

NO. 39823-1-II

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

STATE OF WASHINGTON,

Respondent

v.

STEVEN CRAIG CEARLEY

Appellant.

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

The Honorable Michael J. Sullivan, Judge

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DIVISION II
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BRIEF OF RESPONDENT

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A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion in finding that A.D.M.'s statements were not the result of undue influence.

2. The trial court did not err in finding that the so-called *Ryan* factors were substantially met.

3. The trial court did not err in finding the circumstances of A.D.M.'s out-of-court statements provided sufficient indicia of reliability.

4. The trial court did not err in admitting A.D.M.'s statements under the child hearsay statute, RCW 9A.44.120.

5. The trial court did not err in admitting A.D.M.'s statements to Nurse Practitioner Davis under the medical hearsay exception.

6. The trial court did not err in entering finding of fact #25.

7. The trial court did not err in its memorandum decision on motions in limine, filed on June 15, 2009.

8. The trial court did not err in finding that testimony concerning child hearsay via three separate witnesses was not unfairly prejudicial under ER 403.

9. The trial court did err in instructing the jury it must be unanimous in answering "no" to the special verdict form; but since the offensive language adopted by the court was identical to the language proposed by the Defendant in his proposed instructions, and since the Defendant did not propose remedial instructions at any time, this issue may not be raised for the first time on appeal.

B. STATEMENT OF THE CASE

1. Substantive Facts.

The victim of this case, A.D.M. (DOB 1/4/98) is the biological niece of Mary Cearley, who acquired custody of A.D.M. when A.D.M. was in

still in kindergarten. 6/17/09RP 25. A.D.M. and her younger brother lived with Mary Cearley off and on up until the time the allegations of sexual abuse by Mary's husband, Steven Craig Cearley, were brought to light in November, 2007. Ryan Medley had been a friend of the family for many years, and had lived with Mary Cearley and A.D.M. on more than one separate occasion.

6/17/RP 28-29. Ryan Medley was the son of Mary Cearley's friend, and was not related to A.D.M. in any way other than as a family friend.

6/17/09RP 29. According to A.D.M., she had very little interaction with Ryan Medley during the time he lived with her at 268 State Route 105.

6/17/09RP 29. According to A.D.M., Ryan Medley never touched A.D.M. inappropriately at any time.

6/17/09RP 89.

Steven Cearley came into A.D.M.'s world when he started dating Mary Cearley, when A.D.M. was between the ages of 5 and 7. 6/17/09RP 22-37. At this time, Mary lived at a location referred

to as Ash Street in Aberdeen. 6/17/09RP 26.

According to Mary Cearley, she started dating Defendant in November 2005, when A.D.M. would have been 7 years of age. 6/24/09RP 234. While A.D.M. was still living on Ash Street, Steven Cearley would sometimes kiss A.D.M. on the mouth. 6/17/09RP 37. See also 6/18/10RP 75.

In January, 2006, A.D.M. and her brother moved into Steven Cearley's residence at Airport Road in Pacific County, Washington. 6/24/09RP 234. A.D.M. lived with Mr. Cearley at the Airport Road address while she was in the second grade, and when she was seven to eight years of age. 6/17/09RP22-23. While A.D.M. lived at the Airport Road address, Steven Cearley would sometimes kiss A.D.M. on the mouth, and would use his tongue when doing so. 6/17/09RP 37. During the time A.D.M. lived with Mr. Cearley at the Airport Road address, Mr. Cearley continued having inappropriate contact with A.D.M. 6/17/09RP 75. On one particular occasion, Steven

Cearley told A.D.M. to lay in front of him on the couch, and then pulled down her pants from behind and contacted her bottom with his penis. Id at 76-77. On other occasions at the Airport Road address, Steven Cearley would come into A.D.M.'s bedroom at night, where he would have anal and vaginal intercourse with A.D.M. Id at 77-78.

Sometime when A.D.M. was in the third grade, she moved into Steven Cearley's home at 268 State Route 105 in Pacific County, after living a short while (seven months to a year) with her grandmother, Adele Elliott, in Montesano.

6/17/09RP 24. 6/17/09 RP 27-8. This was approximately 2006 or 2007. 6/17/09RP 28.

A.D.M. continued living at 268 State Route 105 well into the fourth grade (i.e., through 2007). Id at 24. While A.D.M. lived with Steven Cearley at 268 State Road 105, Cearley would sometimes kiss A.D.M. on the lips, and would use his tongue when doing so. 6/17/09RP 37-38. During this time, Steven Cearley would also touch A.D.M. on

her breasts. 6/17/09RP 39. These contacts occurred both at the house and when A.D.M. was alone with Steven Cearley in the car. 6/17/09RP 40. During the time that A.D.M. was in the fourth grade, i.e., during the months of August, September, October, and November, 2007, Steven Cearley also had oral contact with A.D.M.'s genitalia on multiple occasions with an average frequency of approximately once or twice a week. 6/17/09RP 41-45. During this same time period, Steven Cearley engaged in anal sexual intercourse with A.D.M. on multiple occasions 6/17/09RP 46.

The last time the abuse occurred was on Monday, November 19, 2007. 6/17/09RP 50-51. A.D.M. was watching TV, and Steven Cearley snapped his fingers and pointed to her room. 6/17/09RP 51. This was a signal that Mr. Cearley used with A.D.M. on more than one occasion. 6/17/09RP 49. A.D.M.'s younger brother was in the kitchen doing his homework and her Aunt Mary was attending a WIC appointment. Id. Mr.

Cearley was wearing his robe and A.D.M. was wearing jeans and a tee-shirt. 06/17/09 RP 54. Cearley told A.D.M. to remove her clothes. Id. She laid down on the bed with her head facing a pillow. Id. at 54-55. Cearley then engaged in anal intercourse with A.D.M. Id at 55. This lasted for a short time during which A.D.M. experienced pain. Id. at 56. Afterwards, Cearley gave A.D.M. a wash cloth and told her clean up. Id. A.D.M. did not know what to do with the wash cloth, and threw it down the stairs, and then got dressed. Id. The laundry room at the bottom of the stairs was where family members typically put clothing that was to be washed. Id. at 57.

During these incidents, A.D.M. typically was not able to see what was going on because her face was either covered with a pillow when she was on her back, or facing the pillow when she was on her stomach. Id. at 59-60. A.D.M. herself would place the pillow over her own face

because she thought that she was too young for what was going on and she did not wish to see it. Id. at 60. See also 6/18/09RP 78. Cearley would regularly tell A.D.M. not to tell anyone about what he did. 6/17/RP at 60.

The following day, A.D.M. was called to the principal's office at school, where she initially denied that Steven Cearley had touched her inappropriately, but where she eventually reported the abuse that had been occurring. 6/17/09RP 251.

A.D.M. was called to the principal's office after she had disclosed the abuse to five of her classmates. 6/17/09RP 66. A.D.M. disclosed the abuse to two of the five children some months prior, and to three of the five classmates one day prior to being called into the principal's office. Id. The parents of two of her classmates subsequently relayed the information to the school principal. 6/10/09RP 248. A.D.M. specifically chose two of her class mates (J.K.

and A.B.) to tell because of who their parents were. 6/17/10RP 215. The parent of one was a teacher and the parent of the other was a lawyer. Id. A.D.M. chose these classmates in hopes that they would pass the information on to their parents, who would in turn, bring the matter to the attention of the authorities, and bring the abuse to an end. Id at 215-217.

Erin Miller of Children's Services interviewed A.D.M. in the principal's office on November 21, 2007. 6/17/09RP 245. Ms. Miller followed her standard procedures for building rapport with the child, explaining to the child the purpose of the audio recording device, going through questions regarding the difference between telling the truth and lying, and so forth. Id at 245-250. Ms. Miller went on to inform A.D.M. that someone had told her that "something had happened," and that they were concerned about her and wanted to make sure she was okay. Id. at 250. When A.D.M. was initially

asked about the inappropriate touching, A.D.M. denied that anything had taken place. *Id* at 251. Eventually, A.D.M. broke down and revealed a small part of the abuse that had occurred between Mr. Cearley and herself. *Id* at 256-258. Ms. Miller also described the change in demeanor that occurred between the time when A.D.M. first denied any inappropriate behavior and the time she finally changed her story and stated that her Uncle Steve had been touching her inappropriately. *Id.* Ms. Miller described A.D.M.'s demeanor beforehand as "somewhat fidgety." *Id* at 256. Just before disclosing that the abuse had indeed occurred, A.D.M.'s gaze "went down, her body kind of folded itself, and she ended up putting her head down on the table and she started crying." *Id* at 258. *See also* 6/18/09RP 11. A.D.M. provided a fairly detailed description of the most recent incident, which had occurred one day prior to the interview. *Id* at 16-23.

Later in the interview, Deputy Jon Ashley of the Pacific County Sheriff's office was dispatched to the school to join the interview process. 6/10/09RP 336-337. After Deputy Ashley arrived, A.D.M. provided greater detail about the incident that had taken place the previous day, including specifics about the clothes she and her Uncle Steve had been wearing, her bedding, the grey wash cloth that Cearley had thrown at her after the sex act, and where in the house the items were likely to be recovered. Id 338-340. Shortly afterward, Deputy Ashley conducted a search of the residence and located almost all of the items A.D.M. had described. Id 340-341. The pair of blue jeans that Deputy Ashley collected matched A.D.M.'s description of a pair that had pockets on the outside, with one of the pockets being torn out, or having a hole, along the bottom. 6/23/09RP 22-23. 6/23/09RP 28. 6/23/09RP 34. ~~6/23/09RP~~ This same pair of blue jeans was later tested at the Washington State

Patrol Crime Laboratory and found to have two separate sperm stains in the crotch area.

6/23/09RP 153. The Crime Laboratory was able to isolate the spermatozoa in these stains, and it was found to match the DNA profile for Steven Cearley. 6/23/09RP 150-153

During his search of A.D.M.'s bedroom, Deputy Ashley also discovered a tube of "Doc Johnson's Anal Lube" inside of a drawer.

6/10/09RP 341. 6/23/09 RP 27.

A.D.M. was subsequently taken to the Sexual Assault Clinic at Providence St. Peters hospital, where she was examined by Nurse Practitioner Laurie Davis. 6/18/09RP 189. Nurse Davis took a standard medical history from A.D.M. which included questions regarding prior abuse.

6/18/09RP 190-191. 6/18/RP 198-201. A.D.M. disclosed to Nurse Davis that her Uncle had been engaging in sexual contact with her. Id. Nurse Davis' examination revealed anal fissures and an unusually lax rectal tone which was consistent

with A.D.M.'s account of frequent anal penetration. 6/18/09RP 193-198. 6/18/09RP 201-202. Nurse Davis also conducted a follow-up examination approximately a month later, and discovered the fissures completely healed, indicating an acute rather than a chronic condition. Id at 198.

2. PROCEDURAL HISTORY

The Respondent is in agreement with the Appellant's statement of the procedural history of the case with the following additions:

CHILD HEARSAY HEARING

The trial court held two days of hearings on June 10 and 11, 2009, to consider motions in limine that had been filed by both sides, and also to conduct a child hearsay hearing.

6/10/09RP and 6/11/09RP (3 vols.) At the child hearsay hearing, the court heard testimony from A.D.M., Nurse Practitioner Laurie Davis of the Sexual Assault Clinic, Principal Joan Leach, Erin Miller of Children's Services, and Deputy John

Ashley. A.D.M. testified both about the underlying charges, and also regarding her disclosure of the alleged abuse, first to several of her classmates, and subsequently, to Erin Miller, Deputy Ashley, and Nurse Laurie Davis. 6/10/09RP 134-197. At the child hearsay hearing, A.D.M. testified that she was currently 11 years of age, and that she had been only 9 years of age in 2007, at the time she first reported that her Uncle Steven Cearley had sexually assaulted her. Id at 139-140. A.D.M. testified that Steven Cearley had given her "bad touches," and that besides him, only one other adult had ever done so, a man named Rich Clausen, who had been married to her aunt Mary, and who had grabbed A.D.M.'s breast. Id at 142-143. As for A.D.M.'s motivation in coming forth with her allegations, A.D.M. stated that it was "[b]ecause it wasn't right and I didn't like it." Id. at 147. A.D.M. did admit that she was angry at Steven Cearley. Id. But she went on to say that the reason she

was angry at him was that he had given her those bad touches and she didn't like that. Id at 148. Later in her testimony, A.D.M. reiterated that she just did not like her Uncle Steve. Id at 161-162. But when asked if she disliked him enough to fabricate false charges against him, she answered "no." Id at 162.

A.D.M. testified that she told several of her classmates about the abuse, including M.H., H.J., J.K., A.B., and A.W. Id. at 150. Some of the disclosures to the classmates were separated by several months. Id at 164-167. The last classmates to whom A.D.M. reported the abuse were J.K. and A.B. Id at 167. A.D.M. insisted that she had told both J.K. and A.B. that the identity of her abuser was her uncle Steve. Id at 182. A.D.M. was very clear that when she told one of her classmates that the culprit was "the new guy" she was probably referring to Steve. Id at 188.

A.D.M. testified that when the school principal, Virginia Leach, first came to get her

out of class to be interviewed, her first thought was "I know what this is about." Id at 151. She immediately thought that this was about Steve. Id. On the way from the classroom to the interview room, Ms. Leach only told A.D.M. that she needed to talk to someone and that she wasn't in trouble. Id. At the interview room were Ms. Leach, Kris Camenzind, Erin Miller, and later, Deputy Ashley. Id at 152. A.D.M. testified that during the first part of the interview, she did not disclose any sexual abuse. Id at 154. When asked why she did not tell about the abuse during the first part of the interview, A.D.M. stated that she was kind of nervous and did not know what was going to happen. Id. But during the break, Ms. Leach had indicated to her that she should tell about what had happened, and this caused A.D.M. to change her mind. Id at 154-155. A.D.M. stated that A.D.M. thought that Ms. Leach wanted her to tell on Steve, but that Ms. Leach never said Steve's name. Id at 155. A.D.M.

testified that as far as she could remember, the principal "just said that there's something going on and I needed to tell the truth about it." Id at 190.

During A.D.M.'s testimony she indicated an appreciation of the need to be truthful. Id at 137-138. See also 140-141.

A.D.M. remembered recounting to Erin Miller how she had been sexually assaulted by her Uncle Steve. Id at 154. A.D.M. also remembered telling Deputy Ashley about what had happened to her, and telling Deputy Ashley about where she had put her clothes from the previous day. Id at 155-156. A.D.M. indicated that she appreciated the need to be truthful when speaking to a law enforcement officer. Id at 165.

A.D.M. also testified about going to the Sexual Assault Clinic in Olympia. Id at 157-160. A.D.M. testified that no one had told her what to tell Nurse Davis. Id. at 159-160. She also indicated an appreciation for the reason people

go to doctors' offices. Id at 157. A.D.M. indicated an appreciation for the need to be truthful when speaking to doctors and nurses. Id at 157-158. When asked why it is important to tell the truth when talking to a doctor or nurse, A.D.M. answered, "[b]ecause if there is something wrong with you and you tell them a lie, then they're not going to be able to fix you." Id at 158.

A.D.M. testified that during her interview at the school, and during her examination at the Sexual Assault Clinic, her recollection of the events was much fresher in her memory than it was on the day of the child hearsay hearing. Id at 162-163.

At the child hearsay hearing Nurse Laurie Davis of the Sexual Assault Clinic testified. Id at 199-246. At the child hearsay hearing, Nurse Davis testified that the purpose of her assessment, after a sexual assault, is to determine if there are any physical needs or

mental health needs and to make an assessment of the patient's condition. Id at 202. Nurse Davis testified that she had told A.D.M. that she "needed to check her body and make sure the body was okay and that her mind was okay...." Id at 244. Nurse Davis testified that, when she asked A.D.M. who had assaulted her, A.D.M. told her that it was her Uncle Steve. Id at 204. A.D.M. also told Nurse Davis that the assaults had been going on for two years, and that the most recent assault was one day prior to her examination. Id at 204-205. A.D.M. also provided Nurse Davis with an account of the nature of the assaults that was similar to what she had told Erin Miller of CPS. ID at 204-206. A.D.M. told Nurse Davis that the assaults had occurred "at least once a week." Id at 206.

At the child hearsay hearing, Nurse Davis also testified about the examination she had performed. Id at 207-210. Nurse Davis described the particular condition of A.D.M.'s anus,

describing it as "gaping." Id at 208-209. Nurse Davis also described the anus as spontaneously dilated approximately 2.5 centimeters. Id at 208-209. Nurse Davis described the anal fissures she observed as fresh. Id at 209. And Nurse Davis concluded that her empirical observations supported what A.D.M. had told her. Id at 210. Nurse Davis also testified about the phenomenon of incremental disclosure, wherein children tend not to disclose all at once, but rather, will tend to deny abuse initially, and then eventually, a certain percentage will eventually disclose the abuse. Id at 213-214. Specifically, Nurse Davis testified that, in her experience as a nurse specializing in sexual assault examinations, it was common for a child to initially deny, and then later to disclose, part of what happened. Id at 214. Nurse Davis added that very few children do disclose sexual abuse. Id at 214-215.

A.D.M.'s school principal, Joan Leach, also testified at the child hearsay hearing. Id. at 247-276. Ms. Leach explained that the abuse came to light when two of A.D.M.'s classmates, A.B. and J. K., told their mothers, who in turn, relayed the information to Ms. Leach. Id at 248-249. Ms. Leach testified that the information she received was that "[t]here was some type of sexual abuse going on that [A.D.M.] had disclosed to the two little girls. That was it." Id at 248-249. Ms. Leach was never told the identity of the suspect. Id at 249. Nor did Joan Leach know any specifics about the type of sexual contact that had occurred. Id. Joan Leach did not even know the relationship of the perpetrator to A.D.M. Id.

With regard to A.D.M.'s personality, Ms. Leach testified, "[S]he has a great personality, happy, gregarious, even for some of the things she's been through." Id at 253. She described A.D.M.'s general character by saying, "she's a

great kid." Id. She also indicated that A.D.M. was a good student. Id.

When asked what she told A.D.M. to induce her to talk about the abuse, Ms. Leach did not recall. Id at 256. But on cross examination, Ms. Leach adamantly denied telling A.D.M. at any time that she knew that A.D.M.'s Uncle Steve had touched her. Id at 264-267.

Erin Miller also testified at the child hearsay hearing. Id at 277-333. Ms. Miller testified that she had received training in the Harborview child interview techniques. Id at 280-281. Ms. Miller also testified that, as per the protocol, she keeps leading questions to a minimum during her interviews, but that the protocol permits open-ended questions to be combined with a minimal number of leading questions. Id at 281-283. Erin Miller testified that she conducted two interviews with A.D.M., one on November 21, 2007, and a second, follow-up interview on December 20, 2007. Id at 283. Ms.

Miller described the rapport-building portion of the interview, followed by specific questions regarding sexual abuse. Id at 285-286.

Erin Miller described the change in demeanor that took place between the first part of the interview, in which A.D.M. had denied abuse, and the second portion of the interview, in which A.D.M. reported that she had been sexually assaulted. Id at 288-289. She described A.D.M. as initially "fidgety," but then at one point, A.D.M. became teary-eyed, she grabbed the hand of the victim advocate who was present at the interview, and then "her whole body kind of caved in on itself." Id at 289. During this interview, Ms. Miller took measures to impress upon A.D.M. the need to be truthful in her answers. Id at 298. A.D.M. appeared to understand these admonitions, and agreed that she would only talk about things that had actually happened. Id at 298.

Ms. Miller described the second interview as one in which A.D.M. confirmed that Steven Cearley was the person who had sexually assaulted her. Id at 299. A.D.M. also provided additional details in the second interview that she had not provided in the first interview. Id.

Deputy Jonathan Ashley also testified at the child hearsay hearing. Id at 335-359. Deputy Ashley testified that during the portion of the November 21, 2007, interview that he observed, he heard A.D.M. say that she had been sexually assaulted by her Uncle Steve and that it had been going on for approximately two years. Id at 337. Deputy Ashley testified that A.D.M. had stated that the most recent assault had been one day prior, or on November 20, 2007, and that A.D.M. had described to him the nature of the inappropriate touching. Id at 338-339. Deputy Ashley said that A.D.M. described her bed sheets and the clothing that she had been wearing during the most recent incident. Id at 339. When he

subsequently served a search warrant on the residence, he located the bed sheets and A.D.M.'s clothing, finding that they matched the description she provided. Id at 340-341. Deputy Ashley also found pornographic magazines and some anal lube stored in A.D.M.'s bedroom. Id at 341. Deputy Ashley sent the items to the Washington State Crime Laboratory for analysis. Id at 342-345. Deputy Ashley stated that he later received a report back from the crime lab which identified the Defendant as one genetic donor of the sperm stains found in A.D.M.'s blue jeans. Id at 344. The lab report was entered into evidence for purposes of the child hearsay hearing. Id at 345.

The court considered the Ryan Factors and made a finding that they had been substantially satisfied. CP 602.

PROPOSED JURY INSTRUCTIONS

Prior to trial, the Defendant submitted proposed jury instructions. CP 58-105. In the

Defendant's proposed jury instructions contained a concluding instruction that combined WPIC 151.00 and WPIC 160.00. See Defendant's Proposed Instruction, attached herewith as Appendix A.

This instruction reads in part:

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 58-105.

With regard to the language ultimately adopted by the court in its instructions to the jury, it is identical to the language proposed by the Defendant. See *Appellant's Opening Brief* at 36, citing CP 537. Furthermore, the court specifically addressed the issue of WPIC 160.0 in its discussion of the instructions to the jury on the record. 6/29/09RP 84. The court asks, "Now WPIC 1.60 (sic), do you both agree that WPIC 1.60 (sic) is taken care of and was inserted properly into Instruction 1.51 (sic)?" Id. Defense counsel

answers "yes," and the prosecutor answers "The State agrees." At no time did defense counsel object or take exception to the language that he himself proposed, and which the court ultimately adopted, regarding unanimity with respect to the special verdicts. *Id.*

C. ARGUMENT

1. A.D.M.'s HEARSAY STATEMENTS WERE PROPERLY ADMISSIBLE UNDER *STATE v. RYAN*.

In questions concerning of admissibility of evidence, the reviewing Court adopts an abuse-of-discretion standard. *State v. Grogan*, 147 Wash.App. 511, 520, 195 P.3d 1017 (2008). *State v. Woods*, 154 Wash.2d 613, 623, 114 P.3d 1174 (2005). The trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. C.J.*, 148 Wash.2d 672, 686, 63 P.3d 765 (2003). With regard to satisfying the *Ryan* Factors, the child's statements must only substantially meet these factors. *Woods*, 154 Wash.2d at 623-24, 114 P.3d 1174. At a child hearsay hearing, the State need

not prove the existence of every single factor, but the evidence must show that the factors are substantially met. *State v. Grogan*, 147 Wash.App. 511, 520, 195 P.3d 1017 (2008).

Here, the court's findings that the Ryan Factors were substantially met should not be disturbed on appeal for the following reasons. As demonstrated in the "procedural history" section of this brief, *supra*, the Respondent has provided ample grounds to support the view that A.D.M.'s statements were reliable and not the product of undue influence. In the first place, it was A.D.M. herself, and not anyone else, who first advanced the allegation that it was the Defendant, Steven Cearley, who was molesting her, and no one else. A.D.M. told this to her classmates, and some of the information was later passed on to the school principal.

Secondly, Joan Leach did not even know the identity of the suspect at the time she called A.D.M. down to her office. Assuming that the

court believed this testimony, it was well within its discretion to find that Ms. Leach had not improperly influenced A.D.M. Furthermore, Ms. Leach testified that she never suggested to A.D.M. the name of the suspect that A.D.M. was expected to talk about.

Thirdly, A.D.M. herself testified that, when Ms. Leach first came to her classroom to see her, the first thought that went through her mind was that this was about Steve. Thus, A.D.M. already was thinking that she was going to be interviewed about the abuse she had reported to her fellow classmates. No one had to put that idea into her mind. Therefore, the court acted within its discretion in finding that the statements were reliable and not the product of improper influence.

Although the CPS worker, Erin Miller, did bring up Steven Cearley's name, this came about as a direct result of the witness' own prior disclosures to her fellow classmates, the most

recent having occurred one day prior to the interview. Under the circumstances, it was well within the court's discretion to find that Erin Miller did not improperly influence A.D.M.'s statements.

Fourthly, the specific information about the nature and frequency of the assaults, as well as the specific information about the clothing A.D.M. had worn just before the most recent attack, was confirmed when Deputy Ashley served the search warrant and discovered the bed sheets matching A.D.M.'s description, as well as the clothing that matched A.D.M.'s description, in the very same locations where A.D.M. said that they would be found. Thus A.D.M.'s statements were corroborated by the other evidence in the case.

Fifthly, the Washington State Crime Laboratory's DNA analysis of A.D.M.'s blue jeans revealed that the Defendant was the donor of the genetic material found in the stains located in

the crotch area of the jeans, thereby corroborating A.D.M.'s statements, and thereby rendering them more reliable.

Sixthly, Nurse Laurie Davis' testimony regarding her medical examination revealed changed in A.D.M.'s rectum and anus that supported A.D.M.'s account of what had happened to her, thereby rendering A.D.M.'s statements more reliable.

Seventh, although A.D.M. admitted that she did not like her Uncle Steven, she also testified that she did not dislike him enough to fabricate an accusation against him. 6/10/09RP 162.

Eighth, as to timing, the sexual abuse here was an ongoing pattern, and A.D.M.'s disclosures to her fellow classmates, occurring over a period of several months, support a finding of reliability. A.D.M. testified that she reported the abuse because she wanted it to end, and when her initial disclosures did not achieve the desired result of ending the abuse, she went on

to tell more classmates, until eventually the abuse came to light. The fact that the timing of the most recent attack was but one day prior to the interview at the school well justifies a finding that the timing of A.D.M.'s statements is supportive of reliability. Furthermore, the timing of the statements in relation to the most recent attack supports a finding that the possibility of faulty recollection was remote.

Appellant argues that the court's findings here include no application of the Ryan factors to the facts of the case. Appellant's Opening Brief at 16, citing CP 602. This simply is not the case. There is no requirement that the court discuss each Ryan factor separately.

Appellant incorrectly argues that A.D.M. was not sufficiently trustworthy because her statements were inconsistent. Appellant's Opening Brief at 18. But inconsistencies in a child witness's testimony do not necessarily lead to a finding of incompetency. *State v. Woodward*,

32 Wash.App. 204, 207-08, 646 P.2d 135 (1982)
(affirming child-witness's competency to testify since "[a]lthough the testimony of the child at trial was not entirely consistent on certain details, she was unwavering in her testimony that Defendant had intercourse with her ... [since] [a]ny inconsistencies in her testimony went to her credibility and not to admissibility).

"Although the exercise of the trial judge's discretion must be based on the entire testimony, the court is entitled to select which portions have the greater persuasive value on the ultimate issue." *State v. Borland*, 57 Wn.App. 7, 10-11, 786 P.2d 810 (1990).

Appellant argues that A.D.M.'s statements to Nurse Davis should not be admitted because Davis did not go over with A.D.M. whether she could promise to tell the truth. Appellant's opening brief at 22. But there is no requirement, under the child hearsay statute, or under applicable case law, that a medical examiner go over with a

child the need to tell the truth. See RCW 9A.44.120. See also ER 803(a)(4).

ER 803(a)(4) carves out a hearsay exception for statements "reasonably pertinent to diagnosis or treatment." "To be admissible, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis." *State v. Fisher*, 130 Wash.App. 1, 14, 108 P.3d 1262 (2005). "The rationale is that we presume a medical patient has a strong motive to be truthful and accurate. This provides a significant guarantee of trustworthiness." *State v. Perez*, 137 Wash.App. 97, 106, 151 P.3d 249 (2007).

Here, A.D.M. indicated in her testimony that she appreciated the need to be truthful when communicating to doctors and nurses, because if they were provided with incorrect information, they would not be able to "fix" what was wrong

with the patient. In addition, Nurse Davis' testimony as to the reason for the examinations also supports a finding that A.D.M.'s statements to Nurse Davis were consistent with receiving sound medical treatment.

Appellant argues that A.D.M.'s statements were assertions of past facts. Yet applicable case law firmly demonstrates that this particular *Ryan* Factor is of little use in evaluating the reliability of child hearsay statements. *Borland* at 20, noting that the *Dutton* factor of "past fact" can rarely if ever be met. See also, fn.5 to *State v. Henderson*, 48 Wash.App. 543, 551, 740 P.2d 329 (1987), finding that the so-called *Dutton* factors, contained within the *Ryan* Factors, are not very helpful in assessing the reliability of child hearsay statements in most sexual abuse cases.

2. THE MEDICAL HEARSAY EXCEPTION SHOULD APPLY TO A.D.M.'s STATEMENTS TO NURSE DAVIS.

For the above reasons, A.D.M.'s statements to Nurse Davis are admissible both as child

hearsay and as statements made for the purpose of medical diagnosis or treatment. Whether the idea of going to the Sexual Assault Clinic to be examined came from A.D.M. or not, the State demonstrated that A.D.M.'s motivation in making the said statements to Nurse Davis were for purposes of medical treatment, and that A.D.M. appreciated the need to be truthful with her health care provider.

3. REPETITION OF CHILD HEARSAY DID NOT UNFAIRLY BOLSTER THE STATE'S CASE.

Appellant argues that repetition of child hearsay unfairly bolstered the state's case. Appellant's Opening Brief at 31. Repetitive or cumulative evidence is governed by ER 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, of misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As Tegland writes, ER 403 contemplates a balancing test. Karl B. Tegland, COURTROOM HANDBOOK

ON WASHINGTON EVIDENCE, 2009-2010 ed., at 225.

Exclusion under ER 403 is considered to be an extraordinary remedy, and the burden is on the party seeking to exclude the evidence to show that the probative value is substantially outweighed by the undesirable characteristics. *Id.*, citing *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994). When the balance is even, the evidence should be admitted. Tegland, citing *Lockwood v. A.C. & S, Inc.*, 44 Wn.App 330, 722 P.2d 826 (1986), *aff'd* 109 Wn2d 235, 744 P.2d 605 (1987). Moreover, when a party objects to cumulative evidence under ER 403, there is no requirement that the trial court conduct a balancing test on the record before admitting the disputed evidence. *Carson v. Fine* at 223.

Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. *Carson v. Fine* at 226, citing *State v. Gould*, 58

Wash.App. 175, 180, 791 P.2d 569 (1990); *State v. Gatalski*, 40 Wash.App. 601, 610, 699 P.2d 804, *review denied*, 104 Wash.2d 1019 (1985).

There are several reasons why the trial court did not commit a manifest abuse of discretion in this instance. Firstly, the defense counsel, in his opening remarks, made a number of sweeping statements about what he would prove to the jury. 6/16/09RP 19-33. The defense counsel told the jury that Mr. Cearley "did nothing improper to this young lady, period." *Id* at 19. Later, the defense attorney stated "I'll prove to you Ryan Medley sexually abused [A.D.M.], period, ladies and gentlemen of the jury, and I'll prove to you Ryan Medley isn't the only one who sexually abused [A.D.M.]." *Id* at 23. The defense attorney told the jury that the allegations in this case were false. *Id* at 24. He stated that he would prove that [A.D.M.] never gave a name before her principal brought her to the principal's office. *Id* at 27. And he stated

that A.D.M.'s classmates "had been questioning her about how she knew what the terms molested and sexually abused are, how she knew about that, and she said uncle, and when she said uncle, she meant Uncle Matt, period." Id at 27.

Because of the Defendant's sweeping claims about what he expected to prove, the State carried a special burden, in presenting its case-in-chief, of demonstrating that A.D.M. had reported the abuse to many different people, and that, at no time did she ever implicate anyone other than the Defendant. It was also incumbent upon the State to clarify the details of precisely what A.D.M. said to whom at various times, and under what circumstances. For example, the defense counsel, in his opening remarks, argued that A.D.M. denied that Steven Cearley touched her until the principal told her to say that Uncle Steve had touched her. Id at 29. Under these circumstances, the State was obligated to bring out with clarity the precise

circumstances under which A.D.M. reported the abuse, and with special emphasis on the fact that A.D.M. never, at any time, implicated any other person other than the Defendant, although she did mention an old incident in which Rich Clausen had inappropriately grabbed her breast.

Because the Defendant made the specific claim that the allegations were "fabricated," the State was entitled to demonstrate that A.D.M.'s statements as to the identity of the perpetrator, were consistent across the board. Under ER 801(d)(1), once a witness' credibility has been attacked, prior consistent statements may be admissible to rehabilitate the witness's credibility. Thus the State had a special need to reinforce the consistency of all of A.D.M.'s out-of-court statements in light of the fact that the defense was essentially calling her a liar before she ever took the witness stand. Although a party is generally not entitled to rehabilitate a witness until after the witness's credibility

has been impeached, under certain circumstances, the State may attempt to preemptively "pull the sting" out of an anticipated attack during its case in chief. *State v. Ish*, No. 83308-7 (Washington State Supreme Court, October 7, 2010), citing *State v. Bourgeois*, 133 Wash.2d 389, 402, 945 P.2d 1120 (1997).

And throughout the defense cross examination of A.D.M., the theme of fabrication of the charges was revisited time and time again. See e.g., 6/17/09RP 105:

Q. Mr. Cearley never touched you, ma'am, did he?

A. Yes, he did.

Q. Okay, In the principal's office you stated Mr. Cearley never touched you, didn't you?

A. At the very beginning, yes.

Q. Mr. Cearley did not give you bad touches, did he, ma'am.

A. Yes, he did.

Later during cross-examination, 6/17/09RP
175 the defense attorney again attacked
A.D.M.'s credibility by asking A.D.M. about
getting in trouble at school for lying:

Q. Okay, your teacher sometimes removed
you from class for lying?

A. For lying?

Q. Mm-hmm.

Q. Your teacher sometimes removed you from
class for lying?

A. Once.

In conclusion, A.D.M.'s credibility was
attacked by the defense not only during opening
remarks to the jury, but during cross examination
as well. Under those circumstances, it was not
an abuse of discretion for the court to allow the
state to present testimony of three separate
witnesses regarding A.D.M.'s out of court
statements. Because Cearley attacked witness
credibility, the State was entitled to present
this evidence for purposes of witness

rehabilitation. *State v. Froehlich*, 96 Wash.2d 301, 305, 635 P.2d 127 (1981) (corroborating evidence is admissible when witness's credibility attacked by opposing party).

ADDITIONAL CONSIDERATIONS IN SUPPORT OF PERMITTING THREE SEPARATE WITNESSES TO TESTIFY AS TO A.D.M.'s OUT-OF-COURT STATEMENTS

a) Each witness's testimony focused on a separate aspect of the case.

Erin Miller's testimony focused mainly on the initial disclosures A.D.M. made to her during the two separate interviews in which A.D.M. described the history of the abuse she has suffered at the hands of Steven Cearley. This included a great deal of specific detail that was not covered in Deputy Ashley's testimony or in Nurse Davis' testimony. Deputy Ashley's testimony focused more on A.D.M.'s account of the most recent attack, and with specific items of evidence that A.D.M. was able to describe, and which Deputy Ashley was later able to recover, from the Cearley residence. While the things

A.D.M. told Deputy Ashley could arguable have been influenced by what she had said to Erin Miller, since Erin Miller was still in the room, this was not the case with Nurse Davis. The statements to Nurse Davis were made under different circumstances, and at a different location, and were more focused on what Nurse Davis needed to know in order to provide medical care. Neither Erin Miller not Deputy Ashley was present at the Sexual Assault Clinic; therefore the chances of improper influence were significantly lessened. Yet A.D.M.'s account to Nurse Davis remained consistent, and was properly admissible under three separate rationales: (1) the child hearsay statute; (2) the hearsay exception for statements to a health care provider; and (3) prior consistent statement under ER 801(d)(1) to rebut a charge of improper influence or motive or of recent fabrication.

b) Due to the Defendant's alternate theory of the case, suggesting a culprit other than the accused, there was a special need to clarify that

A.D.M. accused Steven Cearley, and only Steven Cearley, of the sexual molestation.

The Defendant sounded the theme, throughout the trial, that Ryan Medley was the perpetrator. This theme was reinforced time and time again, during the cross examination of nearly every witness. Under these circumstances, it was especially appropriate for the State to point out to the jury that A.D.M. had been consistent in accusing Steven Cearley, and no one else, of assaulting her during the time periods charged in the information. Another way of stating the same thing is that, in presenting the alternate theory of the case, the Defendant opened the door to the sometimes repetitive testimony concerning A.D.M.'s out-of-court statements.

c) Defendant extensively cross examined A.D.M. concerning inconsistencies in her prior statements.

Because Defendant successfully pointed out a number of inconsistencies in A.D.M.'s prior statements, the State had the right to rehabilitate the witness by pointing out the consistencies in her prior statements.

4. ALTHOUGH THE COURT ERRED IN INSTRUCTING THE JURY IT MUST BE UNANIMOUS TO ANSWER "NO" TO THE SPECIAL VERDICT FORM, THE INVITED ERROR DOCTRINE BARS THE APPELLANT FROM RAISING THIS ISSUE ON APPEAL

Although the State concedes that the trial court's instructions to the jury were erroneous as a matter of law under *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010) and under *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003), under the invited error doctrine, the jury instructions not objected to became the law of the case. *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998) (citing *State v. Hames*, 74 Wash.2d 721, 725, 446 P.2d 344 (1968)). Defense counsel participated in crafting the instructions he now seeks to challenge. Error, if any, was invited and the instructions became the law of the case. *State v. Studd*, 137 Wash.2d 533, 546, 973 P.2d 1049 (1999) (Defendant may not set up an error at trial and complain about it on appeal). Thus, Cearley may not challenge the instruction.

As noted above, the Defendant himself proposed a jury instruction with language

identical to that eventually adopted by the trial court. CP 58-105; Appendix A herewith; CP 536.

When a Defendant proposes a jury instruction that contains an erroneous statement of the law, and that erroneous statement of the law is ultimately included in the court's instructions to the jury, he is subsequently barred from raising the issue on appeal. *State v. Schaler*, 169 Wash.2d 274, 292, 236 P.3d 858 Wash., 2010. citing *See State v. Henderson*, 114 Wash.2d 867, 867-71, 792 P.2d 514 (1990); *State v. Aho*, 137 Wash.2d 736, 744-45, 975 P.2d 512 (1999) ("Under the invited error doctrine, a Defendant may not *request that instructions be given to the jury* and then complain upon appeal that the instructions are constitutionally infirm." (emphasis added). Under the doctrine of invited error, even where constitutional rights are involved, an appellate court is precluded from reviewing jury instructions when the Defendant has proposed an instruction or agreed to its wording. *State v.*

Winings, 126 Wash. App. 75, 107 p.3d 141 (2008) citing *State v. Bradley*, 141 Wash.2d 731, 736, 10 P.3d 358 (2000); *In re Detention of Gaff*, 90 Wash.App. 834, 845, 954 P.2d 943 (1998). Here, Cearley not only proposed instructions containing the same erroneous language, but at no time did he take exception to the instruction in question, nor did he ever propose any remedial instruction to correct the error. 6/29/09RP 84. Therefore, this Court must not grant the requested relief of vacating Cearley's exceptional minimum sentence.

In *City of Seattle v. Patu*, 147 Wash.2d 717, 58 p.3d 273 (2002) our State's Supreme Court provided some helpful discussion of the rationale behind the invited error doctrine:

The original goal of the invited error doctrine was to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wash.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wash.2d 315, 893 P.2d 629 (1995). In *Pam*, the State intentionally set up an error in order to create a test case for appeal. *Pam*, 101 Wash.2d at 511, 680 P.2d 762. Since then, the doctrine has been applied even in cases where the error

resulted from neither negligence nor bad faith. See, e.g., *State v. Studd*, 137 Wash.2d 533, 547, 973 P.2d 1049 (1999). In *Studd*, a consolidated case, the six Defendants all proposed instructions that erroneously stated the law of self-defense. *Id.* at 545, 973 P.2d 1049. Some, however, also proposed an instruction that effectively remedied the error. While concluding that the error was of constitutional magnitude and therefore presumed prejudicial, we held that those Defendants who had proposed the erroneous instruction without attempting to add a remedial instruction had invited the error and could not therefore complain on appeal. *Id.* at 546-47, 973 P.2d 1049.

F. CONCLUSION

Based on the foregoing, the Respondent respectfully requests that the Court affirm the judgment below in every respect. The court did not abuse its discretion in admitting A.D.M.'s out of court statements under the child hearsay statute. The court did not abuse its discretion in admitting the Nurse Davis' testimony regarding A.D.M.'s out-of-court statements under the medical treatment exception to the hearsay rule. The court did not abuse its discretion in permitting some repetitive testimony regarding

A.D.M.'s out-of-court statements. And finally, the Appellant is barred by the invited error doctrine from raising the issue of an erroneous jury instruction for the first time on appeal under the facts of this case. The Defendant's conviction and sentence should be affirmed in every respect.

DATED this 21nd day of October, 2010.

Respectfully submitted,

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING
ATTORNEY

BY: 
DAVID BUSTAMANTE, WSBA #30668
Attorney for the Respondent

APPENDIX A

DEFENDANT'S PROPOSED JURY INSTRUCTION (CP 58-105)

INSTRUCTION NO. _____

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form for each count.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty," according to the decision you reach.

You will also be given special verdict forms for the crimes charged in counts I, II, III, IV, V, and VI. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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."

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

APPENDIX B
PROOF OF SERVICE

Certificate of Service

I, David Bustamante, do hereby certify under penalty of perjury, under the laws of the State of Washington, that I served the subjoined Respondent's Brief on October 21, 2010, by mailing a copy to Jennifer J. Sweigert, Attorney for Appellant, Nielsen, Broman & Koch, 1908 East Madison Street, Seattle, WA 98122, and also by sending a copy via First Class Mail to the Appellant/Defendant Steven Craig Cearley, DOC #332286, Clallam Bay Correctional Center, Clallam Bay, WA 98326.

Signed this 21th day of Oct., 2010, in South Bend, WA.



DAVID BUSTAMANTE
Declarant

10/21/10 11:16
BY *cm*
COURT REPORTER
CLALLAM COUNTY