

54171-4

54171-4

NO. 54171-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN COLEMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the failure to provide the jury with a unanimity instruction was harmless when there was no rational basis for the jurors to distinguish among the acts described by the victims.

2. Whether the trial court acted within its discretion in admitting the child hearsay.

3. Whether the Blakely¹ error at sentencing was harmless when, in finding the defendant guilty as charged, the jury necessarily found the aggravating facts supporting the exceptional sentence.

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS.

a. The Crimes.

In January of 2002, nine-year-old M.D. and nine-year-old C.V. were classmates in Ms. McAlpin's fourth-grade class at Gregory Heights Elementary School. 9RP 4, 32; 10RP 8, 14, 72.²

¹ Blakely v. Washington, ___ U.S. ___, 124 S. Ct. 2531, 159 L.Ed.2d 851(2004).

² The abbreviations used in this brief for the transcripts are set forth in Appendix A.

The two girls had become friends a year earlier while in the third grade. 9RP 6; 10RP 77. M.D. spent many weekends at C.V.'s house. 9RP 7; 10RP 82.

C.V. lived with her grandmother. 9RP 72; 10RP 9.

Defendant John Coleman was her grandfather's brother; C.V. called him "Uncle Johnny." 10RP 15. Coleman spent a fair amount of time with the young girls. 10RP 20, 83. He frequently took them out to dinner, shopping and the movies. 10RP 17-18, 83-84. He would buy gifts and clothing for the girls. 9RP 1-12; 10RP 25, 88-89, 134-35. M.D.'s mother explained, "Just about every time that he had the girls, he had a little something for them...." 9RP 12; 10RP 89.

In the fall of 2001, Coleman offered to take the girls to Hawaii the following summer. 9RP 17; 10RP 25-26. 107. M.D.'s mother agreed: "we thought we knew him pretty well." 9RP 17-18. The girls, excited about the vacation, began saving money for the trip by doing various chores. 10RP 26, 107-08. That Christmas, Coleman gave M.D. a gumball machine to store her spending money for the trip. 9RP 17-18.

The girls visited Coleman at his condominium on numerous occasions. 9RP 7; 10RP 19-21, 83, 132. Coleman's twenty-two

year old daughter confirmed that several times, M.D. and C.V. came over and spent time with Coleman in his bedroom with the door closed. 10RP 132-34.

M.D.'s mother estimated that the girls saw Coleman once or twice a month beginning in the spring of 2001 until shortly after Christmas 2001. 9RP 7,12-13.

During this time, Coleman was molesting the two girls. 10RP 27-29, 56. Coleman would place his hand under the girls' clothing and touch their vaginas. 10RP 30-32, 91. He would also reach up the shirt and touch the girls' breasts. 10RP 92. While watching movies at his condo, Coleman would have one of the girls sit in his lap, and he then would molest her. 10RP 58-59, 86.

M.D. recalled one incident when they were watching the "Mummy Returns" at Coleman's condo and she was sitting on a leather chair with him. 10RP 95. Coleman placed his hand up her shirt and start rubbing her breasts. 10RP 95. She stopped the abuse by leaving to go to the bathroom, and sitting on the floor when she returned. 10RP 96.

On another occasion, M.D. recalled that she was on his bed telling jokes when he began touching her under her clothing. 10RP 97. M.D. went down on the floor and went to sleep. 10RP 97.

Coleman's daughter was in the condo, but in a different room at the time. 10RP 97-98.

Once Coleman asked M.D. to touch him, and she placed her hand on his penis and then left to go to the bathroom. 10RP 101-02. Coleman tried to reassure M.D., telling her that he would not do anything that she did not want him to. 10RP 94.

M.D. observed Coleman molest C.V. several times. 10RP 99. Once, she saw C.V. on the bed with Coleman when he placed his hand underneath her shirt and began rubbing her breast. 10RP 98.

C.V. and M.D. discussed trying to stop the molestation. 10RP 99. One technique they developed was to leave to go to the bathroom. 10RP 101. At trial, the girls had difficulty estimating the exact number of times the molestation occurred. Both estimated that it occurred more than five times but less than fifty. 10RP 32, 94.

b. The Disclosures.

On January 22, 2002, M.D. approached her fourth-grade teacher, Sarah McAlpin, upset over the fact that C.V. had

threatened to tell one of M.D.'s secrets.³ 9RP 37, 73-74. McAlpin told M.D. that she would talk to C.V. about the issue. 9RP 37. McAlpin pulled C.V. aside and told her that there were "certain secrets that we just don't tell." 9RP 37. C.V. responded, 'I have a secret like that too' and explained that she had an "Uncle Johnny" who touched her where her bathing suit covered her body. 9RP 37-38. C.V. stated that it had been going on for awhile and that he touched her on top of and underneath her clothes. 9RP 38-39. She further stated that M.D. was present when it occurred. 9RP 39. McAlpin observed that C.V. was very guarded and that "[s]he definitely did not want to tell me about this...." 9RP 39, 51.

Before C.V. had the chance to speak with M.D., McAlpin pulled M.D. aside. 9RP 43. In a short conversation, M.D. confirmed that "Uncle Johnny" had been touching her. 9RP 41. McAlpin then contacted Christine Barnes, the school's counselor and reported the girls' disclosures. 9RP 41, 63-64.

Later that day, Barnes talked with C.V. 9RP 65-69. C.V. disclosed to Barnes that her "Uncle Johnny" was touching her in places "down there." 9RP 70. She stated that it happened at both

³ Teacher McAlpin was aware that M.D.'s secret was that her grandfather had molested her as a young child. 5RP 15.

her house and his house. 9RP 70. C.V. stated that it happened while she was in the third grade and fourth grade. 9RP 71. She also confirmed that Coleman was abusing M.D. 9RP 71. C.V. insisted that she liked "Uncle Johnny" because they did fun things like going to dinner and the movies. 9RP 71.

Barnes contacted Child Protective Services, and the next day, Majorie Trudnowski, a CPS social worker, contacted C.V. 9RP 66, 74-77, 92-93, 99. C.V. pointed to her vagina and said "he touched me down there a lot" under her clothes. 9RP 103. C.V. further stated that the abuse had occurred at her grandmother's house and in the car. 9RP 106. She indicated that Coleman "has done the same things to [M.D.] when we were at his house." 9RP 104. C.V. also stated, "he doesn't want me to tell. He told me he would get into deep, deep trouble." 9RP 106.

A week later, Barnes contacted M.D. and briefly spoke with her.⁴ 9RP 108. M.D. confirmed that Coleman had been touching her inappropriately. 9RP 109.

⁴ Barnes explained that her primary concern was with C.V. because Coleman was her relative and she needed to be sure that C.V. was not in immediate danger. 2RP 50-51.

Around this time, C.V. and M.D. disclosed the abuse to M.D.'s mother, Collette Dalby. 9RP 14-15, 20. They explained that C.V. had already told someone at school and they decided that "they better tell me before someone else called me." 9RP 15. M.D. told her mother that Coleman had touched her breasts and vaginal area while trying to explain sex to her. 9RP 16. M.D. acted sad and was worried her mother would be upset that M.D. had not told her sooner. 9RP 16. The girls explained that they had not said anything earlier because they wanted to go on the trip to Hawaii with Coleman. 9RP 18. C.V. acted withdrawn and ended the conversation by announcing, "I don't want to talk about it anymore." 9RP 16.

On February 21, 2002, Christine Liebsack, a child interview specialist with the King County Prosecuting Attorney's Office, interviewed C.V. 9RP 130, 146. Liebsack asked C.V. to talk about "Uncle Johnny." 9RP 149. C.V. stated that "he touches me in places he shouldn't..." 9RP 149. When Liebsack asked her where Coleman touched her, C.V. initially responded, "I really don't want to say it." 9RP 150. When shown a body sketch, C.V. pointed to the crotch and buttocks as the areas Coleman touched and acknowledged that he had touched her under her clothes more

than once. 9RP 151-53. She stated she saw Coleman do the same things to M.D. 9RP 156. She explained that she would get him to stop by asking to play a game or watch a movie. 9RP 157.

On March 13, 2002, Liebsack interviewed M.D. 9RP 146, 161. M.D. confirmed that Coleman touched her in the crotch and buttocks underneath her clothing. 9RP 165-68. She stated it occurred when she spent the night at Coleman's residence. 9RP 164-65. She stated that the touching began about two weeks after she first met him – around July of 2001 and that it stopped in January of 2002 after they had disclosed the abuse. 9RP 173-74. M.D. explained that, “[m]y mom thought [Coleman] was really nice, but I didn't tell her what was happening because he said he would take me to Hawaii.” 9RP 163.

2. PROCEDURAL FACTS.

On August 15, 2002, the State charged Coleman with two counts of first-degree child molestation, one count for each victim. CP 1-2.

The trial court heard pre-trial testimony from various witnesses concerning the proffered child hearsay. After hearing

argument and considering the relevant reliability factors, the court held that the child hearsay was admissible. 7RP 21.

The jury heard testimony over two days. Both C.V. and M.D. testified. 10RP 7, 72. Coleman did not testify; his defense was that the girls had made the abuse up. 11RP 27-39. After hearing closing argument, the jury returned guilty verdicts on both counts later that day. 11RP 52

The State initially sought to have Coleman sentenced to life imprisonment as a “persistent offender.” CP 179-81. Coleman had a prior 1989 conviction in King County for indecent liberties and a 1985 military conviction for “indecent acts on a female under the age of 16.” CP 181, 207. An issue was raised concerning the comparability of the military conviction, and the “persistent offender” allegation was abandoned. 13RP 6.

The trial court subsequently imposed an exceptional sentence of 400 months on the two counts based upon the aggravating factors that the offense was part of an on-going pattern of sexual abuse and that there was an abuse of trust. 13RP 10-11; CP 204. This appeal then followed.

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO GIVE A PETRICH INSTRUCTION WAS HARMLESS ERROR.

For the first time on appeal, Coleman claims that the trial court erred by not submitting a unanimity instruction, commonly referred to as a Petrich⁵ instruction, to the jury. Because there was evidence of multiple acts of molestation with respect to each victim, a Petrich instruction should have been given. However, it is well settled that such an error is harmless if the appellate court concludes that, if a rationale fact-finder believed the testimony about one incident, it would have necessarily believed the testimony about the other incidents. Here, the evidence supporting the multiple incidents was the same: the testimony and hearsay statements of the victims. Coleman's defense was one of general denial – he claimed the victims had made the whole thing up. It is inconceivable that the jury would have distinguished between the incidents described by the victims. Accordingly, any error was harmless.

A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crime charged in the

⁵ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

information has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the State submits evidence and testimony of multiple acts, any one of which could support the count charged, the State must either elect one incident to rely upon or the jury must be instructed that it must unanimously agree on a specific criminal act. Kitchen, 110 Wn.2d at 409.

Here, there was testimony that Coleman committed multiple acts of child molestation with respect to each victim. The State did not elect to rely upon one incident. Accordingly, a Petrich instruction should have been given.

This error was harmless. The failure to give a unanimity instruction is harmless error if a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990). In other words, the error is harmless if the reviewing court concludes that if a rationale fact-finder believed the testimony about one incident, it would have necessarily believed the testimony about the other incidents.

In Camarillo, the State charged Camarillo with one count of indecent liberties with an eleven-year-old boy. The single count information was based upon conduct that occurred over a one-year

period, and at trial, there was evidence of three distinct commissions of the offense. The Washington Supreme Court held that the failure to give a Petrich instruction was harmless error. The Court observed that “[t]he uncontroverted evidence upon which the jury could reach its verdict reveals no factual difference between the incidents.” 115 Wn.2d at 69. The Court cited with approval the Court of Appeals’ analysis of the harmless error issue:

Here, besides Camarillo's bare denial of the allegations, there is no direct, contravening evidence concerning the occurrence of the alleged incidents. The jury, in order to render the verdict it did, must have chosen to believe S. Because proof of the substantially similar incidents relied upon a single witness' detailed, uncontroverted testimony, and because Camarillo offered no evidence upon which the jury could discriminate between the incidents, a rational juror believing one of the incidents actually occurred would necessarily believe that the others occurred as well.

115 Wn.2d at 70, quoting State v. Camarillo, 54 Wn. App. 821, 828, 776 P.2d 176 (1989).

Likewise, in State v. Allen, 57 Wn. App. 134, 787 P.2d 566 (1990), defendant Dixson, charged with indecent liberties on the basis of several incidents, offered a general denial of any physical contact with the victim. This Court found that, where the victim testified to nearly the same contact on each occasion, Dixson’s

general denial gave no rational juror a basis for distinguishing among the different acts. A juror had either to believe Dixson as to all of the alleged acts, and acquit or believe the victim and convict.

Dixson controverted [the victim's] testimony by broadly denying any physical contact with C.P. He did not attempt to distinguish among or question any specific incidents charged in Count I to which C.P. had testified. Nor did defense counsel's cross examination challenge any specific incidents of indecent liberties or attempt to draw any factual distinctions among them....

In view of Dixson's general denial of any improper physical contact and C.P.'s testimony that substantially the same contact occurred during each visit, we find no rational basis for jurors to distinguish among the acts charged in Count I. The jurors had either to believe Dixson and acquit or believe C.P. and convict. There is no possibility that "some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction."

57 Wn. App. at 139.

Here, no rationale trier of fact could have found the victims' credible about one incident of molestation, but not the other incidents of molestation. To find Coleman guilty of first-degree child molestation, the jury had to find that he had sexual contact with the victims. RCW 9A.44.083. Sexual contact is defined as the touching of the sexual or intimate parts of another person done for

the purpose of gratifying the sexual desire of either party. RCW 9A.44.010(2).

The bulk of the testimony concerning the molestation did not pertain to a single incident. C.V. testified at trial that no particular incident stuck out in her mind; she testified to a pattern of abuse that occurred through the third and fourth grade. 10RP 27-30, 53. She testified that it occurred more than five times but less than fifty times. 10RP 32. Similarly, M.D. testified generally to the abuse, stating it occurred more than fifteen times but less than fifty. 10RP 94. She discussed several particular incidents that occurred at Coleman's condo though she did not go into great detail about each incident. 10RP 95-99.

The focus of the child hearsay testimony was on a general description of the abuse rather than an account of specific dates and incidents. The disclosures to McAlpin, Darby, Barnes, Trudnowski and Liebsack were primarily of general abuse – that the molestation occurred more than once over a period of time. 9RP 15-16, 39, 48, 71-72. 80-81, 103-05, 109-10, 149-57, 164-69. C.V. described the abuse to Liebsack, but told her that she could not remember a specific incident. 9RP 151

Neither the State nor the defense distinguished between individual incidents. In closing argument, the prosecutor argued:

[T]his case boils down to two possibilities. First, the possibility... that these incidents that these girls described didn't happen, and for some unknown reason, they are lying to you about that. And the other possibility, of course, is that these incidents they described did happen.... This case comes down to one simple question: Did the defendant touch these girls?

11RP 6-7. The bulk of the argument was devoted to the issue of the victims' credibility and motive. 11RP 7-23.

The defense theory was that the girls had lied. 11RP 36 ("The story simply isn't true."). Defense counsel argued that C.V. decided to lie about the abuse in order to avoid getting in trouble with teacher McAlpin and that M.D. decided to back up C.V. and joined in the lie. 11RP 37-38. The defense attempted (unsuccessfully) to present evidence that M.D. had a poor reputation for telling the truth. There was no suggestion that Coleman may have touched one of the girls, but that it was not "sexual contact." Rather, the defense theory that *all* the testimony about Coleman was a lie.

In his brief, Coleman points out that the child hearsay testimony was inconsistent on whether C.V. had claimed that

Coleman had molested her when he took her to see the movie "Snow Dogs." Both Barnes and Liebsack, testified that C.V. stated nothing occurred when they saw the movie, while Trudnowski recalled that C.V. told her that Coleman had molested her there. 9RP 81, 103, 185. However, at trial, C.V. testified that she recalled seeing the movie with Coleman and that nothing bad occurred when she went to the movies with Coleman. 10RP 17, 64. In closing, the prosecutor did not argue that molestation occurred at this movie, and, in fact, argued that the molestation only occurred in Coleman's car and condo and C.V.'s house. 11RP 24.

This Court confronted a similar situation in State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993), where there was differing testimony concerning multiple acts. This Court found that the failure to give the unanimity instruction was harmless error because the evidence was so weak with respect to some of the incidents that no rational juror would have convicted the defendant for them.

Here, A. testified to only one incident of contact with Jones: the incident on the bed. A.'s testimony stated that no other touches had occurred. This directly contradicts her hearsay statements to Mitchell and Vatne that multiple instances of touching had taken place. However, this testimony regarding other acts was not the focus of the trial. The question becomes

one of whether a rational basis existed for jurors to entertain a reasonable doubt as to whether the evidence of each incident established the commission of a crime. Given the paucity of evidence of the other acts, and the fact that the testimony with regard to these acts was hearsay and inconsistent with the victim's trial testimony, we do not believe a rational trier of fact could have found that any other crimes were in fact committed.

Jones, 71 Wn. App. at 822-23.

Similarly, here, given that two of three child hearsay witnesses testified that C.V. stated that no abuse occurred at the movie, that C.V. herself denied any misconduct occurred there, and that the prosecutor did not argue that molestation occurred at the movie, no rational juror would have convicted based upon the brief child hearsay testimony. The issue at trial was the credibility of the victims and whether Coleman had abused the girls at all. The failure to instruct the jury with a unanimity instruction was harmless.

2. THE TRIAL COURT PROPERLY ADMITTED THE CHILD HEARSAY.

Coleman claims that the trial court erred in admitting testimony under the child hearsay statute, RCW 9A.44.120. After hearing the pre-trial testimony and argument, the trial court

considered the relevant reliability factors, found that they favored the statements admissibility, and admitted the statements. The trial court acted well within its discretion in admitting this evidence.

This Court reviews a trial court's decision to admit evidence under the child hearsay statute for abuse of discretion. State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court abuses its discretion only when its decision is manifestly unreasonable. Id. In reviewing such cases on appeal, this Court recognizes that "[t]he trial court is in the best position to make the determination of reliability as it is the only court to see the child and the other witnesses." State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). In this case, the trial court properly exercised its discretion in admitting the out-of-court statements.

RCW 9A.44.120 sets forth the child hearsay exception:

A statement made by a child under the age of ten describing any act of sexual contact performed with or on the child by another....not otherwise admissible by statute or court rule, is admissible in evidence. . . 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 either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness.....

In State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court identified nine factors to be considered by the trial court in determining whether a child's out-of-court statement is reliable and admissible under RCW 9A.44.120. These factors are:

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;
7. Whether the declarant's lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

C.J., 148 Wn.2d at 683-84; Ryan, 103 Wn.2d at 175-76. "It is clear that not every factor listed in Ryan needs to be satisfied before a

court will find a child's hearsay reliable under the child victim hearsay statute." State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). As long as the factors are substantially met, the trial court's determination will be upheld. 114 Wn.2d at 652.

The state offered child hearsay through the testimony of teacher McAlpin, school counselor Barnes, CPS social worker Trudnowski, child interviewer Liebsack and M.D.'s mother. The trial court carefully considered the nine Ryan factors before ruling that C.V. and M.D.'s out-of-court statements were admissible.

With respect to the first factor, the motive to lie, the trial court held that there was no apparent motive for the girls to lie about the molestation:

But it appears to me that Mr. Coleman was someone that they liked very well. They loved, they wanted to be with him. They wanted to be with him in the future. Neither one of these girls... would have any reason, other than if this was true to, fabricate this story. Just the opposite.

7RP 19. The testimony supports the court's finding. The uncontested evidence was that, shortly before the disclosure occurred, the girls were excited about the prospect of going to Hawaii with Coleman and had not mentioned the abuse because of

the trip.⁶ 6RP 9. Months after the disclosure, C.V. complained to McAlpin, “I miss Uncle Johnny. I don’t understand why people think this is such a big deal.” 5RP 22. Similarly, M.D.’s mother confirmed that M.D. was very affectionate with Coleman and liked him. 6RP 6; 9RP 28. The girls’ disclosure of the molestation was obviously unplanned, and there was no evidence of an ulterior motive for falsely implicating Coleman.

Coleman continues to argue, as he did at trial that C.V. made up the abuse in order to avoid getting into trouble with teacher McAlpin. Yet there was no testimony that C.V. had any reason to fear being in trouble with her teacher. Moreover, Coleman fails to explain what motive would have led M.D. to falsely confirm that the molestation had occurred.

With respect to the general character of the two victims, the court found that the victims were “normal girls of their age, fourth grade....” 7RP 19. Teacher McAlpin testified that C.V. was shy, careful about her work and, other than a slight learning disability, a perfectly normal nine-year-old girl. 5RP 10. McAlpin had never

⁶ The trip to Hawaii was only cancelled after the girls revealed the molestation. 6RP 10. Even after the girls had reported the abuse, Coleman called M.D.’s mother and inquired whether M.D. was still planning on coming to Hawaii. 6RP 10; 9RP 18.

known C.V. to lie. 9RP 37. CPS social worker Trudnowski testified that C.V. appeared to understand the consequences of not telling the truth. 2RP 42

Teacher McAlpin testified that M.D. was very bright, albeit disorganized. 5RP 11. The defense attempted to paint M.D. as a liar; eliciting testimony from her mother that she did tell lies on occasion. 6RP 31. However, M.D.'s mother clarified that M.D. lied no more than her other children or children in the neighborhood. 6RP 23; 9RP 26-27. Teacher McAlpin testified that she never had known M.D. to lie to her, though she would exaggerate. 9RP 55-56.

The court rejected the defense characterization of M.D. as a liar, noting that the specific instances cited by the defense did not involve lies. 7RP 20. On appeal, Coleman continues to suggest that M.D. falsely accused others of misconduct in the past. Appellant's Opening Brief at 29. In fact, the testimony reveals that M.D. had accurately reported abuse in the past. For example, Coleman cites as one example of past questionable reporting that M.D. reported that a boy had come to her house and pinned her down, trying to kiss her. M.D.'s mother and teacher confirmed that

this occurred.⁷ 5RP 12, 19-20; 6RP 26. Similarly, Coleman also claims that M.D. had falsely claimed that her brother had molested her. In fact, M.D.'s mother testified that M.D., who was six-years-old at the time, may not have understood the meaning of "molestation," but that the incident had been confirmed by her brother.⁸ 6RP 23-24. Rather than establish a character for untruthfulness, the evidence established that prior complaints by M.D. were true.

With respect to the third factor, whether more than one person heard the victims' statements, this factor may be satisfied when the child repeats similar statements to different people on different occasions. State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Here, in a relatively short time span, the girls consistently described the molestation to teacher McAlpin, school counselor Barnes, CPS social worker Trudnowski and M.D.'s mother. Coleman's claim that the girls' statements were inconsistent is not supported by the testimony. C.V. and M.D. were

⁷ In fact, the boy in question had a very troubled history, harassed other students and had to be escorted wherever he went in school. 5RP 19-21.

⁸ M.D. had complained that a boy had made her undress and shined a light in her vaginal area and that her older brother Garrett had watched and laughed. 6RP 23.

quite consistent in describing the nature of the abuse they suffered. As noted above, they consistently reported that Coleman had touched them under their clothes in the vaginal and breast area.⁹

The fourth factor, the spontaneity of the statements, also supported the trial court's decision. "[F]or purposes of determining the reliability of a statement made by a child victim of sexual abuse, any statements made that are not the result of leading or suggestive questions are spontaneous." Dependency of S.S., 61 Wn. App. 488, 497, 814 P.2d 204 (1991). The children's disclosures were not the result of leading or suggestive questioning. In fact, C.V. had not planned to tell, but only did so spontaneously while talking with McAlpin. 5RP 15-16. McAlpin testified that "it was obvious that [C.V.] didn't mean to tell me.... It slipped out... And she was very hesitant and reserved about giving me information" 5RP 18. When Barnes then spoke with C.V., Barnes was careful to ask an open-ended question, telling C.V. that

⁹ Coleman points out that in April of 2001, CPS had contacted C.V. and she denied that Coleman had inappropriately touched her. 2RP 56. CPS had begun this investigation after a community person expressed concern about some behavior that she had seen between Coleman and C.V. 2RP 67. C.V. later explained that, at the time CPS first contacted her, she was not ready to tell anyone. 2RP 47-48.

if she wanted to talk, Barnes was there to listen. 2RP 98.

Trudnowski and Liebsack, trained in child interview techniques, testified that they were careful to ask non-leading, open-ended questions. 2RP 48-49; 5RP 59-61; 9RP 97. M.D.'s mother did not really question M.D. or C.V. when they disclosed the abuse because she was in shock from the disclosure. 6RP8; 9RP 29.

The fifth factor – the timing of the statements and relationship between the child declarant and the witness – also supported their admission. With respect to this factor, “[t]he presence of professionals investigating child abuse enhances the reliability of the statements.” Lopez, 95 Wn. App. at 853. C.V.'s and M.D.'s statements were made to Liebsack and Trudnowski, both professionally trained in interviewing sexually abused children.

Washington courts consider the sixth and seventh factors to be of minimal relevance to the analysis of whether child hearsay is sufficiently reliable to be admitted. Lopez, 95 Wn. App. at 852.

With respect to the eight factor, the possibility of faulty recollection, C.V. and M.D. were both nine-years-old at the time of the disclosures and were reporting events that had occurred in the past year. The undisputed testimony was that both children were

relatively normal nine-year old girls who had little difficulty in communicating or understanding questions. 2RP 54; 5RP 10-12. According to teacher McAlpin, C.V. had a great memory. 5RP 28.

With respect to the final factor, the circumstances surrounding the statements supported the trial court's finding that they were reliable. The unplanned, inadvertent nature of the initial disclosures, the girls' affection for Coleman, and the consistent description of the abuse all pointed to the reliability of the hearsay statements. The trial court acted well within its discretion in admitting the child hearsay.

3. THE ERROR AT SENTENCING WAS HARMLESS.

Coleman argues that his exceptional sentence must be reversed under Blakely v. Washington, __ U.S. __, 124 S. Ct. 2531, 159 L.Ed.2d 851 (2004), because the judge, rather than jury, found the aggravating facts supporting his exceptional sentence. While Blakely applies to the sentence in this case, the error is harmless because, in order to convict Coleman, the jury had to have found the aggravating facts, relied upon the court, to impose the exceptional sentence.

In Blakely, the United States Supreme Court, citing its previous decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), held that a defendant has a Sixth Amendment right to have a jury determine, beyond a reasonable doubt, aggravating facts (other than recidivist facts) used to impose an exceptional sentence above the standard range. Here, Coleman's sentencing hearing occurred before Blakely was decided, and the procedures at the hearing did not comply with the demands of Blakely.

Though Coleman does not discuss the issue, Apprendi/Blakely error is subject to harmless error review. In United States v. Cotton, 535 U.S. 625, 122 S. Ct. 1781, 151 L. Ed. 2d 689 (2002), the United States Supreme Court reversed a Court of Appeals decision vacating an enhanced sentence because of Apprendi error. The Court found that the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because the evidence supporting the enhancement was "overwhelming" and "essentially uncontroverted." 535 U.S. at 632.

This decision is consistent with the United States Supreme Court's holding that "most constitutional errors can be harmless."

Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). "Indeed, we have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The United States Courts of Appeals have repeatedly reviewed Apprendi error to determine whether it was harmless beyond a reasonable doubt. See United States v. Soto-Beniquez, 356 F.3d 1, 45-47 (1st Cir. 2004), cert. denied, 124 S. Ct. 2427 (2004) (finding Apprendi error harmless beyond a reasonable doubt because overwhelming evidence established amount of drugs used to enhance sentence); United States v. Friedman, 300 F.3d 111 (2nd Cir. 2002), cert. denied, 538 U.S. 981 (2003) (finding Apprendi error harmless beyond a reasonable doubt, because overwhelming evidence established sentencing enhancement); United States v. Vazquez, 271 F.3d 93, 103-04 (3rd Cir. 2001), cert. denied, 536 U.S. 963 (2002) (rejecting argument that Apprendi error is per se reversible and finding error harmless beyond a reasonable doubt); United States v. Mackins, 315 F.3d 399, 405 (4th Cir. 2003), cert. denied, 538 U.S. 1045 (2003) (holding that appellate court will review Apprendi error to determine whether it

was harmless beyond a reasonable doubt); United States v. Matthews, 312 F.3d 652, 665 (5th Cir. 2002), cert. denied, 538 U.S. 938 (2003) (“Apprendi error is susceptible to harmless error analysis”); Campbell v. United States, 364 F.3d 727, 737 (6th Cir. 2004) (“Apprendi errors are considered to be trial-type errors subject to harmless-error review”); United States v. Trennell, 290 F.3d 881, 890 (7th 2002), cert. denied, 537 U.S. 1014 (2002) (“It is now well established in this circuit that ‘Apprendi errors in both the indictment and the charge to the jury are subject to harmless error analysis.”); United States v. Anderson, 236 F.3d 427, 429-30 (8th 2001), cert. denied, 534 U.S. 956 (2001) (holding that Apprendi error in failing to submit drug quantity issue to jury was harmless error); United States v. Smith, 282 F.3d 758, 771 (9th Cir. 2002) (finding Apprendi error “harmless beyond a reasonable doubt” because of the overwhelming, uncontradicted evidence).

Likewise, numerous state courts have held Apprendi/Blakely

error is subject to harmless error review. State v. Garcia, 28 P.3d 327, 331 (Ariz. Ct. App. 2001); People v. Sengpadychith, 109 Cal.Rptr.2d 851, 859-60 (2001); People v. Thurow, 786 N.E.2d 1019, 1028-29 (Ill. 2003); State v. Daniels, 91 P.3d 1147, 1157 (Kan. 2004). One year ago, the Wisconsin Supreme Court observed that the authorities were virtually unanimous that harmless error analysis applied to Apprendi error:

Neder's harmless error analysis has been applied to Apprendi-type errors in every single federal appellate circuit. In addition, several state appellate courts have also applied Neder to Apprendi-type errors. Contrary to Gordon's argument, acceptance of Neder, and its application in the context of Apprendi-type errors, appears to be practically universal.

State v. Gordon, 663 N.W.2d 765, 776 - 77 (Wis., 2003) (footnotes omitted).¹⁰

¹⁰ One of the few exceptions to these authorities is State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), where, in dicta, the Washington Supreme Court stated that "we do not perform a harmless error analysis since to do so would violate the Supreme Court's holdings in Apprendi and Ring." Thomas, 150 Wn.2d at 849-50. Given that the United States Supreme Court did not prohibit harmless error review in any of those decisions, this language in Thomas is based upon a faulty premise. The Washington Supreme Court is currently considering the issue of whether harmless error analysis applies to Apprendi/Blakely error in State v. Hughes et al., # 74147-6, argued on November 9, 2004.

Washington courts have repeatedly engaged in harmless error analysis with respect to sentencing enhancements decided by the jury. See State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961) (failure to submit special interrogatory concerning age of victim harmless given the uncontradicted testimony at trial); State v. Braithwaite, 34 Wn. App. 715, 725-26, 667 P.2d 82 (1983) (harmless error that jury not instructed that it needed to find firearm enhancement beyond a reasonable doubt given uncontroverted evidence that firearm was used); State v. Cook, 31 Wn. App. 165, 175-76, 639 P.2d 863 (1982) (same).

Here, the error was harmless given that, in convicting Coleman, the jury would have had to have found the aggravating factors that the trial court relied upon when imposing the exceptional sentence.

The State requested that the trial court impose an exceptional sentence based upon two aggravating circumstances:

(1) abuse of trust, and

(2) the offense was part of an on-going pattern of psychological, physical or sexual abuse of the victim manifested over a prolonged period of time.

The defense did and could not contest that Coleman was in a position of trust. See CP 184-93. Rather, the defense argument

was that the fact-pattern of the crime was typical and not deserving of an exceptional sentence. "Assuming for purposes of this memorandum, that Mr. Coleman was proven to be in a position of trust with C.V., this is, unfortunately, a typical fact pattern present in most cases involving Child Molestation 1st degree." CP 188.

Defense made a similar argument concerning the on-going pattern of abuse factor though, at sentencing, they continued to take the position that Coleman had not molested the children. CP 191.

The trial court relied upon both aggravating factors when imposing an exceptional sentence:

[Y]ou did build a position of trust. These girls were obviously very close to you and thought of you as an uncle, they trusted you, unfortunately, even to the point where they were looking forward, and their families were agreeing, to your taking the girls on a trip to Hawaii, which given your history [of prior sex crimes against young girls], you knowing your history, is incredible that you would even think of that.

This abuse did occur. I found it interesting in your memorandum opposing the State's request for an exceptional sentence that you start out with an argument about [M.D.]... being a liar.... That's your argument, but the jury found otherwise. I personally heard the evidence, I think the jury's correct.

....

[T]his was a pattern of ongoing abuse of these young girls, and it occurred in a position of trust, it doe warrant, I think. Discretion; I think the Court has discretion to impose an exceptional sentence.

13RP 10-11.

When analyzing abuse of trust, “[t]he inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense.” State v. Bedker, 74 Wn. App. 87, 95, 871 P.2d 673 (1994). A family relationship between the victim and the perpetrator will establish a position of trust. State v. Garnica, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001). Here, there was no question that a family relationship existed between C.V. and Coleman and that the relationship was used to facilitate the commission of the offense.

Similarly, the aggravating circumstance that the offense was part of a pattern of on-going sexual abuse was necessarily found by the jury. The victims testified to a pattern of abuse that lasted approximately one year. It is inconceivable that the jury could have found that only one incident of abuse occurred. The Blakely error was harmless beyond a reasonable doubt.

Nonetheless, if this Court determines remand for re-sentencing is necessary, it should reject Coleman's claim that the trial court is limited to a standard range sentence. So long as the trial court complies with the requirements of Blakely, it may consider imposition of an exceptional sentence. This Court has already rejected Coleman's arguments that an exceptional sentence on remand would be barred by the unconstitutionality of the exceptional sentence statute, double jeopardy and mandatory joinder. State v. Maestas, ___ Wn. App. ___, 101 P.3d 426 (2004); State v. Harris, 123 Wn. App. 906, 99 P.3d 902 (2004). Though his brief was filed after these cases were published, Coleman does not attempt to distinguish them. On remand, the trial court can re-consider a possible exceptional sentence.

D. CONCLUSION

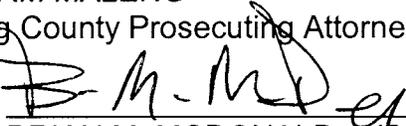
For all the foregoing reasons, Coleman's convictions and

sentence for two counts of first-degree child molestation should be affirmed.

DATED this 8th day of February, 2005.

RESPECTFULLY submitted,

NORM MALENG
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Appendix A

STATE V. COLEMAN, COA # 54171-4-I

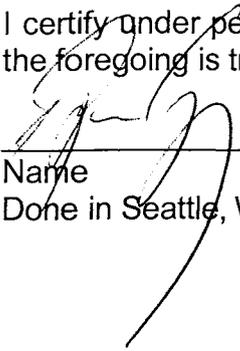
TRANSCRIPT ABBREVIATIONS

1RP 6/27/2003
2RP 7/2/2003
3RP 7/16/2003
4RP 7/24/2003
5RP 8/27/2003 Vol. I
6RP 8/27/2003 Vol. II
7RP 8/28/2003
8RP 9/9/2003
9RP 9/11/2003
10RP 9/15/2003
11RP 9/16/2003
12RP 1/22/2004
13RP 4/23/2004

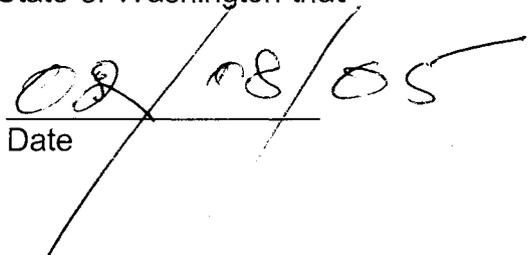
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JOHN COLEMAN, Cause No. 54171-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date

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