

No. 34800-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Benjamin C.,

Appellant.

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DIVISION II
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Clallam County Juvenile Court

Cause No. 05-8-00303-5

The Honorable Commissioner William G. Knebes

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

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REPLY TO STATE'S FACTS

The state alleges that Respondent made errors in the Statement of Facts and Prior Proceedings.

While it is true that the citation for Respondent's assertion that the mother of L.V. did actually ask the child multiple questions about the incident was to the incorrect hearing date, the statement and page numbers were correct. RP (2/23/06) 50-53. Specifically, the mother testified as follows:

... Q. And, you told detective Ensor, "And I said, did he go pee-pee?" do you remember asking that question?

A. Yeah.

Q. And then further down, "And then I asked her if Ben had ever played the snake game before", so you asked her that?

A. Uh hum.

...Q. And you also said that you asked her, "Why did you stop playing hid [sic] the snake today?" do you remember asking her this?

A. I think I said; how did the game end?

Q. And, you also asked her, "And I asked did any part of your body touch – any other part of your body touch his body?" and you also told Detective Ensor, " And I said, did he touch any other part of your body?" do you remember asking her that?

A. Uh huh.

Q. And, you also asked, "And where did you hid [sic] the snake?"

A. When it was her turn, yeah.

Q. Okay, so you did ask her questions?

A. It sounds like, yeah.

RP (2/23/06) 51-53.

Contrary to the state's assertion, Ben never stated in the psychosexual examination or any other context that he had the intent of

arousing himself sexually when he put her hand in his pants to grab the snake. Supp. CP.

The Respondent stands by the Statement of Facts.

ARGUMENT

I. THE STATE FAILED TO ESTABLISH ADMISSIBILITY OF L.V.'S HEARSAY STATEMENTS.

A. *Ryan* factor No. 1: Declarant's apparent motive to lie.

Respondent asserts that the court's finding on the first *Ryan* factor (*State v. Ryan*, 103 Wn.2d 165 at 175-176, 691 P.2d 197 (1984)) was supported by substantial evidence. Brief of Respondent, p. 10. This is incorrect.

First, Respondent claims that L.V. did consider Benjamin C. her friend. Brief of Respondent, p. 10. In support of this argument, the prosecutor inappropriately refers to her own recollections "as the trial attorney who has handled the case from the charging decision to this appeal..." Respondent claims the record is "a little confusing," but reassures the court that "reading it and from my memory of what occurred L.V. was earnest in feelings that Benjamin C. was her friend." Brief of Respondent, p. 9.

But the prosecutor's memories (even if uninfluenced by partisanship) are outside the record, and thus cannot support the trial court's finding. *See, e.g., Moses Lake v. Boundary Review Bd.*, 104 Wn. App. 388 at 391, 15 P.3d 716 (2001). In fact, the cited page (RP (2/8/06) 11) does not establish that L.V. viewed Benjamin C. as a friend. Instead it reflects that L.V. wanted to know if two other people (her friends) would be present in the courtroom. RP (2/8/06) 11.

Second, Respondent argues that L.V.'s fear (that she would get in trouble for the incident) did not provide an apparent motive to lie under *Ryan* factor 1. Brief of Respondent, p. 9. In support of this assertion, Respondent points to L.V.'s testimony. Brief of Respondent, p. 9. But Respondent's reasoning (that there is no evidence of lying in the testimony) is circular and lacks logic. Respondent's argument presumes L.V. told the truth in her testimony, and concludes that she had no apparent motive to lie. Brief of Respondent, p. 9-10. But *Ryan* does not allow the trial court to presume a child's testimony is truthful; instead, factor 1 focuses on whether or not there is pressure-- whether real or imagined-- that could give rise to a motive to lie. In this case, L.V. believed that she could get in trouble for what occurred. RP (2/8/06) 36, 45. Her (unfounded) fear may have prompted her to exaggerate or shade her story, to escape the possibility of punishment. The fact that no

reasonable parent would punish a victim of molestation does not change the way L.V. viewed the situation as she prepared to disclose the incident to her mother. Viewed from her perspective, L.V. had a motive to lie.¹ Accordingly, *Ryan* factor 1 weighs against admission of her hearsay statements. *Ryan, supra*.

B. *Ryan* factor No. 2: Declarant's general character.

Without citation to authority, Respondent next argues that a child's own testimony can be sufficient to establish the child's general character. Brief of Respondent, p. 10. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

In fact, the Supreme Court has never allowed a child's "general character" to be established through the child's own testimony. *See, e.g., State v. Swan*, 114 Wn.2d 613 at 648, 790 P.2d 610 (1990) ("With regard to the girls' general character, the testimony revealed that both children had a reputation for truthfulness"); *State v. Leavitt*, 111 Wn.2d 66 at 74, 758 P.2d 982 (1988) "As to the child's general character, her teacher testified that the child had a reputation for truthfulness in her first grade

¹ On its own, this does not establish that she *did* lie; it merely means that factor 1 does not support admission of the hearsay statements.

classroom.”) Respondent’s argument breaks new ground and departs from the reasoning underlying factor 2. *See Ryan at 175-176.*

Because the prosecution failed to introduce evidence bearing on the child’s general character, it did not sustain its burden of establishing factor 2. L.V.’s hearsay statements should have been excluded.

C. *Ryan* factor No. 3: Whether more than one person heard each statement.

Without citation to authority, Respondent characterizes as “ludicrous” the suggestion that factor 3 requires more than one witness for each statement. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton, supra.* As appellant pointed out in the opening brief, hearsay is more reliable if more than one person heard the statement because a single listener may misunderstand or misremember a statement.² Appellant’s Opening Brief at 13, *citing United States v. Thomas*, 571 F.2d 285 at 290 (5th Cir., 1978). In *Ryan* itself, “the initial statements of the children were made to one person, although subsequent repetitions were heard by others.” The Supreme Court felt this weighed against admission. *Ryan*, at 176.

² A second listener could also provide information as to whether a particular statement was tainted by leading questions, coaching, etc.

Respondent correctly points out that the court listed three people to whom L.V. disclosed. Brief of Respondent, p. 11, citing Findings Nos. 10, 11, 14. However, the court did not determine whether more than one person heard any of the statements, and (with one exception), the evidence suggests that only one person heard each disclosure.³ See Appellant's Opening Brief, pp. 13-14. This diminishes their reliability, and *Ryan* factor No. 3 weighs against admission.

D. *Ryan* factor No. 4: Whether the statements were spontaneous.

Respondent argues (without citation to the record) that L.V.'s statements were "definitely spontaneous" because "L.V. brought up the issue..." Brief of Respondent, p. 12. While it may be true that the first words out of L.V.'s mouth were spontaneous, this does not establish that the rest of her many statements were spontaneous. Indeed, the mother admitted asking her daughter numerous questions. RP (2/23/06) 50-53. Questioning does not necessarily preclude a finding of spontaneity; however, the statute places the burden on the state to establish admissibility. RCW 9A.44.120. Thus the state must show that any questioning did not affect the spontaneity of the accusations.

³ The exception was the child's statement to her father, which occurred with the mother present.

Respondent also claims that the counselor's "methodology and qualifications were addressed with the court." Brief of Respondent, p. 12, citing RP (2/1/06) 2-35. While her experience was briefly summarized, the court denied admission of her resume. RP (2/1/06) 2-6. But the cited pages do not show that the counselor elicited only spontaneous statements. RP (2/1/06) 27-31. Furthermore, the court found that the counselor "may have directed" L.V. during therapy. Finding No. 21, Supp. CP; RP (2/8/06) 55-63.

The state failed to meet its burden of showing that L.V.'s statements were spontaneous. Accordingly, the hearsay should not have been admitted under RCW 9A.44.120.

E. *Ryan* factor No. 5: Timing of the declaration and the relationship between the declarant and the witness.

Respondent dismisses as a "fabrication" the suggestion that the parents' recollection of L.V.'s initial statement may have been affected by L.V.'s subsequent statements, and characterizes appellant's argument as "ridiculous." Brief of Respondent, p. 13.

Respondent's harsh rhetoric is apparently based on a misunderstanding of the argument. A child's initial statement does not become less reliable because she continued to process her feelings; rather, a listener's recollection of that initial statement becomes less reliable after

the listener hears numerous subsequent statements. And, in fact, the parents' testimony about L.V.'s initial disclosure differed significantly from their written statements, made shortly after the initial disclosure. RP (2/8/06) 49-55; RP (2/23/06) 31-60. This does not affect the reliability of the initial disclosure; instead, it calls into question the parents' recollection of the initial disclosure. The later statements may themselves be reliable, even if they differ from the initial disclosure. However, in order to be admissible, they must pass the test for admissibility set forth in RCW 9A.44.120 and in *Ryan*.

The analysis becomes clouded when the initial disclosure and the subsequent statements mix in the listener's memory. When that occurs, as apparently happened here, it is difficult to sort out the timing and circumstances of each statement. Here, the timing of the composite statement is impossible to ascertain. Although the child made one allegation the day of the incident, that allegation was not presented by either parent's testimony. Accordingly, the timing of the statement is in doubt, and does not support admission of the hearsay.

Respondent does not address appellant's arguments regarding L.V.'s January 5 statement, her statements to the counselor, or her drawings. Accordingly, appellant rests on the opening brief with regard to these arguments.

F. *Ryan* factors Nos. 6, 8 and 9.

Appellant stands on the arguments made in the opening brief.

II. THE TRIAL JUDGE UNNECESSARILY EXPRESSED HIS OPINION THAT L.V. WAS CREDIBLE IN RULING ON THE ADMISSIBILITY OF HER HEARSAY STATEMENTS.

Respondent apparently misunderstands the appellant's argument.

First, the scope of a hearing under RCW 9A.44.120 "is restricted to issues pertaining to reliability rather than credibility." *State v. Gregory*, 80 Wn. App. 516 at 521, 910 P.2d 505 (1996). Second, Commissioner Knebes' findings (which he personally drafted) went beyond a finding of reliability, and commented on L.V.'s credibility, as noted in the opening brief.

Commissioner Knebes could have ruled in favor of admission, without commenting on the child's credibility. The fact he did not, and instead went out of his way to find L.V. credible, violates the appearance of fairness doctrine. This does not mean that Commissioner Knebes was actually biased; instead, it shows a potential for bias. This violates the appearance of fairness doctrine. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999). Another judge should have heard the trial of the case.

III. RCW 13.40.021(2), WHICH PROHIBITS JURY TRIALS FOR JUVENILES, IS UNCONSTITUTIONAL WHEN APPLIED TO JUVENILES CHARGED WITH SEX OFFENSES.

Appellant rests on the argument made in the opening brief.

CONCLUSION

The conviction must be reversed and Ben must be afforded a jury trial on remand. At the trial, L.V.'s hearsay statements and drawings must be excluded.

Respectfully submitted on February 16, 2007.

BACKLUND AND MISTRY



Jody R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

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BY [Signature]

DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Benjamin C.
1119 East 7th Street
Port Angeles, WA 98362

and to:

Clallam County Prosecuting Attorney
223 East 4th Street
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 16, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on February 16, 2007.

[Signature]
Jodi R. Backlund, No. 22917
Attorney for the Appellant