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COURT OF APPEALS

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STATE OF WASHINGTON

NO. 39823-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN CEARLEY

Appellant.

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

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in finding A.D.M.'s statements were not the result of undue influence by Joan Leach. CP 601 (Resolution of Disputed Facts 1).

2. The court erred in finding the Ryan¹ factors were substantially met. CP 602 (Resolution of Disputed Facts 4, Conclusion of Law 3).

3. The court erred in finding the circumstances of all A.D.M.'s out-of-court statements provided sufficient indicia of reliability. CP 603 (Conclusion of Law 4).

4. The court erred in admitting A.D.M.'s statements under the child hearsay statute, RCW 9A.44.120. CP 603 (Conclusion of Law 5).

5. The court erred in admitting A.D.M.'s statements to Nurse Davis under the medical hearsay exception in ER 803(a)(4). CP 603 (Conclusion of Law 6).

6. The court erred in entering its memorandum decision on motions in limine filed June 15, 2009. CP 509-10 (Findings 2, 2.1, 2.2, 2.3).

7. The court erred finding repetition of child hearsay via three separate witnesses was not unfairly prejudicial under ER 403. 6/18/09RP 37.

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

8. The court erred in instructing the jury it must be unanimous to answer “no” to the special verdict form.

Issues Pertaining to Assignments of Error

1. In response to doggedly suggestive questioning by a CPS investigator, the child witness, who had a motive to fabricate and whose character for truthfulness is questionable, made a number of inconsistent allegations, over the course of months to a number of people that appellant sexually abused her. The child admitted she did not like appellant, her stepfather and a disciplinarian. The child had also been sexually abused before appellant entered her life. Did the circumstances surrounding the child’s hearsay statements fail to establish their reliability as required by the child hearsay statute?

2. ER 803(a)(4) permits admission of hearsay statements made for purposes of medical diagnosis or treatment. This exception rests on the assumption that persons have an interest in being truthful to ensure they receive proper care and treatment. Is an out-of-court statement to a health care provider inadmissible under this rule when the child declarant did not seek out medical treatment, but instead was sent to the provider by law enforcement after a forensic interview and the provider never explained the importance of telling the truth?

3. Under ER 403, even relevant evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. Here, the child hearsay statements had minimal probative value because the child testified at length. Even if the out-of-court statements to the CPS investigator, the deputy, and the nurse were all independently admissible, was the minimal probative value substantially outweighed by prejudice to appellant from the needless repetition of damning statements made out of court?

4. A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer “no” to the special verdicts?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pacific County prosecutor charged appellant Steven Cearley with six counts of first-degree rape of a child and one count of first-degree child molestation. CP 13-18. The information also alleged the crimes were part of an ongoing pattern of abuse and the defendant used his position of trust to facilitate the crimes. CP 13-18. The jury found him guilty of child molestation and five of the six counts of rape of a child and answered “yes” to both aggravators for the five rape counts. CP 539-544. The court

imposed an indeterminate sentence with an exceptional minimum of 800 months and a maximum of life. CP 576. Notice of appeal was timely filed. CP 595.

2. Substantive Facts

a. Family Background

Cearley is a crane operator. 6/26/09RP² 4. He has been married to Mary³ Cearley since 2006. 6/24/09RP 124; 6/26/09RP 10. Cearley has six children, three from prior marriages and two with Mary, ranging in age from 22 to 1 and a half. 6/26/09RP 7-8. At the time of trial, Mary was pregnant with Cearley's seventh child. 6/26/09RP 7.

Cearley and Mary met in 2006. 6/26/09RP 11. Mary was working at a local coffee stand and raising her sister's two children after leaving a marriage to a severe alcoholic. 6/24/09RP 125, 134. The two fell in love quickly. 6/26/09RP 12. At first, Cearley visited Mary at her home in Aberdeen, occasionally spending the night. 6/26/09RP 14-15. After only a couple of months, Mary and the children moved into Cearley's home on Airport Road. 6/26/09RP 13-14. Within three months, the couple married. 6/26/09RP 12.

² There are 15 volumes of Verbatim Report of Proceedings, most of them encompassing multiple dates, with each date separately paginated. Thus, rather than referring to the volume numbers, this brief cites to the report of proceedings by date.

³ To avoid confusion, Cearley's other family members will be referred to using their first names.

Getting to know Mary also meant getting acquainted with her friend Ryan Medley. 6/26/09RP 15. Her best friend's brother, Medley was like family to Mary. 6/26/09RP 36; 6/26/09RP 171. After she left her former husband, Medley lived with her, at first in a motel and later in an upstairs apartment in the house she shared with the children in Aberdeen. 6/24/09RP 130, 135-36. Even before Mary separated from her former husband, Medley often helped her by watching the children while she worked because her husband was drinking. 6/24/09RP 131-32. Then seven-year-old A.D.M. and her younger brother were often left in Medley's care for six and eight hour stretches. 6/24/09RP 137-38.

After Mary became involved with Cearley, Medley continued to be like a part of the family, visiting when they lived on Airport Road, and living with them for two straight days to help them pack and move to a new home at 268 Route 105. 6/26/09RP 17. Beginning in March or April of 2007, Cearley and Mary lived in the 268 house, while A.D.M. and her younger brother lived with their grandmother.⁴ 6/26/09RP 19.

In September, 2007, A.D.M. and her brother moved back in with Mary and Cearley at the 268 house. 6/26/09RP 22. About the same time, Medley moved in with them. 6/26/09RP 23-24. He was doing volunteer work, but had no paying job. 6/25/09RP 173-74; 6/26/09RP 23-24.

⁴ A.D.M.'s father is a transient and her mother is not involved in her care. 6/26/09RP 20.

During that fall, Cearley worked a lot and was rarely home before five or six p.m. 6/25/09RP 169-70. His schedule varied, depending on the amount of work and the location of the job site. 6/26/09RP 36. Thus, in the afternoons when A.D.M. arrived home from school, Cearley was rarely there, but Medley usually was. 6/25/09RP 175; 6/26/09RP 32.

b. Allegations

On November 21, 2007, just days before Thanksgiving, Principal Joan Leach of Raymond Elementary called nine-year-old A.D.M. to her office. 6/18/09RP 146. A.D.M.'s teacher had asked the principal to check into a situation with A.D.M. 6/18/09RP 146. Waiting for A.D.M. in the principal's office were Erin Miller, an investigator from Child Protective Services (CPS), and Kris Camenzind, an advocate from the Crisis Support Network. 6/17/09RP 63.

Miller began the interview by asking questions to determine whether A.D.M. could distinguish the truth from a lie and eliciting a promise to tell the truth. 6/17/09RP 248-49. She then moved on to discussing the issue at hand. 6/17/09RP 250. She asked A.D.M. if there was anything at home she was not feeling safe or comfortable about. CP 283. A.D.M. said there was not. Id. She then asked A.D.M. to talk about various members of her family, things she liked or disliked about them. CP 293. Regarding her "Uncle Steve," A.D.M. said he was nice and that he told A.D.M. and her

brother he loved them. CP 293. She asked A.D.M. if anyone had touched her privates. CP 300-01. A.D.M. again said no. Id. Miller then asked A.D.M. why someone would say something happened to her. CP 301. A.D.M. did not know. Id. Miller went over the concepts of good touch and bad touch and asked A.D.M. whether anyone had touched her “girl spot.” CP 306-07. Again, A.D.M. said no. Id. Miller told her, “My main concern is from Uncle Steve . . . so why do you think somebody would say that something happened to you from Uncle Steve.” CP 307-08. A.D.M. did not know. Id. Despite repeated suggestions that Uncle Steve was doing something to her, during the first 46 minutes of this interview, A.D.M. consistently maintained that nothing had happened. 6/17/09RP 250-51; 6/18/09RP 128-33; CP 283-312.

After 46 minutes of questioning, Miller decided to take a break, to see if there were other avenues of questioning she should explore with A.D.M. 6/17/09RP 252. She paused the recording and left the room with Camenzind, leaving A.D.M. and Principal Leach alone. 6/18/09RP 134-35.

What happened during this break was a matter of dispute. Principal Leach claimed she did not entirely remember what she told A.D.M., but it would only have been that this was a safe place for her. 6/18/09RP 150. A.D.M. testified Leach said that she knew something was going on and that A.D.M. needed to tell the truth, but did not say what that something was.

6/17/09RP 65-66. However, in a previous interview, A.D.M. had stated under oath that Leach told her to say Uncle Steve touched her. 6/17/09RP 157. Eight minutes later, the recording of the interview resumed, and A.D.M. told Miller and Camenzind she had sexual contact with Uncle Steve. 6/17/09RP 257. She testified she did as Leach instructed, said what Leach wanted her to say. 6/17/09RP 158.

c. A.D.M.'s Trial Testimony

A.D.M. testified Cearley touched her chest both under and over her clothes, kissed her on the mouth, sometimes using his tongue, touched her butt with his penis and his hand, and touched her vagina with his penis and his mouth. 6/17/09RP 34-37. She testified it happened for the first time when she lived in Aberdeen before Mary and Cearley were married. 6/17/09RP 37. During the two-week period from September 1 – September 15, 2007, she testified Cearley touched her vagina with his mouth once a week. 6/17/09RP 44. Between September 16 and September 29, she testified he touched her vagina with his mouth once. 6/17/09RP 44. During the following two weeks there was no oral contact. 6/17/09RP 44. From October 14 to October 27, she testified, he touched her vagina with his mouth four times, and four times again between October 28 and November 10. 6/17/09RP 45.

A.D.M. also testified the first incident of anal intercourse occurred while the family still lived on Airport Road when Cearley told her to lie in front of him on the couch while watching television. 6/17/09RP 76. She also testified he sometimes came into her bedroom at night and engaged in oral or anal sex. 6/17/09RP 77-78. She never knew precisely what happened because on every occasion, either she was either face-down on the bed or covered her face with a pillow. 6/17/09RP 58-59. Although she told Erin Miller it always happened after school, at trial A.D.M. claimed that by "after school" she meant any time between her return home from school and her bedtime. 6/25/09RP 135-36, 155. She claimed Cearley touched her butt with his penis once every two or three weeks while the family lived at the 268 house, with the most recent occasion being the day before her interview in the principal's office. 6/17/09RP 46.

The day before the interview, A.D.M. testified, Cearley did as he usually did, snapping his fingers and pointing to her room. 6/17/09RP 49, 51. Her brother was in the kitchen; Mary was at an appointment with the baby. 6/17/09RP 51. A.D.M. did not know where Medley was, but Cearley was home because he had recently been laid off. 6/17/09RP 52. She testified Cearley had her take off her clothes and lie face down on the bed while he put his penis in her butt and it hurt. 6/17/09RP 54-56. After a minute or two, she testified, he threw a washcloth at her and told her to clean

up. 6/17/09RP 56. Not knowing what he meant, she simply threw the cloth downstairs to the family's laundry pile. 6/17/09RP 56.

d. Other Evidence

Toward the end of A.D.M.'s interview in the principal's office, Deputy John Ashley arrived. 6/23/09RP 15-16. A.D.M. repeated her accusations to him. 6/23/09RP 18-20. She told him about the washcloth and also described her sheets, Cearley's grey bathrobe, and the clothes she was wearing, a t-shirt with the word "cute" on the front and a light-colored pair of jeans with the back pocket starting to rip off. 6/23/09RP 20, 21-23. Ashley seized the jeans and shirt from the family's laundry pile, the bathrobe from the bathroom, and all the bedding from A.D.M.'s bed. 6/23/09RP 25-29, 34-35. Two spots on the interior crotch of A.D.M.'s jeans and two more spots on her sheets tested positive for sperm, and the sperm was a positive match for Cearley's DNA. 6/23/09RP 144-45, 146, 150-51.

Trevor Chowen, a forensic scientist with the Washington State Patrol's Crime Lab testified it was possible Cearley's DNA could have transferred to A.D.M.'s jeans from another item thrown into the same laundry pile, especially if compacted and pushed together when, as Mary testified, she moved the pile from the bottom of the stairs to another pile near the washing machine. 6/23/09RP 168-71, 211; 6/24/09RP 182-83. Cearley and Mary both explained it was his habit to wipe himself off after sex before

going upstairs to take a shower. 6/24/09RP 184-85; 6/26/09RP 76-78. Cearley's bedroom was downstairs, around the corner from the washing machine, while the only bathroom was upstairs. 6/24/09RP 183-84. He and Mary both testified that in the morning of the day Ashley searched the house, they had sex, after which Cearley toweled off as he usually did, and threw the towel into the family laundry pile. 6/24/09RP 183-84; 6/26/09RP 75-76, 124-25.

Cearley and Mary explained that A.D.M.'s bed had belonged to them until their recent purchase of a new bed. 6/24/09RP 198-201; 6/26/09RP 96-97. Since A.D.M. and her brother still spent weekends with their grandmother, in their absence, other family members and friends continued to use her bed. 6/24/09RP 202-04; 6/25/09RP 97-99, 115-17; 6/26/09RP 97-98. They also testified Mary was not particularly diligent about laundry; she did not know when the sheets on A.D.M.'s bed had last been washed, if ever. 6/24/09RP 204-05; 6/25/09RP 117-18; 6/26/09RP 99.

Ashley also seized a tube of "Doc's Anal Lube" from a dresser drawer in A.D.M.'s bedroom. 6/23/09RP 25-27. However, A.D.M. testified she had never seen it before and during the incidents she described, no such substance was ever used on her. 6/17/09RP 189. Mary and Cearley explained the lube was leftover from Cearley's prior marriage, and it ended up in the dresser drawer in their bedroom after the move from Airport Road.

6/24/09RP 217-19; 6/26/09RP 100-02. No one thought to remove it when A.D.M. moved into what used to be their bedroom. 6/24/09RP 221.

After her interview in the principal's office, Deputy Ashley and CPS referred A.D.M. to nurse practitioner Laurie Davis at the Sexual Assault Clinic for an examination. 6/10/09RP 201, 238. A.D.M. did not request medical assistance. 6/10/09RP 238. Davis testified A.D.M.'s anus spontaneously dilated more than two centimeters when she was placed in the prone position, which was very unusual. 6/18/09RP 193-94. Additionally, A.D.M. had four anal fissures, all of which had healed by the time of the second exam, indicating recent acute trauma. 6/18/09RP 196-97. However, anal and vulvar swabs found no semen. 6/18/09RP 230-31. Although Cearley has herpes, A.D.M.'s test came back negative for that as well. 6/18/09RP 222; 6/25/09RP 45.

After a contested hearing, the court also admitted A.D.M.'s hearsay statements to CPS investigator Miller, Deputy Ashley, and Nurse Davis. CP 509-10, 602-03.

e. Defense Case

The defense argued A.D.M. only pointed the finger at Cearley after being influenced by Principal Leach, CPS investigator Miller, Nurse Davis, and Deputy Ashley, all of whom had preconceived ideas about what had happened to her and by whom. A.D.M. testified she never named anyone

other than Cearley, but her classmates at school testified that at first she referred to simply the “one guy,” the “new guy,” her “uncle,” or even her “cousin.” 6/17/09RP 89, 116, 201-07; 6/24/09RP 52, 61, 86-87, 88-89. Mary testified that, because he was like family, A.D.M. referred to Ryan Medley as her “uncle” or “cousin.” 6/24/09RP 139; 6/25/09RP 107-08. Medley was usually home after school, when A.D.M. said the abuse usually happened, while Cearley was usually not. 6/23/09RP 215-16; 6/24/09RP 144; 6/25/09RP 137. Medley was also the most recent person to move into the home and bought a police scanner in the wake of the accusations against Cearley. 6/17/09RP 114; 6/24/09RP 150, 168-69.

A.D.M.’s precocious sexual knowledge was also explained by her exposure to yet more uncles in her life. Her uncle Matt, while visiting from West Virginia, discussed with A.D.M. that both Mary and A.D.M.’s mother were sent to a foster home after being molested by their father. 6/17/09RP 85-87. He also explained to her that molested meant sexually abused. 6/17/09RP 86-87. Yet another uncle, Mary’s former husband, who A.D.M. called Uncle Rich, molested A.D.M. by touching her chest and showed her a pornographic movie, in which she saw people inserting their private parts into each other. 6/17/09RP 81-04, 107-08. A 2004 medical examination, roughly a year before A.D.M. ever met Cearley, showed symptoms consistent with sexual abuse and genital manipulation. 6/18/09RP 214-15.

Cearley testified and gave his own account of the day before A.D.M.'s interview in the principal's office. He testified he was home, recovering from having a tooth pulled the day before. 6/26/09RP 56-57. He recalled Medley arriving home from his new job about the same time as A.D.M. and her brother arrived home from school. 6/26/09RP 59-60. After a fight with her brother, A.D.M. retired to her bedroom. 6/26/09RP 61. He did not know where Medley went after he removed his boots on the porch. 6/26/09RP 63. After 15-20 minutes spent going first to the bathroom, and then downstairs to get socks, Cearley sat on the couch in the living room. 6/26/09RP 64-65. Medley then joined him, coming from the end of the hall that contained only the bathroom and A.D.M.'s bedroom. 6/26/09RP 65-67. Cearley noticed nothing unusual, and about five minutes later, A.D.M. joined them in the living room, just as talkative as usual. 6/26/09RP 66, 68. Cearley denied ever molesting A.D.M. 6/26/09RP 70. Additional facts relating to the specific issues raised herein are more fully set forth below.

C. ARGUMENT

1. A.D.M.'S HEARSAY STATEMENTS WERE INADMISSIBLE UNDER STATE V. RYAN.

Normally, a child's hearsay statements regarding alleged abuse are inadmissible in court unless they meet one of the established exceptions such as "excited utterance" or a statement made for the purpose of medical

diagnosis. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). The Legislature added a new hearsay exception when it enacted RCW 9A.44.120. Under this statute, if a child witness testifies at a criminal trial, the child's out-of-court statements are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120.

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

(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained assertions about past fact; (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement; (8) how likely is it that the statement was founded on faulty recollection; and (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76.

Several of these factors have subsequently been criticized as unhelpful in assessing the reliability of hearsay statements. See A.E.P., 135 Wn.2d at 230-31. It remains clear, however, that a child's hearsay

statements are inadmissible unless the time, content, and circumstances of the statement provide sufficient indicia of reliability. RCW 9A.44.120(1).

Although each of the Ryan factors need not favor admission of child hearsay, the factors as a whole must be substantially met before admission will be affirmed on appeal. State v. Swan, 114 Wn.2d 613, 652, 790 P. 2d 610 (1990). A court's decision to admit child hearsay statements is reversible on appeal when the court abuses its discretion in weighing the Ryan factors. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994).

The court's findings here include no application of the Ryan factors to the facts of this case. CP 602. Instead, after reciting the facts, the court merely listed the Ryan factors and concluded they were substantially met. CP 602. The time, content and circumstances surrounding A.D.M.'s statements show no reason to suppose those statements were particularly trustworthy. Applying the Ryan factors to the facts of this case demonstrates that A.D.M.'s statements lack sufficient indicia of reliability. The State, therefore, did not overcome the presumption of unreliability, and the statements should have been excluded.

- a. A.D.M. Was Motivated to Lie Because She Did Not Like Cearley's Disciplinarian Role in Her Life and She Received Positive Attention at School for Her Accusations.

A.D.M.'s testimony reveals her dislike for Cearley. She testified she "just didn't like him, period" and that fact had nothing to do with the alleged sexual abuse. 6/25/09RP 145, 149. As her aunt's fifth boyfriend who she had only known for two years, A.D.M. could not be expected to be particularly attached to Cearley as a parent. CP 298. Cearley's adult daughter Lindsay confirmed that A.D.M. did not really care about Cearley. 6/25/09RP 121.

Nevertheless, Cearley tried to be father figure to A.D.M. 6/24/09RP 176. His role in her life was at least partly that of disciplinarian; she testified that if Uncle Steve told her what to do, she had to do it. 6/17/09RP 33; 6/25/09RP 31. A.D.M. didn't like Cearley disciplining her; he was strict, and A.D.M. got upset like any child would. 6/24/09RP 176-77; 6/25/09RP 99. Lindsay testified A.D.M. would get mad and stomp away if she got in trouble or failed to get her way. 6/25/09RP 120. A.D.M. knew the potential consequences of her accusations because her Uncle Matt told her that her mother and aunt had gone to a foster home after being molested by their father. 6/10/09RP 164.

A.D.M. also sought and received positive attention at school from her accusations. Before she began talking about being molested, the other children in her school did not particularly like A.D.M. or want to hang out with her. 6/24/09RP 48, 89-90. Since the accusations, A.D.M. has many more friends and seems to like the attention she receives from telling people about the situation. 6/24/09RP 50, 51, 63-64; 6/25/09RP 90.

Once the accusations were made, it is likely A.D.M. was motivated to stick to her story to avoid being caught in a lie. A.D.M. also had a strong motive to lie to protect Ryan Medley, who she had known far longer and was far more attached to than to Cearley. 6/24/09RP 130. These facts lead to a reasonable inference that A.D.M. had strong motives to lie about the identity of her abuser.

b. A.D.M. Was Not Sufficiently Trustworthy.

When A.D.M. was first questioned about what was going on, she repeatedly denied it. 6/10/09RP 310-16. For 46 minutes she maintained clearly and consistently that nothing was wrong, that she felt perfectly safe at home. Id.; CP 283-312. She did so after affirming that she understood the difference between the truth and a lie and promising to only talk about the truth. CP 266. She then changed her mind under an onslaught of leading questions in a room full of powerful adults including her principal. CP 283-

313. Then at trial she gave wildly inconsistent information as to what precisely happened and when and where.

For example, in a prior interview, A.D.M. said the “boy part” was in her “girl part” 40-50 times while she lived in the 268 house; at trial she testified it happened only once. 6/17/09RP 94-95. She also testified anal and vaginal sex occurred in Aberdeen, but in a previous interview, she stated that in Aberdeen there was only kissing. 6/17/09RP 95. In a prior interview, she stated Cearley had her touch his “boy part” with her hands 20 to 30 times, but at trial she testified it only happened three times. 6/17/09RP 99. She stated the tongue touched her girl part more than 20 times at trial, but previously said it only happened twice. 6/17/09RP 99-100. She told Erin Miller it only happened after school, but at trial claimed she could have meant the middle of the night. 6/17/09RP 102.

A.D.M. also admitted she had once been removed from her class in school as a punishment for lying. 6/17/09RP 175-76. A.D.M.’s general character and the content and circumstances of her statements reflect that she was not trustworthy and this factor weighs against admission of her out-of-court statements.

c. A.D.M.'s Statements Lacked Spontaneity and the Timing Shows They Were Influenced by Improperly Suggestive Questioning.

The hearsay statements at issue here were made in response to specific questioning by CPS investigator Miller, Deputy Ashley, and Nurse Davis. CP 313; CP 709; 6/10/09RP 338. A.D.M.'s statements to Miller were far from spontaneous because Miller's questions got more and more leading as A.D.M. continued to refuse to say what Miller wanted. CP 283-313. Even if Deputy Ashley had asked no questions, her statements to him would not be spontaneous, coming as they did toward the end of A.D.M.'s lengthy interview with Miller. Moreover, Ashley also asked direct questions assuming certain answers. He testified he "asked her the nature of the improper touching." 6/10/09RP 338. Nurse Davis began her interview with a direct question implicating Cearley, saying "Is your uncle the one who did this?" CP 709. Even if her answers had not already been tainted by Miller's highly suggestive questions, A.D.M.'s response, "Mmm hmm," and her subsequent discussion of events could hardly be called spontaneous. CP 709.

The questions reflected Miller, Ashley, and Davis's preconceived ideas about what had happened to A.D.M. and more importantly, about who was to blame. The improperly suggestive questioning techniques used should be considered as part of the Ryan factors, specifically as to the timing

of the statements and the circumstances under which they were made. In re Dependency of A.E.P., 135 Wn.2d 208, 231, 956 P.2d 297 (1998).

In A.E.P., the court agreed the circumstances of the child's initial disclosures appeared to render them "highly unreliable." 135 Wn.2d at 231. Although the court ultimately found it unnecessary to rule on the question of reliability, the court also noted the techniques used in subsequent interviews also "cast suspicions on the credibility of A.E.P.'s statements." Id. A.D.M.'s hearsay statements were similarly tainted.

A.E.P.'s initial interviewer was "clearly predisposed" to find sexual abuse because she herself had been victimized. Id. at 228. The interviewer had already asked A.E.P. whether anyone had touched her sexually 12 to 15 times. Id. The court concluded, "it appears [the interviewer] had a 'preconceived idea of what the child should be disclosing.'" Id. (quoting State v. Michaels, 136 N.J. 299, 642 A.2d 1372, 1378 (1994)). The Ryan case discussed this concern as well, noting, "Fifth, as regards timing, both mothers had been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children. They were arguably predisposed to confirm what they had been told." Ryan, 103 Wn.2d at 176.

Miller was similarly predisposed to find sexual abuse, as shown by the fact that she continued pressing A.D.M. for 46 minutes in the face of

continued denials that anything happened. CP 283-312. Davis and Ashley were also predisposed to find abuse because they were not told about these repeated denials. 6/10/09RP 234, 357. They were only told that A.D.M. disclosed sexual abuse; their questions proceeded from the assumption that her allegations were true. 6/10/09RP 234, 338, 357.

Davis conceded that, because she considered the exam a medical one, rather than forensic, she did not go over with A.D.M. whether she could promise to tell the truth before discussing the allegations with her. 6/10/09RP 228-29, 235, 243. She admitted that questioning by someone with preconceived ideas about what happened could negatively affect the reliability of a child's statements. 6/10/09RP 222. As in A.E.P., questioning by interviewers intent on uncovering what they thought they already knew renders the child's statements "highly unreliable." 135 Wn.2d at 231.

The court criticized the interviewer in A.E.P. for focusing on the child's father to the exclusion of other suspects such as the mother. 135 Wn.2d at 229. Miller, Ashley and Davis similarly focused on Cearley to the exclusion of all other suspects. Miller's questions about Ryan Medley and A.D.M.'s other uncles were minimal. CP 283-313. But she repeatedly insisted that something had happened to A.D.M. and that Uncle Steve was the culprit. CP 283-308.

After A.D.M. denied anything that made her feel unsafe or uncomfortable at home, Miller asked about "Uncle Steve" specifically, saying, "tell me about your Uncle Steve" and then "what happens when him and your aunt fight?" CP 288. This line of questioning failed to elicit anything incriminating, so Miller began asking concrete questions about good and bad touch. CP 299. When A.D.M. continued to deny any bad touching, Miller asked what A.D.M.'s brother did with Uncle Steve. CP 302. When A.D.M. began to talk about her aunt sending her to her room, Miller immediately changed the subject back to Cearley, asking, "Does your uncle ever punish you?" CP 303. Finally, in the face of A.D.M.'s repeated denials, Miller said, "See, and my main concern is somebody said that you said that something happened to you from Uncle Steve. . . So why do you think somebody would say that something happened to you from Uncle Steve?" CP 307-08. Miller's questions made clear her belief that A.D.M. was being sexually abused by her Uncle Steve.

Nurse Davis similarly focused on Cearley from the start. Davis knew A.D.M. had disclosed prolonged sexual assault, and Deputy Ashley had provided her a case synopsis. 6/10/09RP 201-02, 234, 357. She knew who the suspect was before the interview. 6/10/09RP 234. After asking A.D.M. who she lived with, Davis launched into the interview with a leading question that suggested Cearley's guilt to the exclusion of all others. "Is

your uncle the one who did this?" CP 709. A.D.M.'s statements were tainted by Miller and Davis's improper interview technique of focusing exclusively on only one suspect and leading the child to that conclusion.

Other improper interview techniques discussed in A.E.P. include using closed and leading questions, trying to force a reluctant child to talk, and telling a child what others have reported. 135 Wn.2d at 227-28. A.D.M.'s interviews were tainted by each of these tactics. Miller repeatedly discussed what others had reported: "So if somebody told me that somebody has touched you in your private spot, has anything like that happened?" CP 300. When A.D.M. said no, she persisted, asking "So why would somebody say they thought something happened to you?" CP 301. When A.D.M. again denied anything happening, Miller got even more specific, directly accusing Cearley: "somebody said that you said that something happened to you from Uncle Steve. . . So why do you think somebody would say that something happened to you from Uncle Steve?" CP 307-08. "So somebody said you were scared to go home yesterday because it was just Uncle Steve, why would that be?" CP 308-09. Miller essentially forced reluctant A.D.M. to talk by repeating to her what others had said and making clear from the circumstances that the interview would not end until A.D.M. incriminated her uncle.

In finding A.E.P.'s statements appeared unreliable, the court also noted that in other, less suggestive interviews, A.E.P. had refused to say her father touched her. A.E.P., 135 Wn.2d at 231. Similarly, until pressured by repeated suggestive and leading questions for 46 minutes, A.D.M. refused to say Cearley had touched her. CP 283-313. The A.E.P. court's discussion of reliability is persuasive in showing the proper analysis of the Ryan factors in the context of interviews tainted by suggestive questioning. For the same reasons the court found A.E.P.'s statements appeared "highly unreliable," the timing and circumstances of A.D.M.'s disclosures to Miller, Ashley, and Davis render her statements highly unreliable. This factor weighs against admitting them.

d. The General Nature of the Statements Does Not Support Admissibility Because Her Precocious Sexual Knowledge Was Easily Explained by Other Incidents in A.D.M.'s Life.

A.D.M.'s exposure to naked pictures on the internet and pornography by Ryan Medley and her Uncle Rich easily explains the sexual nature of her statements, as does her sexual abuse by Rich. 6/17/09RP 131; 6/17/09RP 107-08. In addition to fondling her chest, Uncle Rich watched pornography with A.D.M. 6/17/09RP 107-08. She recalled seeing people putting their privates into other people's privates in the film she watched with Rich. 6/17/09RP 107-08. She also saw pictures of naked people on Medley's

myspace page. 6/17/09RP 131. Thus, she has a basis of information for her statements that in no way depends upon sexual contact with Cearley.

e. The Other Ryan Factors Do Not Support Admissibility.

A.D.M.'s statements were not statements against interest, as shown by her motive to lie, discussed above. Her statements were express assertions of past facts. The possibility of faulty recollection is great, particularly given the repeated suggestive and leading questioning A.D.M. was subjected to. The very idea of sexual abuse appears to initially have been planted in her head by her Uncle Matt. With each friend, she told them precisely what Uncle Matt told her about molestation and abuse relating to her mother and aunt. 6/17/09RP 149-50. Nor can it be said that cross-examination would not show her lack of knowledge.

Thus, the Ryan factors show that A.D.M.'s statements were not sufficiently reliable to justify admission as child hearsay. Of all nine factors, only one, the fact that more than one person heard the statements, would weigh in favor of admission. All the others either weigh against admission or are unhelpful. Cearley's conviction should be reversed because the trial court erred in finding the Ryan factors were substantially met.

2. BECAUSE A.D.M. DID NOT SEEK MEDICAL ASSISTANCE, SHE DID NOT HAVE THE REQUISITE MOTIVATION TO BE TRUTHFUL AND THE MEDICAL HEARSAY EXCEPTION SHOULD NOT APPLY.

Statements made for the purpose of medical diagnosis or treatment are admissible as an exception to the hearsay rule under ER 803(a)(4), which provides:

Statements made for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

To be admissible under this exception, the statements must satisfy a two-prong test: (1) the declarant's motive in making the statement was consistent with the purposes of promoting treatment, and (2) the content of the statement was such as is reasonably relied on by a physician in treatment or diagnosis. State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989); United States v. Renville, 779 F. 2d 430, 436 (8th Cir. 1985). The basis for this exception rests on the presumption that patients have a strong motive to be truthful and accurate in seeking medical assistance. State v. Perez, 137 Wn. App. 97, 106, 151 P.3d 249 (2007). Under such circumstances,

no one would willingly risk medical injury from improper treatment by withholding necessary data or furnishing false data to the physician who would determine the course of treatment on the basis of that data.

Cassidy v. State, 536 A.2d 666, 678 (Md. App. 1988).

Statements of blame or attribution of guilt are generally inadmissible, while statements regarding causation fall under the medical hearsay exception. Perez, 137 Wn. App. at 106. An exception to this general rule is that statements identifying a perpetrator may be admissible when the victim is a child for two reasons. Id. First, children's statements of causation of their injuries are often inseparable from statements attributing fault. Id. Second, learning the identity of the perpetrator may be essential to removing the child from danger. Id. However, even under this exception, the two foundational requirements and the reason for the exception hold fast. The statements are only admissible if the declarant's motive was consistent with promoting treatment and the provider reasonably relied on the statements. State v. Carol M.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1997), rev'd and remanded for reconsideration on other grounds sub nom State v. Doggett, 136 Wn.2d 1019, 967 P.2d 548 (1998).

But the first prong of this test is not met when the patient did not seek medical treatment. When a child has not sought medical treatment, the State must present affirmative evidence the child understood her statements would further diagnosis and treatment. Carol M.D., 89 Wn. App. at 86. The State failed to meet that burden here.

In Carol M.D., the court reversed the trial court's ruling that a child's hearsay statements were admissible under the medical hearsay exception. 89

Wn. App. at 88. Although the child was *capable* of understanding the need for truthfulness to ensure appropriate treatment, there was no showing that she actually did understand. Id. at 85-86. To find a motivation consistent with treatment, the appellate court looked for, but did not find, any evidence that the therapist had explained to the nine-year-old child that her successful treatment depended on providing accurate information. Id. at 87. The therapist merely explained who she was and what she did. Id. The court found that insufficient. Id. The court concluded that if the child had sought treatment, that would likely be sufficient evidence of a motivation consistent with treatment. Id. at 86-87. But where the child did not desire medical assistance, the requisite motivation would not be presumed. Id.

Nor should such a motivation be presumed in this case. Like the witness in Carol M.D., nine-year-old A.D.M. did not seek out medical treatment. 6/10/09RP 238. On the contrary, she was sent to see Nurse Davis by Deputy Ashley, who communicated with Nurse Davis both before and after the examination. 6/10/09RP 238-39. Nurse Davis testified she explained to A.D.M. that the purpose of the examination was to determine her physical and mental health needs. 6/10/09RP 202. However, she did not connect that purpose to the importance of telling the truth or providing accurate information. 6/10/09RP 235. Nor did she tell A.D.M. she might

have medical problems that could only be resolved if she provided truthful information. 6/10/09RP 202.

Under these facts, the State did not come close to meeting its burden under Carol M.D. Because there is insufficient evidence of a motivation consistent with seeking medical diagnosis or treatment, A.D.M.'s statements to Nurse Davis should not have been admitted under the medical hearsay exception.

Division One came to a different conclusion in State v. Kilgore, 107 Wn. App. 160, 26 P.3d 308 (2001), where the court held that unless the child did not know what the medical provider is supposed to do, the court may infer a motive consistent with seeking treatment. 107 Wn. App. at 184. However, expanding the medical hearsay exception to include statements attributing fault without even requiring the foundational showing designed to ensure some modicum of reliability contradicts the intent behind the medical hearsay exception. See Robert R. Rugani, Jr., The Gradual Decline of a Hearsay Exception: the Misapplication of Federal Rule of Evidence 803(a)(4), the Medical Diagnosis Hearsay Exception, 39 Santa Clara L. Rev. 867, 869, 898-901 (1999) (identifying statements made by children to health care providers not sufficiently reliable unless it is clear child understood need to be truthful in providing information to provider). This court should instead follow Division Three's holding in Carol M.D. because inferring the

requisite motive without evidence renders illusory the foundational requirements essential to the validity of the medical diagnosis hearsay exception.

3. REPETITION OF CHILD HEARSAY UNFAIRLY BOLSTERED THE STATE'S CASE.

The child hearsay statute allows admission of otherwise inadmissible hearsay to alleviate proof problems frequently encountered in cases where children are often the only witnesses. State v. Bedker, 74 Wn. App. 87, 92-93, 871 P.2d 673 (1994) (citing State v. Jones, 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989)). The Bedker court found that RCW 9A.44.120 "is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse." 74 Wn. App. at 92.

A child's ability to provide live testimony can be thwarted by feelings of intimidation or confusion engendered by the courtroom setting, embarrassment at the sexual nature of the testimony, discomfort with the role of accuser against someone who may be a close relative or family friend, unwillingness to recount or recall abuses, or failed memories. Id. at 92-93. Thus, the legislature has made it possible to provide the proof necessary by way of reliable hearsay statements. Id. at 93 (citing Jones, 112 Wn.2d at 493-94).

Although sensible in the abstract, these goals must be balanced “against the concern that the use of such hearsay should not create too great a risk of an erroneous conviction. . . .” Jones, 112 Wn.2d at 495. The special conditions set forth in RCW 9A.44.120 do not alleviate the inherent objection to hearsay evidence, and a court should consider with heightened scrutiny the argument that cumulative hearsay testimony is unfairly prejudicial. Even relevant evidence is inadmissible when the probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury with needlessly cumulative evidence. ER 403.⁵ Even assuming, for the sake of argument, that some of A.D.M.’s out-of-court statements were admissible under the child hearsay statute, the repetition of her statements by three different witnesses, Miller, Davis, and Ashley, caused a prejudicial bolstering effect that far outweighed any minimal probative value.

First, there was no need for hearsay testimony in this case. A.D.M. was able to overcome her youth and to testify as to all necessary details of the alleged sexual acts. The hearsay statements of the CPS investigator, the deputy, and the nurse served no purpose other than to provide repetition of her story. There is no legitimate purpose in allowing adults to repeat a child

⁵ ER 403 provides in full: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

witness's prior consistent statements alleging sexual misconduct. The improper bolstering resulting from such testimony can easily mislead jurors.

In this case, by allowing several witnesses to repeat A.D.M.'s prior statements alleging sexual contact, the trial court allowed her testimony to unfairly take on greater importance. See State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934). "A witness may not fortify his testimony or magnify its weight by showing that he has previously told the same story on another occasion out of court." Lynch, 176 Wash. at 351. The Lynch court explained, "If a witness were permitted to do that, then garrulity would supply veracity." Lynch, 176 Wash. at 351-52. This analysis applies with particular vigor in a case such as this, where the child was over nine years old at the time of trial and had no difficulty relating her story to the jury. A.D.M. was not intimidated or confused by the courtroom, and her memory did not become a problem. Moreover, the problem identified in Lynch, of garrulity substituting for veracity, is even more problematic here, where A.D.M.'s many statements were not made of her own accord, but arose from persistent and suggestive interviewing by agents of the State. The justifications for the hearsay exception are absent.

The child hearsay exception should not be used as an open-ended exception to the hearsay rule that allows admission of prior consistent

statements where a child victim is able to testify fully and accurately at trial. Some need must be identified to provide the basis for admission.

While additional statements might be admissible if offered to rebut a charge of recent fabrication, *see Lynch*, 176 Wash. at 352; ER 801(d)(1), the statements admitted in this case do not meet that purpose. Prior consistent statements have negligible probative value and are generally inadmissible because repetition does not make something true. *Perez*, 137 Wn. App. at 107. Nevertheless, they may be admissible if they predate a bribe or other motive to lie. *Id.* Statements made before the pressure arose may rebut the claim of fabrication under pressure. *Id.*

But the additional statements to Davis and Ashley were made *after* the initial interview at which the alleged fabrication arose. Thus, they are not “prior” consistent statements. *See, e.g., State v. Makela*, 66 Wn. App. 164, 831 P.2d 1109 (1992) (“if the statement were made after the events giving rise to the inference of fabrication, it would have no probative value”); *State v. McDaniel*, 37 Wn. App. 768, 771, 683 P.2d 231 (1984) (reversible error when prior consistent statements should have been excluded because not made at a time when the motive to fabricate did not exist). At best, these statements demonstrate that, having once decided to fabricate, A.D.M. continued to do so.

Additionally, prior consistent statements should only be admitted when they are made under circumstances indicating it was unlikely the declarant foresaw the legal consequences of her statements. Makela, 66 Wn. App. at 168-69 (citing State v. Epton, 10 Wn. App. 373, 377, 518 P.2d 229 (1974)). A.D.M. was fully aware of the legal consequences of her statements because her Uncle Matt had introduced the subject by talking about her grandfather going to jail for molesting her mother and aunt. 6/17/09RP 170-71. If that were not clear enough, after her interview with Miller, where a sheriff's deputy appeared towards the end, A.D.M. could hardly fail to appreciate the legal consequences of her statements.

The parade of witnesses all testifying that A.D.M. accused Cearley of sexually abusing her had the obvious effect of bolstering A.D.M.'s testimony. Even though the jury heard the inconsistent statements A.D.M. made to the witnesses and that she made herself, it is difficult to imagine a juror not inferring "where there is smoke there is fire" and convicting Cearley just based on the sheer number of times A.D.M. told people Cearley abused her. The admission of this prejudicial testimony constitutes reversible error.

4. THE COURT ERRED IN INSTRUCTING THE JURY IT MUST BE UNANIMOUS TO ANSWER “NO” TO THE SPECIAL VERDICT FORM.

The jury instruction accompanying the special verdicts in this case informed the jury as follows:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 537. Under State v. Bashaw, ____ Wn.2d ____, ____ P.3d ____ (no. 81633-6, filed July 1, 2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), this instruction was in error.

When a jury is unable to reach a unanimous decision on a special verdict, this is the equivalent to a final determination that the State has not proved the special finding beyond a reasonable doubt. Bashaw, slip op. at 15. While the jury must be unanimous to answer “yes” to a special verdict, unanimity is not required to find that the State failed to prove its case. Id. at 14.

This error is not harmless merely because this jury apparently reached unanimity under the incorrect instruction. Bashaw, slip op. at 16. In Bashaw, the court clarified that the error is the procedure by which the jury arrived at its verdict. Slip op. at 16. “The result of the flawed deliberative process tells us little about what result the jury would have reached had it

been given a correct instruction.” Bashaw, slip op. at 16-17. Thus, despite the jury’s unanimous “yes” answer to the special verdict in Bashaw, the court could not conclude the instructional error was harmless beyond a reasonable doubt and vacated the sentence enhancements. The same result is compelled here. Cearley’s exceptional minimum sentence should be vacated.

D. CONCLUSION

Because Cearley’s conviction rests on inadmissible child hearsay that was also needlessly cumulative and far more prejudicial than probative, Cearley asks this court to reverse his conviction.

DATED this 13th day of August, 2010.

Respectfully submitted,

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No. 39823-1-II

Certificate of Service by Mail

On August 13, 2010, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

David Burke
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Steven Cearley, 332286
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Containing a copy of the brief of appellant, re Steven Cearley.
Cause No. 39823-1-II, in the Court of Appeals, Division II, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch

8-13-10
Date
Done in Seattle, Washington

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BY [Signature]