283-84. The examining nurse found no physical evidence of abuse. 2RP 300. A follow up exam produced similar results. 2RP 312-13. A.W. told the second examiner that she had gone to the hospital because her cousin had "touched" her. 2RP 312.

B. also testified at the fact-finding portion of the hearing. She provided testimony that was consistent with her testimony during the child hearsay proceedings, summarized above. 2RP 321-44. B. testified she knew something was wrong from the moment she picked up T.T. from her

father's house. 2RP 329. A "spirit, a feeling, I don't know what it was" told B. "something's not right, something's not right." 2RP 330.

B. also testified that T.T. admitted to molesting A.W. when B. confronted her the morning after A.W.'s disclosure. 2RP 345. B. admitted that she pinned T.T.'s torso with her arm during the questioning. 2RP 346-47. She also grabbed T.T.'s chin to force her to make eye contact with B. 2RP 348. B. removed her belt, wrapped it around her hand, and threatened T.T. with it. B. testified she did not strike T.T., but she wanted to. 2RP 348-49, 368-69.

A.W. was present for the confrontation. 2RP 370. B. testified that she forced T.T. to look A.W. in the eye and apologize for molesting her. 2RP 349.

A.W. testified. 2RP 382. Nearly two years had passed since the incident in question. 2RP 389. She remembered few details of T.T.'s visits. 2RP 388-90. A.W. recalled her mother asking her whether T.T. touched her the same weekend the touching happened. 2RP 399. She denied anything happened at first, but then acknowledged it. 2RP 390. A.W. initially denied the touching because she did not want anyone to get in trouble. She finally told her mother, however, because B. refused to let her go to bed, and she had "no other choice." 2RP 391, 405. A.W. did not remember exactly what she told her mother. 2RP 392.

A.W. testified that T.T.'s tongue touched her "private part," or vagina, as well as A.W.'s chest. 2RP 393-94. The contact occurred under A.W.'s clothing and underwear. 2RP 395-96. In addition, T.T. had A.W. lick T.T.'s vagina and chest. 2RP 395. But A.W. did not recall that any such incident had occurred on the floor in her bedroom. 2RP 398.

A.W. remembered her mother's confrontation with T.T. 2RP 400, 406. She also recalled talking to various people about the touching, including during the recorded interview. 2RP 401-02. A.W. confirmed that she told the truth during the interview and was telling the truth in court. 2RP 403-04.

T.T. also testified. She denied touching A.W. She had only confessed because her aunt physically threatened her. 3RP 421. T.T. was only 12 at the time. 3RP 421. T.T. had enjoyed playing with her cousin A.W. She had never had anyone to play with before. 3RP 429.

C. ARGUMENT

THE TRIAL COURT MISAPPLIED THE RYAN FACTORS IN ADMITTING A.W.'S EXTENSIVE HEARSAY STATEMENTS.

The juvenile court erred when it found A.W.'s hearsay statements were admissible based on a misapplication of the Ryan factors. The error materially affected the court's verdict: A.W.'s hearsay statements provided the lion's share of the evidence against T.T., as her memories of

the alleged acts were shaky by the time of trial. This Court should reverse T.T.'s juvenile adjudication and remand for a new trial.

1. Applicable law and standard of review

Normally, a child's hearsay statements regarding alleged abuse are inadmissible unless they meet one of the established exceptions such as "excited utterance" or a statement made for the purpose of medical diagnosis. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). But the Legislature added a new hearsay exception when it enacted RCW 9A.44.120. Under this statute, if a child witness testifies at a criminal trial, the child's out-of-court statements are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120.

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court set forth nine separate factors for determining the admissibility of a child's statements under RCW 9A.44.120:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statement contained assertions about past fact;
- (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement;
- (8) how likely is it that the statement was founded on faulty recollection; and
- (9) whether the circumstances surrounding the making of the statement are

such that there is no reason to suppose that the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76. Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).¹² Moreover, statements themselves are the proper focus of the inquiry: "Adequate indicia of reliability must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act." State v. Stevens, 58 Wn. App. 478, 486, 794 P.2d 38 (1990) (quoting Ryan, 103 Wn.2d at 174).

A court's decision to admit child hearsay statements must be reversed when the court abuses its discretion in weighing the Ryan factors. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). A court

¹² Courts have, for example, downplayed at least three of the factors as irrelevant or duplicative. For example, courts have found that the seventh factor, the possibility that cross-examination would show lack of knowledge, is irrelevant if the child testifies. State v. Keneally, 151 Wn. App. 861, 880, 214 P.3d 200 (2009); State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Factor nine (no reason to suppose that the declarant misrepresented the defendant's involvement) has been held to be redundant of the issues contained in the first five factors. In re Dependency of S.S., 61 Wn. App. 488, 499, 814 P.2d 204 (1991). Factor six, whether the statement is an assertion of past facts, has also been found unhelpful, and it can be ignored "so long as other factors indicating reliability are considered." State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991).

abuses its discretion when its decision is manifestly unreasonable, or when discretion is exercised on untenable grounds, or for untenable reasons, such as misapplication of the legal standard. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (quoting State v. Rohrich , 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Even where hearsay statements are admitted in error, no prejudice exists if the inadmissible evidence is “of minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Sanford, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). But an evidentiary error that “within reasonable probabilities” would materially affect the outcome or proceedings is prejudicial and warrants reversal. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

2. The court erred when it found the *Ryan* factors supported admission of A.W.’s hearsay statements.

Here, the juvenile explicitly relied on three of the Ryan factors in determining A.W.’s various hearsay statements were sufficiently reliable to be admitted under the statute. The court’s findings as to each of those factors were, however, erroneous. The court also erred in relying heavily on observations tending to corroborate the alleged crime itself rather than the circumstances surrounding the hearsay statements. Contrary to the

court's ruling, the Ryan factors indicate A.W.'s hearsay statements were unreliable, and the court therefore erred in admitting them.

First, the court determined that A.W. had no motive to lie, the first Ryan factor, because A.W. did not want to get her cousin in trouble. The court also found it significant that B. was trying to help T.T. and had no motive to accuse her of abusing A.W. 1RP 210-12. But this ignores the fact that B. had decided, even before she began questioning A.W., that T.T. was molesting her daughter. E.g. 1RP 71. It also ignores that B. told A.W. she could not go to sleep until she admitted T.T. abused her, which placed intense pressure on A.W. to tell her mother what she was expecting to hear. 1RP 64, 161 (pretrial hearing evidence); see also 2RP 391 (A.W.'s trial testimony). Under these circumstances, contrary to the court's finding, A.W. had a strong motive to lie.

The Ryan case itself is instructive. There, the mothers of two child complainants had been told "of the strong likelihood that the defendant had committed indecent liberties upon their children" before either child disclosed the abuse to his mother. Ryan, 103 Wn.2d at 168-69, 176. After hearing about the abuse from someone else, each mother questioned her child about what happened. Id. at 168-69. The Ryan Court concluded that the children's statements to their mothers were unreliable in part because the mothers were "predisposed to confirm what they had been told." Id. at

176; see also Idaho v. Wright, 497 U.S. 805, 813, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990) (affirming the Idaho Supreme Court’s holding that a child’s hearsay statements were unreliable because “blatantly leading questions were used in the interrogation . . . [, and] this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.”). Based in significant part upon its determination as to the “motive to lie” factor, the Ryan Court held that the hearsay statements were insufficiently reliable to be admitted under the statute. Id. at 176-77.

The situation here is similar. Before questioning her daughter, B. had already convinced herself that T.T. had molested A.W. Regardless of B.’s subjective intentions, her coercive and leading questions provided a powerful incentive for A.W. to fabricate allegations against her cousin. B.’s violent behavior toward T.T. the next morning, which A.W. witnessed, provided additional incentive for A.W. to repeat the allegations to others, including Fry and Webster. Thus, contrary to the court’s finding, the first Ryan factor weighs against admission of A.W.’s statements to her mother. For the reasons stated, it also weighs against admission of A.W.’s statements to Fry, Webster, and Harborview staff.

Next, the court found that A.W.’s statements to Webster, as well as her statements to Detective Fry, were “spontaneous” for purposes of the fourth Ryan factor. For example, Webster asked only open-ended

questions. Indeed, the fourth Ryan factor “compels a less narrow definition of ‘spontaneous,’ one that considers the entire context in which the child makes the statement.” State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

But the juvenile court’s finding ignores that the initial disclosure to A.W.’s mother was the result of a series of leading questions inquiring about very specific acts. The court erred in considering the statements to Webster and others independently from this initial questioning. After all, A.W. made her statements to Detective Fry less than 24 hours after the initial interrogation, and her statements to Webster only the day after that. Because it is impossible to separate the Fry and Webster statements from the initial interrogation, this factor likewise weighs against admission of the hearsay statements to Fry and Webster, regardless of whether those individuals asked leading or suggestive questions. See Ryan, 103 Wn.2d at 176 (holding “spontaneity” factor weighed against admission of children’s hearsay statements because initial disclosures occurred in response to questions by mothers who already believed Ryan had molested their children); cf. A.E.P., 135 Wn.2d at 230-31 (possibility that child’s memory is corrupted or tainted by suggestive interviewing is relevant to fifth, eighth, and ninth Ryan factors).

Also addressing the third Ryan factor, the court found it noteworthy that A.W. told the same story to each of the adults she spoke to. 1RP 212. The court's finding as to this factor does not withstand scrutiny. A.W. answered leading questions from her mother and provided detailed information to Webster consistent with her mother's very specific questioning. However, A.W.'s statements to the other witnesses, including Detective Fry, were merely general statements that she had been touched by her cousin. Such generalized statements fail to corroborate A.W.'s original disclosure in any significant manner. Cf. State v. Kennealy, 151 Wn. App. 861, 883, 214 P.3d 200 (2009) (finding it significant that complainants "told a substantially similar account of the events to multiple people sequentially, which supports the trial court's ruling on the statements' reliability and trustworthiness."). Contrary to the court's finding, the third Ryan factor also weighs against admission of A.W.'s hearsay statements.

Finally, the court commented that "the biggest thing for me" in finding A.W.'s statements reliable was that her allegations were corroborated by B.'s observations during T.T.'s visit. 1RP 211-12. But "indicia of reliability" must be apparent from the circumstances surrounding of the out-of-court statement itself, and not from evidence tending to corroborate the alleged crime. To the extent that the court

relied on observations tending to corroborate the alleged crime, rather than the circumstances surrounding the statements themselves, the court's ruling was erroneous. Stevens, 58 Wn. App. at 486.

In summary, each of the Ryan factors addressed by the court weighs against admission of the hearsay testimony. In addition, the court improperly relied on observations tending to corroborate the alleged crime but which had little to do with the circumstances of the statements themselves. As a result, the juvenile court erred when it found A.W.'s statements to her mother admissible. The court also erred when it found the later statements, which flowed from the initial disclosure, admissible.

3. The error materially affected the juvenile court's verdict.

The next question is whether the error prejudiced T.T. It did. By the time of trial in mid-2015, A.W.'s memory of events had diminished significantly. She could only recall the most general information about the touching, and she could no longer remember many of the details that she provided to Webster in the video interview. Thus, it is clear that the court relied on the detailed hearsay statements in reaching its verdict. E.g. CP 17 (Finding of Fact no. 16, reciting A.W.'s statements to her mother); CP 18 (Finding of Fact no. 24, incorporating A.W.'s statements to Webster into its written findings).

In addition, the court explicitly relied on the fact that A.W. told the same story to each individual to find A.W.'s version of events credible. CP 18 (Finding of Fact no. 26). The admission of A.W.'s hearsay statements therefore affected the court's determinations that the complainant was credible, and T.T. was not. CP 18 (Finding of Fact no. 28).

The erroneous admission of A.W.'s hearsay statements materially affected the juvenile court's verdict. Reversal is, therefore, required. Cunningham, 93 Wn.2d at 831.

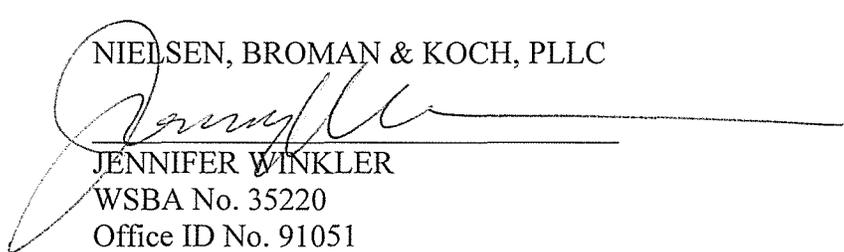
D. CONCLUSION

The juvenile court misapplied the Ryan factors in ruling that the complainant's hearsay statements were admissible. The erroneous admission of the hearsay statements materially affected the verdict. This Court should reverse T.T.'s juvenile adjudication.

DATED this 17th day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 73912-3-1
)	
T.T.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF FEBRUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] T.T.
C/O GARY THOMAS
10242 3RD AVENUE SW
SEATTLE, WA 98146

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF FEBRUARY 2016.

X *Patrick Mayovsky*