

NO. 42416-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEREMY CARR,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-00061-1

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BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 2, 2012, Port Orchard, WA \_\_\_\_\_  
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway,  
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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly found the child hearsay statements admissible under RCW 9A.44.120.?
2. Whether Carr fails to show that the trial court committed either evidentiary or constitutional error by disallowing cross-examination about AB's alleged habit of lying, where the trial court merely deferred the issue until trial, and the issue never arose thereafter?
3. Whether AB's testimony that Carr put his finger "inside" her "private" was sufficient to establish the element of penetration?
4. Whether the trial court properly prohibited Carr from have contact with minors?
5. Whether the trial court properly required polygraph testing as a condition of Carr's community custody?
6. Whether Carr has failed to meet his burden of showing any trial error, much less that cumulative error deprived him of a fair trial?

**II. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

Jeremy Carr was charged by information filed in Kitsap County Superior Court with two counts of first-degree rape of a child, eight-year-old AB. CP 42-45.

Before trial, the State moved to admit statements AB made to her mother, her older brother, and the State's child interviewer. CP 6, 25. After a hearing, the trial court determined that AB was competent to testify, that the statements bore sufficient indicia of reliability to be admissible under the child-hearsay statute, and that the statements to the child interviewer were not testimonial. RP (5/9) 67-75;<sup>1</sup> CP 71-77.

The case proceeded to trial, and a jury found Carr guilty as charged. CP 99. The trial court imposed a standard-range minimum term pursuant to RCW 9.94A.507. CP 114. As part of the judgment, the trial court imposed standard conditions that Carr not have contact with minors and that during his term of community custody he submit to polygraph tests to monitor his compliance with community custody conditions. CP 125.

**B. FACTS: CHILD HEARSAY HEARING**

Sasha Mangahas, is the child interviewer for the prosecutor's office. RP (5/9) 4. Prior to her current job, which she had held for seven years, Mangahas worked for Child Protective Services for five years. RP (5/9) 4. Her training taught her to ask very open-ended questions. RP (5/9) 5. When interviewing a child she had to avoid any questions that might suggest an answer. RP (5/9) 5. In addition to her initial training, Mangahas also

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<sup>1</sup> There are two separately-paginated reports of proceedings: one for the May 9, 2011, child-hearsay hearing, and one for the trial, held June 6-13, 2011. The reports will be referred to as RP (5/9) and RP, respectively.

received annual refresher trainings. RP (5/9) 5. Since joining the prosecutor's office in 2004, she had interviewed approximately two children a day. RP (5/9) 6.

Typically, she receives a report from law enforcement or CPS. RP (5/9) 6. Before conducting the interview, she reads over the record, then contacts the parent or guardian and asks them to bring the child into the office. RP (5/9) 6. The child is taken to the special child interview room in the office. RP (5/9) 6. The room has recording facilities, and the interview is recorded on DVD. RP (5/9) 6. At the interview, Mangahas introduces herself to the child, and explains that she a lady who talks to kids, and just wants to ask some questions. RP (5/9) 6. She lets the child know he or she is not in any trouble, and discussed the ground rules. RP (5/9) 7. She tells that that it is OK if the child does not know the answer to any question. RP (5/9) 7. She also tells them that if she makes a mistake, the child should correct her. RP (5/9) 7. If she is concerned that he child might not know the difference between the truth and a lie, she would have a conversation with them about that. RP (5/9) 7. She always obtains a promise from the child that they will tell the truth. RP (5/9) 7.

After the initial part of the interview, Mangahas tries to get the child to talk about a neutral subject so the child can get some practice narrating, because she wants most of the information to come from the child. RP (5/9)

7. After that, she asks the child why he or she thinks they were there. RP (5/9) 7. If the child knows he or she usually will say why. RP (5/9) 7. Once the child starts talking about the reason for the interview, then Mangahas will ask open-ended questions to try to get the child to articulate what may have occurred. RP (5/9) 7. At the end of the interview, Mangahas produces a summary of the interview. RP (5/9) 8.

Mangahas interviewed AB on August 12, 2010. RP (5/9) 9. AB promised to tell her the truth. RP (5/9) 9. AB stated that while her mother was at work, Carr came into her room and pulled up her skirt and pulled her underwear down and put his finger inside her “wee-wee.” RP (5/9) 9. Mangahas clarified that by “wee-wee” AB meant her genital area. RP (5/9) 10. AB told Carr to stop and tried to scream, but he covered her mouth with his hand and a blue teddy bear. RP (5/9) 9. He told her not to talk about it and left the room. RP (5/9) 9. AB stated that Carr returned several minutes later and touched in her in the same way and told her, “if you tell, you will see what happens.” RP (5/9) 9. AB reported that it hurt when he did it. RP (5/9) 10. After the incident she went into the bathroom and looked at her “wee-wee.” There was a scratch in the middle of it. RP (5/9) 10. AB stated that she told her mother about the incident about a week before the interview because Carr was no longer living with them. RP (5/9) 10. She did not mention it before that because she did not want to upset her mother. RP (5/9)

10. AB did not discuss her relationship with Carr. RP (5/9) 11.

Kellie Fritz, AB's mother testified that Carr was her boyfriend. RP (5/9) 13. Fritz had known Carr since she was 15 or 16. RP (5/9) 13. They were friends and dated a bit in high school. RP (5/9) 13. In 2008 they got back in touch and began dating again. RP (5/9) 13. She lived in East Wenatchee at the time and he lived in Gig Harbor. RP (5/9) 14. She moved in with him in Gig Harbor in the summer of 2008. RP (5/9) 14.

In 2009, Carr, Fritz, her children, and Chris moved to Bremerton. RP (5/9) 15. AB was seven at the time. RP (5/9) 15. The Bremerton house had three bedrooms. RP (5/9) 15. The boys had a room, AB had her own room, and Carr and Fritz shared a room. RP (5/9) 15.

Fritz was a caregiver for Alzheimer's patients. RP (5/9) 17. She worked a four days on, two days off, 10:00 p.m. to 6:00 a.m. shift. RP (5/9) 17. Carr and his brother stayed at home with the children when she was at work. RP (5/9) 17. Carr and AB did not have much of a relationship. RP (5/9) 17. Fritz did most of the disciplining of the children. RP (5/9) 17. Fritz did not recall ever seeing Carr discipline AB. RP (5/9) 18. When she was eight, AB told Fritz that something had happened with Carr. RP (5/9) 18. Carr moved out around September or October 2009, when they broke up. RP (5/9) 16. He returned for a few days around Halloween of 2009, and then moved out permanently. RP (5/9) 16.

About eight months after Carr moved out, AB came to Fritz after dinner and said she had something important to tell Fritz. RP (5/9) 18, 20. Fritz asked what, and AB responded that they needed to talk in private. RP (5/9) 18. AB had not been in trouble for anything that day. RP (5/9) 19. AB said she had to “get it out of her head” and told Fritz that one night when Fritz was at work, Carr had touched her on her private parts. RP (5/9) 19. AB said he had wiggled two fingers in her privates. RP (5/9) 19. AB was crying when she told Fritz. RP (5/9) 20. Fritz asked why she had not told her before. RP (5/9) 17. AB said that she was scared because Carr told her if she told anyone she “would see what would happen.” RP (5/9) 19.

Fritz did not believe that AB had seen Carr since he had moved out. RP (5/9) 20. Fritz, her mother and the three children were living in the house at the time of the disclosure. RP (5/9) 20. It was summer, June or July. RP (5/9) 20. Fritz took a few minutes to calm down and talk to her mother, and then called the police. RP (5/9) 20. Eventually she brought AB in to be interviewed at the prosecutor’s office. RP (5/9) 21.

AB did not lie very much anymore. She usually got caught in her lies. RP (5/9) 21. She used to lie, until she was about six or seven. RP (5/9) 21. Her facial features gave her away when she tried to lie. RP (5/9) 21. Fritz could tell when AB was not telling the truth. RP (5/9) 21. Her eyes got really big. RP (5/9) 21. When she did lie it was usually small things, among

her siblings, like who took the candy, or who hit whom. RP (5/9) 21. AB always admitted it when she was caught lying. RP (5/9) 28.

On cross, the defense elicited testimony that Carr was never involved with the children. RP (5/9) 22. He would occasionally play games with AB's brothers, but did not "really click" with her. RP (5/9) 22. AB never discussed her relationship with Carr. RP (5/9) 22. AB never indicated that she did not like Carr at the beginning of the relationship, only at the end. RP (5/9) 23. Then she stated that he was mean and that she did not want him to live there. RP (5/9) 23. Carr never struck AB or gave any indication that he did not like AB. RP (5/9) 23. Carr never treated the children badly, he just was not really involved with them. RP (5/9) 23. AB never told Fritz that she had told anyone else about the abuse. RP (5/9) 24. Fritz started crying when AB did. RP (5/9) 24.

Fritz believed that Chris was there the night of the incident. RP (5/9) 25. She did not recall whether AB mention that the night she disclosed the incident. RP (5/9) 25. The only thing Fritz asked AB was why she had not told her before then. RP (5/9) 25. Otherwise, she just let her talk. RP (5/9) 25. The lying when she was younger was more frequently than rarely. RP (5/9) 25. It was usually to try to get out of trouble, or try to blame one of her brothers for something she had done. RP (5/9) 25. Fritz would confront AB about lying when she caught her. RP (5/9) 26. She would tell her she knew

she was lying and to tell the truth. RP (5/9) 26. Fritz told AB that her face gave her away. RP (5/9) 26. The lying pretty much stopped when she was six or seven. RP (5/9) 26. Fritz would now occasionally catch her in a lie, but AB was pretty truthful, and knows she will get in trouble if she lies. RP (5/9) 26. AB did not say she had discussed the incident with her brothers. RP (5/9) 26. Fritz later learned that she had talked to her brothers about it before she disclosed it to Fritz. RP (5/9) 27. Fritz discussed it the next day with the boys, and explained that that was why she had been upset the night before. RP (5/9) 27. Fritz did not have any reason to think that AB disliked Carr until the end of the relationship. RP (5/9) 27.

EB, AB's ten-year-old brother, testified that about three or four months after Carr moved out, AB told EB about the incident with Carr. RP (5/9) 32. They were watching TV. RP (5/9) 33. AB told him that Carr had touched her "there," meaning her private parts. RP (5/9) 33. AB was "freaked out" when she told him. RP (5/9) 34. She was scared. RP (5/9) 34. He could tell because it took her a few minutes to tell him from the time she first said that she had something she had to tell him. RP (5/9) 34. Then AB told him not to tell their mother. RP (5/9) 34. AB said she would tell their mother, but it took her several months before she did. RP (5/9) 34.

On cross, EB opined that he and his siblings got along with Carr. RP (5/9) 36. AB never told him she did not like Carr. RP (5/9) 36. He did not

think Carr was ever mean to AB. RP (5/9) 36. He was never mean to EB or his brother. RP (5/9) 36. AB and EB were in the living room when they talked about it. RP (5/9) 36. Their younger brother was not there; he was in their bedroom. RP (5/9) 36. AB did not tell L what happened, just EB. RP (5/9) 37. AB did not tell him any details, just that she had touched her in her private parts. RP (5/9) 38. Fritz was outside at the time. RP (5/9) 38. Nothing strange had happened that day. RP (5/9) 38. They had not recently seen Carr. RP (5/9) 38. AB had in the past tried to get EB in trouble by lying. RP (5/9) 39. It was not something she did a lot. RP (5/9) 39.

AB testified that she knew the difference between truth and a lie, and gave an example. RP (5/9) 41. She believed the truth was better than a lie. RP (5/9) 41. She understood that it was important to tell the truth in court. RP (5/9) 42. She promised to tell the truth in court. RP (5/9) 42.

She knew they lived in Gig Harbor and identified the residents of their home there. RP (5/9) 43. When they moved to Bremerton, EB and the younger brother shared a room, her mother and Carr had a room and AB had her own room. RP (5/9) 43. When Carr moved out, her grandmother took the master bedroom, and her mother took the couch in the living room. RP (5/9) 44. Before Carr moved out, his brother Chris also stayed with them occasionally on the couch. RP (5/9) 44.

AB was eight when they moved to Bremerton. RP (5/9) 44. AB was

eight when the incident occurred. RP (5/9) 44. It occurred in her bedroom in the house in Bremerton. RP (5/9) 44. The room was purple and she had a bunk bed, and a closet, and a TV. RP (5/9) 45. It was about 7:10 p.m. when the incident occurred. RP (5/9) 45. Chris and AB's brothers were home. RP (5/9) 45. AB's mother went to work at 7:00 p.m., and it occurred about 10 minutes after she left. RP (5/9) 46. Her mother took care of old people in a nursing home. RP (5/9) 46.

AB was in her room watching a movie, and Carr came in and reached up her pajama shorts and touched her private. RP (5/9) 46. She was sitting on the bottom bed. RP (5/9) 46. She was wearing underwear, pajama shorts and a T-shirt. RP (5/9) 46. No one else was in the room. RP (5/9) 47. Carr just walked in and reached his hand into her shorts. RP (5/9) 47. She did not remember him saying anything. RP (5/9) 47. He rubbed two fingers on her. RP (5/9) 47. It was under both her shorts and underwear. RP (5/9) 48. Then he left and a few minutes later came back and did the same thing again and then told her not to tell anyone. RP (5/9) 48. Then he went back out to the living room. RP (5/9) 48. The first time it happened she tried kicking him away. RP (5/9) 48. He just kept doing it. RP (5/9) 49. He did it for two or three minutes. RP (5/9) 49. The second time it was about two minutes. RP (5/9) 49. She did not yell out. RP (5/9) 49. She tried to yell the first time. RP (5/9) 49. Then she remembered he said not to tell anyone, and got scared

and stopped herself. RP (5/9) 50.

The incident occurred about three weeks after her mother kicked him out. RP (5/9) 50. He had come over because he had forgotten something. RP (5/9) 50. It was during the fall. RP (5/9) 50. After the second time, AB went out to the living room because she thought Carr had left. RP (5/9) 50. Carr and his brother were still there, however. RP (5/9) 51. AB tried to say something to Chris, but Carr made a motion across his throat, which she thought meant he might kill her or something. RP (5/9) 51.

She told her brothers the next day, but EB did not believe her. EB said that Carr had two daughters, so why would he not just do it to them? AB responded that Carr loved them but did not love her. RP (5/9) 51. AB told her mother about a year later. RP (5/9) 51. She did not tell her sooner because she wanted to make sure Carr was completely out of her life. RP (5/9) 51.

She was on the front porch when she told her mother. RP (5/9) 52. AB was sitting on the porch and her mother got out of her Jeep and AB said she had something to tell her. RP (5/9) 52. AB did not like Carr because he was mean to her and called her names. RP (5/9) 52. He got along with her brothers. RP (5/9) 52.

On cross, AB testified that liked Carr at first “a little bit.” RP (5/9) 53. Her attitude changed when he began to “do mean things” after they

moved to the house. RP (5/9) 53. He called her a crybaby and told her she looked ugly a couple of times. RP (5/9) 53. Carr treated the other kids in the house better than her. RP (5/9) 54. She was mad when her mother let him move in because he was mean to her. RP (5/9) 56. She told her mother when Carr was mean to her and her mother would tell him to stop, but he did not. RP (5/9) 56. He only tried to touch her the one time. RP (5/9) 57. Carr was not living there when it happened. RP (5/9) 57. He came over to visit or had forgotten something. RP (5/9) 57. When he knocked on the door and she realized who it was she went to her room and put on a movie. RP (5/9) 57. Chris and her brothers were in the living room playing a game when Carr came into her room. RP (5/9) 58. They never came into the room. RP (5/9) 58. She told her brothers about it the next day. RP (5/9) 59. Chris was not there. RP (5/9) 59. Her mother was sleeping. RP (5/9) 59. She told her brothers not to tell anyone, and told them she would tell their mother. RP (5/9) 59.

When she talked to the child interviewer after her mother called the police she did not really know why she was discussing what happened. RP (5/9) 60. She told her what happened. RP (5/9) 60. She did not realize she was talking to Mangahas because her mother had called the police. RP (5/9) 61.

### C. FACTS: TRIAL

Mangahas testified that she interviewed AB on August 12, 2010. RP 35. AB stated that while her mother was at work, Carr came into her room and pulled her skirt up and her underwear down and slid his fingers inside of her wee wee. She told him to stop and tried to scream, but Carr covered her mouth with his hand and blue teddy bear. RP 35. Carr told AB not to talk about it and left the room. RP 36. He returned several minutes later and touched her in the same way, and afterwards told her, "If you tell you will see what happens." RP 36. AB said that it hurt when Carr touched her. She went into the bathroom later and saw a scratch in the middle part of her wee wee. RP 36. AB had told her mother about a week before the interview because Carr was no longer living with them. RP 36. She waited because she did not want to upset her mother. RP 36. By "wee wee," AB meant her genital area. RP 36. AB told Mangahas that when AB tried to tell Carr's brother Chris, Carr began talking over her and made some kind of motion. RP 44.

Fritz recounted her history with Carr consistently with her pre-trial testimony. RP 46-51. In October 2009, Carr moved out. RP 51. He came back about a month later and stayed for a few days. RP 51. He moved out for good the first week in November 2009. RP 52. Carr and AB "never bonded." RP 52. Fritz was more the disciplinarian with her children than

Carr. RP 52.

AB told Fritz about the incident in June or July 2010. RP 52. AB told her Carr touched her and wiggled his fingers. RP 54. AB started crying when she told Fritz about it. RP 54. Carr did not live with them at any point between when he moved out and the summer of 2010. RP 54. After AB told her, and Fritz she called the police once she had calmed down. RP 55.

On cross, Fritz conceded that she never saw Carr treating AB badly. RP 55. Fritz would not say that Carr treated AB the same as the other children – “they never really clicked.” They never did much together, but generally he treated the kids about the same. RP 56. AB never complained about how Carr treated her when they lived in Gig Harbor. RP 56. She never came to Fritz and said she did not like Carr. After they moved to Bremerton AB did not complain about Carr a lot; she never said she felt he was being mean to her or treating her unfairly. RP 57. Fritz did not go into the details of the incident with AB. RP 57.

AB’s older brother EB testified that AB told him about what happened with Carr after Carr was no longer living with them. RP 71. Their mother was outside and his younger brother LB was in the room. RP 71. She said that Carr had touched her in her private. RP 72. AB seemed scared when she told him. RP 72. She was afraid no one would believe her. RP 72. It took her a few minutes to tell him. RP 72. At first EB did not believe her.

RP 73. He did not know why someone would do something like that. RP 73. AB asked him not to tell their mother, because she wanted to tell her. RP 73. AB told her mother a few months later. It was about 11 months after Carr moved out. RP 73. EB had not seen Carr since he had moved out. RP 73.

On cross, EB stated that Carr had been gone for about three or four months when AB told EB about the incident. RP 74. LB was not in the living room; he was in the bedroom. RP 74. EB got along with Carr. RP 76. So did AB. RP 76. Carr treated them the same. RP 76. She never complained to him about Carr being mean to her. RP 76. Carr would yell or hit her if he had to tell her to do something more than once. RP 76. He did not do that to EB. RP 76. AB never told EB that she did not like Carr. RP 77.

AB testified that she did not always get along that well with her brothers, probably because she was the only girl. RP 78. Carr was her mother's boyfriend. RP 79. She was seven when they got together. RP 79. They first lived at Carr's mother's house in Gig Harbor. RP 80. They later moved to a house in Bremerton. RP 80.

When she was eight, she was on the bottom bed of her bunk bed watching a movie. RP 82. Chris and her brothers were in the living room. RP 83. Her mother was at work; she had left around 7:00 p.m. RP 83.

About a half hour after her mother left, Carr came into AB's room and put his hand up her underwear and started touching her. RP 83. He acted like it tickled but it did not. RP 83. She was wearing a short and short-sleeved shirt. RP 84. He began to touch her front private. RP 84. It was under her underwear. RP 84. He wiggled his two fingers in the middle of her front part, on the inside. RP 85. Then he left. RP 84. About two minutes later he returned and did it again. RP 85. She tried to kick him the first time. RP 85. She did not do anything after the first time, because she did not think he would do it again. RP 86. The second time she became scared he would come back again. RP 86. He did the same thing with his fingers the second time. RP 86. It was on the inside again, she could feel it. RP 87. She kicked him again, and eventually he left. RP 87. He told her not tell anyone or he would hurt her, or words to that effect. RP 87. After he left, she went out to the living room. RP 88. Carr was there with Chris and AB's brothers. RP 88. AB started to tell Chris about it, but Carr made a gesture, sliding his finger across his throat. RP 88. She continued to try to tell Chris, but Carr did it again. RP 88. She left the room at that point. RP 89. The next morning she told her brothers. RP 89. She told her mother about a year later. RP 90. Carr was no longer living with them at the time. RP 90.

On cross, AB admitted that her relationship with Carr was not so good. RP 92. He treated his own daughters and her brothers better than her.

RP 92. She complained to her mother about it. RP 93. It happened a lot.  
RP 93. Before the incident, he had never tried it before. RP 93.

Carr recalled Mangahas, who testified that AB said that in addition to her mother she had told her brother. RP 107. She said it was three days before the interview. RP 107. The interview was on August 12, 2010.

Chris Carr testified and denied that Carr and AB were ever alone in the room the last night Carr was there. RP 110. Carr treated AB the same as the other children. RP 110.

The defense investigator testified that she interviewed AB on April 20, 2011. RP 119. AB stated that the incident occurred on the day Carr was moving out. RP 120. She said she was wearing shorts. RP 120. She stated that he pulled them down. RP 120. AB also said Chris interrupted Carr the second time. RP 121.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY FOUND THE CHILD HEARSAY STATEMENTS ADMISSIBLE UNDER RCW 9A.44.120.**

Carr challenges the admission of AB's statements to her mother, brother and the prosecutor's child interviewer. The trial court heard the testimony of the three witnesses, as well as AB herself, and concluded that AB was competent to testify and that the statements were sufficiently reliable

to be admitted under the child hearsay statute. The court did not abuse its discretion.

RCW 9A.44.120 provides that in sex case, child hearsay is admissible if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child ... [t]estifies at the proceedings.

A trial court's decision to admit evidence under RCW 9A.44.120 is reviewed for an abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 684–85, 63 P.3d 765 (2003). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *Id.* The Court applies the *Ryan* factors to determine if a child's hearsay statements should be deemed reliable:

“(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness[;]” ... [(6)] the statement contains no express assertion about past fact[;] [(7)] cross examination could not show the declarant's lack of knowledge[;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.”

*State v. Borboa*, 157 Wn.2d 108, 121-22, 135 P.3d 469 (2006) (*quoting State v. Ryan*, 103 Wn.2d 165, 175–76, 691 P.2d 197 (1984)) (editing the Court's).

Not all of the factors must be satisfied for admissibility, but the factors must be “substantially met.” *State v. Woods*, 154 Wn.2d 613, 623–24, 114 P.3d 1174 (2005).

AB testified at the hearing and at trial. Below, Carr conceded that factors (4), (6), (7) and (9) were not in issue. RP (5/9) 64-66. On appeal he challenges the trial court’s findings as to factors (1), (3) and (5).

***1. Factor (1): motive to lie***

Carr first asserts that the trial court erred in entering Finding of Fact XIX, that AB’s dislike of Carr did not rise to the level of a motive to lie. He bases his challenge on his contention that court had found that “AB was a liar and had a propensity to lie.” Brief of Appellant at 15. The trial court made no such finding. In support of this claim, Carr takes two findings of the trial court utterly out of context.

The first is Finding of Fact XVII, in which the trial court found that AB would have had a motive to lie *while* Carr was living in the home. Carr completely ignores the next findings, that at the time AB disclosed the abuse to both her mother and her brother, Carr was no longer living in the home. CP 72 (FOF XVIII).

Carr next cites Finding of Fact XXVII, in which the court found that AB would at times lie to get out of trouble. He again ignores two relevant finding related to the one he cites: Finding of Fact XXV, in which the court

found that there was no evidence that AB was trying to get out of trouble when she reported the abuse. CP 74. Perhaps more importantly, the court also found, based on uncontradicted evidence, RP (5/9) 21, 26, that AB had stopped lying to get out of trouble some time before the incident was reported. CP 74 (FOF XXVIII).

Carr finally discounts the trial court's finding that AB would have had a motive to lie only if Carr were still living in the house because AB alleged that the incident occurred on the last day that Carr was in the house. Brief of Appellant at 16. This argument misapprehends the import of the trial court's finding. It matters not if Carr was in the house when AB claimed the abuse occurred. Under the trial court's logic, what mattered was whether Carr was in the house when AB *revealed* the abuse. The testimony of AB's mother and brother was uniformly that Carr was no longer living in the house when AB disclosed the abuse. As such, Carr fails to show that the trial court abused its discretion in concluding that AB did not have a motive to lie.

**2. *Factor (3): whether more than one person heard the statements***

Carr next faults the trial court for finding that AB disclosed to three people and finding that the statements were relatively consistent. He pins this argument on two alleged distinctions: (1) that AB told child interviewer Mangahas that Carr lifted her skirt, while AB testified that she was wearing shorts, and (2) that AB told Mangahas that Carr covered her mouth with a

teddy bear, but did not tell this to her mother or brother.

As for the teddy bear, AB was never asked about it at either trial or the hearsay hearing. Nor were AB's mother or brother. The brother did testify, however, that AB did not go into the details with them of what Carr did. RP (5/9) 38. Nothing in the mother's pre-trial testimony indicates that AB went into that kind of detail with her, either. *See* RP (5/9) 19-20. At trial, the mother specifically testified that AB did not go into details. RP 57.

With regard to whether AB was wearing a skirt or shorts, the fact remains that she consistently told everyone she spoke to (and testified at the hearsay proceeding and at trial) that Carr twice came into her room while she was alone there and put his hand up her garment, under her underwear and wiggled his fingers in her "private". The accounts were also consistent in that this occurred shortly before Carr left for good and while Carr, his brother Chris, and AB's two brothers were in the living room and AB's mother was at work. The trial court did not abuse its discretion.

***3. Factor (5): the timing of the declaration and the relationship between the declarant and the witness***

Finally, regarding factor (5), Carr essentially repeats the argument he makes regarding AB's motive to lie. Regardless of some confusion regarding the exact timing of the disclosures, as might be expected when dealing with under-ten-year-olds testifying more than a year after the events occurred,

both EB and the mother were quite certain that Carr was no longer living with them when AB disclosed to them. As such regardless of when AB thought Carr moved out, the relevant fact is that when she told the witnesses, Carr *had* moved out, and therefore the trial court's conclusion that AB no longer had a motive to lie is logically sound.

**4. Factor (9): the circumstances surrounding the statement**

In his final attack on the trial court's child hearsay ruling, which Carr sub-heads "Standards of Review for Conclusions of Law," Brief of Appellant at 19-20, Carr appears challenge the trial court's findings as to Factor (9). As noted previously, however, Carr conceded this factor at trial. As such he cannot complain about the trial court's findings in that regard.

Moreover, even absent his trial concession, this claim would also be without merit. He quibbles with regard to AB's disclosure to EB about whether their younger brother was in the living room or in his own room when she told EB about the abuse. As noted above, every *Ryan* factor does not have to met to perfection. The trial court weighed all the factors and properly concluded that the overall impression was one of reliability.

Carr also in this section of his brief attacks the admission of AB's statements to Mangahas, arguing that the trial court did not find that the statement to her was reliable. However, it appears that the trial court was making *additional* findings with regard to whether or not the statements

made to Mangahas, a prosecution employee, were admissible as non-testimonial statements under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). *Cf.* CP 18-22 (State memorandum discussing applicability of *Crawford* to Mangahas statements); CP 34-41 (Defense memorandum on same topic).

Carr now argues that the statement to Mangahas was testimonial, and therefore should not have been admitted at trial, presumably under *Crawford*.

The trial court's oral ruling best summarizes why that position is incorrect:

With respect to Sasha Mangahas, I do analyze that a little differently on whether or not the statements made to Ms. Mangahas were the subject of interrogation such that they can be categorized as testimonial. It is clear that the child believed, well, knew, that the incident had been reported to the police, but when asked both by defense counsel and by the prosecution as to why she was here to talk to Ms. Mangahas, she simply couldn't reveal anything. She said, I don't know. That tells me that she was unaware that her statements were going to be used to prosecute Mr. Carr, and, therefore, I don't find that they were necessarily testimonial in that respect. We do know that Sasha is there as an interviewer to get testimonial evidence for the prosecution. Well, actually, she's there to investigate as to whether an incident occurred upon and, if so, then to formulate the basis for prosecution. But here it is clear to me that the child's knowledge of that just simply doesn't exist, and so I don't find them to be the product of an interrogation such that she would be able to manipulate the facts.

RP (5/9) 75. This conclusion is supported by the evidence, and most of the trial court's findings as to the disclosures made to Fritz and EB are equally applicable to the disclosures to Mangahas. The trial court did not abuse its

discretion in admitting any of the statements.

**B. THE TRIAL COURT DID NOT COMMIT EVIDENTIARY OR CONSTITUTIONAL ERROR BY DISALLOWING CROSS-EXAMINATION ABOUT AB'S ALLEGED HABIT OF LYING; IT MERELY DEFERRED THE ISSUE UNTIL TRIAL, WHERE THE ISSUE NEVER AROSE.**

Carr next claims that the trial court erred in excluding evidence of “AB’s habit of lying.” The trial court did no such thing. Instead, on prompting from Carr, it deferred ruling on such issues until they arose at trial:

THE COURT: ... We do have 3-C: “Does the child have tendencies to tell lies?”

Well, Ms. Taylor, would you like to be heard on this one?

MS. TAYLOR [defense counsel]: Your Honor, I anticipate that there is a potential that this issue would come up. I know that in a defense interview with [AB] she indicated that she was a good child, and I think that if there is testimony that comes out to the effect that she is a good child or that she has no real disciplinary issues, then her background in lying I think that at that point may become relevant, and there may be a reason to go into it.

Personally I think this may be an issue that would best be reserved upon until we get some of the testimony out because at this point, not knowing exactly how testimony is going to come out and what testimony is going to come out, I believe that there is a potential that [AB]’s potential or history of telling lies may become an issue.

THE COURT: All right. what I am going to do is that I am going to restrict both parties to the colloquy that is issued by Carl Tegland with respect to reputation evidence of truthfulness.

Ms. Taylor, if you believe that 404(b) evidence like

telling lies or prior acts of lying becomes relevant because you think that the State has opened the door, that you simply take this matter up before you start questioning so you can get a further ruling from the Court.

MS. TAYLOR: I will, Your Honor.

The issue never arose at trial. There is thus no ruling presently available for this Court to review. Likewise, his third claim, that his constitutional right to cross-examine witnesses was denied, based on the same erroneous contention, is also without basis.

**C. AB'S TESTIMONY THAT CARR PUT HIS FINGER "INSIDE" HER "PRIVATE" WAS SUFFICIENT TO ESTABLISH THE ELEMENT OF PENETRATION.**

Carr next claims that there was insufficient evidence of penetration to sustain the convictions. This claim is without merit because as Carr himself notes, AB herself testified that Carr put his finger "inside" her "private."

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

As Carr concedes, AB testified that Carr placed his fingers "inside" her private. Carr nonetheless apparently argues that that evidence should be disregarded because it was a leading question. First, there was no objection, and it is axiomatic both that evidentiary issues that are not raised at trial may not be raised on appeal, and that evidence that is admitted without objection may be used for any purpose. Further, even were there an objection, it is difficult to see how "Was it on the inside or the outside?" suggests an answer. The question poses diametrically opposed options. This claim lacks merit.

**D. THE TRIAL COURT PROPERLY PROHIBITED CARR FROM HAVE CONTACT WITH MINORS.**

Carr next claims that the trial court erred in prohibiting him from having contact with minors. This claim is without merit because Carr was convicted of twice digitally raping an eight-year-old girl, and there is no evidence other than that with regard to the safety of him being around minors.

Parents do have a fundamental constitutional right to raise children without interference by the state. *State v. Letourneau*, 100 Wn. App. 424, 438, 997 P.2d 436 (2000). But in the criminal sentencing context, community custody restrictions of this right are permissible if they are reasonably necessary to further the government's compelling interest in protecting children. *Letourneau*, 100 Wn. App. at 439-42; *see also State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998). The trial court's decision to imposed a crime-related prohibition is reviewed for an abuse of discretion. *State v. Powell*, 139 Wn. App. 808, ¶ 28, 162 P.3d 1180 (2007).

If the record shows that it is reasonably necessary to prevent harm to the children, a court can impose a sentence condition that restricts a defendant's fundamental right to parent. *State v. Sanford*, 128 Wn. App. 280, 288, 115 P.3d 368 (2005); *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). The crime-related prohibition must relate to the crime, but the

prohibition “need not be causally related to the crime.” *Letourneau*, 100 Wn. App. at 432 (citing *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992)). And the prohibition must be reasonably necessary to “help prevent the criminal from further criminal conduct for the duration of his or her sentence.” *Letourneau*, 100 Wn. App. at 438.

Washington courts have previously rejected constitutional challenges to community custody conditions imposed on sex offenders that restrict the offender’s ability to have contact with children. For instance, in *State v. Riles*, 86 Wn. App. 10, 936 P.2d 11 (1997), the defendant challenged his community placement prohibition on contact with children, arguing that it was overbroad and infringed on his constitutional rights of free association and speech. *Riles*, 86 Wn. App. at 15. The court, however, noted that a defendant’s constitutional rights during community placement are subject to the infringements authorized by the SRA. *Riles*, 86 Wn. App. at 15 (citing *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996)). In addition, the Court noted that RCW 9.94A.120(9)(c)(ii)<sup>2</sup> expressly authorized the sentencing court to condition a sex offender’s community placement by ordering that “[t]he offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals.” *Riles*, 86 Wn. App. at 15. Furthermore, an offender’s freedom of association may be reasonably

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<sup>2</sup> Recodified as RCW 9.94A.700(4).

restricted. *Riles*, 86 Wn. App. at 15 (citing *State v. Riley*, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)). The *Riles* court concluded, therefore, that the challenged order was plainly authorized by the SRA, and upheld the no-contact condition. *Riles*, 86 Wn. App. at 15.

The Washington Supreme Court affirmed this Court's decision in *Riles*. *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998). In so doing, the Supreme Court rejected the defendant's constitutional challenges to the terms of his community custody and held that prohibiting the defendant "from having contact with minor-age children for the period of his community placement upon his release from prison is a reasonable restriction imposed upon him for protection of the public -- especially children." *Riles*, 135 Wn.2d at 347.

In *Letourneau*, upon which Carr relies, the Court held that the State had failed to demonstrate that restrictions on the defendant's contact with her children were reasonably necessary. The record in *Letourneau* contained the opinions of four evaluators who discussed the merits of the prohibition, and who "were unanimous in their conclusions that Letourneau [was] not a pedophile." *Letourneau*, 100 Wn. App. at 441. The court found unpersuasive one evaluator's opinion that the prohibition was valid because Letourneau "would 'mold' her children's minds based on her distortions as

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she did with her victim.” *Letourneau*, 100 Wn. App. at 440. Thus, the record did not support the prohibition forbidding Letourneau from contact with her children.

Here, on the other hand, the only evidence regarding Carr’s danger to children is the evidence presented at trial: that Carr twice inserted his fingers into the vagina of his ex-girlfriend’s eight-year-old daughter. Moreover in both the PSI, and at sentencing, Carr continued to refuse to accept responsibility for his actions. In light of this record, that court did not abuse its discretion in imposing the following condition:

Have no contact with any children under the age of 18 without the presence of an adult who is knowledgeable of this conviction and who has been approved by Defendant’s CCO.

CP 90.

Here, unlike in *Letourneau*, no expert opined that it would be appropriate for Carr to be permitted unsupervised contact with any child. Carr did not contest the provision at sentencing. There is thus no factual basis upon which this Court could conclude that the provision was not appropriate. *Cf. State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 13, 161 P.3d 990 (2007) (an error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.”). For all of these reasons, the record in the present case, unlike the record in

*Letourneau*, was sufficient to show that the challenged condition was reasonably necessary to further the government’s compelling interest in protecting children. Thus, the trial court was authorized to restrict Carr’s right to raise children without interference by the state. *Letourneau*, 100 Wn. App. at 439-42; *see also, Riles*, 135 Wn.2d at 350.

**E. THE TRIAL COURT PROPERLY REQUIRED  
POLYGRAPH TESTING AS A CONDITION OF  
CARR’S COMMUNITY CUSTODY.**

Carr next claims that the trial court was without authority to require Carr to submit to polygraph testing. This claim has already been rejected by the Washington Supreme Court.

Carr relies on *In re Hawkins*, 169 Wn.2d 796, 238 P.3d 1175 (2010), for his argument, but that case is inapposite. In *Hawkins*, a sexually violent predator case, the State essentially requested a polygraph examination as a matter of pre-trial discovery. *See Hawkins*, 169 Wn.2d at ¶ 6 n.1 (rejecting Court of Appeals reliance on CR 26). The Supreme Court rejected the State’s request for the polygraph as a matter of statutory construction. *See Hawkins*, 169 Wn.2d at ¶ 8 (“We are called upon to determine what the legislature intended with respect to polygraph examinations when it authorized “an evaluation as to whether the person is a sexually violent predator.”). After examining the relevant statutory language in RCW ch. 71.09, the Supreme Court concluded that the Legislature did not intend to

permit polygraphs to be ordered in the context presented there. *Hawkins*, 169 Wn.2d at ¶¶ 9-14.

Carr, however, utterly ignores the Supreme Court's holding in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998),<sup>3</sup> *abrogated on other grounds*, *State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). In *Riles*, the Court examined whether the Legislature intended to allow submission to polygraph testing as a condition of a sex offender's sentence. The Court concluded that it did:

A trial court has authority to impose monitoring conditions such as polygraph testing. Although the results of polygraph tests are generally not admissible in a trial, this Court has acknowledged their validity as an investigative tool. Allowing trial courts to impose polygraph testing on sex offenders is consistent with the guidelines provided in WAC 246-930-310(7)(b) for therapists working with sex offenders:

The use of the polygraph examination may enhance the assessment, treatment and *monitoring* processes by encouraging disclosure of information relevant and necessary to understanding the extent of present risk and *compliance with treatment and court requirements*. *When obtained, the polygraph data achieved through periodic examinations is an important asset in monitoring the sex offender client in the community.*

*Riles*, 135 Wn.2d at 342 (emphasis the Court's, footnotes omitted). The Court went on to note that in 1997, the Legislature had amended RCW 9.94A.030 and 9.94A.120 to authorize trial courts to order affirmative acts

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<sup>3</sup> Notably *Riles* is not referenced in *Hawkins* at all.

necessary to monitor compliance with sentencing conditions, and making mandatory the affirmative acts necessary to monitor compliance with orders of the court. *Riles*, 135 Wn.2d at 342-43. The Court concluded that these amendments were meant to ratify the imposition of polygraphy conditions:

These amendments suggest the Legislature intended to confirm the practice of allowing testing, such as polygraphs, for monitoring compliance with sentencing conditions. Where there has been doubt or ambiguity surrounding a statute, amendment by the Legislature is interpreted as some indication of legislative intent to clarify, rather than to change, existing law. A subsequent amendment can be further indication of the statute's original meaning where the original enactment was "ambiguous to the point that it generated dispute as to what the Legislature intended." One can conclude from these amendments that the Legislature intended to clarify and interpret the statute to resolve any dispute concerning its actual meaning

*Riles*, 135 Wn.2d at 343 (footnotes omitted) (*quoting Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150-51, 736 P.2d 265 (1987)).

Although the SRA has been modified many times since *Riles* was decided, the relevant provisions still contain the language on which the holding in *Riles* relied. For example, RCW 9.94A.030(10) still provides:

"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. *However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.*

(Emphasis added). Likewise, RCW 9.94A.505(8) provides:

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.703(3)(d) permits the court to impose affirmative conditions as part of community custody:

As part of any term of community custody, the court may order an offender to: ... Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

Because the condition was contemplated by the Legislature, *Riles*, not *Hawkins* controls. This claim should be rejected.

**F. CARR FAILS TO SHOW THAT CUMULATIVE ERROR DEPRIVED HIM OF A FAIR TRIAL.**

Carr finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Here, as has been discussed, Harvey fails to even show multiple trial errors. This contention is without merit.