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DIVISION II

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No. 37665-2-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY  DEPUTY
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENNIS KENNEALY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Wickham, Judge
Cause No. 07-1-01304-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court correctly admitted testimony regarding uncharged acts of sexual abuse against children, pursuant to ER 404(b), as evidence of a common plan or scheme.

2. Whether the prosecutor committed misconduct in her closing argument by asking the jury to consider the uncharged acts in making it's decision.

3. Whether the court correctly found S.J. to be competent to testify.

4. Whether the court properly determined that the hearsay statements of the three child witnesses were admissible pursuant to RCW 9A.44.120.

B. STATEMENT OF THE CASE.

The State accepts Kennealy's statement of the case.

C. ARGUMENT.

1. The trial court correctly admitted evidence of prior uncharged acts of sexual assaults committed by Kennealy, pursuant to ER 404(b).

Kennealy argues that the acts committed against Daniela Rapoza [03/10/2008 RP 255-265, 330-339], Bobbi Jo Hundley [03/10/2008 RP 266-275, 340-348], Dawn Olival [03/10/2008 RP 276-281, 348-357], and Deborah Titus [03/10/2008 RP 281-288, 358-365] were so unlike the acts for which he was on trial that it was error for the court to admit them as evidence of a common scheme or plan. The State has little disagreement with Kennealy as

to the applicable law; the State does disagree with his application of that law to the facts of this case.

ER 404(b) reads as follows:

Other Crimes, Wrongs, or Acts. 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

An appellate court reviews a trial court's interpretation of an evidentiary rule de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." Id. The trial court begins with the presumption that evidence of other bad acts is inadmissible, and the State bears the burden of establishing that the evidence falls under one of the exceptions to the general prohibition. Id.

Evidence that establishes a common scheme or plan is one of the exceptions to the general rule that character evidence is inadmissible. Such evidence cannot be used to prove that the defendant is a "criminal type" and therefore more likely to have committed the crime with which he is charged, but it can be used to prove that he had a plan to do it. State v. Lough, 125 Wn.2d 847,

853, 889 P.2d 487 (1995). Whether the prior bad acts show evidence of a common plan or scheme is largely fact dependent.

Id., at 856.

When a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. . . . To establish common design or plan, for the purposes of ER 404(b), 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.

Id., at 860 (internal cite omitted).

This is different from using the prior bad acts to establish the identity of the person who committed the charged crimes. In that event, where the State is attempting to prove that the current crime was committed by the defendant because he had committed a similar crime, or crimes, in the past, the similarity between the charged and the uncharged acts must be greater. To prove that the defendant used a unique modus operandi, the method used in both crimes, or sets of crimes, must be "so unique" that proving that he committed one essentially proves he committed the other. State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002). A prior act is

admissible for this purpose “only if it bears such a high degree of similarity as to mark it as the handiwork of the accused.” State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984).

That is not the situation in Kennealy's case. Here the State was not attempting to prove a “signature” crime, but to prove that he had “a common scheme or plan where the prior acts demonstrate a single plan used repeatedly to commit separate but very similar crimes.” State v. Sexsmith, 138 Wn. App. 497, 504-05, 157 P.3d 901 (2007), *citing to* DeVincentis, *supra*, at 19. The purpose is to prove a plan instead of a person. “It requires a slightly lower level of similarity, inconsistent with that required to show identity.” State v. Foxhoven, 161 Wn.2d 168, 179, 163 P.3d 786 (2007).

[A]dmission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. Such evidence is relevant when the existence of a crime is at issue. Sufficient similarity is reached only when the trial court determines that the “various acts are naturally to be explained as caused by a general plan . . .”

DeVincentis, *supra*, at 21, *citing to* Lough, *supra*, at 860.

Before the trial court admits evidence of other bad acts, those acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or

scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” Lough, *supra*, at 852. If the evidence is admitted, the court must give a limiting instruction. Id., at 864.

The court in this case conducted the required analysis before admitting some, but not all, of the proffered evidence. [03/10/2008 RP 305-315] It found the witnesses who testified about the prior misconduct to be “remarkably credible”, [03/10/2008 RP 305] they remembered sufficient detail and were able to articulate the incidents of sexual abuse even though they occurred some time previously, their disclosures were consistent with the court’s experience with other sexual abuse victims, and their accounts were “remarkably similar and seemed consistent with the conduct of the defendant as related by the witnesses in this case so far.” [03/10/2008 RP 305] The court further compared the incidents as described by the earlier victims with those described by the later victims, and found them sufficiently similar, in most cases, to constitute evidence of a common plan. There was the common touching of the girls’ vaginas both over and under their underclothes, there was the common technique of separating the victim from other people, even when others were in the vicinity, the

acts did not go “substantially beyond” molestation or improper touching [03/10/2008 RP 309], and the defendant asked them not to tell. “[T]he defendant seeks sexual contact with children; he seeks to do so in a way that separate (sic) the child from other adults and gradually leads the child to further sexual contact.” [03/10/2008 RP 312]

The court did not admit some of the proffered evidence, including all of the testimony of Paul Amarian [03/10/2008 RP 312], and part of the testimony of Bobbie Jo Hundley [03/10/2008 308] and Deborah Titus [03/10/2008 RP 311]. The court separated out the evidence that was not substantially similar to the evidence of the current victims, and excluded it. In regard to the evidence admitted, the court found that it was probative to prove that the crime occurred, not to prove the character of the defendant, and that it was more probative than prejudicial. The court indicated that it would, and it did, give a limiting instruction before the testimony of each of these witnesses.

Kennealy argues that the court was incorrect in finding the incidents sufficiently similar to be relevant in proving that the crime occurred. He points out that the locations were different, one set involved relatives and one didn't, and in the earlier incidents he did

not entice the children with food or gifts. However, as discussed above, admissibility of evidence to prove a common scheme or plan does not require the same similarity as evidence offered to prove modus operandi or identity. In addition to the similarities noted by the trial judge, it is apparent that in all cases, Kennealy took advantage of the victims before him; he did not go to schools or places outside his residence to seek out children. With his daughter and nieces, the children were in the houses where he lived or visited, he was an adult relative, and he had no need to offer them sweets or drinks in order to make them familiar with him. With the children at his apartment complex, he did not have that family relationship, so he used popsicles and other treats to give them a reason to be around him. Still, he stayed within his apartment complex, choosing victims who were pretty much under his nose.

Kennealy also argues that the places where the molestations occurred were substantially different, but again that is only because of the accommodations available to him at the time. In both sets of crimes, he isolated the children from others, although it is interesting to note that in the case of Dawn Olival, he once touched her in the family dining room while other family members were

nearby, and he touched M.Y. on the steps to his apartment, which were somewhat shielded from public view but he was still taking a substantial risk of being observed. Kennealy further argues that none of the earlier incidents involved his use of food or gifts to lure the children, which is true, but since he was related to them, this fact is not particularly significant. With the children in his apartment complex, offering popsicles was an easy way to get acquainted with them, make them willing to be around him, and have a reason for their presence at his apartment. In each instance, he took advantage of the opportunities that presented themselves. With the exception of his son, none of Kennealy's family would have anything to do with him, and thus he no longer had access to his relatives. The similarities between the offenses are more than coincidental, and sufficiently similar in significant respects to indicate conduct directed by design.

Relevant evidence is evidence which has any tendency to make the existence of any fact more or less probable than it would be without the evidence. ER 401. The prior bad acts evidence was relevant "to the specific issue if whether the conduct on which the charge was based actually occurred or was, as the Defendant

contended, a fabrication or mistake by the victim.” Lough, *supra*, at 862.

The trial court weighed the probative value of each piece of evidence against the danger of unfair prejudice, and concluded that the evidence was admissible. [03/10/2008 RP 313]

Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim. . . This court reviews the trial court’s balancing of probative value against prejudicial effect for abuse of discretion. . .

Sexsmith, *supra*, at 506, internal cites omitted. When the defense to a charge is a general denial, every element of the crime is at issue, and the credibility of the witnesses is central to the case. Id. All evidence offered by the State in a criminal trial is prejudicial, but the question is whether that prejudice is unfair. When there is substantial evidence that Kennealy committed the earlier offenses, it was not unfair for them to be used against him, particularly where the evidence of the current crimes consisted almost entirely of the testimony of small children. The court did not abuse its discretion by admitting this evidence.

Kennealy argues that the evidence of his prior bad acts overwhelmed the evidence of the charged crimes, but he does not

point to anything in the record to substantiate that. It is reasonable to assume that the testimony of three small children had a significant impact on the jury, and there is no reason to think the testimony of his now-adult family victims “overwhelmed” their evidence.

Kennealy argues that the limiting instruction given to the jury was inadequate in that while it told the jurors they could not consider the evidence as propensity evidence, it did not tell them how they should use it. However, Kennealy did not object to the instruction and therefore cannot raise the issue on appeal. He specifically advised the court he was not objecting, and was not proposing an instruction. [03/10/2008 RP 319] An appellate court does not review on appeal an alleged error not raised at trial unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is “manifest.” State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). “[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional

errors raised for the first time on appeal.” State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998)

The court read this instruction to the jury before each of the “prior bad act” witnesses testified:

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.

[03/10/2008 RP 330, 341, 348-49, 358] The instruction packet given to the jury at the conclusion of the trial included instruction

No. 23:

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.

[CP 61.]

Contrary to Kennealy’s assertions, the instruction did tell the jury how it was to use the evidence. He complains that any instruction would be ineffective in preventing the jury from considering the evidence as proof that he is a lifelong child molester. The purpose of the instruction was not to prevent the jury from reaching that conclusion. The purpose of the instruction was

to tell the jurors that they could not convict him of the current charges simply because he had a propensity to molest children, but rather that they could consider it as evidence that he had a lifelong plan to molest children as the opportunity presented itself, and that he did it in remarkably similar ways. In other words, because he had molested his relatives when they were children using the same sort of conduct as alleged by the current victims, the jury could consider that as evidence that the current victims were telling the truth. The limiting instruction given by the court was adequate to inform the jury of the law.

2. The prosecutor's closing argument was not improper. The evidence of Kennealy's prior crimes was correctly admitted, and thus the prosecutor could properly argue that evidence.

Kennealy argues that even though the prosecutor used the words "scheme" and "plan", she was really asking the jury to convict him because his character was bad. The record does not support this assertion.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); State v. Hughes, 106 Wash. 2d 176, 195, 721 P.2d 902 (1986). Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. Hoffman, supra, at 93; State v. York, 50 Wn. App.

446, 458, 749 P.2d 683 (1987), *review denied*, 110 Wash. 2d 1009 (1988).

[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Hoffman, *supra*, at 93, York, *supra*, at 458-59. In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Lord, 117 Wash. 2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 121 L. Ed. 2d 112, 113 S. Ct. 164 (1992); State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541, *review denied*, 107 Wash. 2d 1011 (1986).

State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

Here, Kennealy is asking this court to assume that the jury inferred improper propensity evidence from the prosecutor's argument. The jury was properly instructed, not only verbally preceding each ER 404(b) witness's testimony but in Instruction No. 23, and Kennealy has not shown that the argument, even if it were improper, contravened or undermined any instruction from the court. The court instructed the jury to consider the evidence only for purposes of establishing a common scheme or plan, which is what the prosecutor argued, and this court must presume that the jury followed its instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

The evidence to which the prosecutor referred was properly admitted and referring to it was not error. She did not once ask or imply that the jury should convict Kennealy because of his character or inclinations. She did point out that he has molested children using a common scheme for a number of years, using several examples of the similarities between the earlier molestations and the ones for which he was on trial, [03/11/2008 RP 470-472] something that is clearly supported by the evidence. Wide latitude is given for reasonable inferences based on the evidence presented. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), *review denied* 129 Wn.2d 1012, 917 P.2d 130 (1996).

Kennealy maintains that the prosecutor's argument, while using the words "scheme" and "plan", actually argued propensity because she referred to a plan to molest children (the outcome) rather than emphasizing the common features of his molestations. Apparently his point is that one cannot have a plan to commit crimes, but "plan" or "scheme" must refer to the specific techniques or methods used to commit those crimes. That reasoning does not seem logical. People have all sorts of plans—to climb the tallest mountain in every state, for example, or read every book written by

a particular author—that are outcomes rather than mechanisms for obtaining those outcomes. There is no reason one cannot have a plan or scheme to molest children.

Even if the remarks had been improper, Kennealy has not shown that he was prejudiced by them. Prejudice is established only if there is a substantial likelihood that the alleged misconduct affected the jury's verdict. State v. Borg, 145 Wn.2d 329, 335, 36 P.3d 546 (2001) For the argument to have prejudiced him, the jury would have had to be so swayed by the prosecutor's argument that they ignored the court's instructions and convicted on a basis they were specifically told not to consider. There is no reason to believe that they did.

Finally, Kennealy did not object to any of the remarks to which he now assigns error. Absent an objection, a conviction will be reversed only if the remarks were so flagrant and ill-intentioned that a curative instruction would have been useless. Kennealy has not demonstrated that a curative instruction (which would have duplicated the instructions already given) would have failed to rectify any error.

3. The court properly found S.J. competent to testify.

The trial court is responsible for determining the competency of witnesses, and that determination is given great weight. “Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.” State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). This is so because the trial court “sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review.” Id. See also State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995).

The test for determining the competency of a young witness is set forth in Allen:

- (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.

Allen, *supra*, at 692. “Inconsistencies in the child’s testimony go to weight and credibility, not competency.” State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d 536 (1991) (citing to State v. Stange, 53

Wn. App. 638, 642, 769 P.2d 873, *review denied* 113 Wn.2d 1007 (1989).

S.J. was seven years old at the time he testified. [03/05/2008 RP 71] He was able to describe his home and family situation and other details about his life. [03/05/2008 RP 71-75] While he said he didn't know the difference between the truth and a lie, he was able to demonstrate that he did know. [03/05/2008 RP 76] He was occasionally confused about vocabulary; for example, he confused the words "promise" and "secret". [03/05/2008 RP 86] According to his mother, S.J. suffered from ADHD, and took medication for it. He comprehended well, but sometimes had trouble with sequence. [02/19/2008 RP 42-45]

After observing S.J.'s testimony at the child competency/child hearsay hearing, the court applied the Allen factors and found him competent. The court specifically was impressed that S.J. listened carefully to the questions and attempted to answer accurately. The court further found that although S.J. may have refused to talk when interviewed, and may have sometimes not told the truth, it appeared to the court that he understood he was supposed to tell the truth on the witness stand. The trial court also concluded that his memory was sufficient to

meet the Allen standard, and was able to understand questions put to him. [02/19/2008 RP 62]

It is intuitively reasonable that seeing the manner of the witness is particularly important when assessing the credibility of children. A seven-year-old does not have the vocabulary, the experience, or the base of knowledge that an adult has when relating a past experience to people who were not there when it happened. S.J. did lie on the stand a couple of times, and apparently it was obvious to those in the courtroom that he understood he had been lying and had been caught. In the prosecutor's rebuttal, she remarked:

Your job is to determine credibility, and you saw that kid on the stand. You saw that defense attorney, that bed wasn't round and you said it was. You saw the look on his face. You said you took the Nemo toy home and you didn't, and you saw the look on his face, and you said he sucked on your penis and he didn't. No, he sucked on my penis, adamantly, again, every time, consistency.

[03/11/2008 RP 505]

It is apparent that S.J. was not a good liar. But being a bad liar is not the same as being incompetent to be a witness. If every witness who told a lie were deemed incompetent, there would be a great many adults who would be prohibited from taking the stand.

His inconsistencies and lies go to his credibility and the weight the jury gave to his testimony, not to his competence. All of those problems were apparent to the jury; they could take into account he was a seven-year-old hyperactive child with difficulty putting things in sequence, and make their credibility determination. The court did not abuse its discretion by permitting S.J. to testify.

4. The trial court properly admitted the hearsay statements of the child witnesses pursuant to RCW 9A.44.120.

Kennealy argues that the trial court improperly admitted the hearsay statements of the three child victims. RCW 9A.44.120 provides, in pertinent part:

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, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(a) Testifies at the 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.

As with the competency of a witness, the determination of the reliability of child hearsay statements is reviewed for abuse of discretion.

The trial court is in the best position to make the determination of reliability as it is the only court to see the child and the other witnesses. . . Whether statements are admissible pursuant to the child abuse hearsay exception is within the sound discretion of the trial court and will not be reversed on absent a showing of manifest abuse of discretion. . .

State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994)

(internal cites omitted).

Kennealy's central argument is that the court did not make sufficient findings of fact regarding each of the factors set forth in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), for determining the admissibility of child hearsay statements. Those factors are:

- (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.

Id., at 175-76.

Where the trial court has weighed the evidence, the appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. Ridgeview Properties v. Starbucks, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996). Where findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court will not disturb the trial court's ruling. State v. Smith, 84 Wn.2d 498, 527 P.2d 674 (1974); State v. Chapman, 84 Wn.2d 373, 526 P.2d 64 (1974). See also, House v. Erwin, 83 Wn.2d 898, 524 P.2d 911 (1974).

In this case, the court found, on the record, that each of the hearsay statements it admitted met the Ryan factors. [S.J.--02/19/2008 RP 73, 81; M.Y.—02/19/2008 RP 87-88 (the court

misspoke once and referred to the Allen factors, RP 87); K.W.—
02/19/2008 RP 89-90] These findings were memorialized in the
Findings of Fact and Conclusions of Law. [CP 64-72] What the
court did not do is analyze each statement admitted individually as
it pertained to each of the nine Ryan factors. Kennealy has not
cited to any authority that the court is required to make such a
record as long as it is clear that the Ryan factors were considered.

After testimony was taken regarding all of the hearsay
statements the State sought to admit, there was a lengthy
argument in which the Ryan factors were discussed, [02/19/2008
RP 66-89], and it is clear from the court's colloquy with the parties
that it considered those factors in making its rulings. One of S.J.'s
statements was excluded, his statement to his mother about being
frightened. [02/19/2008 RP 71-72] It is the State's position that
because the Ryan factors were clearly considered, and the court
explicitly said that it found them to be satisfied, it is not necessary
that the record include an exhaustive recitation of each and every
factor as applied to each and every statement. As Kennealy
concedes, not every factor must be established; they need only be
substantially satisfied. State v. Woods, 154 Wn.2d 613, 623-24,
114 P.3d 1174 (1995). "Each of these circumstances is both non-

exclusive and nonessential.” State v. Karpenski, 94 Wn. App. 80, 110, 971 P.2d 553 (1999).

Kennealy cites to State v. Armenta, 143 Wn.2d 1, 948 P.2d 1280 (1997) for the proposition that in the absence of findings of fact, the State is presumed to have failed to meet its burden of proof. However, Armenta deals with an entirely different issue. That case involved a suppression hearing following charges of possession of a controlled substance with intent to deliver. An officer testified that one of the defendants told him he had a Washington identification card, but the court had not entered that specific finding of fact and therefore the Supreme Court assumed that the State had not proved that the statement had been made. Id., at 14. Here the court specifically held that the statements it was admitting had met the Ryan factors.

a. S.J.

Kennealy argues that S.J.’s statements should not be admitted because he was in trouble with his sister and had a motive to lie. The court specifically found that the circumstances surrounding the statement did not infer a motive to lie; the court’s decision will be reversed only for abuse of discretion, *i.e.*, no reasonable person would have reached that conclusion. That is not

the case here. In fact, Kennealy's argument that S.J. blurted out his accusation in an effort to deflect attention from his own misbehavior and thus escape further punishment is far-fetched. It seems extremely unlikely that a six-year-old child would fabricate a story about an adult with whom he had no quarrel sucking his penis and calling it "knuckles" just because his sister thought Kennealy was weird, particularly when there is no record that S.J. had any such precocious sexual knowledge from another source. The court particularly noted that S.J. was in time-out but that in watching him testify, the court did not believe that that was a significant factor. [02/19/2008 RP 81]

Kennealy also complains that S.J.'s statements to all the others except his sister were not spontaneous because they resulted from questioning. However, "[f]or purposes of a child hearsay analysis, spontaneous statements are statements the child volunteered in response to questions that were not leading and did not in any way suggest and answer." State v. Carlson, 61 Wn. App. 865, 872, 812 P.2d 536 (1991). While it is true the initial disclosure was made to one person, he consistently repeated his statements to others, and Kennealy does not explain why an initial disclosure

made to a crowd is more reliable than that made to an audience of one.

While Kennealy argues that there are factors weighing against admission of S.J.'s testimony, the court heard the boy's testimony, listened to argument by both sides, and made a decision based upon the Ryan factors. That decision will be reversed only for abuse of discretion, and based upon the record as a whole. One cannot say it was made on untenable grounds or for untenable reasons.

b. M.Y.

Kennealy again argues that M.Y.'s statements do not satisfy the Ryan factors and should not have been admitted. As with S.J.'s statements, the court heard the evidence, listened to argument, and, in its decision, specifically found the Ryan factors to have been satisfied, although at one point it mistakenly referred to the Allen factors. [02/19/2008 RP 87-88] In its Findings of Fact and Conclusions of Law the word "Allen" is crossed out and "Ryan" substituted. [CP 70].

Kennealy points to M.Y.'s mother's characterization of her—"I don't know—I was going to say conniving. I don't know. She is smart in her own way. She thinks outside the box. She thinks

smarter than I do usually.” [02/01/2008 RP 160]—as proof that M.Y. is a liar. Her mother also said: “I mean every kid every now and then tells a little fib, but usually if you talk to her in the right way, she will tell you the truth.” [02/04/2008 RP 159]. It is fair to assume that there is never a case where an issue is black and white. Here the trial court weighed the evidence and, considering the Ryan factors, found the statements admissible. Kennealy repeatedly argues that various factors “suggest a possibility” that her memory was faulty, she “may have misrepresented” his involvement, “there is some possibility” that she was influenced by her sister [Appellant’s brief 46]. The court found other factors weighing in favor of admissibility [02/19/2008 RP 73, 80] and exercised its discretion. This court can review the entire record and find that the court’s findings are supported by substantial evidence. There was no abuse of discretion.

c. K.W.

Again, Kennealy lists reasons why the statements of K.W. do not satisfy the Ryan factors. Again, he argues that “there is some possibility” that K.W.’s memory was faulty and that her mother “was not likely to be objective.” [Appellant’s brief 47] All of the circumstances he identifies were known to the court, and after

hearing testimony and argument, the court found that the Ryan factors were met. [02/19/2008 RP 89]

Where the court clearly had the Ryan factors in mind and made the finding that they had been satisfied, it was not abuse of discretion to admit the hearsay statements of K.W. For each of the three children, the court gave tenable reasons to support the admissibility of the statements. The fact that Kennealy disputes those reasons does not make the court's ruling an abuse of discretion.

"It is clear that not every factor listed in Ryan needs to be satisfied before a court will find a child's hearsay statements reliable under the child victim hearsay statute, RCW 9A.44.120." State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990)

d. Kennealy failed to object below to the court's Findings of Fact and Conclusions of Law.

Kennealy did not object to the court failing to articulate a finding for each Ryan factor as applied to each hearsay statement. A reviewing court will not consider objections raised for the first time on appeal unless the admission of the challenged evidence constitutes a manifest error affecting a constitutional right. RAP 2.5(a). In this instance, the constitutional right affected by the

erroneous admission of hearsay statements is the Sixth Amendment right to confront witnesses. Because of this right, “a hearsay statement that is ‘testimonial’ is inadmissible unless the defendant has an opportunity to cross-examine the witness either before or at trial.” State v. Watt, 160 Wn.2d 626, 630, 160 P.3d 640 (2007) (quoting Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). Kennealy had the opportunity to cross-examine the child witnesses both at the child hearsay hearing and at trial, as well as the persons who heard and testified to the hearsay statements. Therefore, any failure of the trial court to enter individual findings of fact as to each of the Ryan factors did not result in a manifest error affecting a constitutional right, since all three children were available as witnesses. Thus, Kennealy’s failure to properly raise an objection to the trial court’s findings of reliability precludes appellate review.

D. CONCLUSION.

The trial court correctly admitted ER 404(b) evidence of uncharged acts of sexual abuse, correctly found the child witnesses to be competent, and correctly admitted their hearsay statements. It was not misconduct for the prosecutor to argue inferences from the evidence.

The State respectfully asks this court to affirm Kennealy's convictions.

Respectfully submitted this 21st day of January, 2009.

Carol La Verne

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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 37665-2-II,
on all parties or their counsel of record on the date below as follows:

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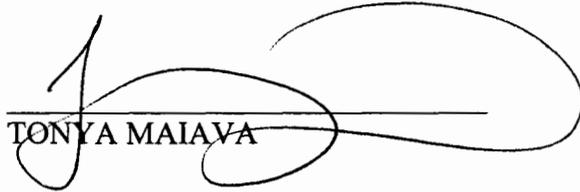
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 21st day of January, 2009, at Olympia, Washington.



TONYA MAIAVA