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**I. ANSWERS TO ASSIGNMENTS OF ERROR**

1. **THE DEFENDANT RECEIVED A FAIR TRIAL AND THE TRIAL JUDGE DID NOT PREJUDGE THE CREDIBILITY OF THE STATE'S WITNESS.**
2. **THE COURT PROPERLY WEIGHED THE RYAN FACTORS AND THE VICTIM'S STATEMENTS WERE RELIABLE AND ADMISSIBLE.**

**II. ISSUES PERTAINING TO ANSWERS TO THE ASSIGNMENTS OF ERROR**

1. DOES A TRIAL COURT MAKE A PREJUDMENT AS TO WITNESS CREDIBILITY WHEN IT GENERALLY NOTES RELIABILITY OF STATEMENTS IN THE CONTEXT IN WHICH THEY ARE MADE?
2. DID THE TRIAL COURT PROPERLY CONSIDER AND ADMIT RYAN HEARING STATEMENTS WHEN IT DISCUSSED THREE OF THE MOST IMPORANT FACTORS AND THE REMAINING FACTORS FOR ADMISSIBILITY WERE SUPPORTED BY THE RECORD.

**II. STATEMENT OF THE CASE**

**Procedural History**

The State concurs with the Defendant's rendition of the procedural history.

## Statement of Facts

Jane Doe and her father Kirsten<sup>1</sup> lived with the Defendant and his family for four months from October 2008 to February 2009. RP 144, 172. C.C.'s father, Jeremy Caraway, invited Kirsten and Jane to live with them during the week because Kirsten's home was too far away from his work without transportation. RP 131, 144. The apartment had three bedrooms, the first room belonged to their seriously ill Uncle Joe, Jeremy and his wife Jennifer shared the second, and C.C. was in the third. RP 57, 132, 146, 173. Jane was very close to Uncle Joe and slept on a pallet on his floor, while Kirsten slept on the couch downstairs. RP 145, 147. After a two months, Kirsten noticed Jane no longer wanted to sleep in Uncle Joe's room. RP 147,178-79. Kirsten explained Jane repeatedly asked if she could sleep downstairs with him. RP 148. Kirsten also noticed Jane did not want to be around C.C., she didn't want C.C. to babysit her, and Jane said C.C. was mean to her. RP 148-49.

Kirsten described his daughter as shy around new people, but happy-go-lucky when she warms up. RP 135. He stated she was a big girl

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<sup>1</sup> The State means no disrespect in using only Doe's father's first name. However, the State found it somewhat confusing to refer to him as John Doe, and did not want to identify the victim by using her father's last name.

who was mature for her age and excelled at math. RP 135-36, 142-43. He never caught her in a big lie and any lies she told were the typical lies of children. RP 137. Kirsten first taught Jane good touching and bad touching when she was five or six years old. RP 138. He told her bad touching was any touching she didn't feel comfortable with and no one had a right to touch her "girl parts" – those areas below her waist and above her chest. RP 138-39. Kirsten said at the age of eight, Jane was wearing a training bra because of her build. RP 142. Kirsten also stated Jane did not have access to pornography and never saw anyone engaged in sexual intercourse. RP 169

Kirsten and Jane moved out of Jeremy and Jennifer's home after C.C. assaulted Kirsten and Jeremy. RP 151. Kirsten explained he didn't want his daughter around C.C.'s anger and violence. RP 151. Jennifer Caraway also opined there were some bad feelings concerning a DVD cable that was misplaced. RP 322-23. However, Kirsten said while the missing cable may have caused a little bit of tension, it had nothing to do why they left. RP 153, 175-76. Kirsten and Jane then lived with Kirsten's friends Chuck and Patty. RP 153-54.

Kirsten explained after a conversation with another relative in April 2009, he decided to talk with Jane about C.C. RP 155-56. Kirsten woke Jane around 7:00 am and gave her time to fully wake up. RP 156-58. He asked her if anybody had ever done anything to her, such as hit her or make fun of her. RP 156-58, 184. He then asked if C.C., Jeremy, Justin, or Cheko, or anybody did anything to her. PR 156-57. Jane looked down and fidgeted. RP 158. Kirsten told Jane that she needed to tell him if something happened, but if nothing happened, it was fine. RP 159. Because Jane was still fidgeting, he knew something was amiss. RP 159. He then asked her if she would be more comfortable talking to a woman. RP 159. Jane agreed and it was decided she would talk with Patricia Halk. RP 159.

When Jane went to Halk she was really upset, scared, nervous and fidgety. RP 204. Halk asked Jane if anybody touched her “wrong.” RP 204. At first Jane said no. RP 204. Halk then told Jane when Halk was a child someone touched her wrong and she really wished she told because the person later touched other girls. RP 204, 208, 220. Halk never told Jane where or how she was touched. RP 220.

Jane then told Halk C.C. touched her breast once and showed Halk how C.C. touched her. RP 205. Jane made a squeezing motion with her hand and Halk demonstrated this motion to the court. RP 206. Halk asked Jane if any other male touched Jane and gave Jane a list of names. RP 210. Jane indicated the only person who touched her was C.C. RP 210-11. Halk told Jane it was good she told and assured Jane she was not in trouble. RP 207. After Halk told Kirsten what Jane said, Kirsten immediately called the police. RP 211-12. Kirsten relayed two additional questions from the police to Halk. RP 212-14. Halk told Jane Kirsten was speaking with the police and they needed to know if the touching was over or under her shirt and if it happened more than one time. RP 213, 226. Jane said the touching was under her shirt. RP 213. When Halk tried to confirm the touching was only one time, Jane put her head down. RP 213. Halk then asked if something like this happened to Halk's daughter, if Jane would want her friend to tell. RP 224. Halk then said, "Okay, so it was just once?" Jane said no, it happened six or seven times. RP 213, 224. Jane also told Halk the touching happened at night or when C.C. would babysit her. RP 215. Throughout the entire conversation Halk said Jane was uncomfortable and shy, but understood she needed to talk about

things. RP 227. Halk stated she never used leading questions or gave Jane any ideas of the type of touching. RP 216.

After speaking with the police, Kirsten arranged to bring Jane for a forensic interview with Investigator Olga Lozano. RP 162-63. He did not tell Jane why she was talking with Mrs. Lozano, only that Lozano needed to talk with her about “stuff.” RP 163.

Investigator Lozano interviewed Jane on April 16, 2009 in a private interview area. RP 271-72. Mrs. Lozano stated Jane appeared mature for her age and shy. RP 273. When Lozano asked Jane why she was there, Jane said she was there to talk about something that happened and what someone did to her. RP 275-76. It was obvious to Lozano Jane was uncomfortable in talking about the subject and needed some extra time. RP 276. This was not an unusual occurrence in Lozano’s fourteen years of experience in talking to children. RP 263-64, 276. When Jane did speak about what happened, she was able to give Lozano a description of when, where, and how the touching happened. RP 278-85. She also freely corrected Lozano when Lozano purposefully misstated an important fact. RP 286.

Jane told Lozano when she was eight years-old C.C. touched her chest when she lived at his house in December. RP 277-78, 281. When she described the touching, Jane pointed to her chest area and said it was inappropriate touching. RP 278-79. Jane also told Lozano, C.C. touched her bottom with his hand. RP 279-80. Without being asked, Jane told Lozano it happened when she slept on the floor in Uncle Joe's room. RP 280. She said Uncle Joe was a heavy sleeper and C.C. would come into the room. RP 282-83, 291. C.C. would talk with her, would place his hand under her shirt and bra, and rub his hand across her chest and squeeze. RP 282-83, 287. She was often woken up by his touching. RP 282, 284. Jane also told Lozano C.C. would stroke and squeeze her bottom on the outside of her pants. RP 282, 286. Jane said she would tell C.C. to stop and try to remove his hand when he touched her. RP 283. Jane related to Lozano she wore her pajama bottoms, underwear, bra, and pink or purple top when it happened. RP 284. When Lozano asked how many times this happened, Jane told her seven times on her breast and five or six on her bottom and marked on a drawing where on her body the touching occurred. RP 281-82, 288-89. Jane also gave a long narrative to

Mrs. Lozano about how she was embarrassed to tell her father and told Patricia Halk instead. RP 290-91.

After her forensic interview, Jane became slightly more comfortable in talking with her father. RP 163. One time when she and Kirsten were cooking dinner, Jane spontaneously asked her father “why won’t Sarah and Hailey say what happened to them?” RP 163-64. When Kirsten indicated he didn’t know and the girls might need counseling, Jane said “Well, I did a good job for saying [C.C.] went under my shirt, huh, Dad?” RP 164-65. At another time, when Jane expressed disappointment in not being able to see Uncle Joe, Jane asked “Why does [C.C.] have to touch people in the wrong places?” RP 166. When Kirsten asked her what she meant, Jane said when he grabbed my butt and went up her shirt. RP 167, 165. Kirsten explained Jane would often lament about not being able to see Uncle Joe. RP 167.

Jane also began to open up to her grandmother, Edna Kellim. Mrs. Kellim testified that in August 2009 when Jane spent a month with Kellim, the two were watching television and Jane spontaneously told her she was sleeping in Uncle Joe’s room and C.C. came in and put his hand under her shirt. RP 232. Mrs. Kellim said Jane’s demeanor was very

serious during the statement. RP 233. Mrs. Kellim told Jane it wasn't her fault and she was very brave for coming forward and telling the police. RP 232. In October 2009, immediately after an interview with defense counsel, Jane told Kellim it felt so good to finally let this out and talk about things. RP 234. Mrs. Kellim also corroborated to the court how scared Jane was of C.C. RP 234. Kellim said when they first came in the courtroom door and Jane saw C.C., Jane froze and started to back up, saying she was afraid of C.C. RP 234.

When Jane stayed with Kellim in August 2009, her Uncle Jason Kellim was there. Mr. Kellim testified he wanted to talk with Jane about what happened and one night brought up the topic. RP 239. He said to Jane, "I heard Corey touched you someplace, do you want to talk about that?" RP 239. Jane was reluctant to talk with Mr. Kellim and was withdrawn and crying. RP 239-40. Mr. Kellim stated it took a while to get it out of her, 15 to 20 minutes, and he was visibly upset during the conversation. RP 239-41. Jane told him C.C. put his hand up under her shirt and touched her breasts and squeezed them. RP 239. This evidence was not considered by the trial court. CP 20-21.

In the combined Ryan hearing and fact-finding, Jane Doe testified the Respondent, C.C., touched her between five and ten times on her breasts and buttocks when she was eight-years-old. RP 56, 84, 89-90. Jane was frightened to testify in front of the Respondent. RP 61, 170. She said C.C. came into the room she shared with Uncle Joe when she was sleeping. RP 82, 88. She told the court, C.C. came in through the open door and she would wake up when she felt his hand touch her chest or butt over her clothing. RP 84-85, 88, 90. She was wearing her pink nightgown and blue pajama pants. RP 82. She described the touching as soft and his hand stayed still on her body. RP 85, 87. She said the touching made her feel tingly inside. RP 87. She didn't tell her father about the touching because she was scared she would get in trouble. RP 124-25. When her father approached her and asked if anyone touched her, Jane felt embarrassed talking with a man. RP 97-99, 126-27. She agreed to talk to her father's friend, Patty Halk. RP 96, 99, 116-17. When Patty asked her if anyone touched her, she told her what C.C. did and later confirmed this to her father, grandmother, Uncle, and police investigator Lozano. RP 99-102, 118.

The trial court found Jane Doe was a competent credible witness. RP 336, CP 19. Under the Ryan factors the court found the statements made to her father, Patricia Halk, and grandmother were spontaneous and consistent. RP 350-51, CP 20. It also found Jane had no motive to lie and was not telling to please anyone else. CP 20. The court found the questioning by Investigator Lozano to be appropriate and not leading. CP 20. Additionally, that Jane provided information not called for in the question. CP 20. The court found the statements to Kirsten, Patricia Halk, Edna Kellim, and Investigator Lozano were reliable and admissible, but those to Jason Kellim were not reliable and were inadmissible. CP 21.

During its decision considering the Ryan factors, the court cogitated on the record. The court found RCW 9A.44.120 unhelpful in determining reliability as the statute gave no guidance. RP 350. The Court mused that the Rules of Evidence were established to set up reliability factors, citing to the exception to the hearsay rule for present sense impression, excited utterance, statements of mental state or medical diagnosis, business records, market reports, learned treatises. RP 350. The trial court then looked to State v. Ryan, indicating the salient factor in Ryan was whether a child had a motive to lie. RP 350. The trial court

mused this factor was a strange indica of reliability since motive would not satisfy the hearsay Evidence Rule 804. RP 350. The court then clarified the issue is whether the statement is in itself inherently reliable. RP 351.

The court found the factor of character to be unhelpful, stating it is hard to know about the character of children. RP 351. The court found the factor of consistency to multiple individuals made sense, as well as if the statements were spontaneous. RP 351. The court stated it is a common experience across society that children have the ability to understand when they've been hurt and the ability to make an accusation. RP 352. Moreover, statements about being hurt have some inherent reliability because they are not ordinarily "untrue in a premeditated...way." RP 352. The court distinguished statements of harm and how the harm occurred from who was at fault in starting the "fight." RP 352. The court stated when children spontaneously say they are hurt, the common experience is they are telling the truth. RP 353. The court also found the statements made to Lozano, while not spontaneous, were made under appropriate questioning guidelines and there was no motive to lie. RP 354.

After the court determined admissibility under RCW 9A.44.120, the parties gave closing argument as to C.C. guilt. RP 355. The court found Jane credible because she reluctantly relayed her story that C.C. touched her breasts and buttocks on a number of occasions. RP 368. It found she was consistent in telling multiple people over time. RP 368. Moreover, the court did not find she told with any ulterior motive to get C.C. into trouble or ingratiate herself to her father, but told her story for herself. RP 368.

#### IV. ARGUMENT

##### **A. THE DEFENDANT RECEIVED A FAIR TRIAL AND THE TRIAL JUDGE DID NOT PREJUDGE THE CREDIBILITY OF THE STATE'S WITNESS.**

The Defendant<sup>2</sup> states the trial court violated his due process rights and argues the trial court prejudged the credibility of the State's witnesses by holding the opinion that spontaneous statements by children describing how they've been hurt are generally reliable implies partiality.

Due process guarantees defendants a trial before a fair and impartial tribunal. State v. Richard 4 Wn.App. 415, 424-25, 482 P.2d 343 (Div 1, 1971) (citing State ex rel. McFerran v. Justice Court, 32 Wn.2d 544, 202

P.2d 927 (1949)). Judges must avoid not only actual bias but also the appearance of partiality. State v. Madry, 8 Wn.App. 61, 70, 504 P.2d 1156 (Div 2, 1972). In determining whether there is an appearance of bias, we consider how the proceeding would appear to a reasonably prudent and disinterested person who knows and understands all the relevant facts. State v. Perala, 132 Wn.App. 98, 112-13, 130 P.3d 852 (Div 3, 2006), State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (Div 2, 1999). There is a presumption that a judge is impartial, and a party alleging bias must make an affirmative showing that it exists. Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions, 133 Wn.App. 723, 766, 137 P.3d 78, 100 (Div. 2, 2006) *citing* Ritter v. Bd. of Comm'rs of Adams County Pub. Hosp. Dist. No. 1, 96 Wn.2d 503, 513, 637 P.2d 940 (1981); *see* Org. to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 913 P.2d 793 (1996).

The Defendant cites to a number of cases from other jurisdictions for the position a judge may not pre-judge the credibility of a witness on the basis of inadmissible evidence, evidence outside the record, or preconceived ideas of the person. *See* App. Brf. at 13-15. The State

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<sup>2</sup> The State refers to C.C. as the Defendant, instead of the usual juvenile term

agrees whole-heartedly that a judge should not engage in such behavior. However, the trial court did not prejudge the credibility of the victim in this case. The judge's comments about credibility of children arose in his deliberations of what statements by children are reliable and admissible in context of a Ryan hearing under RCW 9A.44.120. The trial judge did not speak to Jane Doe's credibility, but shared a common experience that children who make spontaneous statements about being hurt are generally reliable. The trial court's statement is comparable to the declaration and exception to the hearsay rule: that people who make statements about an exciting event shortly after experiencing the event are generally reliable. General reliability is a hallmark of admissible evidence. Should facts arise questioning the reliability of such a statement, the court should and would consider them. The defendant could not reasonably argue a court prejudices any person who makes an excited utterance. Therefore arguing the trial court prejudices a child making spontaneous statements of harm is unreasonable.

Moreover, the Defendant's argument of prejudgment fails because the trial court did not merely accept Jane's statement as reliable. When

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Respondent, to avoid any confusion of the parties.

the record reflects that a judge considers more than a “preconceived notion,” the Defendant fails to demonstrate the appearance of unfairness. See State v. Perala, 132 Wn.App. 98, 112-13, 130 P.3d 852 (Div 3, 2006). In the present case, the court stated it considered the way in which Jane’s statements were made, the type of questioning used, and whether she had a motive to lie. If the court had truly prejudged the admissibility of such statements, he would never have considered these points.

The Defendant cites to Turman v. United States, 555 A.2d 1037, 1038 (D.C. 1989) comparing a judge’s statement the officer testified in front of him before and he knew him to be a person of great credibility, to the case at hand. See Def. Brf. at 14-15. The Appellate court found the action was improper and cautioned the court in its language. Id. 1039. Additionally, while the appellate court found nothing inherently improper about a judge deciding the credibility of a witness who previously testified, it cautioned in the future the court should announce it would not rely on any evidence outside the record. Id.

In the present matter, the trial court had no specific evidence of Jane’s credibility and made no statements as such. RP 352, 368. There is no evidence in light of his considerations of all her testimony and the

surrounding circumstances of her statements that he prejudged her credibility.

The Defendant cites to People v. Kennedy, 191 Ill. App. 3d 86, 547 N.E.2d 634 (1989) comparing the Cowlitz County trial court's general statement of common understanding of children's disclosure of harm to the Illinois trial court's vitriolic name calling of the defense witnesses based upon their clothing and matters not contained in the record. In a trial to the judge, the People presented evidence Kennedy was positively identified by a police officer as the person driving a stolen vehicle at 12:45 am. Id. at 88. Kennedy presented testimony from two female friends that he was at home at 1:00 am and could not have been the person seen in the vehicle. Id. During its verdict, the trial court stated it did not believe the testimony of the female friends. Id. at 90. He repeatedly called the witnesses "thieves, drug addicts, fornicators, and welfare recipients." Id. at 91. The Appellate court stated that while a trial court may comment on the credibility of witnesses and use their testimony and demeanor to make conclusions, what the trial judge did was to use preconceived notions about clothing, living arrangements, and economic status, relying on matters outside the record or on guesswork. Id.

The present case is nothing like Kennedy. Here the trial court first stated he found Jane's testimony itself credible. RP 368. He then took into account her consistency in telling multiple people the same story. RP 368. He looked to see if she had a motive to lie, and finding none, found the Defendant guilty. RP 368. The court did not consider any evidence not in the record, did not make guesses as to facts, and considered whether there was any evidence presented to question her credibility. RP 368.

The Defendant's claim of partiality fails as the trial court merely made a statement pondering the reliability of children's spontaneous statements of harm in light of RCW 9A.44.120, there is no evidence of bias or prejudgment and the court evaluated Jane's statements in light of the whole trial.

**B. THE COURT PROPERLY WEIGHED THE RYAN FACTORS AND JANE'S STATEMENTS WERE RELIABLE AND DMISSIBLE.**

Revised Code of Washington section 9A.44.120 governs when a child's hearsay statements are admissible at trial. The section states if a child testifies at trial, statements made by the child describing the sexual acts are admissible if the court determines that the "time, content, and circumstances of the statement provide sufficient indicia of reliability."

RCW 9A.44.120 (2010). Because this statute, as the trial court indicated, gives no aid in determining reliability, there are many appellate court decisions devoted to this determination. The seminal case of State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), set forth the following nine factors for determining admissibility:

(1) whether there is an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) whether the statements were spontaneous, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contains express assertions about past facts, (7) whether cross-examination could show the declarant's lack of knowledge, (8) whether the possibility that the declarant's recollection is faulty is remote, and (9) whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

State v. Ryan, 103 Wn.2d at 175-76, see State v. Swan, 114 Wn.2d 613, 647-78, 790 P.2d 610 (1990) cert. denied, 498 U.S. 1046 (1991). No single Ryan factor is decisive and the reliability assessment is based on an overall evaluation of the factors. State v. Young, 62 Wn.App. 895, 902-03, 802 P.2d 829, 817 P.2d 412 (1991). But the factors must be “substantially met before a statement is demonstrated to be reliable.” State v. Griffith, 45 Wn.App. 728, 738-39, 727 P.2d 247 (Div 3, 1986); see also State v. Kennealy 151 Wn.App. 861, 881, 214 P.3d 200, 209 (Div. 2,

2009), State v. Stevens, 58 Wn.App. 478, 487, 794 P.2d 38 (Div 1, 1990) (appellate court may affirm admissibility of statements when trial court misapplied Ryan factors if reliability is apparent from the record). A trial court's admission of child hearsay statements under RCW 9A.44.120 is only reversed when there is a manifest abuse of discretion. Id. at 623. The test is not whether the trial court considered each and every factor, but whether its decision to admit the statements was manifestly unreasonable or based on untenable reasons or grounds. State v. Borboa, 157 Wa.2d 108, 135 P.3d 469 (2006).

The Defendant argues the trial court abused its discretion in admitting Jane Doe's statements because they failed to consider each of the Ryan factors nor find they were substantially met. Because the Defendant did not assign error to any of the trial court's Findings of Fact or Conclusions of Law, they are treated as verities on appeal. See e.g. State v. O'Neill, 148 Wash.2d 564, 571, 62 P.3d 489 (2003).

The trial court clearly looked at the number one factor – if Jane had a motive to lie. There was substantial evidence presented to the court that Jane had a difficult time telling her story and was very reluctant to do so. RP 368. There was no evidence Jane held a grudge against C.C., and

evidence was present that after Jane disclosed she could no longer see Uncle Joe. RP 106, 166.

While the court did not consider the second factor of character, finding it unhelpful, there was evidence from multiple witnesses that Jane was never known to tell more than the typical childhood lie to keep out of trouble and that she was a quiet, but happy child. RP 136-37, 200, 229. While the trial court expressed concern about how one tells the character of a child, there was substantial evidence of her truthful character.

The trial court did consider the third Ryan factor, whether more than one person heard the statements. The court found Jane told Patricia Halk, her father Kirsten, her grandmother Edna Kellim, and Investigator Lozano. RP 351, CP 19-20. Moreover, the court found her statements were consistent. RP 351-52, CP 19.

The fourth factor under Ryan is whether the statements were spontaneous. Statements made in response to questions are spontaneous where the child volunteers the information in response to questions that are neither leading nor suggestive. State v. Henderson, 48 Wn.App. 543, 550-51, 740 P.2d 329 (Div 1, 1987), State v. McKinney, 50 Wn.App. 56, 63, 747 P.2d 1113 (Div 1, 1987). There is ample evidence of the court's

finding the spontaneous nature of the statements and the Defendant does not challenge this finding. RP 351.

The fifth factor, the timing of the declaration and relationship between Jane and the listener, is supported by the record, although not specifically addressed by the court. The court does note Jane had a recollection of the events and the timing of those in relation to the Christmas holiday. CP 20. Additionally, it notes the declarations were made to her father and grandmother and her father's friend. CP 20. Moreover, the record establishes the statements to her father, grandmother, and Halk were to trusted adults.

The Defendant argues that by not considering the possibility that Kristen, Halk, Kellim, and Lozano were predisposed to confirm what they already heard, the court missed a vital clue in the reliability test. However, courts after Ryan have not taken the relationship factor to this point. In State v. McKinney, 50 Wn.App. 56, 62, 747 P.2d 1113, 1116 (Div 1, 1987) the court found "Ryan does not require the trial court to determine if the *witness's* memory or articulation of the child's statement is reliable. Indeed, any deficiencies in the witness's memory or perception may be explored on cross examination," and the court rejected

McKinney's attempt to alter the focus of the Ryan analysis from the reliability of the victim's statement to the reliability of the witness's recollection. Id. at 62.

The Defendant also argues the court failed to consider Jane was told she should talk in order to protect other children. See Def. Brf at 22-23. However, the court did consider the spontaneity of the statements. Using the definition in State v. Henderson, that statements made in response to questions are spontaneous where the child volunteers the information in response to questions that are neither leading nor suggestive, the court did consider whether the statements made to Jane about other children were coercive and found they were not. State v. Henderson, 48 Wn.App. 543, 550-51, 740 P.2d 329 (Div 1, 1987), State v. McKinney, 50 Wn.App. 56, 63, 747 P.2d 1113 (Div 1, 1987).

The sixth factor, whether the statement contained assertions of past fact is no long valid as a “significant portion of child hearsay testimony will always be an assertion about past fact, usually about the very act constituting the crime charged.” State v. Stange, 53 Wn.App. 638, 644, 769 P.2d 873, *review denied*, 113 Wn.2d 1007 (1989); see also State v. Borland, 57 Wn.App. 7, 17, 786 P.2d 810, *review denied*, 114 Wn.2d 1026

(1990). Because this sixth Ryan factor is merely cautionary, it does not weigh in favor of reliability or unreliability. State v. Swan, 114 Wn.2d 613, 650-51; Borland, 57 Wn.App. at 17. Therefore, this sixth factor does not prevent the trial court from admitting Jane's child hearsay statements and the court properly did not consider it.

The seventh factor, whether cross-examination could establish the declarant was not in a position of personal knowledge is also not applicable because Jane testified at trial. State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Thus, the court's failure to consider it cannot be error.

The eighth factor, how likely is the statement to be founded on faulty recollection was supported in the trial court's finding of competency and considered by the court. When the court found Jane competent, it indicated she had a memory of the events and could accurately recall events surrounding the time frame. RP 336, CP 20. These specific findings show it is unlikely that Jane's recollection was faulty; instead, these findings demonstrate the reliability of Jane's statements. Woods, 154 Wn.2d at 624.

The ninth factor, whether the circumstances surrounding the making of the statement were such there was no reason to suppose the declarant misrepresented the defendant's involvement, was not addressed by the trial court directly. While this factor has been found redundant, there was sufficient evidence indicating this factor. See In re Dependency of S.S., 61 Wn.App. 488, 499, 814 P.2d 204 (Div 1, 1991) *overruled on other grounds*, State v. Karpenski, 94 Wn.App. 80, 971 P.2d 553 (Div. 2, 1999). First, Jane testified it was the defendant who molested her. RP 84-85, 88, 90. Additionally, she possessed a reasonable memory and had no motive to lie. RP 351-53, CP 20. Lastly, she was consistent in telling each person C.C. was the person who touched her and she denied any other person touched her. RP 210, CP 20.

After looking at the six remaining applicable factors, the court considered Jane's motive to lie, whether the statements were heard by more than one person, and whether the statements were spontaneous. The court also had substantial evidence of the timing and relationship of the statements and witnesses, made a determination Jane did not have faulty recollection of the events in its determination of competency, and there was no reason to suppose misrepresentation of the defendant's

involvement. The record before us shows that the Ryan factors were substantially met; thus, the trial court did not abuse its discretion.

In State v. McKinney, 50 Wn.App. 56, 63, 747 P.2d 1113 (Div 1, 1987), Division One found substantial compliance in considering the Ryan factors when the court considered factors of motive to lie, spontaneity of the statements, time and relationship in factor five, faulty recollection and no reason to suppose misrepresentation in factor nine. Additionally, in State v. Quigg, 72 Wn.App. 828, 835-36, 866 P.2d 655 (Div 3, 1994), cited by Defendant, the court relied again on factors of motive to lie, spontaneity, faulty recollection, misrepresentation and also considered character.

The Defendant compares the present matter to State v. Jackson, 46 Wn.App. 360, 730 P.2d 1361, (Div 1, 1986). See Def. Brf at 24. In Jackson, the trial court never made any attempt to consider the Ryan factors and never stated on the record that it considered the statements to be reliable as to time, content, and circumstances. Id. at 368. The Appellate court found only two factors established by the record, spontaneity and the statements were heard by more than one person. Id. It did find the victim's substantially similar testimony subject to cross-

examination added to the reliability of the statements. Id. However, Division one also found there was substantial reason to question the victim's motive to lie, the statements were made a year and a half after she was no longer around Jackson, and there was no information in the record to give the court information of the victim's character. Id. The Court held there was insufficient evidence on the record to determine reliability.

The present case is distinguishable from Jackson, as there is sufficient evidence on the record to support the factors and ample indication the court considered Ryan when it determined reliability. RP 151-53, CP 19-21.

The Defendant argues the trial court's failure to consider each of the Ryan factors and to make a finding was an abuse requiring a new trial as it materially affected the outcome. The Defendant bases this argument on the length of time spent at trial presenting the hearsay statements. However, the Defendant never addresses the trial court's finding Jane Doe's testimony that Defendant touched her breasts and butt over her clothing as credible. This evidence in itself is sufficient evidence to find the Defendant guilty.

**V. CONCLUSION**

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 28 day of February, 2011.

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COULSON, David S  
2011 FEB 18

**COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II**

FILED - C. P. 11-018

STATE OF WASHINGTON  
DEPUTY

STATE OF WASHINGTON, )  
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 Respondent, )  
 )  
 vs. )  
 )  
 C.C., )  
 )  
 Appellant. )  
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NO. 40835-0-IBY \_\_\_\_\_  
Cowlitz County No. DEPUTY  
09-8-00273-1

**CERTIFICATE OF  
MAILING**

I, Michelle Sasser, certify and declare:

That on the 28<sup>th</sup> day of February, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals, Clerk  
950 Broadway, Suite 300  
Tacoma, WA 98402

Jennifer J. Sweigert  
Attorney at Law  
1908 E. Madison Street  
Seattle, WA 98122

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

Dated this 28<sup>th</sup> day of February, 2011.

Michelle Sasser  
Michelle Sasser