

NO. 34046-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES CATCHING, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 05-8-01323-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On September 6, 2005, the State filed an Information charging C.T.C. (hereinafter “defendant”), a juvenile, with three counts of first degree child molestation (counts I-III), one count of second degree rape (count IV), two counts of indecent liberties (counts V and VII) and one count of indecent exposure – victim under the age of fourteen (count VI). CP 9-14.

The case proceeded to trial before the Honorable Roseanne Buckner on September 1, 2005. The court presided over several pre-trial hearings. After a capacity hearing, the court determined that defendant had the capacity to commit the crimes alleged in Counts III and VI.¹ CP 18-20; RP 328-30, 1655. Following a competency hearing on the victims’ competency, the court determined that only D.S. was competent to testify.² CP 61-63; RP 391-93, 584. Following a child hearsay hearing, the court ruled that, with the exception of Z.S.’s statements to the nurse practitioner, the hearsay statements of D.S., N.S., and Z.S. were admissible. CP 64-73; RP 707-711.

¹ The court was not asked to, and did not, make a finding of capacity on Count VI during the pre-trial capacity hearing. But after evidence at trial showed that the acts alleged in Count VI occurred prior to defendant’s 12th birthday, the court made a specific finding of capacity on Count VI in its oral ruling. RP 1655.

² The parties agreed that N.S. and Z.S. were not competent witnesses. RP 391.

After several weeks of trial, the court found the defendant guilty as charged on Counts I-VI. RP 1655-58. The court acquitted defendant of Count VII, which was charged as an alternative to Count I. CP 9-14. The court entered written findings of fact and conclusions of law. CP 49-60. The court sentenced defendant to a standard range commitment of 45-108 weeks in custody. RP 1670.

This timely appeal follows. CP 30-46.

2. Facts

The following facts are taken from the court's written Findings of Fact ("FOF") and supplemented with additional evidence from the trial. Where the facts have been taken from the FOF, the State has provided a citation to the specific FOF. The State has also provided a citation to the record where evidentiary support for the FOF can be found. A diagram of the victims' family is attached to this brief as "Appendix A" and is intended to aid the court in understanding the relationship of the various witnesses in this case.

Harriet Steele and four of her grown children (Harold, Emmitt, Onnewa, and Sukari) live in Tacoma. CP 49-60 (FOF II); RP 729, 735. Harold Steele is married to Shantia Hill, who has two daughters from prior relationships: S.L.H. (DOB 10/11/92) and S.K.H. (DOB 3/14/94). CP 49-60 (FOF II); RP 731. Harold Steele raised and treated S.L.H. and S.K.H. as his daughters. CP 49-60 (FOF II). Harold and Shantia have a biological daughter, Z.S. (DOB 10/27/01). CP 49-60 (FOF II); RP 731,

998. Harold and Shantia live next door to Harold's mother, Harriet. RP 736. Onnewa Steele has three children: D.S. (DOB 2/27/96), N.S. (DOB 12/11/99), and J.S. CP 49-60 (FOF II); RP 729, 871. Emmitt Steele dated and lived with Valencia Catching for over 10 years. CP 49-60 (FOF II); RP 733. The defendant (DOB 2/11/92) is Valencia Catching's son from a prior relationship. CP 49-60 (FOF II); RP 733. The Steele family treated the defendant as their biological son, nephew, and/or grandson. CP 49-60 (FOF II); RP 734. The defendant's nickname is "Squeak." CP 49-60 (FOF II); RP 732, 873, 971.

During the period of December 11, 2002 through February 27, 2005, the defendant resided with Valencia Catching and Emmitt Steele at a house on "M" Street in Tacoma. CP 49-60 (FOF III); RP 1486, 1541. Throughout this period, S.L.K., S.K.H., Z.S., D.S., and N.S. often visited Valencia Catching's house. CP 49-60 (FOF III); 737-40, 746, 806, 838-40, 882-85, 1018-24. D.S. and N.S. frequently spent the night at Valencia Catching's home. CP 49-60 (FOF III); RP 740. Between April and July 2004, Valencia Catching babysat D.S. and N.S. full-time at her house while their mother, Onnewa, worked and went to school. CP 49-60 (FOF III); RP 882-85. At times, Valencia Catching would leave D.S. and N.S. alone with the respondent while she ran errands. CP 49-60 (FOF III); RP 1071-72.

Count I. Between the period of 2/27/04 and 2/26/05³, D.S. was staying at Valencia Catching's house and fell asleep in the defendant's bedroom. CP 49-60 (FOF V); Ex. 8; RP 1107-08, 1254-56. The defendant was not home at the time. Id. D.S. awoke later when the defendant came into the room and attempted to unbutton her pants and pull them down. Id. The defendant touched D.S.'s buttocks with his hand. CP 49-60 (FOF V); Ex. 8. D.S. pushed the defendant's hands away, but defendant did not stop touching her. CP 49-60 (FOF V); Ex. 8; RP 1254. D.S. climbed off the bed and ran into the living room where Valencia Catching was sleeping. CP 49-60 (FOF V); Ex. 8; RP 1107, 1254. D.S. did not tell Valencia what had happened because she was scared. Ex. 8; RP 1107-08.

When he was interviewed on March 30, 2005, the defendant admitted to Detective Bair that he had sexual intercourse with D.S. "... for less than 30 seconds. It was three to four years ago. I think I was nine or ten and she was a year younger." RP 947.

Count II. During the period of August 1, 2004 and December 31, 2004, S.K.H.'s family hosted a spaghetti dinner at their house in Tacoma. CP 49-60 (FOF VIII); RP 1170-72. Defendant attended the dinner. CP 49-60 (FOF VIII). After the defendant finished eating dinner, he went into

³ D.S. turned eight years old on 2/27/04. RP 871. D.S. testified that this incident occurred after Christmas when she was 8 years old and in the 3rd grade; thus the incident likely occurred near the end of the charging period. RP 1255.

S.K.H.'s bedroom to watch television. CP 49-60 (FOF VIII); RP 1179.

Not long after, S.K.H. observed Z.S. enter the bedroom. RP 1179.

Minutes later, Z.S. exited the same bedroom and was pulling up her pants.

CP 49-60 (FOF VIII); RP 1177. S.K.H. asked Z.S. if the defendant had touched her and Z.S. pointed to her vaginal area, said yes and indicated that it hurt. CP 49-60 (FOF VIII); RP 1180-81.

Count III. During the period between April and July 2004, N.S. found herself alone with the defendant at Valencia's house. RP 1114. N.S. and the defendant were in the defendant's bedroom, lying on the bed. RP 1114. Defendant pulled down N.S.'s pants and began "humping" N.S. CP 49-60 (FOF XII-XVI); RP 893-95, 1114. On the night of the disclosure, N.S. demonstrated for her mother what she meant by the word "humping." CP 49-60 (FOF XIV); RP 893-95. N.S. lay down on top of Onnewa and rubbed her vagina up and down. CP 49-60 (FOF XIV); RP 893-95.

Count IV. There are two separate factual bases for the charge of second degree rape as charged in Count IV.

During the period between October 11, 2003 and February 27, 2005, S.L.H. went to the defendant's house when his parents were not home. CP 49-60 (FOF XVII); RP 988. The defendant and S.L.H. watched pornographic movies. RP 990. The defendant touched S.L.H.'s private part and put his penis in her vagina. CP 49-60 (FOF XVII); RP 990-93.

S.L.H. did not like it because it hurt. CP 49-60 (FOF XVII); RP 993, 1127-29.

In September 2004, the defendant took S.L.H. into her parent's bedroom and closed the door. CP 49-60 (FOF XVIII); RP 1071. After a few minutes, S.K.H. opened the door and entered the bedroom. CP 49-60 (FOF XVIII); RP 1075. The lights were on and S.K.H. observed the defendant and S.L.H. on the bed together. CP 49-60 (FOF XVIII); RP 1076. S.L.H.'s pants and underwear were removed and she was lying on her stomach. CP 49-60 (FOF XVIII); RP 1076-77. The defendant's pants and boxers were pulled down below his thighs and his penis was exposed. Id. The defendant was lying on top of S.L.H. and his penis was on the inside of S.L.H.'s buttocks. CP 49-60 (FOF XVIII); RP 1078, 1229-32. Defendant's penis was moving up and down against S.L.H.'s anus. Id. The defendant told S.K.H. to get out of the room and not to tell or he would do it again to S.L.H. CP 49-60 (FOF XVIII); RP 1079.

When he was interviewed on March 30, 2005, the defendant admitted to Detective Bair that he had sexual intercourse with S.L.H. "once or twice, maybe a year or two ago." CP 49-60 (FOF XX); RP 935, 945. Defendant admitted that he put his penis in her vagina, but that "[i]t didn't feel right so [he] stopped." RP 946.

S.L.H. is mentally retarded and has an IQ of only 47. CP 49-60 (FOF XXI); RP 1453, 1465. S.L.H. was 12 years old at the time of trial, but she cognitively operates at the level of a 7 or 8 year old. RP 1450. By

all witnesses' accounts, S.L.H. was significantly delayed. Ex. 16 and 17; RP 1447. S.L.H. was unable to be left alone, could not cook or use the stove and needed assistance riding the school bus. RP 783-84, 798, 835, 1000-1005, 1010, 1341-51. S.L.H. attended special education classes at a school in Lynnwood. RP 1002-06.

Count V. During the period between March 14, 2004 and February 27, 2005, S.K.H. was alone with the defendant at his house. CP 49-60 (FOF XXIII); RP 1182-84. The defendant pulled S.K.H. into his bedroom, closed the door and tried to undo her belt and pull down her pants with his hand. CP 49-60 (FOF XXIII); RP 1134-35, 1185-86. The defendant used his other hand to try and pull down his own pants. CP 49-60 (FOF XXIII); RP 1135, 1187. S.K.H. struggled with defendant to get away and he pushed her onto his bed. CP 49-60 (FOF XXIII); RP 1186. Defendant moved towards her on the bed, touched her buttocks with his hand, but S.K.H. pushed his hand away and told him to stop. CP 49-60 (FOF XXIII); RP 1136, 1185-86. Defendant told her not to tell and S.K.H. ran out of the defendant's room. CP 49-60 (FOF XXIII); RP 1136, 1186. S.K.H. did not tell anyone at that time because she was scared. RP 1188. S.K.H. called home and told her mother that she wasn't feeling well so her mother would pick her up. RP 1026, 1136.

Count VI. During the period between March 14, 2003 and March 24, 2004, the defendant and S.K.H. traveled together in the backseat of Valencia Catching's car. CP 49-60 (FOF XXV); RP 1199. Valencia was

driving and S.K.H.'s mother, Shantia, was in the passenger seat. CP 49-60 (FOF XXV); RP 1199. When they arrived at their destination, Valencia and Shantia went inside, leaving the defendant and S.K.H. alone in the car. CP 49-60 (FOF XXV); RP 1200. Once alone, the defendant exposed his bare penis to S.K.H. by pulling it out of the front of his pants. CP 49-60 (FOF XXV); RP 1200-01. S.K.H. was disgusted and upset. S.K.H. yelled at the respondent and exited the car. CP 49-60 (FOF XXV); RP 1200.

Disclosure

On February 27, 2005, N.S., Z.S., and J.S.⁴ were playing over at S.K.H.'s house. RP 562. There were no adults home at the time. RP 562. When they were alone in the kitchen, N.S. told S.K.H., "Did you know Squeak touched my private?" RP 563. N.S. said the defendant closed the door, turned off the light and said don't tell anybody or else he would do it again. RP 564. Upon hearing this, S.K.H. went into the bedroom where Z.S. and J.S. were watching television and asked them if the defendant had ever touched them. RP 564. Z.S. said, "Yeah, he touched my private and he told me not to tell and it hurt." RP 564. S.K.H. took N.S. next door to her grandmother Harriet's. RP 565. S.K.H. and N.S. knocked on the door and told Harriet that they needed to speak with her. RP 510. Harriet told them that she was taking a nap and that she would talk to them later. RP

511. S.K.H. screamed, “No, now!” RP 511. S.K.H. told her grandmother that Squeak had been messing with N.S. RP 511. Harriet asked N.S. if Squeak did anything to her and she said, “Yes.” RP 512. Harriet then called Onnewa, N.S.’s mother, and Sukari and told them to come over immediately. RP 512.

Once they arrived, Onnewa, Sukari, and Harriet spoke with N.S. and S.K.H. in Harriet’s bedroom. RP 480. Onnewa asked N.S. what was going on and N.S. said that Squeak humped her. RP 453, 480. N.S. demonstrated what she meant by the word “humping” by getting on top of Onnewa and moving her vagina up and down against Onnewa’s vagina. RP 453, 481-83. N.S. said she didn’t tell because the defendant told her he would beat her up. RP 480.

After they spoke with N.S., they brought all of the other nieces into the room, including D.S., Z.S., and S.L.H. D.S. did not arrive with the other nieces, as she had been staying with a close family friend, Yolanda Hull. RP 399. Onnewa called Yolanda and told her to bring D.S. to Harriet’s house. RP 400. On the way to Harriet’s house, Yolanda told D.S. that they were going to Harriet’s because there had been an allegation that Squeak had been messing with the girls. RP 404-05. Yolanda asked D.S. if anything had happened to her and D.S. started crying. RP 404-05.

⁴ JS is not a victim in this case.

D.S. told Yolanda that the defendant had pulled down her pants and touched her in the closet and that she had seen him make S.L.H. put her mouth on his penis. RP 405-07. D.S. said she didn't say anything because defendant said he would beat her up. RP 405.

After D.S. and Yolanda arrived at Harriet's, all of the girls met in Harriet's room and Onnewa asked them if Squeak had been messing with them. RP 460. 518-19. All of the girls said yes. RP 460, 518-19. D.S. said the defendant humped her and she watched nasty movies with him. RP 493, 519. S.L.H. also said that something happened. RP 492. Z.S. said the defendant humped her too. RP 496, 520.

Harold arrived at the house soon after the disclosure. Everyone was still in Harriet's bedroom. Harold's sisters told him to sit down and then told him about the disclosures. RP 542. Harold took his daughters individually into the bathroom and asked them one-on-one what was going on. RP 543. Z.S. told Harold that the defendant had touched her and pointed to her private part. RP 544-46. Z.S. said that S.K.H. found her and that S.K.H. knows. RP 544. After speaking with his daughters, Harold went back out to the bedroom and asked his nieces what happened. N.S. said that Squeak was humping her. RP 548. D.S. said that the defendant touched her and then pointed to her vaginal area. RP 550. The

girls said that the defendant told them he would beat them up if they told.
RP 552-53.

Harold took everyone over to Valencia's to ask the defendant about the allegations. Harold and Valencia got into an argument and Valencia called the police. RP 526. The police responded to Valencia's house, resulting in an investigation into the present crimes.

Where necessary, additional facts are discussed below as they apply to a particular issue.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED PURSUANT TO RCW 9A.44.120 THE HEARSAY STATEMENTS OF D.S., NS, AND Z.S..

The admissibility of child hearsay statements is governed by RCW 9A.44.120. The decision to admit statements pursuant to this statute is within the trial court's discretion. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995). An appellate court should affirm the trial court's decision to admit child hearsay if, taking the record in the light most favorable to the State, the trial court reasonably could have found it "to be more likely true than not true" that the evidence shows sufficient indicia of reliability." State v. Karpenski, 94 Wn. App. 80, 105-106, 971 P.2d 553 (1999).

RCW 9A.44.120 provides:

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 ... not otherwise admissible by statute or court rule, is admissible in evidence in ... criminal proceedings, ... 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 hearing; or
 - (b) Is unavailable as a witness; PROVIDED, That when the child is unavailable as witness, such statements may be admitted only if there is corroborating evidence of the act.

RCW 9A.44.120. Defendant does not dispute the court's findings with regard to RCW 9A.44.120(2). Thus, the only issue is whether the victims' statements were sufficiently reliable.

In determining reliability under RCW 9A.44.120(1), the Supreme Court in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984), set forth nine factors that the court should consider: (1) whether the child had a motive to lie; (2) the child's general character for veracity; (3) whether more than one person heard the child's 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 contains express assertions about past facts; (7) whether cross-

examination could not show the declarant's lack of knowledge; (8) how likely it is that the statement was founded on faulty recollection; and (9) are the circumstances surrounding the statement such that there is no reason to suppose the declarant misrepresented defendant's involvement. Ryan, 103 Wn.2d at 176; State v. McKinney, 50 Wn. App. 56, 62, 747 P.2d 1113 (1987) (citations omitted). Each of these circumstances is both non-exclusive and non-essential. State v. Karpenski, 94 Wn. App. 80, 110-11, 971 P.2d 553 (1999). Washington courts have criticized the latter four factors as being unhelpful in determining reliability. See, e.g., Karpenski, 94 Wn. App. at 109-11 n.124-130; State v. Swan, 114 Wn.2d 613, 650-51, 790 P.2d 610 (1990). Specifically, factors six (express assertions about past fact) and seven (cross-examination exposing lack of knowledge) have all but been eliminated from the child hearsay context. See State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988) (past facts factor does not carry any significant weight because most statements offered for admission under 9A.44.120 are assertions about past facts); State v. Strange, 53 Wn. App. 638, 647, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989)("cross examination could in every case possibly show error in the child hearsay statement.").

An appellate court should uphold a finding of reliability even if it determines that only some of the factors suggest trustworthiness. It is not

error to find that a child's hearsay statement is reliable even if it does not satisfy every Ryan factor. See State v. Swan, 114 Wn.3d 613, 652, 790 P.2d 610 (1990). The factors simply help the court decide "whether the comments and circumstances surrounding the statement indicate it to be reliable." Swan, 114 Wn.2d at 648.

The trial court in this case went through the Ryan factors and properly determined that the victims' hearsay statements were reliable. RP 707-09. The trial court thus properly exercised its discretion when it admitted the child hearsay statements of N.S., D.S., and Z.S.

a. Hearsay statements of N.S.

Defendant claims that N.S.'s statements to the nurse practitioner were improperly admitted under the child hearsay statute because they were unreliable. The trial court admitted the nurse practitioner's testimony under RCW 9A.44.120 and ER 803(a)(4), which allows the trial court to admit hearsay statements made for purposes of medical diagnosis or treatment, without first finding indicia of reliability. See ER 803(a)(4); CP 64-67. Because defendant does not challenge the nurse practitioner's testimony under ER 803(a)(4), this court should assume that the trial court properly admitted N.S.'s statements to the nurse under that rule. Thus, this court need not address the admissibility of N.S.'s statements to the nurse under RCW 9A.44.120. See State v. Grant, 83 Wn. App. 98, 105, 920

P.2d 609 (1996) (erroneous admission of evidence under ER 609 harmless where evidence properly admissible under ER 404(b)).

The following analysis applies to N.S.'s hearsay statements to her grandmother (Harriet), mother (Onnewa), uncle (Harold), and aunt (Sukari), which defendant contends were unreliable. The main thrust of defendant's argument is that the statements were not spontaneous and inconsistent.⁵

i. Motive to Lie.

The evidence does not suggest that N.S. had a motive to lie about the abuse. Witnesses testified that the entire family was close and they all enjoyed spending time together prior to the disclosure. RP 407. N.S. often spent time at the defendant's house and considered the defendant's mother her favorite aunt. The witnesses were unaware of any problems between N.S. and defendant that would cause N.S. to make up allegations against him. RP 448. There is simply nothing in the record to suggest that N.S. disliked the defendant to the extent that she would contrive the allegations. In fact, defendant makes no claim that N.S. had a motive to lie. This factor thus favors admission of the hearsay statements.

⁵ Defendant cites to the *trial* testimony as evidence of the statements' inconsistencies. But the court held a separate hearsay hearing where the statements were discussed. As such, the only evidence that should be considered by this court for purposes of assessing the reliability of the hearsay statements is the evidence presented at the hearsay hearing. Any inconsistencies that arose at trial were properly subject to cross-examination, but should not be considered in assessing whether the trial court properly determined that the hearsay statements were reliable.

ii. NS's General Character.

N.S. testified during the competency hearing that she understood the difference between truth and lie and that it was better to tell the truth. RP 364. N.S.'s family also testified that she didn't lie about important things and followed the rules. RP 449-50, 485-87. N.S. was punished if she did something wrong. RP 487. On appeal, defendant does not claim that N.S.'s veracity was in question. This factor thus favors admission of the hearsay statements.

iii. Whether More Than One Person Heard the Statements.

N.S. disclosed the abuse to several people: her sister S.K.H., grandmother Harriet, mother Onnewa, uncle Harold, aunt Sukari, and the nurse at Mary Bridge. Defendant does not deny that multiple people heard the statements. Instead, defendant contends that the statements were inconsistent. A review of the record, however, reveals that N.S.'s version of events remained substantially consistent throughout these interviews. N.S. said that defendant had been humping on her and physically demonstrated what she meant by the word "humping." RP 453-54, 480-81, 512, 518, 548, 563, 601-04. N.S. also consistently stated that defendant told her not to tell. RP 480, 564, 604. The substance of N.S.'s statements was entirely consistent – that defendant had touched N.S. inappropriately. If there were differences in how N.S. described the situation, it was a result of the way that the question was asked or in how

specific she was being and not necessarily a result of her contriving the allegations. This factor thus favors admission of the hearsay statements.

iv. Whether the Statements were Spontaneous.

The thrust of defendant's claim is that N.S.'s statements were a result of suggestion and thus not spontaneous.

For purposes of child hearsay analysis, statements are spontaneous so long as they are made in response to questions that are not leading and do not suggest an answer. In re Dependency of S.S., 61 Wn. App. 488, 497, 814 P.2d 204 (1991); see also State v. Swan, 114 Wn.2d 613, 649, 790 P.2d 610 (1990) (statements made in response to questions are spontaneous as long as the questions do not suggest who abused the child or supply the child with details). When considering spontaneity, the court must consider "the entire context in which the child [made] the statement." State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

N.S.'s initial disclosure to her sister, S.K.H. was clearly spontaneous. S.K.H. and N.S. were alone in the kitchen when N.S. told her sister that the defendant had touched her private. RP 563. S.K.H. immediately took N.S. to their grandmother's house where S.K.H. told their grandmother in the presence of N.S. that the defendant had been messing with N.S. RP 511. The grandmother asked N.S. if the defendant did anything to her and N.S. responded, "Yes." RP 512. A few minutes later, the grandmother asked N.S. in the presence of S.K.H. whether the defendant had ever

bothered her or messed with her. RP 518. N.S. answered in the affirmative and said the defendant had done “nasty stuff” to them. RP 518. After a few minutes, N.S.’s mother and aunts arrived. RP 451-52. N.S.’s mother, Onnewa, asked N.S. what happened. RP 451-52. N.S. appeared scared so S.K.H. told her to tell Onnewa what N.S. had told S.K.H. RP 452. N.S. then told her mother that, every time she goes to the defendant’s house he “be humping on me.” RP 453. Onnewa had N.S. demonstrate what she meant by “humping” and N.S. showed her by laying on top of Onnewa and moving her vagina up and down. RP 453-54. N.S.’s uncle, Harold, also arrived at the grandmother’s house and spoke with the kids about the allegations. RP 548. Uncle Harold asked the girls what happened and N.S. said that the defendant was humping her. RP 548. All of these statements were spontaneous under the standards set forth above. Even though the discussion occurred in the presence of others, there is no evidence that anyone suggested to N.S. that she had been sexually abused and, if so, how the abuse occurred. Nobody ever suggested the term “humped” or “humping”, which is the term that N.S. used. In addition, nobody demonstrated what “humping” meant – N.S. did this on her own accord.

The record amply supports the trial court’s finding that the statements were spontaneous. This factor favors admission of the hearsay statements.

v. Timing of the Statements and the Relationship Between the Declarant and the Witness.

N.S. first disclosed to her older sister, a person whom she trusted. N.S. then told her grandmother, another person whom she loved and trusted. N.S. then told her mother, aunt and uncle. Statements to friends suggest trustworthiness. State v. Whelchel, 115 Wn.2d 708, 723, 801 P.2d 948 (1990). Further, the record does not suggest that any of these people were predisposed to believe N.S. The defendant was their nephew and grandson whom they also loved and trusted. See State v. Borland, 57 Wn. App. 7, 14, 786 P.2d 810 (1990) (4-year-old's statements to mother and grandmother that uncle had abused her were reliable where mom and grandma, although predisposed to believe child, would also presumably be reluctant to verify false allegations against their son and brother). In fact, the court had to take a brief recess during grandmother Harriet's testimony because she became emotional over the fact that the accused was her grandson. RP 518-520. The relationship between N.S. and the people she told supports a finding of reliability.

With regard to the timing of the statements, it is unclear when the last incident of sexual abuse occurred between N.S. and the defendant. The victims disclosed the abuse in February 2005. The charging period was from December 2002 to December 10, 2004. There was evidence produced at trial that N.S. last spent the night at defendant's house in

December 2004, but this testimony was not presented at the child hearsay hearing. RP 916. Even if there was a small delay, however, delayed reporting by child sex crime victims is a well-recognized phenomenon. State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984). “To treat a lapse of time between abuse and accusatory statements as necessarily indicative of unreliability would also overlook the tendency of abuse victims to delay reporting that abuse occurred.” State v. Carlson, 61 Wn. App. 865, 873 n.3, 812 P.3d 536 (1991). This factor favors admission of the hearsay statements.

vi. Assertion about a Past Fact.

N.S.’s statements clearly related to past facts, but as stated earlier, the usefulness of that conclusion is questionable. Strange, 53 Wn. App. at 646-47; State v. Borland, 57 Wn. App. 7, 17, 786 P.2d 810 (1990). Thus, “[i]t is a cautionary concern rather than a factor to be weighed.” Borland, 57 Wn. App. at 17. The trial court was aware that this factor was of little help and did not make an explicit finding regarding this factor. Based on the case law that questions the usefulness of this factor, defendant’s claim that the trial court erred in not considering it lacks merit.

vii. Whether cross-examination could not show N.S.’s lack of knowledge.

As the court noted in Strange, 53 Wn. App. at 647, “cross examination could in every case possibly show error in the child hearsay statement.” “The real question then becomes whether the other indicia of

reliability are sufficiently strong to justify admission.” Id. Again, defendant claims that the trial court erred in failing to consider this factor. But because the courts have recognized that this factor is not useful in the reliability determination, the trial court did not err in failing to consider it.

viii. Possibility of N.S.’s faulty recollection.

N.S.’s statements were substantially consistent. The possibility that she was speaking from faulty recollection was therefore remote. This factor favors admission of the hearsay statements.

Circumstances surrounding the statements are such that there is no reason to suppose the declarant misrepresented defendant’s involvement. As stated above, N.S. had no motive to lie. N.S.’s statements were spontaneous. These circumstances provide no reason for N.S. to misrepresent the defendant’s involvement. This factor favors admission.

Consideration of the above factors reveals that N.S. was reliable. She had no motive to lie and her character for veracity was unblemished. More than one person heard substantially the same statements, many of which were spontaneous and made near in time to the incident. Based on this evidence, the trial court properly evaluated and applied the Ryan factors and did not abuse its discretion when it admitted N.S.’s hearsay statements.

b. Hearsay statements of D.S.

Defendant claims that the trial court erred in admitting D.S.'s statements to the nurse practitioner. As with N.S.'s statements to the nurse practitioner, the trial court admitted D.S.'s statements to the nurse practitioner under RCW 9A.44.120 *and* ER 803(a)(4). CP 71-73. Because defendant does not challenge the admissibility of the nurse practitioner's testimony under ER 803(a)(4) this court should assume that the trial court properly admitted D.S.'s statements to the nurse under that rule. Thus, this court need not address the admissibility of this testimony under RCW 9A.44.120.

The following analysis applies to N.S.'s hearsay statements to her mother (Onnewa), aunt (Sukari), grandmother (Harriet), uncle (Harold), and family friend Yolanda Hull. Defendant does not specify which Ryan factors indicate unreliability. Rather, defendant claims that the statements are inconsistent with each other, that the family's recollection of the statements is inconsistent and that the statements were the result of suggestion by the family. See Appellant's Brief at 38-42.

i. Motive to Lie.

The evidence does not suggest that D.S. had a motive to lie about the abuse. Prior to the disclosure, D.S. had a good relationship with the defendant and his family. RP 407, 414, 448, 465. The family spent a lot of time together. D.S. often spent the night at defendant's home. RP 445-47. The family was unaware of any problems between D.S. and the

defendant. RP 407, 448. There is simply nothing in the record to suggest that D.S. disliked the defendant to the extent that she would contrive the allegations.

Defendant claims that, because D.S. had been in trouble before for inappropriate behavior with the defendant⁶, she “had incentive to put the onus on [the defendant] this time so that she would not be punished.” Appellant’s Brief at 39. Defendant’s claim is nonsensical. If D.S. had been in trouble for inappropriate behavior before, she would not admit to inappropriate behavior again. If anything, her motivation would be to deny that anything happened at all. Moreover, D.S. testified that she would never lie to please her mother. RP 389. Defendant’s claim that D.S. had a motive to lie lacks merit. This factor thus favors admission of the hearsay statements.

ii D.S.’s General Character.

It is undisputed that D.S. knew the difference between truth and lie, knew it was wrong to lie, and that there were repercussions if she did lie. RP 382-89, 408, 439, 449. Everyone in the family agreed that D.S. didn’t lie about important things, did not steal, and complied with the rules. RP 407-09, 448-50. On appeal, defendant claims that D.S. would lie to avoid trouble. Appellant’s Brief at 39. The record does not support defendant’s

⁶ In 2000, defendant’s step-father found the defendant and D.S. alone in defendant’s bedroom engaging in what appeared to be sexual activity. RP 447. Both D.S. and the defendant got in trouble. RP 447.

claim. D.S. testified that she would never get someone in trouble just to please her mother. RP 389. This factor thus favors admission of the hearsay statements.

**iii Whether More Than One Person
Heard the Statements.**

D.S. disclosed the abuse to several people: Yolanda Hull, mother Onnewa, aunt Sukari, grandmother Harriet, uncle Harold, nurse practitioner, and the child interviewer. Defendant does not deny that multiple people heard the statements. Instead, defendant contends that the statements, as relayed by those that heard them, were inconsistent with each other. See Appellant's Brief at 38-42. But this does not mean that the statements themselves were inconsistent. This is more likely a result of how the witnesses remembered them. As such, this was a proper issue for cross-examination, but did not make the statements unreliable. This factor thus favors admission of the hearsay statements.

**iv. Whether the Statements were
Spontaneous.**

Defendant claims that D.S.'s statements were a result of suggestion and thus not spontaneous.

D.S. initially disclosed a closet incident to her mother's best friend, Yolanda Hull. D.S. was staying at Yolanda's house on the night of the disclosure. RP 399. During the drive to Harriet's (D.S.'s grandmother) house, Yolanda told D.S. that they were going to Harriet's house because

S.L.H. had disclosed that the defendant had been messing with her. RP 404. When Yolanda asked D.S. if anything had happened to her, D.S. started crying and said that the defendant had her in the closet, pulled her pants down and touched her. RP 404, 411. D.S. said she didn't say anything because the defendant told her he would beat her up. RP 405. These statements are spontaneous even though Yolanda began the conversation by telling D.S. what S.L.H. had disclosed. Yolanda never suggested that D.S. had been abused, she simply asked her an open-ended question if anything had happened. Yolanda also never suggested how or where the abuse occurred. D.S. was the one that filled in the details about the incident occurring in the closet.

When they arrived at Harriet's house, Onnewa (D.S.'s mother) asked D.S. if defendant had ever messed with her. D.S. said that he tried to, but didn't say anything else. RP 461-62. D.S. appeared scared to talk about it. RP 462. D.S. then disclosed to her mother a second incident that occurred at the defendant's house when defendant tried to pull down D.S.'s pants. RP 463. These statements were also spontaneous even though they were in response to a question from her mother. D.S.'s mother did not suggest the specifics of the incident or where it occurred; D.S. provided those details.

Aunt Sukari remembered D.S.'s disclosure to Onnewa differently. Sukari testified that D.S. disclosed that defendant had humped her and that she had watched nasty movies at Valencia's house. RP 492-93. The fact

that family members remembered the statements differently reflected on their ability to recall, but did not make the statements unreliable.

Uncle Harold spoke with D.S. after Sukari and Onnewa spoke with her. This conversation took place in front of the other nieces. Harold asked D.S. if somebody had touched her and D.S. started crying and said, "Uh, yeah." RP 550. D.S. said defendant touched her and then pointed to her vaginal area. RP 551. D.S. said it was a "you show me yours and I'll show you mine" type of thing. RP 552. Defendant said he would beat her up if she told. RP 552-53. These statements were also spontaneous even though they occurred in the presence of others. Harold did not suggest to D.S. who had touched her nor how it happened.

The record supports the trial court's finding that the statements were spontaneous. This factor favors admission of the hearsay statements.

v. Timing of the Statements and the Relationship Between the Declarant and the Witness.

Defendant does not claim that the timing of the statements and the relationship between D.S. and the witnesses suggest unreliability. Even if he had, the record does not support that any of the people that D.S. told were predisposed to believe D.S. D.S. disclosed to people that she loved and trust. She first disclosed to a very close family friend, Yolanda Hull, and thereafter to her grandmother, mother and uncle. This factor supports a finding of reliability.

vi. Assertion about a Past Fact and Whether cross-examination could not show D.S.'s lack of knowledge.

D.S.'s statements clearly related to past facts and cross-examination could have shown a lack of knowledge, but, as argued above, the usefulness of these conclusions is questionable. See Strange, 53 Wn. App. at 646-47; Leavitt, 111 Wn.2d at 75.

vii. Possibility of D.S.'s faulty recollection.

The substance of D.S.'s statements was entirely consistent. Even though her description varied in its details, the substance of each statement remained the same – the defendant sexually assaulted her. Defendant himself admitted to the Detective that he had engaged in sexual intercourse with D.S. “three or four years ago.” RP 947. Thus, the possibility of D.S. faulty recollection was small. This factor thus favors admission.

viii. Circumstances surrounding the statements are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

As stated above, D.S. had no motive to lie. D.S.'s statements were spontaneous. These circumstances provide no reason for D.S. to misrepresent the defendant's involvement. This factor favors admission.

Based on this evidence, the trial court properly evaluated and applied the Ryan factors and did not abuse its discretion when it admitted D.S.'s hearsay statements.

c. Hearsay Statements of Z.S.

The following analysis applies to Z.S.'s hearsay statements to her grandmother Harriet, aunt Onnewa, father Harold, aunt Sukari, and sister S.K.H., which defendant contends were unreliable.

i. **Motive to Lie.**

Defendant makes no claim that Z.S. had a motive to lie. There is simply nothing in the record to suggest that Z.S. disliked the defendant to the extent that she would contrive the allegations. This factor thus favors admission of the hearsay statements.

ii. **N.S.'s General Character.**

Witnesses testified that Z.S. did not lie and followed the rules. RP 497, 538-39. Z.S. was punished if she broke the rules. RP 539. On appeal, defendant does not claim that Z.S.'s veracity was in question. This factor thus favors admission of the hearsay statements.

iii. **Whether More Than One Person Heard the Statements.**

N.S. disclosed the abuse to aunt Onnewa, aunt Sukari, grandma Harriet, father Harold, and sister S.K.H. RP 460, 496-97, 520, 544-46, 559-60, 564. Defendant does not deny that multiple people heard the statements. Z.S.'s version of events remained substantially consistent

throughout these interviews. RP 496, 520, 544-46, 559-60, 564. This factor thus favors admission of the hearsay statements.

iv. Whether the Statements were Spontaneous.

The thrust of defendant's claim is that Z.S.'s statements were a result of suggestion and thus not spontaneous.

Z.S.'s initial disclosure was to her sister, S.K.H. S.K.H. asked Z.S. if the defendant had ever touched her. Z.S. responded, "Yeah, he touched my private and told me not to tell and it hurt." RP 564. Although S.K.H. identified the perpetrator, she did not suggest any of the details. For a three-year-old to provide the details that she did suggests reliability. See State v. Swan, 114 Wn.2d 613, 633, 790 P.2d 610 (1990) (accurate description by a three-year-old indicated precocious sexual knowledge that was considered corroborative of abuse). After she told S.K.H., Z.S. disclosed to her aunt Sukari and grandma Harriet. Harriet asked all of the girls whether the defendant had put his hands on them and Z.S. responded that C.C. touched her "right here" and pointed to her vagina. RP 520-21. Z.S. said it hurt. RP 521. Harriet did not suggest the details of the touching and these statements were thus spontaneous. Finally, Z.S. disclosed to her father, Harold, after he took Z.S. into the bathroom by herself. Z.S. told her father that the defendant had touched her and pointed to her private part. RP 544-46. Z.S. said it happened at her house in her

bedroom and that S.K.H. saw it. RP 544-46. S.K.H. confirmed that she saw Z.S. as Z.S. exited her bedroom after the incident. RP 568.

In each of these statements, Z.S. was responding to questions posed of her, but none of those questions suggested the details of the abuse. The record amply supports the trial court's finding that the statements were spontaneous. This factor favors admission of the hearsay statements.

v. Timing of the Statements and the Relationship Between the Declarant and the Witness.

Defendant does not argue that the timing of the statements and the relationship between Z.S. and the witnesses supports a finding that the statements are unreliable. Even if he had, the record does not suggest that any of the people that Z.S. told were predisposed to believe Z.S. Z.S. disclosed to people that she loved and trust. She first disclosed to her sister, S.K.H., and thereafter to her grandmother, aunt, mother, and uncle. This factor supports a finding of reliability.

vi. Assertion about a Past Fact and Whether cross-examination could not show Z.S.'s lack of knowledge.

Z.S.'s statements clearly related to past facts and cross-examination could have shown a lack of knowledge, but, as argued above, the usefulness of these conclusions is questionable.

vii. Possibility of Z.S.'s faulty recollection.

Z.S.'s statements were remarkably consistent thus suggesting that the possibility of faulty recollection was remote. This factor thus favors admission.

viii. Circumstances surrounding the statements are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

As stated above, Z.S. had no motive to lie. Z.S.'s statements were spontaneous. These circumstances provide no reason for Z.S. to misrepresent the defendant's involvement. This factor favors admission.

Based on this evidence, the trial court properly evaluated and applied the Ryan factors and did not abuse its discretion when it admitted Z.S.'s hearsay statements.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF FIRST DEGREE CHILD MOLESTATION (COUNT I) AND INDECENT LIBERTIES (COUNT V).

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Anderson, 72 Wn. App. 453, 458, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Following a bench trial, an appellate court determines whether substantial evidence supports the trial court's findings of fact and whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the finding's truth." Stevenson, 128 Wn. App. at 193. Where the findings of fact and conclusions of law are supported by substantial but disputed evidence, a reviewing court will not disturb the trial court's ruling. State v. Aase, 121 Wn. App. 558, 564, 89 P.3d 721 (2004).

A reviewing court accords a trial court's factual findings great deference because it alone has had the opportunity to view the witness's demeanor and to judge veracity. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). It is the fact finder whose role is to resolve conflicting testimony, evaluate the credibility of witnesses, and weigh the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Therefore, when the State has produced evidence of all elements of a crime, the decision of the trier of fact should be upheld.

- a. The State presented sufficient evidence to prove that defendant committed the crime of first degree child molestation against D.S. as charged in Count I.

A person commits the crime of child molestation when he has sexual contact with another who is less than twelve years old, not married to the perpetrator, and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.083. "Sexual contact" is defined as:

any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

Defendant contends that there was insufficient evidence of "sexual contact" because D.S. did not testify in trial that defendant actually touched her buttocks. While it is true that D.S. did not testify to touching

in court (RP 1254), she did tell the child interviewer that, while she was in bed at the defendant's house, the defendant approached her, pulled her pants down and touched her butt with his hand and moved it around in a rubbing motion. Ex. 8, at page 5-6. D.S.'s statements to the child interviewer were admitted as substantive evidence. RP 1307. D.S.'s statements to the nurse, as well as her reluctant testimony in court was more than sufficient to prove "sexual contact."

Defendant's claim that touching the buttocks does not amount to sexual contact is also without merit. See Appellant's Brief at 47. The "touching of the sexual or other intimate parts" element of RCW 9A.44.010(2) is not restricted to the touching of genitalia or breasts. Which anatomical areas, apart from genitalia and breasts, are "intimate" is a question for the trier of fact. In re Adams, 24 Wn. App. 517, 520, 601 P.2d 995 (1979) (citing State v. Buller, 31 Ore. App. 889, 571 P.2d 1263 (1977) and State v. Turner, 33 Ore. App. 157, 575 P.2d 1007 (1978)). Hips, abdomen, and buttocks are considered intimate parts for purposes of the statute. In re Adams, 24 Wn. App. at 519-20. Defendant's actions of pulling down the pants of D.S. and S.K.H. and then touching their bare buttocks constituted touching of intimate parts and sexual contact.

Defendant also claims that a finding of sexual contact cannot be found where the touching is through the clothing. See Appellant's Brief at

48. Our Supreme Court rejected this claim in In re Adams, 24 Wn. App. 517, 519, 601 P.2d 995 (1979), where the Supreme Court stated that sexual contact may occur through the clothing and the contact does not have to be by the hand of the aggressor. In re Adams, 24 Wn. App. at 519 (relying on People v. Thomas, 91 Misc. 2d 724, 398 N.Y.S.2d 821 (1977), State v. Buller, 31 Ore. App. 889, 571 P.2d 1263 (1977) and State v. Peterson, 560 P.2d 1387 (Utah 1977)).

Finally, defendant claims that modern day social norms do not treat the buttocks as an intimate part and, as such, a reasonable person would not know that touching of the buttocks was prohibited by the statute. The court in In re Adams also considered and rejected a similar argument. See In re Adams, 24 Wn. App. at 521 n. 2.

The State presented sufficient evidence to support the court's finding that the defendant had "sexual contact" with D.S. The court was entitled to conclude that this element of the crimes was satisfied.

- b. The State presented sufficient evidence to prove the crime of indecent liberties against S.K.H. as charged in Count V.

A person commits the crime of indecent liberties when he, by forcible compulsion, knowingly causes another person who is not his spouse to have sexual contact with him.⁷ RCW 9A.44.100.

Again, defendant claims only that there was insufficient evidence of sexual contact because S.K.H. did not testify that the defendant actually touched her buttocks with his hand. See Appellant's Brief at 47; CP 49-60 (FOF XXIII).

But S.K.H.'s trial testimony was not the only evidence admitted on this charge. In addition to S.K.H.'s trial testimony, the State presented the testimony of Cheryl Hanna-Truscott, a registered nurse who evaluated S.K.H. for sexual abuse. RP 1132. S.K.H. told the nurse about the incident that occurred when S.K.H. stayed overnight at the defendant's house. S.K.H. told the nurse that the defendant pulled her into a room, closed the door, pulled down his pants and started touching S.K.H. on her private. RP 1134-35. Defendant also held his private with his hand and held S.K.H.'s butt in his other hand. RP 1136. Defendant told S.K.H. not to tell anybody. RP 1135. Immediately after this incident, S.K.H. called

⁷ There are alternative ways to commit indecent liberties, but the State charged the defendant with committing the crime "by forcible compulsion." CP 9-14.

her mother and lied about not feeling well so that she could go home. RP 1136. S.K.H.'s mother confirmed that she received a phone call from S.K.H. when S.K.H. was staying at the defendant's house and that S.K.H. complained of not feeling well so she brought her home. RP 1026.

S.K.H.'s statements to the nurse were admitted pursuant to ER 803(a)(4) as substantive evidence. S.K.H.'s statements provided sufficient evidence of "sexual contact" for purposes of Count V.

3. THE CHILD MOLESTATION AND INDECENT LIBERTIES STATUTES ARE NOT VOID FOR VAGUENESS.

Under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, a statute is void for vagueness if: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972); City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). This test serves two purposes. First, it ensures that citizens receive fair warning of what conduct they must avoid, and, second, it protects citizens from "arbitrary, ad hoc, or discriminatory law enforcement." State v. Halstein, 122 Wn.2d

109, 117, 857 P.2d 270 (1993). A statute is unconstitutionally vague if either requirement is not satisfied. Douglass, 115 Wn.2d at 178.

Despite its broad sweep, the vagueness doctrine is limited in two important ways. Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988). First, a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt. Haley v. Medical Disciplinary Bd., 117 Wn.2d 720, 739, 818 P.2d 1062 (1991); Eze, 111 Wn.2d at 26. A party bringing a constitutional challenge to a statute bears the burden of proving its unconstitutionality. Halstien, 122 Wn.2d at 118. Second, “impossible standards of specificity” or “mathematical certainty” are not required because some degree of vagueness is inherent in the use of language. Eze, 111 Wn.2d at 26-27; Haley, 117 Wn.2d at 740. “Consequently, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct.” Eze, 111 Wn.2d at 27. Rather, a statute will be deemed void for vagueness only “if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability.” State v. Williams, 144 Wn.2d 197, 204, 26 P.3d 890 (2001) (citing State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998)).

Vagueness challenges to statutes which do not involve First Amendment rights are to be evaluated under the particular facts of each case. Maynard v. Cartwright, 486 U.S. 356, 361, 109 S. Ct. 1853, 100 L.

Ed. 2d 372 (1988). The context of the entire statute is considered by the court to determine a sensible, meaningful, and practical interpretation. Douglass, 115 Wn.2d at 177. A defendant whose conduct clearly fits within the proscriptions of a statute does not have standing to challenge the constitutionality of that statute for vagueness and, thus, may not challenge the statute on the ground that it is vague as applied to the conduct of others. City of Seattle v. Abercrombie, 85 Wn. App. 393, 400, 945 P.2d 1132, review denied, 133 Wn.2d 1005 (1993); State v. Hegge, 89 Wn.2d 584, 589, 574 P.2d 386 (1978). If a person of ordinary intelligence can understand what the ordinance proscribes, *notwithstanding some possible areas of disagreement*, the ordinance is sufficiently definite. Eze, 111 Wn.2d at 27 (emphasis in original) (quoting State v. Maciolek, 101 Wn.2d 259, 265, 676 P.2d 996 (1984)).

Both the child molestation and indecent liberties statutes require the State to prove that the defendant had “sexual contact” with the victim. RCW 9A.44.083 and RCW 9A.44.100. “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2). Defendant claims that both statutes are unconstitutionally vague because they do not define the term “intimate parts” with sufficient precision. But an “as applied” vagueness challenge to the indecent liberties statute was already rejected in In re Adams, 24 Wn. App. at 521. See also State v. Galbreath, 69 Wn.2d 665, 667-69, 419 P.2d 800 (1966). In In re Adams,

the court rejected a vagueness challenge to the indecent liberties statute where defendant was accused of unbuttoning the victim's pant and touching her hips and lower abdomen. In re Adams, 24 Wn. App. at 520.

In rejecting the challenge, the court stated:

In determining what is fair notice to a citizen, it is not necessary that the statute spell out every detail. Some aspects of the prohibited conduct may be left to the commonly accepted community sense of decency, propriety and morality.

In re Adams, 24 Wn. App. at 520 (citing State v. Stuhr, 1 Wn.2d 521, 527, 96 P.2d 479, (1939) and People v. Jones, 75 Mich. App. 261, 272, 254 N.W.2d 863 (1977)). The court went on to find that,

[a]s with the buttocks, we believe that the hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited, particularly if that touching is incidental to other activities which are intended to promote sexual gratification of the actor.

In re Adams, 24 Wn. App. at 520; see also State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982) (Supreme Court, relying on In re Adams and Galbreath, rejected an “as applied” vagueness challenge to the indecent liberties statute where defendant was accused of touching the victim's buttocks with a washcloth).

Additionally, the statute defining “sexual contact”, which defendant claims is unconstitutionally vague, contains key terms that serve to clarify and narrow the reach of the statute. Specifically, the statute defines “sexual contact” as “any touching of the sexual or other intimate

parts of a person done for the purpose of gratifying sexual desire of either party.” The terms “purpose” and “gratifying sexual desire” are easily applied and not oblique. The Supreme Court addressed a similar challenge to the “sexual motivation” statute, which uses the same terminology, in State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993) (court rejected defendant’s claim that term “motivation” too nebulous a concept for ordinary people to understand because definition included the terms “purpose” and “sexual gratification”, which served to clarify and narrow the reach of the statute).

Defendant has not sustained his heavy burden of proving that the indecent liberties and child molestation statutes are unconstitutionally vague because they use the term “sexual contact.” Defendant’s challenge to the statutes should be rejected.

4. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE S.L.H.’S COMPETENCY.

The defendant bears the burden of proving ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To succeed on a claim of ineffective representation, the defendant must prove both that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The claim fails

unless the defendant proves both prongs of the test. See Strickland, 466 U.S. at 697; State v. Walton, 76 Wn. App. 364, 371, 884 P.2d 1348 (1994), review denied, 126 Wn.2d 1024, 896 P.2d 63 (1995). The prejudice prongs of the test for effective assistance requires the defendant to prove there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Thus, in a case whether the alleged deficiency is based on counsel's failure to challenge the competency of a child witness, the defendant must affirmatively show that the trial court would have found the witness to be incompetent if a competency hearing had in fact been held. See McFarland, 127 Wn.2d at 337, n.4. In this case, the record does not support a finding that S.L.H. was incompetent.

Competency of a witness is a matter to be determined by the trial court within the framework of RCW 5.60.050 and CrR 6.12. State v. Froehlich, 96 Wn.2d 301, 304, 635 P.2d 127 (1981). RCW 5.60.050 provides that the following people are not competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050; CrR 6.12(c)⁸. A witness who has a low IQ is not *per se* incompetent. See State v. Smith, 30 Wn. App. 251, 633 P.2d 137, affirmed, 97 Wn.2d 801, 650 P.2d 201 (1981) (38-year-old witness with mental age of four and I.Q. of 23 competent to testify). The burden is on the party opposing the witness to prove that the witness is incompetent. See State v. Watkins, 71 Wn. App. 164, 173, 857 P.2d 300 (1993). A trial court's opinion on the competency of a witness carries great weight in the appellate courts and will not be disturbed except for manifest abuse of discretion. Froelich, 96 Wn.2d at 304.

Defendant challenges S.L.H.'s competency under subsection (2) of RCW 5.60.050, claiming that S.L.H. was manifestly unable to receive just impressions of facts or relate them truly. Defendant's claim lacks merit. Viewed in isolation, parts of S.L.H.'s testimony may seem somewhat confusing and disjointed. When viewed in the context of her entire testimony, however, S.L.H. was actually a very articulate witness who was clearly capable of recollecting the incident and communicating the details of the incident in detail. S.L.H. testified that she knew she had to tell the truth on the witness stand and that she knew what it meant to tell the truth. RP 967-69. The answers she gave were responsive to the questions being asked by counsel and the court. S.L.H. was hesitant to talk about the incidents with defendant because she was "embarrassed" (RP 977), but

⁸ CrR 6.12(c) contains similar language.

eventually testified that the defendant had touched her on her body and put his penis in her vagina. RP 975-76, 979-81, 992-93. In addition, the record indicates that her testimony was corroborated by the testimony of other State witnesses. RP 1065-1080. S.L.H. was, by all means, a very competent and articulate witness. See State v. Smith, 30 Wn. App. 251, 633 P.2d 137, affirmed, 97 Wn.2d 801, 650 P.2d 201 (1981) (although 38-year-old witness with mental age of four and IQ of 23 was severely retarded, trial court did not abuse discretion in allowing witness' testimony since witness was able to understand obligation to tell truth and was able to relate basic facts of incident).

Based on the evidence of S.L.H.'s competency, counsel's failure to challenge her competency cannot be considered deficient. Defendant also cannot establish that he was prejudiced by counsel's conduct because a challenge to S.L.H.'s competency would not have been successful.

5. THE TRIAL COURT'S FINDING THAT THE DEFENDANT COMMITTED THE CRIME CHARGED IN COUNT IV *AFTER* DEFENDANT TURNED 12 YEARS OLD IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD; THE COURT WAS THUS NOT REQUIRED TO MAKE A FINDING REGARDING DEFENDANT'S CAPACITY TO COMMIT THIS CRIME.

The capacity statute, RCW 9A.04.050, provides in part:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they

have sufficient capacity to understand the act or neglect, and to know that it was wrong.

Defendant claims that, because the crime alleged in Count IV “could have” occurred when defendant was 11 years old, the trial court should have made a finding regarding his capacity and the court’s failure to do so warrants reversal. See Appellant’s Brief at 55-57. But the court made a specific finding that the defendant was 12 years old when he committed the crimes alleged in Count IV.⁹ CP 49-60 (FOF XVIII). The court’s factual finding is supported by the record.

S.K.H. testified that she observed the defendant and S.L.H. engaging in what appeared to be sexual intercourse in September 2004. RP 1070-80. S.K.H. testified that she knew it was September 2004 because her parents were getting ready to go to Las Vegas for her mother’s birthday. RP 1072-74. S.K.H.’s parents confirmed that they traveled to Las Vegas in September 2004. RP 1029, 1353. S.L.H. also corroborated this testimony when she testified that she was eleven when the sexual incident with defendant occurred. RP 980. S.L.H. was born on 10/11/92 making her eleven years old from 10/11/03 to 10/11/04; thus, she was eleven in September 2004 when S.K.H. personally observed S.L.H. and the defendant engaging in sexual intercourse.

⁹ Even though the charging period covered a period where defendant was 11 and 12 years old, the Court made a specific finding that the incident occurred after defendant’s 12th birthday.

The above testimony provided substantial evidence that the defendant committed the crime charged in Count IV in September 2004. Because the court properly determined that the incident occurred *after* defendant turned 12 years old, the defendant was not presumed to lack the capacity to commit the crime. The court was thus not required to make a finding regarding defendant's capacity and its failure to do so does not require reversal.

6. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE THAT S.L.H. WAS INCAPABLE OF CONSENTING TO SEXUAL ACTIVITY FOR PURPOSES OF THE CHARGE IN COUNT IV.

Defendant claims that there was insufficient evidence that he committed the crime of second degree rape against S.L.H. Specifically, defendant claims that the State failed to prove that S.L.H. was incapable of consent based on mental incapacity.¹⁰

A person commits the crime of second degree rape when he or she engages in sexual intercourse with another person when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated. RCW 9A.44.050(1)(b). "Mental incapacity" is a condition existing at the time of the offense "... which prevents a person from

¹⁰ Defendant does not appear to contest the fact that he and S.L.H. had sexual intercourse.

understanding the nature or consequences of the act of sexual intercourse . . .” RCW 9A.44.010(4). In assessing whether the victim understands the nature or consequences of sexual intercourse, the jury may evaluate that person’s testimony and other relevant evidence, including the victim’s demeanor, behavior, and clarity on the stand. State v. Ortega-Martinez, 124 Wn.2d 702, 714, 881 P.2d 2331 (1994). The jury may also consider the victim’s IQ; mental age; ability to understand fundamental, nonsexual concepts; mental faculties generally; and ability to translate information acquired in one situation to a new situation. Id. at 714.

In this case, the State presented sufficient evidence to permit a finding that S.L.H. was incapable of consent by reason of being mentally incapacitated. S.L.H.’s mother, father and grandmother testified about her developmental and mental infirmities. RP 742-45, 783-85, 1000-14, 1341-53. Everyone agreed that S.L.H. was mentally challenged and attended special education classes. RP 742, 783, 835-36, 1000-02. S.L.H.’s special ed teacher, Marie Martindale, testified that S.L.H. had an IQ of 47 (the mean is 100) and cognitively operates at or below a second grade level. RP 1445-46. Martindale described S.L.H. as “significantly delayed” and categorized her as mentally retarded. RP 1447, 1453. S.L.H. had the mental age of a 7-8 year old and was not street wise. RP 1450-51. S.L.H.’s father testified that, during the period of the charged incidents,

S.L.H. had difficulty expressing herself, couldn't understand what she was reading, did not write well and was easily confused by what people said. RP 1005, 1342-43, 1348. In addition, everyone agreed that S.L.H. could not be left home alone, could not cook and needed assistance to get on the school bus.¹¹ RP 1350-51. The nurse practitioner that interviewed S.L.H. and examined her for sexual abuse also testified that S.L.H. was "significantly delayed" and it was "really obvious upon meeting her." RP 1121. S.L.H. provided nonsensical answers to the nurse when answering questions about the consequences of sex. When the nurse asked S.L.H. if she had any worries from the incident, S.L.H. responded that she "might get pregnant." RP 1126. When the nurse explained that she could not get pregnant unless his private went into her private, S.L.H. said, "I went in the bathroom. I used it. I checked it. And then that stuff – and then I went pee. And then I wiped it." RP 1127-28. S.L.H.'s statements to the nurse practitioner clearly reflect her limited understanding of the nature and consequences of sexual intercourse. What limited understanding she *did* have likely came from her sex education class, which S.L.H. appears to have attended *after* the incident, but before she testified. RP 1014. In addition, even though S.L.H.'s mother testified that she spoke with her

¹¹ On two occasions that S.L.H. had been left alone she drove the car through the garage and almost lit the house on fire. RP 1010, 1351.

daughter about reproduction, she did not discuss it in terms of sex. RP 1011, 1016. Shantia testified that, after S.L.H. got her period at age 11, Shantia told her that her body could make babies, but she did not tell her about sexual intercourse. RP 1011.

In addition, the judge observed S.L.H. when she testified at trial and was able to see her physical reactions, demeanor, and responses. This allowed the judge to assess her capacity firsthand. State v. Miller, 60 Wn. App. 767, 774, 807 P.2d 893 (1991) (“Credibility of witnesses is a matter for the jury.”)

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that S.L.H. had a condition which prevented her from meaningfully understanding the nature or consequences of sexual intercourse at the time of the incident and that she was therefore incapable of consent by reason of mental incapacity.

7. THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT HAD THE CAPACITY TO COMMIT THE CRIME OF INDECENT EXPOSURE AS CHARGED IN COUNT VI.

Children under the age of eight years are incapable of committing crime. A child from the age of 8 and under 12 years of age is presumed incapable of committing any crime, but this presumption may be rebutted by clear and convincing evidence that the child had sufficient capacity to

understand the act and to know that it was wrong. RCW 9A.04.050; State v. Q.D., 102 Wn.2d 19, 26, 685 P.2d 557 (1984); State v. Linares, 75 Wn. App. 404, 410, 880 P.2d 550 (1994).

Defendant was under twelve at the time of the offense charged in Count VI. Thus, the State had the burden of rebutting the presumption of incapacity by clear and convincing evidence. Q.D., 102 Wn.2d at 26.

The determination of capacity must be made in reference to the specific act charged and is necessarily fact-specific. Q.D., 102 Wn.2d at 26; Linares, 75 Wn. App. at 415. In addition to the nature of the crime, other elements may be relevant in determining whether the child knew the act was wrong: (1) the child's age and maturity; (2) whether the child exhibited a desire for secrecy; (3) whether the child admonished the victim not to tell; (4) prior conduct similar to that charged; (5) any consequences that attached to that prior conduct; and (6) acknowledgment that the behavior is wrong and could lead to detention. Q.D., 102 Wn.2d at 27; Linares, 75 Wn. App. at 415; State v. S.P., 49 Wn. App. 45, 47, 746 P.2d 813 (1987), rev'd on other grounds, 110 Wn.2d 886, 756 P.2d 1315 (1988). Also relevant is testimony from those acquainted with the child and the testimony of experts. State v. K.R.L., 67 Wn. App. 721, 726, 840 P.2d 210 (1992).

a. Child's Age and Maturity.

Defendant was at least 11 years old at the time of the offense, just one year shy of the age at which capacity is presumed.¹²

b. Whether the Child Exhibited a Desire for Secrecy.

Almost all of the incidents that the victims testified about occurred after the adults left the home. RP 988, 1066, 1072-73, 1182-85, 1200. This supports the court's finding that the defendant had a desire for secrecy.

c. Whether the Defendant Admonished the Victim Not to Tell.

Virtually all of the victims testified that the defendant told them not to tell or he would beat them up. RP 1079, 1108, 1114, 1135-36, 1186, 1265. When S.K.H. walked in on the defendant and S.L.H. engaging in sexual activity, the defendant told S.K.H. not to tell anyone or he would do it again. RP 1079. This evidence supports the court's finding that the defendant admonished the victims not to tell.

¹² Defendant turned 11 years old on 2/11/03. The incident charged in Count VI was alleged to have occurred between 3/14/03 and 3/14/04. Thus, defendant would have been 11 or 12 at the time of the incident.

c. Prior Conduct Similar to that Charged and Any Consequences that Attached to that Conduct.

Witnesses testified to a prior incident that occurred between D.S. and defendant in 2000 or 2001. RP 21, 78, 112. D.S. was four or five years old at the time and defendant was nine or ten. RP 21-22. D.S. and defendant were caught in the defendant's room engaging in some sort of sexual activity. RP 21, 78-80. Defendant's stepfather, Emmitt, walked in on them and punished them for their conduct. RP 78-80. Emmitt testified at the capacity hearing that he "whipped" the defendant, told him it was inappropriate and otherwise made it crystal clear that the behavior was inappropriate. RP 78-82, 99.

Witnesses also testified about a sexual incident that occurred between the defendant and his cousin "Poosh." RP 112-14. Defendant was sent to live with his Aunt Kisha and cousin Poosh in Mississippi after the incident with D.S. RP 84, 112. Soon after arriving in Mississippi, the defendant was sent home for allegedly "messing with" Poosh. RP 115, 154. Grandma Harriet testified that Aunt Kisha called Valencia (defendant's mother) and said that the defendant had been messing with Poosh and that she (Valencia) had 24 hours to come get the defendant or she could pick him up in a box. RP 154.

These incidents provide substantial evidence to support the court's finding that there was prior conduct similar to that charged and that there were consequences for that conduct.

d. Acknowledgement that the Behavior is Wrong and Could Lead to Detention.

Defendant's stepfather testified that he told the defendant it was inappropriate to be having sex at the age of 12. RP 93. In addition, the defendant clearly indicated in his statements to the Detective that he knew certain actions were wrong. For example, Detective Bair asked the defendant if he did anything with J.S. and defendant responded, "I never did anything wrong with her, only took her clothes off to give her a bath." RP 291. Finally, defendant admitted at trial that he knew it would be wrong to touch or even think about touching little girls in their private area. RP 1617. This evidence supports the court's finding that defendant knew the behavior was wrong and could lead to detention.

The record is more than sufficient to support the court's finding that defendant had the capacity to commit the crime of Indecent Exposure at charged in Count VI.

8. THE STATE PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF INDECENT EXPOSURE AS CHARGED IN COUNT VI.

Indecent exposure requires proof that the offender made an open and obscene exposure of his or her person to another under the age of

fourteen years, knowing that such conduct was likely to cause reasonable affront or alarm. RCW 9A.88.010(1) and (2).

Defendant takes issue with the court's finding that the defendant knew his conduct was likely to cause reasonable affront or alarm. See Appellant's Brief at 62-63. Defendant's claim is wholly without merit because defendant admitted at trial that he knew it was wrong to show his penis to S.K.H. RP 1600. Defendant's own testimony provided more than adequate evidence to support the court's finding that defendant knew his actions would cause reasonable affront or alarm.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm the defendant's adjudications.

DATED: December 26, 2006

GERALD A. HORNE
Pierce County
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Deputy Prosecuting Attorney
WSB # 29285

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32734
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/21/06 [Signature]
Date Signature

FILED
COURT OF APPEALS
DIVISION III
06 DEC 26 PM 3:23
STATE OF WASHINGTON
BY [Signature]
DEPUTY

APPENDIX “A”

Family Tree

