

COA No. 71133-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

D.G-R.,

Appellant.

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STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Palmer Robinson

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF APPEAL 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 4

 (1) 3.5 hearing. 5

 (2) Hearsay. 6

 (3) Verdict. 7

E. ARGUMENT 8

 1. D.G-R. WAS SUBJECTED TO CUSTODIAL INTERROGATION BUT WAS NOT ADVISED OF HIS MIRANDA RIGHTS, REQUIRING SUPPRESSION OF HIS STATEMENTS 8

 a. A suspect's statements that are the product of custodial interrogation are not admissible at trial unless he receives and waives his *Miranda* protections 8

 b. In determining whether a juvenile was in "custody" for *Miranda* purposes, courts must take the suspect's young age into account. 10

 c. D.G-R. was in "custody" at the time of the interrogation because a reasonable 14-year-old in his position would not have felt free to terminate the questioning. 14

 d. The adjudication must be reversed. 19

 2. THE TRIAL COURT ADMITTED HEARSAY TESTIMONY THAT DID NOT FALL UNDER THE "HUE AND CRY" EXCEPTION TO THE HEARSAY RULE. 21

(a) <u>Ms. Arevalo-Ramirez’s testimony was impermissible hearsay.</u>	21
b. <u>Reversal is required.</u>	23
3. ALTERNATIVELY, THE ERRORS REQUIRE REVERSAL BECAUSE OF THEIR CUMULATIVE PREJUDICE.	24
F. CONCLUSION.	26

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992). . .	24
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984)	26
<u>State v. Bray</u> , 23 Wn. App. 117, 594 P.2d 1363 (1979)	22
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997). . .	23
<u>State v. Daniels</u> , 160 Wn.2d 256, 156 P.3d 905 (2007), <u>cert. denied</u> , 558 U.S. 819 (2009)	9,14
<u>State v. D.R.</u> , 84 Wn. App. 832, 930 P.2d 350 (1997)	12,13
<u>State v. Ferguson</u> , 100 Wn.2d 131, 667 P.2d 68 (1983)	22
<u>State v. Goebel</u> , 40 Wn.2d 18, 240 P.2d 251 (1952)	22
<u>State v. Gore</u> , 101 Wn.2d 481, 681 P.2d 227 (1984).	23
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000)	25
<u>State v. Griffin</u> , 43 Wash. 591, 86 P. 951 (1906)	22
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).	19
<u>State v. Harris</u> , 106 Wn.2d 784, 725 P.2d 975 (1986).	10
<u>State v. Hawkins</u> , 157 Wn. App. 739, 238 P.3d 1226 (2010). . .	23
<u>City of Tacoma v. Heater</u> , 67 Wn.2d 733, 409 P.2d 867 (1966) . . .	8
<u>State v. Heritage</u> , 152 Wn.2d 210, 95 P.3d 345 (2004).	11
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004)	10
<u>State v. Murley</u> , 35 Wn.2d 233, 212 P.2d 801 (1949).	22

<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999).	13
<u>State v. Radka</u> , 120 Wn. App. 43, 83 P.3d 1038 (2004)	13
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003)	23
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995)	24
<u>State v. Schoel</u> , 54 Wn.2d 388, 341 P.2d 481 (1959)	8
<u>State v. Short</u> , 113 Wn.2d 35, 775 P.2d 458 (1989).	12

UNITED STATES SUPREME COURT CASES

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)	21
<u>Berkemer v. McCarty</u> , 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed. 317 (1984)	10
<u>Bruton v. United States</u> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)	21
<u>California v. Beheler</u> , 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)	10
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).	19
<u>Dickerson v. United States</u> , 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).	9
<u>In re Gault</u> , 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)14	
<u>Graham v. Florida</u> , __ U.S. __, 130 S. Ct. 1022, 176 L. Ed. 2d 825 (2010).	13
<u>Haley v. Ohio</u> , 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948)14	

J.D.B. v. North Carolina, ___ U.S. ___, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). 11

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966) 3,4,11

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). 13

Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). 12

Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). 10,11

COURT RULES

ER 801 23

ER 803 23

CONSTITUTIONAL PROVISIONS

Wash. Const. art. 1, sec. 9 8

U.S. Const. amend. 5 8

TREATISES

Barry C. Feld, Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. Crim. L. & Criminology 219 (2006). 13

A. SUMMARY OF APPEAL

D.G-R., age 14, was wrongly convicted of rape of a similar-aged male friend when the juvenile court erroneously admitted contradictory statements that he made to a detective, in circumstances where the court found he did not feel free to end the interrogations. The court erred in concluding that a reasonable person would not have felt he was free to end the questioning. In addition, the court abused its discretion by admitting emotionally-freighted hearsay evidence from the complainant's mother about her son's allegations, under the hue and cry exception. The complainant had made the claim to his mother several months after the alleged incident, and the court's ruling disregarded the timeliness requirement of this hearsay exception. These errors individually, or cumulatively, require reversal of D.G-R.'s adjudication of guilt.

B. ASSIGNMENTS OF ERROR

1. In D.G-R.'s juvenile court trial on a charge of rape in the second degree, the court erred in admitting evidence of his statements made during custodial interrogation.

2. The juvenile court erred in considering inadmissible hearsay evidence.

3. In the absence of substantial evidence, the juvenile court erred in entering CrR 3.5 finding of fact no. 1, to the extent that it finds that D.G-R. was not aware that Detective Maley was carrying a firearm during any portion of the time he was in the school meeting room where she questioned him. CP 13-15 (CrR 3.5 Findings of fact and conclusions of law).

4. The juvenile court erred in entering CrR 3.5 finding of fact no. 2 to the extent that it finds that the detective's uncommunicated subjective purpose of closing the room door for "privacy" is pertinent to whether the respondent reasonably believed his freedom of action was curtailed, and to the extent it finds that the respondent's freedom of movement was not explicitly curtailed.

5. The juvenile court erred in entering CrR 3.5 finding of fact no. 6 to the extent that it finds that D.G-R.'s belief at the school that he was not free to refuse to answer the Detective's questions was not also D.G-R.'s belief when two detectives subsequently came to his home, learned his mother was not present, and questioned him there.

6. The juvenile court erred in entering CrR 3.5 finding of fact no. 7 to the extent it finds that Detective Maley did not have her gun visible when she and another detective went to D.G-R.'s home

and questioned him, where D.G-R. testified without dispute that he could see that Maley had the same holster or gun belt that he had observed her carrying a gun with during the first interrogation.

7. The juvenile court erred in entering CrR 3.5 finding of fact no. 7 to the extent that it finds that the detective merely asked the respondent if there was anything he wanted to change about his story, where both Maley and the respondent testified that the detective told him he needed to 'now' tell the truth.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The juvenile court admitted evidence of D.G-R.'s statements made on two occasions to Detective Pat Maley, which were both the product of custodial interrogation where the court found D.G-R. subjectively felt his freedom was curtailed and that he could not refuse to answer the detective's questions, and where the court erred in concluding that the belief was not legally reasonable.

Where the interrogations were not preceded by valid warnings and waiver of D.G-R.'s rights under Miranda,¹ did the court err in its CrR 3.5 ruling, requiring reversal?

2. Did the juvenile court abuse its discretion in considering inadmissible hearsay evidence of the complainant K.P.A.'s

¹ Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct.

allegations, made to his mother, under the “hue and cry” exception, where they were made several months after the alleged incident, requiring reversal?

3. Alternatively, does cumulative error require reversal and a new juvenile trial?

D. STATEMENT OF THE CASE

The juvenile respondent, D.G-R. (d.o.b. 10/9/97), was charged with rape in the second degree, and rape in the third degree in the alternative. The information was based on a claim made by D.G-R.’s friend K.P.A. (d.o.b. 3/13/98); the two boys were friends because their mothers attended the same church. They had been spending the night at D.G-R.’s home. K.P.A. stated that D.G-R. played pornography on a computer, then got on top of K.P.A. and “put defendant’s penis in K.P.A. [sic] behind.” CP 1-2.

At trial, K.P.A. stated that D.G-R. started to touch him inappropriately; when K.P.A. resisted, D.G-R. threatened him and put his penis in K.P.A.’s anus. 9/24/13RP at 60-62, 68-75.

D.G-R. denied the allegations, and described that it was K.P.A. who made him search for pornography on the computer; subsequently, while the two boys may have been masturbating,

1602, 10 A.L.R.3d 974 (1966).

K.P.A. got on top of D.G.R. and tried to put D.G.R.'s penis on K.P.A.'s ass. 9/25/13RP at 106, 154-65.

(1) 3.5 hearing. Based on a CrR 3.5 hearing that was incorporated into the fact-finding, Detective Pat Maley of the King County Sheriff's Office was permitted to testify that she went to 14-year old D.G-R.'s school, Aqui La Rosa, and questioned him about K.P.A.'s allegations. She asserted she told him that he was free to leave. D.G-R. told her that the conduct described by K.P.A. had not happened. 9/24/13RP at 187-89. The detective testified that D.G-R., who was apparently from Latin America, did not seem to have any difficulty understanding the English language. 9/24/13RP at 201; see 9/25/13RP at 195. Detective Maley stated she showed D.G-R. her badge but also told him he was not "under arrest," and she asserted that she was not in uniform although she was wearing a "511" law enforcement issue jacket. 9/24/13RP at 185-87.

Several days later, in the company of a Detective Janez, Detective Maley went to D.G-R.'s home. After she learned that D.G-R.'s mother was not there, she proceeded to question him. 9/24/13RP at 194-95. At that point, D.G-R. told the detective that during that night, something had happened; K.P.A. had pulled D.G-

R.'s pants down and then started touching him. 9/24/13RP at 201-02.

In the incorporated CrR 3.5 hearing, the juvenile court found that D.G-R. correctly assumed that Detective Maley had a gun during the questioning, because she was a police officer. He also subjectively believed he could not leave the questioning, and that he was required to talk to the detective, because of his particular national background. 9/25/13RP at 126; CP 13-15 (Finding of fact no. 1).

However, the court stated that the question was whether a reasonable person would feel he was in custody to the degree associated with formal arrest, and stated that there was "nothing about what was said by the officer or the situation which would – I mean I don't know what else she could have done." 9/25/13RP at 126-27. See Supp. CP ____ (Exhibit list filed Oct. 4, 2013) (Exhibit 3 [KCSO Follow up Report], Exhibits 4 and 5 [recorded CD and transcript of respondent's statement]).

(2) Hearsay. At the fact-finding hearing, the complainant K.P.A.'s mother, Adriena Arevalo-Ramirez, stated she had met the respondent's mother when they volunteered at the local Christian Family Center, and their two sons had become friends. 9/24/13RP

at 166-70. During a period of time after talking to her, Ms. Arevalo-Ramirez stated, K.P.A. had been crying and not eating, wanted to kill himself, and was doing badly in school. 9/24/13RP at 163-65.

Ms. Arevalo-Ramirez was permitted to testify over hearsay objection that K.P.A. told her several months after the night in question that he had been sexually assaulted, by D.G-R.. 9/24/13RP at 175-76. The court overruled the respondent's hearsay objection, agreeing with the prosecutor that the "hue and cry" exception applied and allowing the detailed testimony beyond the fact of complaint, on the premise that it rebutted any concerns of possible recent fabrication. 9/24/13RP at 175-78. The court invited further authority and argument on the matter, but rejected the respondent's argument and request to strike, in which D.G-R. contended that the hearsay exception did not apply because the declarant must make the allegation in a timely manner after the alleged incident. 9/25/13RP at 4-5.

(3) Verdict. The juvenile court found D.G-R. guilty of rape in the second degree by intercourse via forcible compulsion, pursuant to RCW 9A.44.050(1)(a). 10/4/13RP at 34-37; CP 31-33 (CrR 6.1 adjudicatory hearing findings and conclusions).

D.G-R. appeals. CP 40.

E. ARGUMENT

1. **D.G-R. WAS SUBJECTED TO CUSTODIAL INTERROGATION BUT WAS NOT ADVISED OF HIS MIRANDA RIGHTS, REQUIRING SUPPRESSION OF HIS STATEMENTS.**

a. **A suspect's statements that are the product of custodial interrogation are not admissible at trial unless he receives and waives his *Miranda* protections** The Fifth

Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself."² U.S. Const. amend. 5. In Miranda v. Arizona, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966), the United States Supreme Court fashioned a practical rule to ensure the integrity of the privilege against self-incrimination by suspects under investigation, to effectuate the Fifth Amendment:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.

Miranda v. Arizona, 384 U.S. at 444. To safeguard the

² Our state constitution article I, section 9 is equivalent to the Fifth Amendment and "should receive the same definition and interpretation as that which has been given to" the Fifth Amendment by the United States Supreme

uncounseled individual's Fifth Amendment privilege against self-incrimination, the Miranda Court held, a suspect interrogated while in police custody must be read his series of rights including that of remaining silent. Id. at 479; Dickerson v. United States, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

This right of the suspect to be informed of his Fifth Amendment right to be silent attaches when "custodial interrogation" occurs. Miranda, 384 U.S. at 444. "Custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Such interrogation, the Court recognized, places "inherently compelling pressures" on persons like D.G-R., and trades on the weakness of individuals such as the adult suspect in Miranda. Id. at 455, 467. Even such adults, when "surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot [feel] otherwise than under compulsion to speak." Id. at 461.

This Court reviews de novo a trial court's determination that a suspect was or was not in "custody" for Miranda purposes. State

Court. Wash. Const. art. 1, sec. 9; City of Tacoma v. Heater, 67 Wn.2d 733, 736,

v. Daniels, 160 Wn.2d 256, 261, 266, 156 P.3d 905 (2007), cert. denied, 558 U.S. 819 (2009); State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). The first step in the process, determining the circumstances surrounding the interrogation, is a factual one. Thompson, 516 U.S. at 112-13. Where the facts are not in dispute, this Court reviews the trial court's determination that D.G-R. was not in custody *de novo*, a non-deferential standard which applies to question of whether a reasonable person in the defendant's situation would have believed he was not free to end the questioning and leave. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (trial court's custodial determination reviewed de novo).

b. In determining whether a juvenile was in "custody" for *Miranda* purposes, courts must take the suspect's young age into account. A person is in "custody" if his "freedom of

action is curtailed to a 'degree associated with formal arrest.'"

Berkemer v. McCarty, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed. 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)); State v. Harris, 106

409 P.2d 867 (1966) (citing State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959)).

Wn.2d 784, 789-90, 725 P.2d 975 (1986).

Miranda specifically provides that, due to the coercive nature of police questioning, officers must administer Miranda warnings prior to interrogation of any suspect who “has been taken into custody or otherwise deprived of his freedom of action in any significant way.” (Emphasis added.) Miranda, 384 U.S. at 444; accord J.D.B. v. North Carolina, ___ U.S. ___, 131 S. Ct. 2394, 2401-02, 180 L. Ed. 2d 310 (2011). Thus, a suspect must be warned of his rights if, in light of all the circumstances, a reasonable person would have felt he “was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. at 112 (person in custody if he felt it impermissible to leave officers and end questioning); State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). In determining this question, the court looks at all of the circumstances surrounding the interrogation to determine how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action. J.D.B., 131 S. Ct. at 2402 (citing Thompson, 516 U.S. at 112). The court assesses any circumstance that “‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her

freedom to leave.” Id. (quoting Stansbury v. California, 511 U.S. 318, 322, 325, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)).

In State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997), the Court of Appeals addressed whether police were required to read Miranda warnings before interrogating a juvenile suspect. The Court explained, “[t]he sole question is whether a 14-year-old in D.R.’s position would have ‘reasonably supposed his freedom of action was curtailed.’” State v. D.R., at 836 (quoting State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)). This “freedom of action” standard indicates that D.G-R.’s belief that Detective Maley was affirmatively holding him in the school room and was later entitled to demand answers and the “truth” from him upon entering his home must be deemed to satisfy the requirement that a reasonable person in this 14-year-old’s position would deem himself effectively arrested. The juvenile court’s reasoning that a reasonable person in D.G-R.’s shoes would believe himself held but not fully arrested draws a dividing line that is not supportable as distinct in application to the circumstances of this juvenile case.

9/25/13RP at 126-27; CP 13-15 (Findings of Fact -- Conclusion of law no. 1).³

The rule announced in D.R. is consistent with the United States Supreme Court's recognition in other contexts that children are "more vulnerable or susceptible" to influence and pressure than adults. Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Indeed, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." Graham v. Florida, ___ U.S. ___, 130 S. Ct. 1022, 176 L. Ed. 2d 825, 841 (2010). Juveniles' "diminished competence relative to adults increases their susceptibility to interrogation techniques," because the "[s]ocial expectations of obedience to authority and children's lower social status make them more vulnerable." Barry C. Feld, Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice, 97 J. Crim. L. & Criminology 219, 230, 244 (2006). As the

³ The State-drafted findings and conclusions cite the case of State v. Radka, 120 Wn. App. 43, 48-49, 83 P.3d 1038 (2004), for the findings' emphasis that it was inadequate that D.G-R. actually felt his freedom of action was curtailed and that he could not leave or refuse to answer. CP 13-15. But Radka involved the issue whether an arrest had occurred for purposes of authorizing a subsequent *search incident to arrest*. State v. Radka, 120 Wn. App. at 48-49 (interpreting rule of State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) that an arrest must precede a search incident thereto). The Radka case did not provide guidance on any issues of custodial interrogation, and indeed noted that courts had applied widely different tests for determining custodial arrest for

United States Supreme Court recognized in In re Gault, authority "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." In re Gault, 387 U. S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (quoting Haley v. Ohio, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948)). Thus, a person's young age is a proper consideration in determining Miranda issues of custody and waiver, and the like. J.D.B. v. North Carolina, 131 S.Ct. at 2400–2401.

c. D.G-R. was in "custody" at the time of the interrogation because a reasonable 14-year-old in his position would not have felt free to terminate the questioning. In State v. Daniels, 160 Wn.2d 256, 266-67, 156 P.3d 905 (2007), 17-year-old Daniels was not formally arrested but was questioned for over 90 minutes by two police detectives at the precinct in an 8 foot by 10 foot room. She was not given Miranda warnings until near the end of the interrogation. Id. at 267. The Supreme Court held Daniels was subject to custodial interrogation, because a reasonable person in her position would not have felt free to terminate the questioning and leave. Id.

search purposes, including the intent of the police officer, and the "manifestation" of the intent of the officer. State v. Radka, 120 Wn. App. at 48-49.

Similarly, here, D.G-R. was twice subjected to custodial interrogation. He knew the detective was an officer with authority, because Detective Maley was wearing black jeans or beige jeans and a "511" jacket, which the court later stated was technically a uniform, but it did not have any insignia or pieces flipped out and showing. 9/25/13RP at 124; see 9/24/13RP at 184-85 (Maley testimony). The detective only stated she believed that her gun was not visible. 9/24/13RP at 184-86.

When asked if she told D.G-R. that he was free to leave, the detective seemed to equivocate at first; she responded that she "went as far as I wanted to record what we talked about" and D.G-R. "went as far as to assert his ability to say no, he didn't want me to record." 9/24/13RP at 185-88. In testimony the next day, she stated "I believe I told him "that he didn't have to stay in there." 9/25/13RP at 90.

Maley also testified that she closed the door to the room where she questioned D.G-R. "for privacy," but it was not stated that this purpose was communicated to D.G-R. 9/24/13RP at 187. D.G-R. had been told to go into the room by office staff; the detective was waiting for him there. No Miranda warnings were read. 9/25/13RP at 87-88.

Maley admitted that when the questioning in the room was over, she told D.G-R., "Okay, you can leave." 9/24/13RP at 192. This jibes squarely with D.G-R.'s subsequent CrR 3.5 testimony that he did not believe he was free to leave before then.

When Detective Maley visited D.G-R.'s home several days later, in the company of a Detective Janez, she learned that D.G-R.'s mother was not at home. She asked D.G-R. if there was "anything he wanted to change about the story you told me before." 9/24/13RP at 194-95. Maley testified that she told D.G-R. he did not have to talk to her, and D.G-R. said the word "Fine." 9/24/13RP at 196. She stated that she told D.G-R. he was not "under arrest." Id. However, the next trial day, the detective stated that she told D.G-R. he did not have to let the detectives in and talk to them, but also told him that "it is best that we clear this up today and you tell me the real truth." 9/25/13RP at 91-92.

For his part, D.G-R. testified at the CrR 3.5 hearing that he did not believe he was free to leave, and that he had no choice but to answer the Detective's questions, because "you always have to talk to a police officer when they tell you to." 9/25/13RP at 109-10. At the school, he was called into the room where the Detective

was, where there were no windows and just a table. 9/25/13RP at 107.

As the detective moved, D.G-R. could see her gun and its belt or holster she used to carry it. 9/25/13RP at 108. Overall, he did not believe the detective was wearing a cop uniform, although she was wearing black like an officer with a badge, which Detective Maley showed him. 9/25/13RP at 113-15.

D.G-R. did not recall Detective Maley telling him he could leave or that he didn't have to answer questions. 9/25/13RP at 108-10, 113. He did not believe he was free to leave, and thought he did have to answer the Detective's questions. 9/25/13RP at 108-10.

D.G-R. had seen Detective Maley's gun at the end of her questioning at the school. 9/25/13RP at 115. Regarding the interview at D.G-R.'s home several days later, D.G-R. testified that Detective Maley appeared at the home with another officer. D.G-R. could again see the Detective's holster or belt, and believed she had a gun. 9/25/13RP at 110-11, 116. He did not feel he could refuse to let her enter the family's home, or not talk to her and answer her questions. 9/25/13RP at 110-11.

Detective Maley never told D.G-R. that he could tell the detectives to leave; instead, Maley told him that "it is best to say the truth." 9/25/13RP at 111. He did not remember that she said he didn't have to speak with them, or didn't think so, and he did not feel free to refuse to answer. 9/25/13RP at 112, 116.

Detective Maley never told him he had a right to be silent. 9/25/13RP at 118.

In sum, it is inconceivable that a reasonable 14-year-old in D.G-R.'s position would have felt free to resist the authority of the detective(s) surrounding him and terminate the questioning and leave or usher them out. D.G-R. indeed did not feel he could ask the Detectives to leave, but he would have done so if he knew it was allowable. He did not.

Because like – in my country like cops – like they are always like racist and stuff, so like I have always been scared of cops, so like I don't really mess with them.

9/25/13RP at 112.

Importantly, the court believed D.G-R. and found that D.G-R. did actually feel that he was not free to refuse to answer Detective Maley's questions. 9/25/13RP at 126; CP 13-15 (Findings of Fact - Finding of fact no. 1). And under all the circumstances, as a legal question of what a reasonable person in D.G-R.'s position would

have believed, D.G-R. was subjected to "custodial" interrogation. The CrR 3.5 ruling was in error. D.G-R. was in custody and Miranda warnings were required.

d. The adjudication must be reversed. The State must prove beyond a reasonable doubt the erroneous admission of the custodial statements did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. Id. at 426. But a conviction should be reversed "where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id. Here, that possibility is more than reasonable, and the error was not harmless. The prosecutor repeatedly emphasized that K.P.A.'s statements to police had been consistently related to multiple persons:

The victim's story has, in all substantive aspects, remained the same since he first reported the

matter to the police, to when he was interviewed by my boss and Detective Maley, to when he was interviewed by [defense counsel] Ms. Jennifer Beard, to when he testified at trial.

9/26/13RP at 4. The State *contrasted* D.G-R. with the complainant, urging the juvenile court to reject his trial testimony expressly because *he* had not been consistent:

Now Your Honor, if you want to talk about some *substantive inconsistencies, you need to look at the respondent.*

(Emphasis added.) 9/26/13RP at 8. The prosecutor emphasized that D.G-R. had told Detective Maley in the interrogation at his school Aqui La Rosa, where D.G-R. stated that nothing had happened that night, including because if it had, that would make him gay. 9/26/13RP at 8. The prosecutor leveraged⁴ D.G-R.'s fear of police and belief he must speak with them, and the absence of Miranda warnings, to employ his answers to the interrogations to cast D.G-R. as guilty, arguing regarding the second interrogation:

Second, we have [D.G-R.'s] decision to change his story a second [sic] time and admit, "You know that thing we talked about, Detective Maley? There was some touching."

9/26/13RP at 8. The prosecutor then argued that DGA had only fully stated that K.P.A. had sexually abused him during the trial,

⁴ D.G-R. specifically stated he would not have spoken with the Detective

and stated D.G-R. was guilty because his “versions” (plural) of the matter did not add up. 9/26/13RP at 8, 11. This case theme of relying on K.P.A.’s consistency and D.G-R. having made inconsistent statements in his two interrogations was announced by the State as early as its trial brief. Supp. CP ____, Sub # 53 (State’s Trial Memorandum, at p. 3).

In this case of Miranda error, there is a reasonable and strong possibility that D.G-R.’s statements caused the court to reach its verdict. An accused’s statements can form damaging evidence against him Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J., dissenting)). That is the case here, and admission of D.G-R.’s statements was not harmless beyond a reasonable doubt and the adjudication must be reversed.

2. THE TRIAL COURT ADMITTED HEARSAY TESTIMONY THAT DID NOT FALL UNDER THE “HUE AND CRY” EXCEPTION TO THE HEARSAY RULE.

(a) **Ms. Arevalo-Ramirez’s testimony was impermissible hearsay.** The general rule is that in criminal trials for sex offenses, the prosecution may present evidence that the victim complained to

if he knew he was free to refuse or leave. 9/25/13RP at 112.

someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); State v. Goebel, 40 Wn.2d 18, 25, 240 P.2d 251 (1952), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 860 n. 19, 889 P.2d 487 (1995). The rule admits only such evidence as will establish that the complaint was timely made. Ferguson, 100 Wn.2d at 135–36. Evidence of the details of the complaint, including the identity of the offender and the nature of the act is excluded. Id. at 136; State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949).

The rule is grounded in the politically incorrect but common-sense-grounded assumption that, in forcible rape cases, an outcry of rape very shortly after an incident – compared to a claim made against a person some significant period of time later – is reliable enough to overcome the general prohibition against hearsay in trials of the accused. See State v. Bray, 23 Wn. App. 117, 121–22, 594 P.2d 1363 (1979) (citing State v. Griffin, 43 Wash. 591, 86 P. 951 (1906)). Allowing the State to present the fact of complaint in its case-in-chief dispelled this inference. See Murley, 35 Wn.2d at 237. But, the doctrine requires that the complaint be timely in order for the State to be permitted to introduce evidence of the victim's complaint. For example, in Griffin, the Supreme Court held

that “evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force.” Griffin, 43 Wash. at 598.

The State Supreme Court has not overruled the timeliness requirement. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The juvenile court abused its discretion because it applied an incorrect legal standard in adjudging the evidentiary admissibility of the mother’s testimony. See State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); State v. Hawkins, 157 Wn. App. 739, 752, 238 P.3d 1226 (2010).

The “hue and cry” or “fact of complaint” exception is narrow and allows only evidence establishing that a complaint was timely made. State v. Ferguson, 100 Wn.2d at 135. The evidence is otherwise inadmissible hearsay. ER 801, ER 803. It was inadmissible here absent the required time frame of complaint. State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 804 (1950). Because the complaints by W.D. in this case were not “timely,” the fact-of-complaint exception was inapplicable.

b. Reversal is required. A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is deemed

prejudicial where, within reasonable probabilities, the outcome would have been different but for the error. State v. Bourgeois, 133 Wn.2d at 403.

The hearsay error requires reversal here. The prosecutor, in addition to emphasizing that K.P.A.'s revelation was an example of his believably consistent claims over time, emphasized that K.P.A., around the time of the hearsay statements to his mother, was "suicidal, depressed, cried all the time, lost his appetite [and] his grades declined." 9/26/13RP at 6-7. The admission of the hearsay was an abuse of discretion, and, within reasonable probabilities, had an effect on the outcome of the adjudicatory hearing.

3. ALTERNATIVELY, THE ERRORS REQUIRE REVERSAL BECAUSE OF THEIR CUMULATIVE PREJUDICE.

In the alternative, the cumulative error doctrine allows this Court to reverse convictions for multiple errors that together prejudiced the outcome. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

D.G-R. asks this Court, alternatively to his individual assignments of error, to conclude that the several errors in the juvenile court had a cumulatively prejudicial effect that requires

reversal of his conviction. State v. Russell, 125 Wn.2d at 93-94.

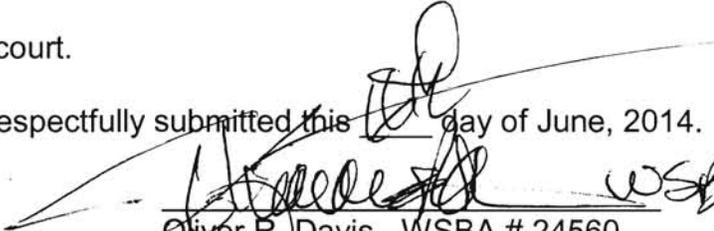
The court should not have allowed D.G-R.'s statements made during custodial interrogation to be admitted; doing so allowed the State to pursue its strategy of arguing the victim's alleged consistency, contrasted to young D.G-R.'s supposed lack of consistency in the face of police questioning. This theme in trial and closing was repeated again in the State's final closing argument remarks. 9/26/13RP at 27, 28, 29 (State's rebuttal closing argument). And the juvenile court accepted this theory; in issuing its relatively brief oral decision, the court stated that K.P.A. was credible and D.G-R.'s account had "evolved over time." 10/4/13RP at 35. The error was not harmless beyond a reasonable doubt, but also certainly contributed substantially to reversible cumulative prejudice. This was combined with a clear evidentiary error, taken advantage of by the State in rebuttal closing argument, when the prosecutor specifically used the untimely revelation to argue that it was normal for a sexual assault victim to delay reporting, a contention that the court permitted over defense objection, and one that the State could not have indulged in without the juvenile court's erroneous evidentiary ruling. 9/26/13RP at 27-28.

The errors in D.G-R.'s fact-finding hearing cumulatively produced a trial that was fundamentally unfair. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984),

F. CONCLUSION.

Based on the foregoing, the juvenile appellant D.G-R. respectfully requests that this Court reverse the judgment of the juvenile court.

Respectfully submitted this 12th day of June, 2014.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71133-4-I
v.)	
)	
D. G-R.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] D.G-R.	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JUNE, 2014.

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