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STATE OF WASHINGTON  
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No. 37665-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Dennis Kennealy,**

Appellant.

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Thurston County Superior Court

Cause No. 07-1-1304-4

The Honorable Judge Chris Wickham

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence of prior sexual misconduct.
2. The trial court's admission of uncharged allegations of prior sexual misconduct violated ER 404(b).
3. The trial court erred by determining that evidence of prior sexual misconduct established a common scheme or plan.
4. The trial court erred by admonishing the jury that it could only consider uncharged misconduct as evidence of a common scheme or plan, without explaining that they were to examine the design of the plan rather than the result.
5. The trial court erred by instructing the that it could consider uncharged misconduct as evidence of a common scheme or plan, without explaining that the jury was to examine the design of the plan rather than the result.
6. The trial court erred by giving Instruction No. 23, which reads as follows:

Evidence of uncharged allegations cannot be considered to prove the character of the Defendant in order to show that he acted in conformity therewith, and can only be considered to determine whether or not it showed a common scheme or plan.  
Supp. CP.
7. The prosecuting attorney committed misconduct violating Mr. Kennealy's right to due process by repeatedly arguing that evidence of prior sexual misconduct could be used as propensity evidence.
8. The trial court erred by finding S.J. competent to testify at trial.
9. The trial court erred by admitting child hearsay in violation of RCW 9A.44.120.
10. The trial court erred by admitting child hearsay without finding that the time, content, and circumstances of each statement established its reliability.
11. The trial court erred by admitting child hearsay without entering findings showing that each statement substantially satisfied the nine *Ryan* factors.

12. The trial court erred by adopting the unnumbered Findings of Fact, which are reproduced in the Appendix.
13. The trial court erred by adopting Conclusion of Law No. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, which are reproduced in the Appendix.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Evidence of prior misconduct is inadmissible if offered to establish propensity to commit the charged crime. The trial court admitted allegations of prior misconduct that established propensity and nothing else. Did the trial court's admission of propensity evidence violate ER 404(b)?
2. The state bears a "substantial burden" of proving that prior misconduct shares common features with the charged crime, establishing a substantial degree of similarity. The trial court admitted allegations of prior misconduct that did not share common features with the charged crimes in this case, beyond similarity of result. Did the trial court's admission of evidence of prior misconduct violate ER 404(b)?
3. Before admitting evidence of prior misconduct, a trial court must find that it has substantial probative value that outweighs its prejudicial effect. The six episodes of prior sexual misconduct introduced here through three witnesses were highly prejudicial, and had little (if any) probative value. Did the trial court's admission of all six episodes of prior sexual misconduct violate ER 404(b)?
4. A conviction based (in part) on propensity evidence violates due process. The prosecuting attorney repeatedly argued in closing that the jury should look at Mr. Kennealy's lifelong history of molesting children to find him guilty of these charges. Did the prosecuting attorney's misconduct violate Mr. Kennealy's constitutional right to due process?
5. A child witness is not competent to testify if she or he appears incapable of receiving a just impression of the facts or of relating them truly. In this case, witness S.J. expressed a poor understanding of what it meant to promise to tell the truth, and gave varying and contradictory testimony, some of which was demonstrably false. Should S.J.'s testimony have been excluded because he was not competent to testify?

6. A child's hearsay statement is admissible under RCW 9A.44.120 only if the time, content, and circumstances of the statement provide sufficient indicia of reliability; admissibility is evaluated with reference to the nine *Ryan* factors. The trial court admitted ten hearsay statements from three child witnesses without analyzing the nine *Ryan* factors. Did the trial court's admission of child hearsay violate RCW 9A.44.120?

## SUMMARY OF THE CASE

The prosecution of this case was based on allegations from three children, S.J., M.Y., and K.W. Two of the children had difficulty promising to tell the truth in court, but the trial judge found them competent to testify. All three children gave conflicting statements about the circumstances surrounding the alleged incidents. The time, content, and circumstances surrounding the statements did not support a finding that the statements were reliable. The trial judge admitted their hearsay statements without examining or making findings on factors that could affect the statements' reliability.

The trial judge also admitted evidence of unrelated and uncharged sexual misconduct, through the testimony of Mr. Kennealy's adult daughter and two adult nieces. The court admitted the prior misconduct as evidence of a common scheme or plan, even though the prior allegations of misconduct were not substantially similar to the charged crimes. In her closing arguments, the prosecutor repeatedly told the jury that the evidence of prior misconduct proved that Mr. Kennealy was a lifelong child molester, with a long-term scheme or plan to molest children.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

### **I. PRIOR PROCEEDINGS**

Dennis Kennealy was charged with one count of Child Molestation in the First Degree (for alleged sexual contact with M.Y.), one count of Communication with a Minor for Immoral Purposes (for alleged inappropriate conversations with K.W.), one count of Assault in the Fourth Degree with Sexual Motivation (for allegedly touching K.W.'s bottom), and one count of Rape of a Child in the First Degree (for allegedly performing oral sex on S.J.). CP 2-3.

The state sought to admit child hearsay from each child, as well as prior sexual misconduct involving Mr. Kennealy's daughter and nieces. The court held hearings and admitted the child hearsay statements and the alleged prior misconduct. RP<sup>1</sup> (2/19/08) 62-64, 66, 67-89; Findings and Conclusions, Supp. CP; RP 304-312. Mr. Kennealy was convicted as charged, and he appealed. CP 4, 18.

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<sup>1</sup> References to the Report of Proceedings are abbreviated 'RP,' followed by the date of the hearing in parentheses. References to the trial are abbreviated 'RP' with no date specified.

## II. STATEMENT OF FACTS

A. The trial court found S.J. competent to testify and ruled four out-of-court statements admissible as child hearsay.

S.J., who was six at the time of the alleged offenses, testified at the child hearsay hearing that he went inside Mr. Kennealy's house twice. RP (2/4/08) 93. At first he said that he did not know what happened inside the house, but then he described removing his own clothes, filling the bathtub, and playing with a Nemo toy in the bathtub while Mr. Kennealy was in the kitchen. RP (2/4/08) 94-95. After the bath, he dried himself and got dressed. He explained that he took the bath because he wanted to, and because his grandmother didn't have a bathtub. He said that Mr. Kennealy did not come into the bathroom. RP (2/4/08) 94-96.

He also described a second time when he went to Mr. Kennealy's house, in the daytime on the Fourth of July. He said he went during the day, after the fireworks had started that night, to get a Popsicle. RP (2/4/08) 96-99. He testified that during this visit, Mr. Kennealy touched him inappropriately:

A. He sucked my private part.

Q. When did that happen?

A. After the fireworks in the daytime.

Q. Where were you when he sucked your private parts?

A. At his house.

RP (2/4/08) 99.

He said that Mr. Kennealy had removed S.J.'s pants and put them on the bed, and that the incident took place on the bed. RP (2/4/08) 99-100. Afterward, S.J. put his pants on, and Mr. Kennealy went into the kitchen. RP (2/4/08) 101.

S.J. went and told his sister that “Dennis sucked my private part.” RP (2/4/08)102.

He denied using another term:

Q. Now, do you remember telling her that he sucked your knuckles?

A. Uh-uh.

Q. Do you remember saying “knuckles”?

A. Uh-uh.

Q. What do you call your private parts?

A. I don’t know.

Q. You don’t know what you call them?

A. Uh-uh.

RP (2/4/08) 102.

On cross-examination, S.J. testified that he hadn’t told defense counsel about the incident during a defense interview because he didn’t remember. RP (2/4/08) 105. He reiterated that it happened during the day, on the day of the fireworks, after he’d watched the fireworks at night, but this time he said that he went to bed at Mr. Kennealy’s house. RP (2/4/08) 105-106. He said that he took off his own pants on his own, and that this was the same day he took a bath at Mr. Kennealy’s house. RP (2/4/08) 106. He again described removing his clothes, filling the tub, and playing with the Nemo toy. RP (2/4/08) 107. This time, he said that Mr. Kennealy came in to pee, and then went into the kitchen to get S.J. a Popsicle. RP (2/4/08) 107-108. He said that after the bath, he went into the bedroom and had a Popsicle, and then Mr. Kennealy “sucked on my knuckles, and then he just left.” RP (2/4/08) 108. He said he told his sister “That Dennis sucked my private part,” which he described as being between his legs, and used for

going pee. RP (2/4/08) 109. He denied ever referring to his penis as “my knuckles,” and denied ever telling his sister or the police “Dennis sucked my knuckles.” RP (2/4/08) 109-110. He said he only told his sister about the incident, not the police, not his father, and not his mother. RP (2/4/08) 110. He then said he did tell his father and mother. RP (2/4/08) 110.

S.J. described Mr. Kennealy’s bedroom as having a rectangular bed, large enough for two people. RP (2/4/08) 111. He did not remember whether the floor was wood or carpet, and denied that the room had “doors like Eddie’s,” or that he’d ever told anyone that the room had double doors like Eddie’s. RP (2/4/08) 111-112.

The state sought to introduce four of S.J.’s hearsay statements. He made the first statement to his sister, when he was in a “time out” after throwing a toy. RP (2/4/08) 185, 190. She was on the phone telling a friend about how “weird” Mr. Kennealy was acting. RP (2/4/08) 185, 190. His sister testified that while she was on the phone S.J. said “‘Dennis sucked my knuckles,’ and then he pointed to his private parts...” RP (2/4/08) 185-186.

S.J.’s second hearsay statement was a conversation over the phone with his mother, after S.J.’s sister told their mother what S.J. had said. S.J. told his mother that Mr. Kennealy had touched and sucked his ‘knuckles,’ which he said was the word Mr. Kennealy used for ‘penis.’ RP (2/19/08) 46. He did not say anything about bathing at Mr. Kennealy’s, and his grandmother had not said

anything about the shower or tub being broken. RP (2/19/08) 53-54; RP 39. She said that she tried to talk about it with him twice a month since then, and that she had taken him to a counselor, but that he did not want to talk about it. RP (2/4/08) 48-49; RP 36, 40.

S.J.'s third hearsay "statement" was a nod, agreeing with his sister's description to a police officer of what S.J. had said to her. This was shortly after he told his sister, on July 5, 2007. RP (2/4/08) 194-195.

S.J.'s fourth hearsay statement was taken by Sergeant Carlson, who drove him to the police department and interviewed him on July 7, 2007. RP (2/4/08) 213-214. During the drive, S.J. asked if they were on their way to arrest Mr. Kennealy. RP (2/4/08) 216. S.J. repeated his statement that Mr. Kennealy had sucked his knuckles, and he pointed to his groin. RP (2/4/08) 217. He said that it occurred in Mr. Kennealy's living room. RP (2/4/08) 218. S.J. said that he had made up the word "knuckles" himself at his grandmother's, and that it meant penis. RP (2/4/08) 217. He told Sergeant Carlson that it happened Wednesday and that it was dark out, and that Mr. Kennealy gave him a cappuccino. RP (2/4/08) 217. S.J. said he returned to Mr. Kennealy's later, on his own, because he wanted to. RP (2/4/08) 218.

During a later interview, S.J. said that the incident occurred in Mr. Kennealy's bedroom, which he described as having a round bed, a wood floor,

and “doors like Eddie.”<sup>2</sup> RP (2/4/08) 220-221. Sergeant Carlson, who had viewed Mr. Kennealy’s bedroom, said that it did not fit this description: the room was carpeted, with a rectangular bed, and no double doors. RP (2/4/08) 221.

The trial judge ruled that S.J. was competent to testify and that his hearsay statements were admissible at trial. RP (2/19/08) 62-63, 67-81. He later entered Findings of Fact and Conclusions of Law in support of his decision. Findings and Conclusions, Supp. CP.

At trial, S.J. said he didn’t know the difference between the truth and a lie, but was able to demonstrate an understanding. RP 76-77. He had trouble grasping the meaning of the word “promise,” and answered the prosecutor’s questions about promises incorrectly:

Q. Do you know what a promise is?

A. No.

Q. Well, let’s see. If I promised to make you cookies, do I have to make you cookies?

A. No.

Q. How come?

A. Because if you tell me to cook it, I don’t have to.

Q. But if I promise you I will give you a cookie, do I have to give you a cookie?

A. No.

RP 77.

S.J. was then asked if he’d promise to tell the truth:

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<sup>2</sup> Although not clear from the record, S.J. apparently meant double doors. RP (2/4/08) 212, 221.

Q. Well, I want to ask you if you can promise today to tell the truth today and not tell any lies. Can you promise to only tell the truth today?

A. Yes.

RP 77.

Later in his testimony, he used the word “promise” when he meant to say “secret.” RP 86.

S.J. said he did not remember staying at his grandmother’s house around the Fourth of July, although he did remember watching fireworks at Mr. Kennealy’s. RP 77-79. He said he’d gone to Mr. Kennealy’s apartment twice to ask for Popsicles. RP 82-83. He said he knew Mr. Kennealy had Popsicles “Because I dreamed about it.” RP 83. He denied ever having anything else (such as a cappuccino) while there.<sup>3</sup> RP 84.

He testified that he went into the bedroom on the Fourth of July, after the fireworks, during the daytime, and then clarified that it was the next day after the fireworks. RP 84. He said that Mr. Kennealy “tried to suck my privates... on July 4<sup>th</sup>.” RP 85. He said that Mr. Kennealy took S.J.’s shoes, pants, and underwear off, and that Mr. Kennealy was standing and that S.J. was sitting on the bed. RP 85-86. When asked how he knew that Mr. Kennealy wanted to suck his private, he replied, “I don’t know. I just dreamed about it all the time.” RP 87.

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<sup>3</sup> He said he did not know what a cappuccino was. RP 84.

He testified that Mr. Kennealy had a Nemo fish on top of his TV, and that he took it to his grandmother's and took a bath with it. RP 90. He denied taking a bath at Mr. Kennealy's house, and denied ever having said that he had (although he later admitted it on cross-examination). RP 90, 94-98. He denied ever having said that Mr. Kennealy sucked on his "knuckles." RP 91, 106. He testified that Mr. Kennealy's bed was round, that the bedroom had wood floors, and doors "like Eddie's." RP 100, 103, 107. He denied having told the police that the incident occurred in the living room, or that he took a bath at Mr. Kennealy's. RP 104. He testified that he never took a bath there, and that he had made that up, and had also made up the story about taking a Nemo toy from Mr. Kennealy's house. RP 105. Later in his testimony, he said that he didn't borrow the toy, but that he played with it at his grandmother's house. RP 108. He then said he played with it at Mr. Kennealy's house. RP 109.

B. The trial court admitted as child hearsay three out-of-court statements made by M.Y.

M.Y. was six years old when she testified in court. RP (2/4/08) 16. Her mother said M.Y. was very smart and could "outsmart" her; she also used the word "conniving" to describe M.Y. RP (2/4/08) 159-160.

At a child hearsay hearing, M.Y. said she understood the word "promise," but had difficulty with examples:

Q. So if you promise someone you will come to a birthday party, what then?

A. Maybe you will not come.

...

Q. So if I promise you I will bake you cookies, do I have to bake you cookies?

A. No.

Q. How come?

A. (No response).

Q. If you promise someone you will do something for them, do you have to do that?

A. No.

RP (2/4/08) 25-26.

Despite her lack of understanding, she was asked to promise to tell the truth in court:

Q. ...Can you promise me something today?

A. Yes.

Q. Can you promise me that you will only tell the truth?

A. Yes.

Q. Now, if you promise me that, does that mean that you can only tell the truth today?

A. Yes.

RP (2/4/08) 26.

When asked about the incident, M.Y. initially said she didn't want to talk about it and forgot what happened, but then said that Mr. Kennealy had touched her under her underpants. RP (2/4/08) 33-37. M.Y. said the touching occurred outdoors, on a sunny day, with her sister K.W. present. RP (2/4/08) 40-41. She said that she'd told her mother and her sister what happened. RP (2/4/08) 38.

M.Y.'s mother and sister contradicted this testimony. Both said that M.Y. had not mentioned being touched inappropriately, and K.W. said that she did not see Mr. Kennealy touch M.Y. RP (2/4/08) 66-67, 161.

M.Y. made three hearsay statements the state sought to admit at trial. First, her father questioned her immediately after he had been told that M.Y.'s mother had spoken to the police, that officers were investigating Mr. Kennealy's relationship with children, and that his other daughter K.W. had already disclosed inappropriate interactions. RP (2/4/08) 175. He asked if she knew "Dennis," and described her response as follows:

- A. [S]he said yes, and I asked her if she could tell me something about him, anything, she said, "He is a man that lives by the playground who [K.W.] goes over and sees all the time, but I don't go over there only ones [sic] or twice, because I don't like him." And I asked why. She said, "Well, he is not nice, but [K.W.] likes him, but he asks us to come over, and [K.W.] goes over because he gives us popsicles and stuff like that." And I asked, "Well, why do you go over there? Does he touch you? Does he make you feel uncomfortable?" And she said, "Yes, that's why I only went over there once or twice." I said, "Well, what does he do?" And she said, "He goes like this," and puts his hands here in her pants. She didn't say, "in our pants," but she said, "He puts his hands down here like this."  
RP (2/4/08) 176-177.

He indicated that she demonstrated by putting her hand down her pants. He also testified that M.Y. said "He asks us to show our underwear or pull our dresses up." RP (2/4/08) 177.

Second, M.Y. was interviewed by Officer Field on July 14, 2007. RP (2/4/08) 204. She told Field that "Dennis had touched [K.W.]'s pee-pee, and then she pointed between her own legs." RP (2/4/08) 207. When asked how she knew,

she said that K.W. had told her, and went on to say that Mr. Kennealy had touched her as well, and she pointed to her private area. According to Field,

- A. She told me that it only happened once and that she had been standing outside the stairs she described outside of Dennis' apartment. She told me she was wearing the same dress the day she was came in for the interview. It was a purple dress, and she was very sure of that, that she was wearing that dress.... She said that he reached down and put his hand up underneath her dress. I asked her where he put his hand, and she pointed to her crotch again. I asked [her] if Dennis had touched her under her underwear or on top of her underwear, and she was very clear that she said under her underwear.  
RP (2/4/08) 207-208

M.Y. said that the touching didn't hurt, and added that "she thought that Dennis should go to jail for touching her pee-pee." RP (2/4/08) 209-210.

M.Y.'s third hearsay statement came during an interview at the Child Sexual Assault Clinic on September 18, 2007, when M.Y. said that Mr. Kennealy had not hurt her, but that he'd done something she didn't like. RP (2/4/08) 123, 132. According to the interviewer, "she wasn't able to point out on her body what part he might have done something to," and "wasn't able to state any more about that, what he might have done." RP (2/4/08) 122, 123, 132.

The court found M.Y. competent to testify, and ruled her hearsay statements admissible. RP (2/19/08) 64, 82-88. The court later entered Findings of Fact and Conclusions of Law in support of its decision. Findings and Conclusions, Supp. CP.

At trial, M.Y. testified that she did not know the difference between the truth and a lie, but then demonstrated an understanding of the difference. RP 126-127. She again struggled over the meaning of the word promise:

Q. Do you know what a promise is?

A. (No response.)

Q. No? Is that a tough one? Let me ask you: If I promise you that I will give you my pen, do I have to give it to you?

A. Uh-uh.

Q. How come?

A. Because it's your pen.

Q. Okay. Well, here is what I want to do today. I want to know if you can promise to tell the truth. Can you tell the truth today?

A. Yes.

RP 127.

She testified that she had been to Mr. Kennealy's apartment for Popsicles "a lot of times," and that Mr. Kennealy had allowed her to walk his dog. RP 130, 140. She said that Mr. Kennealy had touched her once under her clothes, while they were on the stairs outside his apartment. RP 132-136. She did not mention her sister being present. RP 119-143. On cross-examination, she testified that the touching hurt; she did not remember telling the officer that it did not hurt. RP 141-142. She again said that she told her mother and her sister about the touching after it occurred. RP 139, 143. Her mother and sister both denied this during their trial testimony. RP 154, 158, 162, 188-189.

C. The trial court admitted as child hearsay three out-of-court statements made by K.W.

K.W. testified at the child hearsay hearing that Mr. Kennealy gave out Popsicles, and that he once gave her a “bag with stuff in it,” but she couldn’t remember what the stuff was. RP (2/4/08) 57. At other times he gave her punch, balloons, and chocolate milk. RP (2/4/08) 58, 71.

She described a time when she used the bathroom in his apartment, and Mr. Kennealy “asked me if he could go in and watch, and I said no.... He said, ‘please,’ and I said no.” RP (2/4/08) 58-59. She described another time when she was hanging upside down on play equipment, trying to keep her underwear from showing while she played. She said Mr. Kennealy “said ‘I don’t mind. I like seeing your underwear.’” RP (2/4/08) 59-60. She didn’t remember telling a police officer that Mr. Kennealy had wanted to see underneath her underwear. RP (2/4/08) 59-60.

She described another occasion, when Mr. Kennealy hugged her and put his hand on her bottom. RP (2/4/08) 60-61. When asked on cross-examination if Mr. Kennealy had ever picked her up or given her a hug, she replied “I don’t know... I think he might have,” and that “maybe” she’d told a police officer that he had. Further cross-examination elicited the allegation:

Q. Right now today, do you remember if Dennis ever picked you up and gave you a hug?

A. Uh-uh.

Q. Did Dennis ever touch you in a way that you didn’t like?

- A. (Shrug).  
Q. You shrugged your shoulders, so does that mean that you don't remember that?  
A. I don't know, don't remember.  
Q. Do you ever remember having to wiggle to get away from Dennis?  
A. Yeah, one time he picked me up and gave me a hug, but I didn't like it.  
RP (2/4/08) 68.

She didn't remember him ever trying to kiss her, and denied that he'd ever touched her privates. RP (2/4/08) 61. She also said she'd never told her sister (M.Y.) that he'd touched her privates. RP (2/4/08) 63. On cross-examination, she said she might have told medical personnel that he tried to touch her private parts, "[b]ecause they might have asked me," but she didn't remember him ever trying. RP (2/4/08) 73-74.

She couldn't remember a time when she fell off her bike, hurt her knee, and went to his house to get help, but she did remember going to his house with her sister once. RP (2/4/08) 61-62. She said she told M.Y. to be careful, and not to go inside, but that her sister went inside anyway. RP (2/4/08) 62-63.

She did not see Mr. Kennealy pick up M.Y., and she denied hearing from her sister that Mr. Kennealy had touched her, adding "I don't think he did, because if he did, she would probably tell me." RP (2/4/08) 66.

The state sought to admit three hearsay statements from K.W. Her mother, Carmen W., took her first hearsay statement. Carmen's landlord had told her to speak with her children, because "she had found out that he [Mr. Kennealy] been

[sic] doing some bad stuff to kids. So she said she wanted me to double check and ask my daughters, because she saw them talking to him at the park.” RP (2/4/08) 148.

Carmen testified (at trial) that she was “really upset,” and that she was “trying not to freak out in front of my daughter.” RP 190. When she spoke to K.W., Carmen thought her daughter was “acting funny,” by not wanting to talk, and by closing up. RP (2/4/08) 149. She told K.W. she needed to ask about Mr. Kennealy (“Dennis”), and asked her to “tell me anything that she needed to tell me, because, you know, I was told that some stuff happened, and I wanted to make sure that nothing happened.” RP (2/4/08) 149. She could not remember the exact words she used, but she wanted her daughter to know she wasn’t in trouble, and didn’t explicitly suggest that anything sexual might have happened. RP (2/4/08) 150-151. She may have mentioned that the police needed to know if anything had happened. RP (2/4/08) 150-151.

She directed K.W.’s attention to Mr. Kennealy, and asked “when she did talk to him, just to tell me if anything had, you know, anything was weird to her or uncomfortable...” RP (2/4/08) 151. She said her daughter kept asking “like what?” and she responded by asking K.W. to tell her anything that happened. RP (2/4/08) 151-152. At that point, K.W. told her Mr. Kennealy had said he liked her underwear and wished he could see beneath her underwear, and that she felt uncomfortable because he was watching her (while she played in the park). RP

(2/4/08) 152-153. She also said he wanted to come in to the bathroom and watch her use the toilet, and that he would kiss her on the cheek and grab her bottom. RP (2/4/08) 153-154. Carmen added that K.W. had been caught lying in an attempt to conceal the fact that she had broken rules by leaving the park to spend time with Mr. Kennealy. RP (2/4/08) 154-155. K.W. had never said anything about inappropriate interactions with Mr. Kennealy before Carmen received the call from her landlord. RP (2/4/08) 162; RP 193.

K.W. made similar statements to Officer Field, and also told her that she'd previously heard (from two other girls in the apartment complex) that Mr. Kennealy was a "bad guy." RP (2/4/08) 198-202; RP 407.

When K.W. spoke to an interviewer at the Child Sexual Assault Clinic, she said that he had tried to touch her on her "private part" once when she was riding her bike; she pointed to her crotch and said that he had touched her on her underwear. Exhibit 1 (from 2/4/08), p. 4, Supp. CP. She said that he had tried to touch her more than one time, and that he also wanted to kiss her. Exhibit 1 (from 2/4/08), p. 4, Supp. CP. She did not mention the bathroom incident, or the bottom-grabbing hug. Exhibit 1 (from 2/4/08), p. 4, Supp. CP.

The court found K.W. competent to testify and admitted her statements. RP (2/19/08) 66, 89; Findings and Conclusions, Supp. CP.

During her trial testimony, K.W. testified about the bathroom incident and the playground incident. RP 151-152. She also said that he asked for hugs, and

one time picked her up and hugged her, touching her bottom under her dress but over her underwear. RP 155-156. She denied that he had ever touched her crotch area, and testified that she'd told everyone she'd spoken to that he hadn't touched her crotch. RP 164-165.

D. The trial court admitted 404(b) evidence from three of Mr. Kennealy's family members, and the state argued to the jury in closing that Mr. Kennealy had a lifelong history of molesting children.

The state sought to admit evidence of prior uncharged misconduct, to show that these offenses were part of a common scheme or plan. The state summarized the evidence prior to trial, and presented testimony in an offer of proof mid-trial. RP (2/19/08) 4-28, RP 254-297.

Daniela Rapoza testified that Mr. Kennealy is her uncle, and that he lived in a trailer on her family's property when she was seven or eight years old.<sup>4</sup> RP 256-257. She said that the family often played cards in his trailer. RP 257. Sometimes she would go play cards with him by herself, and when he caught her cheating, he would fondle her, sometimes over her clothing and sometimes by pulling her shorts aside. She testified that this occurred eight to twelve times. RP 258-259. He told her not to tell her mother. RP 259. She did not remember him attempting to entice her with gifts. RP 263.

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<sup>4</sup> Rapoza was 18 at the time she testified. RP 256.

Bobbi Jo Hundley testified that Mr. Kennealy is her father, and that her parents had divorced when she was young.<sup>5</sup> RP 266. She said that when she was seven, she would visit him at his parents' house, and that his mother (her grandmother) was usually there during the visits. RP 268, 272, 275. She said that during visits, Mr. Kennealy held his hand on the outside of her clothes on her vagina while they were cuddling. RP 268-269. She would move his hand away, but he put it back.<sup>6</sup> RP 269. He did not rub her with his hand, but instead held it still. RP 269. He did not give her gifts or other enticements, and he did not ask her not to tell anyone. RP 269, 271.

Dawn Olival, who was 43 at the time of trial, testified that Mr. Kennealy is her uncle, and that he touched her on three occasions. RP 276. First, she said that when she was 11 or 12, she was lying on the floor watching television at her house, and Mr. Kennealy rubbed his hand over her clothing on her crotch. RP 277. She tried to get up, but he held her with his hand on her leg. RP 278. She told him she needed to go to the bathroom, and he released her. RP 278. He did not speak during the incident, and they did not talk about it afterwards. RP 277-278. Her sister was present during the incident. RP 351.

Second, Olival testified that when she was 12 or 13, she was watching TV in her nightgown and he rubbed her legs, abdomen, and breasts. RP 279. Her

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<sup>5</sup> She was 36 at the time she testified. RP 266.

sister was present during the incident. RP 352. Olival cried and went to bed, and woke up to find Mr. Kennealy rubbing her breasts again. RP 279-280. He left when she turned over, but returned four or five times that night and kept rubbing her and kissing her face. RP 280. He eventually asked her if she wanted him to stop, and he stopped when she said yes. RP 280.

Third, Olival testified that once she was sitting at the dining table, with other family members nearby, when Mr. Kennealy touched her crotch. RP 280-281. She got up and moved without telling anyone. RP 280-281. This occurred at around the same time as the prior incident. RP 280.

Throughout these incidents, Mr. Kennealy did not offer her gifts or other enticements. RP 277-281. During the second incident, he told her that it was “okay that we do this, but it’s not okay for you to tell anybody.” RP 279.

Olival’s sister, Deborah Titus, testified that Mr. Kennealy is her uncle, and that he touched her on one occasion when she was eight years old.<sup>7</sup> RP 283-285. Titus said that she was in a car with him and that he reached over and petted her crotch over her clothing. RP 283. She said that she was uncomfortable and tried to turn or wiggle away, and that after a bit he slapped himself on the hand and said “[O]h, that’s bad, I’m not supposed to do that, don’t tell your mother.” RP 284. A few years later, she was again in a car with him and he asked if he could “tickle”

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<sup>6</sup> Once, he told her to touch his “tickle bone,” and had her put her hand down his pants and touch his penis. RP 270. The court did not admit this evidence. RP 308.

her like he had before, and she refused.<sup>8</sup> RP 284. At no time did he offer her gifts or other enticements. RP 285.

The court found these incidents similar to the charged crimes, and admitted them under ER 404(b) to show a common scheme or plan. RP 304-312. The witnesses then testified about the incidents in front of the jury. RP 329-365. Prior to each witness's testimony, the court admonished the jury as follows: "Ladies and gentlemen of the jury, you may hear from this witness evidence of uncharged allegations. That evidence of uncharged allegations cannot be considered to prove the character of the defendant in order to show that he acted in conformity therewith, but can only be considered to determine whether or not it proved a common scheme or plan." RP 330, 340, 348, 357. A similar instruction was included in the Court's Instructions to the Jury. Instruction No. 23, Supp. CP.

In closing, the prosecuting attorney made the following arguments:

[T]he defendant has molested children most of his life. He had a goal, a plan, a scheme to molest children from his sister's children, Dawn and Debra, to his daughter, Bobbi, who had innocently jumped on her dad's bed in the morning when she visited him in Hawaii to his niece, Daniella, nearly 20 years later, whom he would molest as he played cards with in the trailer.

RP 457.

[W]e all know that based on the behavior of this man and the plan that he has had to carry out child molestation for years and years, that we know

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<sup>7</sup> She was 41 at the time she testified. RP 282.

<sup>8</sup> On another occasion, she was present when Mr. Kennealy talked with his mother about a date he'd had. He described kissing his date, and used Titus "as the model" to show his mother the kiss. RP 285. The court did not admit this incident. RP 311.

that that has been for sexual gratification, and we have proved this element beyond a reasonable doubt.

RP 462

[H]e did it for the purpose of the [sic] sexual gratification, and you know that because of his prior acts at the site, his prior acts with Kaytlin, his history of planning and carrying out assaults on children.

RP 465.

We have proof, a lifetime of molesting children, a far-reaching plan designed and carried out by this defendant to use children for his own sexual gratification.

RP 469.

All of this evidence, this prior molestation, this is corroborative evidence of the crimes charged as a plan, as a scheme for him to molest children, to use them for his own sexual gratification, and he continued that scheme, that plan, for years and years and years... We have more corroboration. You can use the fact that there were three victims in the apartment all involved in incidents of a sexual nature to show that the defendant molested each of them or committed the crimes of each of them. Neither one of them knew each other. [M.Y.] and [K.W.] don't know [S.J.]. [S.J.] doesn't know them. The families don't know each other. They have no motive to make this up.

RP 472.

This defendant has been planning and carrying out sexual assaults on children for years... He spent a lifetime planning sexual assaults, and he has become good at manipulating children...

RP 477-478.

He has been manipulating and planning and scheming sexual assaults on children for years.

RP 502

The defense wants you to ignore the evidence of the history. He says that they have nothing do with what happened to [S.J.] and [K.W.] and [M.Y.], and I would submit to you that it has everything to do with it. It's this over-reaching plan that this defendant has had his whole life or for years and years and years at least, and that's to isolate children and molest them.

RP 514.

E. Mr. Kennealy was convicted and sentenced to life in prison.

Mr. Kennealy was convicted as charged and sentenced to confinement for life in prison with the possibility of parole after 160 months. CP 4-17. He timely appealed. CP 18.

### **ARGUMENT**

#### **I. THE ADMISSION OF NUMEROUS UNRELATED INSTANCES OF ALLEGED SEXUAL MISCONDUCT VIOLATED ER 403 AND ER 404(B) AND DEPRIVED MR. KENNEALY OF HIS RIGHT TO A FAIR TRIAL.**

Under ER 404(b), “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” A trial court “must always begin with the presumption that evidence of prior bad acts is inadmissible.” *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). ER 404(b)’s *raison d’etre* is to exclude propensity evidence.

Where the state seeks to introduce evidence of prior bad acts, it bears a “substantial burden” of showing admission is appropriate for a purpose other than propensity, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b); *DeVincentis*, at 18-19.

Evidence of prior bad acts is only admissible to prove a common scheme or plan if the state (1) establishes the prior acts by a preponderance of the evidence, (2) offers the prior acts for the purpose of proving a common plan or scheme, (3) shows that the prior acts are relevant to prove an element of the crime charged (or to rebut a defense), and (4) establishes that the evidence is more probative than prejudicial. *DiVincentis*, at 18-19, citing *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

The Supreme Court has called for caution in applying the common scheme or plan exception. *DeVincentis*, at 18-19. In close cases, the balance must be tipped in favor of the accused person. *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). Erroneous admission requires reversal whenever it is reasonably probable that the outcome of the trial was materially affected by the error. *Wilson*, at 178.

“Common plans” fall into two distinct categories. The first is where multiple acts, including the crime charged, are part of a larger, overarching criminal plan (for example, when a person steals a weapon for use in a robbery, then the theft is part of a larger plan). The second category involves a single plan that is “used repeatedly to commit separate, but very similar, crimes.” *DeVincentis*, at 19.

Evidence of this second type of plan requires the state to establish “[a] high level of similarity... ‘the evidence of prior conduct must demonstrate not

merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.’

...[T]he degree of similarity for the admission of evidence of a common scheme or plan must be substantial.” *DeVincentis*, at 19-20, *quoting Lough*, at 860.

Furthermore, the prior misconduct must show a “strong indication of a design (not a disposition).” *Lough*, at 858-859 *quoting* 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335.

It is helpful to have an understanding of the difference between three categories of 404(b) evidence: *modus operandi* evidence, common scheme or plan evidence, and propensity evidence. Evidence of bad acts may be admissible to prove identity by showing a unique *modus operandi*. *State v. Thang*, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). Such evidence is relevant only if the method used to commit both crimes is so unique that proof of commission of one crime creates a high probability that the accused person also committed the other crime. *Thang*, at 643. The method must be so unusual and distinctive as to be like a signature, and “[t]he greater the distinctiveness, the higher the probability that the defendant committed the crime, and thus the greater the relevance.” *Thang*, at 643. To be relevant as a “signature,” the distinctive features must be common to both crimes. *Thang*, at 643.

Evidence of a common scheme or plan may be relevant as corroborative evidence to show that a crime occurred: evidence of a common scheme or plan “is relevant when the *existence* of the crime is at issue.” *DeVincentis*, at 21, *emphasis added*. In other words, if an alleged victim describes the charged crime in a way that is substantially similar to the defendant’s prior bad acts, it is likely that the victim is telling the truth and the crime occurred.<sup>9</sup> Thus, for example, the state may introduce evidence that a man accused of drugging a woman and raping her while she was unconscious had done the same thing to other women over a period of 10 years. *Lough*, at 850-852. Similarly, a common scheme or plan is shown where the defendant abuses his position of authority as a father (or father-figure), isolates his victims in a basement, targets victims when they are at a certain age, forces them to take nude photographs, makes them watch pornography, and has them fondle him. *State v. Sexsmith*, 138 Wn. App. 497, 505-507, 157 P.3d 901 (2007). Likewise, a man’s “repeated and unique use of ... truth or dare games indicate[s] a common scheme that tend[s] to show [a] design to molest,” when combined with other commonalities (such as the defendant’s abuse of his position of trust, the similar age of his victims, and the location where each crimes); under these facts, “the repeated pattern combined with the unique truth or dare ploy

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<sup>9</sup> Evidence of a unique modus operandi will be relevant to determining whether or not multiple acts fit within a common scheme or plan; however, the focus of the inquiry is similarity, not uniqueness. *DeVincentis*, at 20.

demonstrate a plan devised and used repeatedly to perpetrate separate but similar crimes...” *State v. Griswold*, 98 Wn. App. 817, 823-826, 991 P.2d 657 (2000).<sup>10</sup>

In contrast to the prior two categories, propensity evidence is never admissible in criminal cases. ER 404(b). Where the charged crime and the prior acts aren’t substantially similar (beyond mere similarity of outcome), the prior acts serve no purpose other than to show that the accused person is a bad person, and thus likely committed the charged crime. Such evidence is “clearly inadmissible.” *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). *See, e.g., State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001) (evidence of defendant’s prior possession cannot be used to rebut defense of unwitting possession).

In this case, the trial judge admitted evidence of prior misconduct that was not substantially similar to the charged crimes, and the state used it as propensity evidence. The improper admission of this evidence was highly prejudicial and violated Mr. Kennealy’s right to a fair trial.

A. The state failed to present evidence of a common scheme or plan.

The state presented six separate accusations of prior sexual misconduct; two of the accusations were allegedly perpetrated numerous times. None of the

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<sup>10</sup> *See also State v. Baker*, 89 Wn. App. 726, 733-734, 950 P.2d 486 (1997) (“The strong similarities in the relationships, the ages, the scenario, and the touchings described ... are indicative of design rather than coincidence.”)

six prior allegations were substantially similar to the facts of the crimes charged here. First, all of the prior incidents involved close relatives—Mr. Kennealy’s three nieces and his daughter. On the other hand, the three accusations here related to children unrelated to Mr. Kennealy, who lived or stayed in neighboring apartments.

Second, none of the prior incidents involved locations similar to each other or to those at issue in this case. Mr. Kennealy’s nieces and daughter testified to incidents in a trailer adjoining the family home, in a bedroom at Mr. Kennealy’s parents’ house in Hawaii, in a TV room in the family home, in a child’s bedroom in the family home, in a dining room in the family home, and in a car. By contrast, the crimes charged here allegedly occurred in a playground at an apartment complex, in a stairwell in the apartment complex, and inside Mr. Kennealy’s apartment.

Third, none of the prior incidents involved food, gifts, or other enticements designed to lure the children into unsafe situations. Here, all the children referred to Mr. Kennealy’s distribution of Popsicles as a reason for their visits to his apartment; they also mentioned drinks, toys, and his dog. RP (2/4/08) 57, 58, 71; RP 82-83, 130, 140, 176-177.

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These differences far outweigh any similarities between the offenses, and the trial court should have excluded the prior misconduct. *DiVincentis, supra*. Although all the misconduct (and the charged offenses) had a similar “disposition,” or result—inappropriate touching or communication of one sort or another—they did not share “such occurrence of common features that the various acts are naturally to be explained as caused by a general plan.” *DiVincentis*, at 19; *Lough*, at 858-859 quoting WIGMORE § 375, at 335. Furthermore, any similarities between the current charges and the prior misconduct were not “substantial,” and there was no “strong indication of a design.” *DeVincentis*, at 19-20, quoting *Lough* at 860. Instead of showing a scheme or plan whose design was similar to the charged crimes, the prior misconduct was aimed at showing that Mr. Kennealy was a lifelong child molester.

B. The court failed to balance the *de minimis* probative value of the prior misconduct evidence against its considerable prejudice.

Even if evidence of prior misconduct is relevant to establish a common scheme or plan, a trial court must weigh the probative value of the evidence against its prejudicial effect. *DeVincentis*, at 18-19. Evidence of prior misconduct must have “substantial probative value” in order to outweigh its highly prejudicial effect. *DeVincentis*, at 23.

Here, the evidence of prior sexual misconduct overwhelmed the evidence of the charged crimes. Three witnesses—Mr. Kennealy’s daughter and two

nieces—testified to six separate kinds of prior sexual misconduct, two of which occurred on multiple occasions. RP 329-365. The prior misconduct involved incestuous molestation (including father-daughter incest), and hence was likely even more prejudicial in the eyes of the jury than the conduct charged.

Furthermore, even if the prior misconduct were considered evidence of a common scheme or plan (despite the lack of substantial similarity), it had very little probative value in establishing a common scheme or plan.

Under these circumstances, the prejudice was enormous and the probative value was minimal. Furthermore, the trial court failed to conduct any meaningful analysis on the record, and certainly didn't consider the cumulative prejudicial effect of allowing all three witnesses to testify about the alleged prior misconduct. RP 304-312.

C. The trial court's oral admonition and written limiting instruction on uncharged allegations was inadequate.

While juries are presumed to "follow court instructions to disregard testimony...no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" *State v. Babcock*, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008) (internal citations and quotation marks omitted) (quoting *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987)).

Here, the court admonished the jury (at the time the evidence was introduced) and gave a limiting instruction; however, the admonition and instruction did not explain how the jury could consider evidence of a common scheme or plan without crossing the line to consider the prior misconduct as propensity evidence. RP 330, 340, 348, 357; Instruction No. 23, Supp. CP. The problem was compounded by the prosecuting attorney's misconduct in closing, as outlined below; her focus (with respect to the prior misconduct) was that Mr. Kennealy had a scheme or plan to molest children—not that he had a specific scheme or plan that he used to accomplish that result. RP 457, 462, 469, 472, 514.

Furthermore, it is doubtful that any limiting instruction would prevent a jury from considering this evidence of prior sexual misconduct as proof that Mr. Kennealy is a child molester. Even if the court had instructed jurors to disregard the evidence altogether, the “jury undoubtedly would use it for its most improper purpose, that is, to conclude that [Mr. Kennealy] acted on this occasion in conformity with” his propensity to molest children. *Escalona*, at 256.

The trial court's admission of all six allegations of prior sexual misconduct violated ER 404(b) and prejudiced Mr. Kennealy. The convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence. *DeVincentis, supra*.

## II. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING CONVICTION COULD BE BASED ON PROPENSITY EVIDENCE.

The use of propensity evidence to prove a crime violates due process under the Fourteenth Amendment.<sup>11</sup> U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, at 776, 777-778.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.<sup>12</sup> *See, e.g., State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way

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<sup>11</sup> The U.S. Supreme Court has reserved ruling on this issue. *Estelle v. McGuire*, 02 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

<sup>12</sup> Prosecutorial misconduct may be reviewed absent a defense objection if it causes a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907, 20 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988). In the absence of a manifest constitutional error, the accused person must show both improper conduct and a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, the court will review misconduct that is "so flagrant and ill-intentioned" that no curative instruction would have negated its prejudicial effect. *Henderson*, at 800.

affected the final outcome of the case. *State v. Gonzales Flores*, 64 Wn.2d 1, 186 P.3d 1038 (2008). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

In this case, the prosecuting attorney committed misconduct that violated Mr. Kennealy's constitutional right to due process by arguing that the jury could base guilty verdicts, in part, on Mr. Kennealy's propensity to commit sexual crimes against children. RP 457, 462, 465, 469, 472, 477-478, 502, 514. Although the prosecutor used words like "scheme" or "plan," she did not argue that the prior misconduct reflected a similar design, or shared common features with the charged offenses. Instead, she argued that he had "a plan, a scheme to molest children," a "plan that he has had to carry out child molestation for years and years," "a lifetime of molesting children, a far-reaching plan designed and carried out by this defendant to use children for his own sexual gratification." RP 457, 462, 469.

The prosecutor specifically argued that "[a]ll of this evidence, this prior molestation, this is corroborative evidence of the crimes charged as a plan, as a scheme for him to molest children, to use them for his own sexual gratification, and he continued that scheme, that plan, for years and years and years..." RP 472.

In her rebuttal closing, she argued against defense counsel's attempt to steer the jury away from considering the propensity evidence:

The defense wants you to ignore the evidence of the history. He says that they have nothing do with what happened [in these cases.] I would submit to you that it has everything to do with it. It's this over-reaching plan that this defendant has had his whole life or for years and years and years at least, and that's to isolate children and molest them.  
RP 514.

The prosecutor's arguments invited the jury to consider the evidence of prior misconduct as evidence of Mr. Kennealy's propensity to commit sexual misconduct against children.<sup>13</sup> Although the trial judge gave a limiting instruction, the instruction was inadequate. It did not explain to the jury how to use the evidence to determine whether or not the current offenses were part of a common scheme or plan by focusing on design and common features rather than "disposition" or "outcome." *DeVincentis, supra; Lough, supra*. This violated Mr. Kennealy's constitutional right to due process, and requires reversal of his convictions. The case must be remanded to the superior court for a new trial.  
*Garceau, supra*.

**III. S.J. WAS NOT COMPETENT AND SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY AT TRIAL.**

By statute, persons "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" are not

competent to testify. RCW 5.60.050. A court evaluating a child's competency must examine five factors:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express in words his memory of the occurrence; and
- (5) the capacity to understand simple questions about it.

*In re Dep. of A.E.P.*, 135 Wn.2d 208, 223-224, 956 P.2d 297 (1998). If a child is unable to meet any of these five factors, the child is not competent to testify.

*A.E.P.*, *supra*. For example, if the court can't determine the "time of the occurrence," the child's testimony is inadmissible. *A.E.P.*, at 225-226. Similarly, a child who promises to tell the truth but then recites untrue events and confuses dreams with reality is not competent to testify. *State v. Karpenski*, 94 Wn. App. 80, 106, 971 P.2d 553 (1999).

Although a trial court ordinarily determines competence prior to trial, appellate courts examine the entire record. *State v. Avila*, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). In this case, S.J. was not competent to testify, and the trial judge's finding to the contrary was erroneous.

First, at trial, S.J. could not express an understanding of what it meant to promise to tell the truth. RP 76-77, 86. Second, even though he promised to tell the truth and not to lie, he changed his testimony repeatedly, as outlined in the

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<sup>13</sup> By contrast, the current charges shared some common features with each other; thus the

statement of facts. Third, he made statements that were demonstrably false (such as his claim that his grandmother didn't have a bathtub, or his claim that Mr. Kennealy had a round bed, wood floors, and double doors in his bedroom). RP (2/4/08) 94-96, 220-221. Fourth, he testified that he knew certain things because he'd dreamed them. RP 83, 87. Fifth, he had difficulty describing the sequence of events, such as when he said that the incident occurred on the Fourth of July, that it started in the daytime, that it occurred after the fireworks, that he'd watched the fireworks at night, and that the incident (which started in daylight) went on until it was dark. RP (2/4/08) 96-99, 105-106; RP 84, 87.

S.J.'s testimony reveals that he lacked a complete understanding of the obligation to tell the truth, he did not have an independent recollection of the events about which he testified, he may have lacked the capacity to accurately express in words his memory, and he may have lacked the capacity to understand simple questions about the subject of his testimony. Under these circumstances, the trial court should not have found him competent to testify, and his evidence should have been excluded. *A.E.P., supra*.

Mr. Kennealy's convictions must therefore be reversed, and the case remanded for a new trial with instructions to exclude S.J.'s testimony.

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prosecutor's argument that they corroborated each other to some extent was likely not misconduct.

**IV. THE TRIAL COURT SHOULD NOT HAVE ADMITTED THE CHILDREN'S HEARSAY STATEMENTS.**

RCW 9A.44.120 is captioned "Admissibility of child's statement – Conditions," and provides that "[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... if: (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act." Reliability is established with reference to the nine so-called *Ryan* factors:

(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] the statement contains no express assertion about past fact, [7] cross examination could not show the declarant's lack of knowledge, [8] the possibility of the declarant's faulty recollection is remote, and [9] the circumstances surrounding the statement... are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

*State v. Ryan*, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984). Although not every factor need be established, the factors must be substantially satisfied. *State v. Woods*, 154 Wn.2d 613, 623-624, 114 P.3d 1174 (2005). Analysis of factor seven

is not required when the child testifies at trial; however, the remaining factors apply in all cases. *Woods, supra*, at 624. The burden is on the state to establish reliability. RCW 9A.44.120.

A trial court's findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to convince a rational, fair-minded person. *Rogers Potato*, at 391. In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259, 265, 39 P.3d 1010 (2002).

In this case, trial judge did not make factual findings on each of the *Ryan* factors for each statement submitted. The state also failed to produce sufficient evidence to satisfy RCW 9A.44.120 and the *Ryan* factors.

A. The trial court did not make factual findings sufficient for admission of the children's hearsay statements.

Review of the transcript and the trial court's written Findings of Fact and Conclusions of Law shows that the court failed to make specific findings addressing most of the nine *Ryan* factors. For example, with regard to S.J.'s statements to his sister and his mother, the court adopted the unnumbered findings set forth in the first two pages of its Findings of Fact and Conclusions of Law, as well as Conclusions Nos. 3, 8, 9, and 11. Supp. CP. However, even when

supplemented with the court's oral findings, these do not adequately cover the *Ryan* factors. Of the nine *Ryan* factors, the court addressed only the first (apparent motive to lie), fourth (spontaneity), and part of the fifth (timing). *See* Conclusion of Law No. 8, Supp. CP. The court made no findings addressing the second (general character), third (more than one person heard the statement), part of the fifth (relationship between declarant and witness), sixth (express assertion of past fact), eighth (possibility of faulty recollection), ninth (circumstances suggesting misrepresentation of defendant's involvement).<sup>14</sup> In the absence of such findings, the state is presumed to have presented insufficient evidence to sustain its burden. *Armenta, supra*. Accordingly, S.J.'s statements to his mother and sister should have been excluded. Review of the court's written and oral findings and conclusions on the remainder of S.J.'s statements, as well as the statements of M.Y. and K.W., produces the same result.

The court's sporadic approach to the *Ryan* factors requires reversal of Mr. Kennealy's conviction. The case must be remanded for a new trial, with instructions to exclude the children's hearsay statements. *Ryan*.

B. The state did not prove that S.J.'s hearsay statements were admissible under RCW 9A.44.120 and *State v. Ryan*.

S.J.'s statements should not have been admitted as child hearsay. First, S.J. had a motive to lie: he was in trouble and was in a time out, and his sister was

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<sup>14</sup> Since S.J. testified, the seventh *Ryan* factor does not apply.

talking on the phone about Mr. Kennealy; by interrupting his sister with a dramatic accusation about Mr. Kennealy—an accusation whose significance he could not fully appreciate—S.J. may have hoped to get out of trouble. RP (2/4/08) 185, 190.

Second, S.J.'s mother described him as having ADHD and being emotionally immature, and she said that he jumps around with sequence sometimes when describing things. RP (2/19/08) 42, 45. She also said that at the time of his statements, S.J. was on a lower dose of adderol (which helps him slow down and be clearer) than at the time of trial, and that he was not taking his medication when he made his initial statement to his sister. RP (2/19/08) 42-44. She was not asked about his general truthfulness, and no one testified on that subject. RP (2/19/08) 39-55. Under these circumstances, S.J.'s "general character" does not help establish the reliability of his hearsay statements under *Ryan* factor number two.

Third, only one person (his sister) heard his initial statement; this weighs in favor of exclusion. *See, e.g., State v. Karpenski*, at 121-123. Fourth, although the initial statement (to his sister) was spontaneous, the others were not: each subsequent statement was the product of questioning by a person who knew he'd made an allegation.

Fifth, although S.J.'s statements were made soon after the alleged incident, the state did not show the impact on reliability caused by his relationship with his

sister and his mother. As one court has observed, the relationship between parent and child “makes objectivity difficult.” *Sampson v. Dep’t of Soc. & Health Servs.*, 61 Wn. App. 488, 498, 814 P.2d 204 (1991). Sibling relationships may well have a similar impact.

Sixth, S.J.’s statements were all assertions about past facts (as is true in all child hearsay cases). As noted above, the seventh factor does not apply because S.J. testified at trial.

Eighth, S.J.’s conflicting statements, his inability to remember what he’d said previously, his embellishments, and his demonstrably false descriptions (of Mr. Kennealy’s bedroom, or his grandmother’s bathroom) demonstrate that his recollection was faulty. Ninth, the “circumstances surrounding the statement” include his sister’s contemporaneous phone conversation (about Mr. Kennealy); this provided some reason to suppose he may have misrepresented Mr. Kennealy’s involvement.

Analysis of S.J.’s statements under *Ryan* requires exclusion. Many of the factors weigh against admission, and the state did not present evidence proving that the remaining factors favor admission. This is especially true given the trial court’s failure to enter findings addressing the majority of the factors. *Armenta, supra*. Accordingly, Mr. Kennealy’s convictions must be reversed and the case remanded with instructions to exclude all of S.J.’s hearsay statements. *Woods, supra*.

A. The state did not prove that M.Y.'s hearsay statements were admissible under RCW 9A.44.120 and *State v. Ryan*.

M.Y.'s statements should not have been admitted as child hearsay. First, the state did not establish how her "general character" affected the reliability of her statements. Her mother described her as "conniving" and able to outsmart adults. RP (2/4/08) 159-160. Her father said that she struggled in school, and had a speech impediment (although her speech had improved.) RP (2/4/08) 171-172; RP 197. Neither parent talked about her general truthfulness or her understanding of the difference between reality and fantasy. *See* RP, generally.

Second, only one person (her father) heard M.Y.'s initial statement. Third, none of her statements were spontaneous; all were in response to questioning, and her initial statement was in response to leading questions. RP (2/4/08) 175-177.

Fourth, the timing of her initial statement and her relationship with her father weigh against a finding of reliability: M.Y.'s father questioned her after learning that his other daughter had inappropriate interactions with Mr. Kennealy, and that police were investigating. RP (2/4/08) 175. He brought up Mr. Kennealy's name, and asked "Does he touch you" and "Does he make you uncomfortable?" before she'd made any disclosures. RP (2/4/08) 176-177. Furthermore, the relationship between parent and child "makes objectivity difficult." *Sampson at 498*.

Fifth, the statements contained express assertions about past facts (as is true for all child hearsay). Sixth, contradictions between M.Y.'s statements and those of her sister and mother suggest a possibility that her recollection was faulty. *See, e.g.*, RP (2/4/08) 38, 40-41, 66-67, 161.

Seventh, the circumstances suggest M.Y. may have misrepresented Mr. Kennealy's involvement. M.Y. said that she'd spoken about what had happened with K.W., and so there is some possibility that K.W.'s statements influenced M.Y.'s recollections.<sup>15</sup> *See Woods, supra*, at 625 (*Ryan* factor nine can include examination of "whether the children may have talked with each other about the allegations and been influenced by each other.")

On this record, it cannot be said that the nine *Ryan* factors have been "substantially" satisfied. Furthermore, as noted above, the trial court failed to make findings addressing the majority of the nine factors. Accordingly, Mr. Kennealy's convictions must be reversed and his case remanded to the trial court with instructions to exclude M.Y.'s hearsay statements. *Woods, supra*.

B. The state did not prove that K.W.'s hearsay statements were admissible under RCW 9A.44.120 and *State v. Ryan*.

K.W.'s hearsay statements should not have been admitted as child hearsay. First, only one person (K.W.'s mother) heard her initial statement. RP

(2/4/08) 148-155. Second, none of K.W.'s statements were spontaneous, and her initial statement was made with reluctance in response to questions that were at least somewhat leading. Her mother testified that K.W. didn't want to talk, closed up, and kept asking "like what?" when prompted to disclose anything that happened. RP (2/4/08) 149, 151-152.

Third, the timing of the initial statement, and K.W.'s relationship with her mother, weigh against a finding of reliability. Carmen had just learned that police were investigating Mr. Kennealy for molesting other children in the complex, and that her daughters had been seen spending time with him. RP (2/4/08) 148-155. Carmen was upset, she brought up Mr. Kennealy (instead of allowing K.W. to mention his name), and asked questions that were at least somewhat leading. RP (2/4/08) 148-155. Furthermore, as K.W.'s mother, she was not likely to be objective. *Sampson v. DSHS, supra, at 498.*

Fourth, K.W.'s statements contained express assertions about past facts. Fifth, there is some possibility that K.W.'s recollection was faulty, or that she misrepresented Mr. Kennealy's involvement: (1) she'd been told Mr. Kennealy was a "bad guy," and (2) she gave one statement claiming he'd touched her crotch (not her bottom), which suggests her statements might have been influenced by

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<sup>15</sup> In fact, M.Y. alleged that Mr. Kennealy asked to see her underwear, or to have her pull her dress up, a statement that sounded more like K.W.'s allegations than like her own statements. RP (2/4/08) 177.

what M. Y. alleged.<sup>16</sup> RP (2/4/08) 198-202; RP 407; Exhibit 1 (from 2/4/08), p. 4, Supp. CP.

The trial court should have excluded K. W.'s statements, because the state failed to establish that they were admissible under RCW 9A.44.120 and *State v. Ryan*. Furthermore, as noted above, the trial judge didn't enter findings addressing all nine *Ryan* factors. Accordingly, Mr. Kennealy's convictions must be reversed and the case remanded to the trial court, with instructions to exclude K. W.'s statements. *Woods, supra*.

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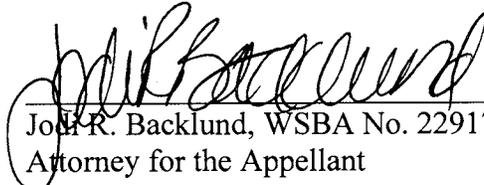
<sup>16</sup> See *Woods, supra*, at 625, regarding influence of this type.

**CONCLUSION**

For the foregoing reasons, Mr. Kennealy's convictions must be reversed and his case remanded to the trial court, with instructions to exclude evidence of prior sexual misconduct, the testimony of S.J., and all hearsay statements obtained from S.J., M.Y., and K.W.

Respectfully submitted on October 22, 2008.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
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# APPENDIX



1 S.J. disclosed that Dennis sucked on his knuckles and then gestured toward his groin area;  
2 Dennis is a neighbor of the grandmother, and also lives in the apartment complex.

3 As Merrick related the information to the police officers, S.J. was shaking his head in an up  
4 and down motion;

5 The defendant asked on two occasions if S.J. could spend the night at his house while S.J.'s  
6 grandmother was in the hospital.

7 Sergeant Robert Carlson of Yelm interviewed S.J. about the allegations;

8 Sergeant Carlson received training to interview children regarding sexual assault issues.

9 S.J. disclosed quickly disclosed that Dennis sucked his knuckles and pointed to his groin  
10 area and stated that was his penis;

11 S.J. spoke to Sgt. Carlson a second time, but was unfocused and appeared to be hyperactive;

12 S.J. told the court he that he lives with his Mom, Dad and his sister; that his family has a cat  
13 and a dog, that he was seven years old and that is birthday was on September 30<sup>th</sup>. He testified he  
14 went to Simmons Elementary School, and that he knew his teacher's name.

15 S.J. knows the difference between the truth and a lie and that if he tells lies at home he gets in  
16 trouble, and that a lie is a bad thing.

17 S.J. understands what a promise is.

18 S.J. testified about the allegations of sexual assault at the Child Hearsay hearing.

19 Christina Jeffords is S.J.'s mother;

20 Christina Jeffords corroborated the information S.J. reported to the court regarding the  
21 Home, family, and school facts;

22 S.J. suffers from Attention Deficit Hyperactivity Disorder and was found to be emotionally  
23 immature for his age;

24 S.J. takes Adderall medication and at the time of the incident, was taking lower dosage.

25 S.J.'s medicine affects him by allowing him to stay focused, pay attention, stay on task ;

26 S.J. disclosed to his mother that Dennis had touched him and sucked on his knuckles;

Christina Jeffords had never heard S.J. use the expression "knuckles" before, he told her he it  
means his penis and that he heard the term from Denni;

Carmen Webster is the mother of K.W. (DOB 3-13-99) and M.Y. (4-6-01);

On July 7<sup>th</sup>, 2007 Carmen Webster lived at the apartments on Mountain View Road;

Dennis Kennealy was her neighbor;

1 In July of 2007 her daughters were staying with her;

2 K.W. disclosed to Webster that Kennealy continually invited her to his home for popsicles  
3 and punch;

4 K.W. also disclosed that one time she had to use the restroom and Kennealy asked her if he  
5 could watch her go to the bathroom Kennealy kept trying to come in or he asked if he could come in  
6 and help her and she said no. Kennealy said, "I would like to, I would really like to;"

7 K.W. disclosed to her mother that Kennealy was always hugging and kissing her;

8 K.W. disclosed to her mother that Kennealy kept watching her and stated that he liked her  
underwear and wanted to see what was underneath the underwear.

9 K.W. thought Dennis' comment was weird and it made her feel uncomfortable.

10 Webster wrote down the statements her daughter made regarding Kennealy.

11 Officer Stacy Field, of the Yelm Police department, interviewed K.W. on July 9<sup>th</sup>, 2007.

12 Officer Field has been trained to interview children alleging sexual assault;

13 K.W. disclosed the allegations to Field;

14 Field also asked K.W. questions for the purpose of establishing competency;

15 K.W. had no trouble answering those questions;

16 K.W. testified at the child hearsay hearing;

17 K.W. testified that she is 8 years old and that her birthday is March 13<sup>th</sup>, 1999;

18 K.W. testified that her sister's name is [M.Y.] and that her sister is 6 years old. K.W.  
19 testified that she really like the game "Hungry Hippo" that she received on her last birthday, that her  
20 favorite movies were "Lady and the Tramp" and "Matlida," that she lived with her Dad, step-mother,  
21 and M.Y. and that they have lots of animals, that she attends Prairie Elementary School and is in the  
third grade, that she likes school and her favorite subject is math, that she and M.Y. stayed with her  
mom on week ends. Her mom lives in apartment D8;

22 K.W. testified that she knew a man named Dennis. She testified that her friend Jordan  
23 introduced her to Dennis.

24 K.W. also testified regarding the allegations;

25 Carmen Webster corroborated K.W.'s testimony regarding her home, family, and school.

26 James Young, is the father of K.W. and M.Y.

James Young testified at that child hearsay hearing and corroborated K.W.'s testimony  
regarding home, family and school;

1 July 31<sup>st</sup>, James Young contacted the police because M.Y. disclosed an incident of sexual  
2 contact with a Dennis Kennealy;

3 M.Y. is K.W.'s younger sister;

4 James Young testified at the child hearsay hearing regarding the sexual assault allegation  
5 made by M.Y.

6 Officer Stacy Field interviewed M.Y. at the police station;

7 M.Y. has a significant speech impediment that makes it difficult for her to be understood and  
8 therefore chose to have M.Y.'s mother present to assist in any need translation;

9 The Officer asked questions of M.Y. that pertain to competency;

10 M.Y. had no trouble answering those questions;

11 Kayla. Salan is a speech language pathologist working with M.Y since September of 2007 at  
12 Prairie Elementary School in Yelm;

13 She has been employed with Yelm Community Schools since September of 2007;

14 Salan has a Bachelor of Arts and a Masters Degree in Speech and Language Sciences. Salan  
15 was acquainted with M.Y. as her speech language pathologists.

16 M.Y. suffers from a severe articulation disorder;

17 M.Y. is in an IEP or individualized educational program because of difficulties with her  
18 speech, math and reading.

19 M.Y. has no difficulty with comprehension and responds appropriately to questions.

20 Salan is able to translate for M.Y. if necessary because she had gotten to know her speech  
21 patterns and some of her substitutions.

22 M.Y. testified at the child hearsay hearing;

23 M.Y. testified that she was six years old, her birthday is April 6th, she could not remember  
24 the year she was born, she remembered her last birthday, she went to Chuck E. Cheese, she  
25 remembered going with a friend from her Kindergarten class but could not remember his name, she  
26 remembered that her sister went with her and that M.Y. played the bumble bee game and that they  
27 pineapple pizza and that she got Barbie for a present, that she lives with her dad and step mom and  
28 K.W. in a house, and that she is in the first grade at Prairie Elementary, that she knew the difference  
29 between telling the truth and a lie, and that you get into trouble if you tell a lie, and she promised to  
30 tell the truth;

1 M.Y. testified regarding the sexual assault allegations;

2  
3 Nancy Young is an advanced registered nurse practitioner at the Providence Sexual Assault  
4 Unit;

5 Young has employed at the Sexual Assault Clinic for 24 years;

6 She has a Bachelor of Arts and a Masters Degree in Nursing and a certification as an  
7 Advanced Registered Nurse Practitioner;

8 Ms. Young testified attends continuing education on a regular basis;

9 She has performed approximately 1400 sexual assault examinations;

10 With regard to this case, she testified as to the procedures that are used at the clinic and she  
11 detailed her examinations on M.Y. and K.W.

12 Ms. Young testified regarding the statements made to her by M.Y. and K.W. as well as the  
13 physical examination;

## 14 II. CONCLUSIONS OF LAW

15 1. This court has jurisdiction over the parties and subject matter.

16 2. All the acts referenced above occurred in the State of Washington.

17  
18 3. The Court found that S.J. was born September 30th, 2000. He was 7 years old at the time  
19 of hearing and that he was six years old at the date of the incident. The court found that S.J.  
20 understood the obligation to speak to the truth on the witness stand.

21 The court found that S.J. was competent to testify. The testimony of S.J. met all of the Allen  
22 factors. The court based it's conclusion on watching S.J.'s testimony carefully and was impressed  
23 with how carefully he listened to the questions and attempted to provide an accurate answer. The  
24 court recognized that S.J may have withheld information on other interviews. He may have not  
25 always told the truth on other occasions, but the question for the court, is whether he understood the  
26 obligation to speak the truth on the witness stand, and it appeared to the court that S.J. did so. S.J  
had a sufficient memory of the incident such that he had an independent recollection of it and that he  
had an adequate mental capacity at the time of the incident such the he could relate an accurate  
impression and express in words his memory of the incident. He was able to understand questions on

1 direct and cross. Finally, that he apparently suffers from ADHD however from all of the testimony  
2 the court was persuaded that it was sufficiently under control at the time in question and while he  
3 testified such that it was not a factor in terms of his competence.

4  
5 4. The Court found that M.Y. was born April 6th, 2001. She was 6 years old at the time of  
6 the hearing and that she was five years old at the date of the incident. The Court found that M.Y.  
7 understood the obligation to speak the truth on the witness stand.

8 The court found that M.Y. was competent to testify. The testimony of M.Y met all of the  
9 Allen factors. M.Y. gave a detailed description of the events in question. She clearly understood  
10 questioning on direct and cross-examination. The court found that M.Y.'s ability to perceive, ability  
11 to relate, her understanding of the requirement of telling the truth on the witness stand were all  
12 present. The court also found that there was good cause for the assistance for a speech pathologists;  
however, nearly all of the testimony was readily understandable without assistance.

13 5. The Court found that K.W. was born March 13th, 1999. She was 8 years old at the time  
14 of the hearing and the she was seven years old at the time of the incident. The Court found that K.W.  
15 understood the obligation to speak the truth on the witness stand.

16 The court found that K.W. was competent to testify. The testimony of K.W. met all of the  
17 Allen factors. The court based its conclusion on watching K.W.'s testimony and listening to her  
18 responses to questions. The court found that M.Y. had a memory sufficient to retain an independent  
19 recollection of the incident in question and further that she had the ability to express in words her  
20 memory of the incident. The court found remarkable with all of the witnesses their ability to remain  
21 focused in the courtroom and relatively relaxed. There were times when one or more expressed  
22 discomfort, but they were able to proceed with the questioning and still go ahead and give complete  
23 accounts of incidents involving the defense. The court's impression was that each of the understood  
the obligation to tell the truth and was exhibiting their best efforts to do so.

24 6. The court found admissible M.Y. statements that she made to her father James Young.  
25 The court ruled that the statement appeared to be prompt and spontaneous. The court was persuaded  
26 that the father was not overly aggressive in eliciting that statement. Therefore, the court believed  
that statements had the reliability as required in the Allen factors.

1 7. The court found admissible K.W. statements that she made to her mother Carmen  
2 Webster. The court was persuaded that the mother was not overly aggressive in eliciting that  
3 statement. Further the court believed that that since Ms. Webster wrote down the answers to her  
4 questions that it enhanced the reliability of her statement and aided in her memory of the incident.  
5 Therefore, the court believed that statements had the reliability as required in the ~~Allen~~ factors.

Ryan

6 8. The court found admissible S.J.'s statements made to Shawna Merricks and Christina  
7 Jeffords. The court found that the statements met all of the Ryan factors. Furthermore, the court  
8 found persuasive that the statements were spontaneous and close in time to the incident. In addition,  
9 the court found that the surrounding circumstances did not infer any motive or basis to misrepresent  
10 actual facts; they appeared to be more or less consistent.

11 9. The court found admissible pursuant to E.R 803(a)(1)&(2) statements or affirmations from  
12 Shawna Merrick's and S.J's made to Officer Bill Devore. The court found persuasive the immediacy  
13 in which the statements were made after the incident in question. The court also found persuasive  
14 the officer taking on a limited statement until an officer with training and experience was available to  
15 conduct a more detailed investigation.

16 10. The court found admissible all statements that were made to Officer Field by K.W. and  
17 M.Y. That court found that Officer Field had the necessary training and experience to interview  
18 child victims of abuse. The court was persuaded that since Ofc. Field interviewed K.W. and M.Y.  
19 reasonably close to the incident in question and conducted the interviews in a way that enhanced the  
20 reliability of the answers that the statements were admissible.

The First

21 11. The court found admissible ~~all~~ statements ~~that were~~ made to Sgt. Carlson by S.J. That  
22 court found that Sgt. Carlson had the necessary training and experience to interview child victims of  
23 abuse. The court was persuaded that since Sgt. Carlson interviewed S.J. reasonably close to the  
24 incident in question and conducted the interviews in a way that enhanced the reliability of the  
25 answers that the statements were admissible. The court was impressed that S.J. understood the  
26 obligation to tell the truth to the officer at the time of the interviews. The court found looking at all

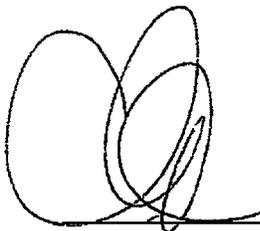
1 of the Ryan factors that there was a sufficient reliability and trustworthiness with the statements that  
2 were made to Sgt. Carlson.

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4 12. The court found admissible all statements that were made to Nancy Young by K.W. and  
5 M.Y.. The court found persuasive the follow factors in regards to the statements made to Ms.  
6 Young: That the interviews occurred in a clinical setting designed to enhance reliability; place  
7 children at ease, not aggressively interview them, and encourage spontaneity, and so the court found  
8 that the statements made to Ms. Young also met the indicia of reliability called for under the Ryan  
9 factors.

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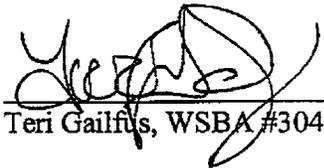
12 The second statement was not  
13 reliable based on the demeanor  
14 and behavior of child.  
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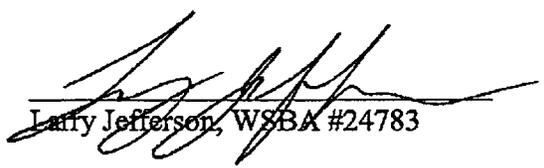
  
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Judge

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Presented by:

  
\_\_\_\_\_  
Teri Gailfus, WSBA #30489

Approved as to Form:

  
\_\_\_\_\_  
Laffy Jefferson, WSBA #24783

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to Y \_\_\_\_\_

Dennis Kennealy, DOC #316308  
Washington Corrections Center  
P. O. Box 900  
Shelton, WA 98584

and to:

Thurston Co Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

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

All postage prepaid, on October 22, 2008.

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 October 22, 2008.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant