

NO. 39823-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN CEARLEY,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

COURT OF APPEALS  
DIVISION II

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

The Honorable Michael J. Sullivan, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>STATEMENT OF THE CASE IN REPLY</u> .....	1
B. <u>ARGUMENT IN REPLY</u> .....	1
1. THE COURT ERRED IN FINDING THE RYAN FACTORS WERE SUBSTANTIALLY MET BECAUSE THE FACTUAL FINDINGS AT BEST ONLY MENTION THREE OF THE NINE FACTORS. ....	1
2. INCONSISTENCIES IN THE CHILD’S STATEMENTS MAY SHOW A LIKELIHOOD OF FAULTY COLLECTION, ONE OF THE RYAN FACTORS. ....	3
3. CEARLEY DID NOT OPEN THE DOOR TO IMPERMISSIBLY CUMULATIVE AND REPETITIVE HEARSAY.....	3
a. <u>The Open Door Doctrine</u> .....	4
b. <u>Cearley Did Not Open the Door to Unnecessarily             Cumulative Evidence.</u> .....	6
D. <u>CONCLUSION</u> .....	11

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Ma'ele v. Arrington</u> 111 Wn. App. 557, 45 P.3d 557 (2002).....	5
<u>Patterson v. Kennewick Public Hosp. Dist. No. 1</u> 57 Wn. App. 739, 790 P.2d 195 (1990).....	5, 9
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	5
<u>State v. Borboa</u> 157 Wn.2d 108, 135 P.3d 469 (2006).....	2
<u>State v. Ciskie</u> 110 Wn.2d 263, 751 P.2d 1165 (1988).....	4
<u>State v. Gefeller</u> 76 Wn.2d 449, 458 P.2d 17 (1969).....	4, 5
<u>State v. Grogan</u> 147 Wn. App. 511, 195 P.3d 1017 (2008).....	2
<u>State v. Howard</u> 52 Wn. App. 12, 756 P.2d 1324 (1988).....	6
<u>State v. Keneally</u> 151 Wn.App. 861, 214 P.3d 200 (2009).....	3
<u>State v. Pogue</u> 104 Wn. App. 981, 17 P.3d 1272 (2001).....	5
<u>State v. Swan</u> 114 Wn.2d 613, 790 P.2d 610 (1990).....	2, 3

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Swanson</u> 62 Wn. App. 186, 813 P.2d 614 (1991).....	2
<u>State v. Welchel</u> 115 Wn.2d 708, 801 P.2d 948 (1990).....	6, 7
<u>State v. Woodward</u> 32 Wn. App. 204, 646 P.2d 135 (1982).....	3

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 403 .....	4, 6, 10
ER 404 .....	4
ER 801 .....	9
 Karl B. Tegland <u>5A Washington Practice: Evidence Law and Practice</u> § 103.14 (2010).	4, 5

A. STATEMENT OF THE CASE IN REPLY

Principal Leach initially testified that, before A.D.M.'s interview in her office, she did not know who the suspected abuser was. 6/10/09RP 249. However, on cross-examination, she admitted she could not recall whether she had been told who the perpetrator was. 6/10/09RP 271.

Regardless of whether she was told before the interview, she certainly had that information before the break at which she spoke privately with A.D.M. In the first part of the interview, before the break, Erin Miller clearly and repeatedly identified Cearley as the suspect. CP 307-08. Miller stated, "My main concern is, somebody said that you said that something happened to you from Uncle Steve." CP 307-08. During the period before the break, Miller also asked A.D.M., "So why do you think somebody would say that something happened to you from Uncle Steve?" CP 308.

B. ARGUMENT IN REPLY

1. THE COURT ERRED IN FINDING THE RYAN<sup>1</sup> FACTORS WERE SUBSTANTIALLY MET BECAUSE THE FACTUAL FINDINGS AT BEST ONLY MENTION THREE OF THE NINE FACTORS.

The court did not discuss the Ryan factors or explain how they related to the facts of this case. In its findings of fact and conclusions of law after the Ryan hearing on the admissibility of A.D.M.'s out-of-court

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<sup>1</sup> State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). The factors a court must consider when determining admissibility of child hearsay are found on page 15 of the opening Brief of Appellant.

statements, the court merely listed the Ryan factors and concluded they were substantially met. CP 596-607. The court did not explain how the facts it found related to the Ryan factors, and the factual findings at best relate to only three of the factors. CP 596-607. The court's findings do not mention whether A.D.M. had a motive to lie. CP 596-607. They do not mention whether the court found the statements to be spontaneous. Id. They do not discuss the likelihood of faulty recollection or whether the circumstances give reason to suppose the child misrepresented Cearley's involvement. The court did not state which of the factors were met or by what evidence.

A valid exercise of the court's discretion to determine admissibility under Ryan requires, at a minimum, consideration of each of the Ryan factors. For example, in Swan the trial court's rulings "demonstrated careful consideration of the Ryan factors." Swan, 114 Wn.2d at 648. In State v. Grogan, 147 Wn. App. 511, 195 P.3d 1017 (2008), "the trial court made specific findings on each Ryan factor" and "orally considered each Ryan factor. Grogan, 147 Wn. App. at 515, 521. In State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006), the trial court "considered each of the Ryan factors in turn" and determined the statements were reliable. Borboa, 157 Wn.2d at 122. In State v. Swanson, 62 Wn. App. 186, 813 P.2d 614 (1991), the court considered each Ryan factor in its memorandum decision. Swanson, 62 Wn. App. at 193. In State v. Keneally, 151 Wn.App. 861, 214

P.3d 200 (2009), the trial court mentioned several of the Ryan factors, finding the child's statements were spontaneous, were made close to the incident, and were made without any apparent motive to lie. Id. at 871. The State cites no authority whatsoever for its assertion that the court need not discuss the factors individually. Brief of Respondent at 32.

2. INCONSISTENCIES IN THE CHILD'S STATEMENTS MAY SHOW A LIKELIHOOD OF FAULTY RECOLLECTION, ONE OF THE RYAN FACTORS.

In the opening brief, Cearley noted several inconsistencies among A.D.M.'s various out-of-court statements. Inconsistent statements are relevant to the required analysis under Ryan because they may demonstrate a likelihood that A.D.M.'s recollection was faulty. See, e.g., State v. Swan, 114 Wn.2d 613, 651-52, 790 P.2d 610 (1990) (consistent statements indicate low possibility of faulty recollection). The State argues inconsistencies do not establish a witness is incompetent. Brief of Respondent at 32-33 (citing State v. Woodward, 32 Wn. App. 204, 207-08, 646 P.2d 135 (1982)). This is correct but immaterial, as Cearley does not challenge A.D.M.'s competency to testify.

3. CEARLEY DID NOT OPEN THE DOOR TO IMPERMISSIBLY CUMULATIVE AND REPETITIVE HEARSAY.

The State argues it was permitted to repeat A.D.M.'s hearsay statements via three different witnesses after she testified, despite counsel's

objection to cumulative prejudicial evidence under ER 403 because Cearley “opened the door” either via his opening statement, his cross-examination of A.D.M. and attacks on her credibility, or his presentation of an “other suspect” defense. This argument should be rejected. Permissible defense strategy, achieved through admissible evidence, does not open the door to inadmissible evidence.

a. The Open Door Doctrine

The open door doctrine is based on concepts of fundamental fairness and dictates that one party may not present a partial picture of a material issue while preventing the opposing party from further exploring the same issue. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). Commentator Karl B. Tegland divides the doctrine into two rules. First, when one party presents evidence of dubious admissibility, the opposing party may be permitted to present otherwise inadmissible evidence in response. Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 103.14 (5th ed. 2010). For example, when a criminal defendant denies past misconduct, the State may present evidence of past misconduct, otherwise inadmissible under ER 404(b). State v. Ciskie, 110 Wn.2d 263, 280-81, 751 P.2d 1165 (1988).

A defense strategy that does not rely on inadmissible evidence does not implicate this version of the open door doctrine. State v. Pogue, 104 Wn.

App. 981, 17 P.3d 1272 (2001). Pogue was charged with possession of cocaine. Id. at 981-82. He testified the cocaine was not his and he had no idea it was in his sister's car; he also suggested the police may have planted the evidence. Id. at 983. The State argued this testimony opened the door to otherwise inadmissible evidence of Pogue's prior conviction for delivering cocaine. Id. at 984. The court rejected this argument, finding the unwitting possession defense was not akin to presenting character evidence, which would have opened the door to character evidence by the State. Id. at 986-87. In short, admissible evidence in support of a valid defense theory does not open the door to inadmissible evidence. See id.; Patterson v. Kennewick Public Hosp. Dist. No. 1, 57 Wn. App. 739, 744, 790 P.2d 195 (1990).

In the second branch of the open door doctrine, when one party raises a subject, the opposing party is permitted to fully explore that subject in response. Tegland, supra, § 103.15; State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). “[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

Evidence admissible under this second rule remains subject to the rules of evidence. See Ma'ele v. Arrington, 111 Wn. App. 557, 45 P.3d 557 (2002). In Ma'ele, the defendant in a personal injury action presented evidence the plaintiff had discontinued his medical treatment. Id. at 565.

This opened the door for the plaintiff to testify he stopped treatment only because the record of injuries might hurt his military career. Id. The plaintiff also wanted to testify he could not afford further medical treatment, but the trial court excluded the testimony as misleading and confusing to the jury under ER 403. Id. The appellate court affirmed the trial court's judgment that, although the door to the topic was opened, ER 403 still applied. Id. at 565-66.

b. Cearley Did Not Open the Door to Unnecessarily Cumulative Evidence.

The State first argues Cearley opened the door to cumulative evidence because of "sweeping statements" during opening argument that Cearley was innocent. Brief of Respondent at 38. The State cites no authority for its assertion that strenuously maintaining one's innocence during opening arguments permits the State to present otherwise inadmissible evidence. As discussed above, the open door doctrine permits responses when the opposing party presents certain types of evidence. It is well established that opening statements are not evidence. State v. Howard, 52 Wn. App. 12, 24, 756 P.2d 1324 (1988).

Moreover, references to the State's evidence during opening statements do not open the door to the State's use of that evidence. State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990). In Whelchel, the State

argued vigorously at a pretrial hearing that recorded statements by Whelchel's co-defendants were admissible. 115 Wn.2d at 727-28. In opening statements, defense counsel addressed this evidence and used it to support the defense theory of the case. Id. at 726-27. The State argued the defense thereby waived objection to the statements. Id. at 726-27. The court rejected this argument finding defense counsel's opening statement was proper and did not open the door to otherwise inadmissible evidence. Id. at 726-27. As in Whelchel, Cearley reasonably focused on inconsistencies in the State's evidence and used it to bolster the defense theory of the case. 115 Wn.2d at 727-28. As in Whelchel, attempting to disarm the State's evidence during opening statements did not open the door. 115 Wn.2d at 728.

Second, the State argues Cearley opened the door by arguing that A.D.M. never gave a name until the interview in the principal's office and by arguing she was influenced by her Uncle Matt and the questions of her peers. Brief of Respondent at 38-39. In fair response to that argument, the State was likely justified in presenting A.D.M.'s statements to her peers before the interview. But those are not the statements Cearley challenges. See Brief of Appellant at 32. Cearley challenges the subsequent statements to Miller, nurse Davis and deputy Ashley that were unnecessarily cumulative of A.D.M.'s own testimony. Id.

Third, the State argues Cearley opened the door by presenting an “other suspect” defense, arguing it was not he but Ryan Medley who committed these offenses. Brief of Respondent at 38, 44-45. Because Cearley did not attempt to show this defense via inadmissible evidence, it did not open the door under the first type of open door case. And under the second rule, by broaching the subject of Ryan Medley, Cearley opened the door to evidence by the State on the subject of Ryan Medley’s potential involvement or lack thereof. But the evidence that may be presented on that topic remains limited by the Rules of Evidence. See Ma’ele, 111 Wn. App. at 565-66.

Finally, the State argues Cearley opened the door by attacking A.D.M.’s credibility, pointing out inconsistencies in her statements, and arguing the claims were fabricated. Brief of Respondent at 40-43, 45-46. Pointing out inconsistencies in testimony is cross-examination on the proper topics of witness bias and ability to recall events. It does not open the door to inadmissible evidence. Moreover, when A.D.M.’s statements were allowed to be repeated so many times before the jury, pointing out the inconsistencies was the only strategy left to minimize the impact of the repetition.

Even had Cearley been responsible for admitting some of A.D.M.’s statements, instead of merely pointing out inconsistencies in them once

admitted, that would not justify permitting additional statements. See Patterson, 57 Wn. App. at 744. In Patterson, the plaintiff stated he was told delivery by his corporation would take 30-60 days. Id. at 744. The court held this was not hearsay because it was admitted solely to show its effect on the listener. Id. at 744. The defendant attempted to rebut this testimony with a letter from the same corporation stating delivery could have occurred in less than 30 days. Id. at 744. Although the letter was hearsay, the defendant argued the plaintiff had opened the door. Id. at 744. The court rejected this argument and held that the letter was inadmissible hearsay that could not be used to support the defendant's case. Id. at 745. Admission of one statement under an exception to the hearsay rules does not permit admission of other inadmissible statements by the same declarant. Id. Cearley reasonably responded to the State's evidence by cross-examining witnesses for inconsistencies. He did not seek to admit the hearsay. Even if he had, it would not open the door to otherwise inadmissible evidence.

A claim of recent fabrication does open the door to prior consistent statements under ER 801(d)(ii). But this rule does not justify admitting A.D.M.'s statements to Miller, Davis, and Ashley. The defense theory was that the fabrication occurred in the interview with Miller in the principal's office. Thus, her statement to Miller at that time and her subsequent statements to Davis and Ashley are not "prior" consistent statements. See

Brief of Appellant at 34-35. The rule does not permit hearsay showing that the witness repeated the alleged fabrication several times. ER 801(d)(ii).

Cearley asks this Court to find that the court abused its discretion in admitting unnecessarily cumulative hearsay under ER 403. However, even in the event this Court should disagree, the defense did not open the door to the evidence.

The State's only argument that meets the substance of the ER 403 issue is its argument that the statements made to Davis and Ashley were not unnecessarily cumulative because Davis and Ashley, as medical and law enforcement professionals, respectively, were focused on different aspects of A.D.M.'s statement. This argument should be rejected because the attitude of the listener is irrelevant to the ER 403 analysis. ER 403 requires a balancing of probative value on the one hand and the danger of unfair prejudice and needlessly cumulative evidence on the other. The State cites no authority for its assertion that the listener's focus (whether on forensic evidence or health care) is relevant. The attitude of the listener or the listener's focus in eliciting the statements does not add to or otherwise affect the probative value of the statements when their substance was virtually identical. The statements made to Miller, Davis and Ashley should have been excluded because they merely provided unnecessary repetition of facts already elicited in A.D.M.'s live testimony.

D. CONCLUSION

For the foregoing reasons and for the reasons cited in the opening Brief of Appellant, Cearley asks this Court to reverse his convictions.

DATED this 18<sup>th</sup> day of November, 2010.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 39823-1-II
	)	
STEVEN CEARLEY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18<sup>TH</sup> DAY OF NOVEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF NOVEMBER 2010.

X *Patrick Mayovsky*