SUPREME COURT NO. 98079-9

NO. 36108-0-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KURT BRODERICK LEPPERT SR.,

Petitioner.

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

The Honorable Maryann C. Moreno, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Kurt Leppert Sr. asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Leppert seeks review of the Court of Appeals' unpublished decision in State v. Kurt Broderick Leppert, filed December 10, 2019 ("Opinion" or "Op."), which is appended to this brief.

C. ISSUE PRESENTED FOR REVIEW

1. The trial court admitted P.D.'s child hearsay statements under RCW 9A.44.120. Where the record of the child hearsay hearing does not establish the reliability of P.D.'s statements, should this Court grant review?

2. The trial court excluded evidence that C.I.'s father was in prison for child pornography offenses. Did the trial court abuse its discretion in excluding this evidence, should this Court grant review?

D. STATEMENT OF THE CASE

Appellant Kurt Broderick Leppert Sr. was charged with sexually assaulting three minor girls, P.D., H.D., and C.I. Before trial, the State moved to admit videotaped testimony of nine year old P.D. under RCW 9A.44.120, the child hearsay statute. The State also moved in Limine to

prohibit the defense from introducing other suspect evidence relating to C.I.'s father, who was incarcerated for a child pornography offense.

The defense argued both against admission of the child hearsay and, later, for redaction. RP2 50-57[1]. The trial court found P.D.'s statements admissible, but agreed that portions would need to be redacted. *Id.* The redacted video was played during trial and the recording was admitted as an exhibit. RP 3 11; Ex. 1. Mr. Leppert was found guilty of all counts and aggravators charged. RP 615-18; CP 259-72. Mr. Leppert timely appealed. CP 320-50. He challenged his conviction on the grounds that the trial court erred in admitting the child hearsay and that it erred in granting the State's motion in Limine to exclude testimony relating to C.I.'s father. Brief of Appellant at 1 (assignments of error).

In its decision, the Court of Appeals rejected Leppert's arguments that the child hearsay should not have been admitted, ruling that under the invited error doctrine these issues were waived when defense counsel made the tactical decision to impeach the videotaped testimony and to decline to fully address the *Ryan*[2] factors. Op. at 4-5. Similarly, the Court of Appeals rejected Leppert's argument that the trial court erred in excluding evidence that C.I.'s father was in prison for child pornography

[1] Appellant cited to the Verbatim Report of Proceedings as RP (covers majority), RP2 (3/15/18 hearing), and RP3 portion of 3/21/18 hearing).
[2] *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) provides the list of factors applicable to determining the reliability of the hearsay statements.

offenses, ruling that the trial court properly excluded the defense's "speculative" theory that C.I. had knowledge of her father's activities. Op. at 5-6.

Mr. Leppert also filed a Statement of additional grounds for review, which the Court of Appeals found did not identify legal errors and did not merit appellate review. Op. at 6. He now asks this Court to accept review, reverse, and remand.

E. REASON REVIEW SHOULD BE ACCEPTED

1. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(4) BECAUSE THE ISSUE OF WHETHER P.D.'S RECORDED STATEMENTS SHOULD HAVE BEEN EXCLUDED AS CHILD HEARSAY WAS NOT WAIVED UNDER THE INVITED ERROR DOCTRINE.

The Court of Appeals erred when it found that the issue of admission of the child hearsay was waived under invited error doctrine. Op. at 4-5. The Court found that because defense counsel argued for redactions and discussed impeaching the admitted testimony, that this was invited error. Op. at 2-5. Further, the Court found that defense counsel declined to fully address the *Ryan* factors. Op. at 3-5. The Court of Appeals characterized all of this as tactical by the defense. *Id.*

a. The invited error doctrine does not apply.

The Court of Appeals' characterizations misstate the events that occurred at the evidentiary hearing. The defense did indeed argue the

issue of whether P.D.'s recorded statements were admissible. RP2 50-57. The defense objected to the State's improper use of child hearsay testimony. RP2 38-40. The defense also alternatively argued for redactions in the case of admissibility. RP2 50-57. Also contrary to the Opinion in this case, the defense did argue the *Ryan* factors. *See* RP2 35-36, 44.

The defense was seemingly trying to first prevent the introduction of the video, not willing conceding admissibility hoping to point out inconsistencies, but being ready to go there in the event the video was let in. Contrary to the Court's ruling, recognizing that the admitted video provided opportunities for cross-examination is not the same thing as conceding the initial argument made against its admission. *See* Op. at 3.

b. The error was not waived.

The error of admission of the child hearsay was not waived under the invited error doctrine because defense counsel did not set the issue up to argue it on appeal. Contrary to that, the record supports that the defense argued both against introduction of the child hearsay evidence and also for redactions after it was admitted. These actions are clearly not meant set up any appeal issue, but rather an attempt to fully argue against the introduction of child hearsay, which means the issue is not waived.

Further, the admission of the hearsay materially affected the trial, and so this Court must reverse. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

2. THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(4) BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING EVIDENCE THAT C.I.'S FATHER WAS IN PRISON FOR CHILD PORNOGRAPHY OFFENSES.

The Court of Appeals erred when it found that the trial court properly excluded the defense from presenting its theory that C.I. had knowledge of her father's activities, and that C.I.'s sexual knowledge from this source was relevant as to the issue of whether C.I. was assaulted by Mr. Leppert. See Op. at 5-6.

The defense responded to the State's motion in Limine, arguing that C.I.'s father was a possible source of her sexual knowledge, but the defense said it would not argue C.I. had been molested by her father. RP 62-65. The Court of Appeals found the defense had not specifically argued the father as an "other suspect" in its response to the State motion in Limine to prevent mention of other suspects. Op. at 5-6. Further, the reference to the defense seeking to establish the father as a "possible alternative suspect" contained in the Brief of Appellant (at page 14) was meant as suspected source of sexual knowledge, which as argued, did not

necessarily mean a crime against C.I. but could have meant knowledge received through incidental exposure to her father's criminal activities. The Court of Appeals findings on this issue are inaccurate because the defense did indeed argue the father as an alternative suspect as source of sexual knowledge. RP 62-65. Also, contrary to the Opinion, the defense theory that C.I. had knowledge of her father's activities was more than speculative. Rather, C.I. had provided conflicting information in the past regarding what she had seen on her father's computer. RP 62-65. Thus, as the defense has argued at trial and on appeal, there was another way for the girls to have known about sexual behaviors, which was relevant and it was error for the trial court to granting the State's motion in Limine preventing the defense from questioning C.I. on this issue.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(4) and reverse Mr. Leppert's conviction based on these errors. Evidentiary error requires reversal if the defendant was prejudiced. *Id.*

DATED this 14th day of May, 2020.

Respectfully submitted,

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FILED
DECEMBER 10, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. KURT BRODERICK LEPPERT SR., Appellant.	)	No. 36108-0-III UNPUBLISHED OPINION

PENNELL, A.C.J. — Kurt Broderick Leppert Sr. challenges his convictions for sexual assault, alleging two evidentiary errors. We affirm.

FACTS

Mr. Leppert was charged with sexually assaulting three minor girls, H.D., P.D., and C.I. Prior to trial, the State sought admission of a videotaped interview of nine-year-

old P.D. under the child hearsay statute, RCW 9A.44.120.[1] It also moved in limine to prohibit other suspect evidence relating to C.I.'s father, who was serving time in prison for a child pornography offense.

In its written response to the State's child hearsay motion, the defense did not argue against application of the child hearsay statute. Instead, it claimed the video interview of P.D. should be redacted.

With respect to the State's motion in limine, the defense explained that it would not seek to introduce evidence regarding C.I.'s father as other suspect evidence. Instead, the defense wished to introduce "brief testimony" to show a possible basis for precocious sexual knowledge. Clerk's Papers (CP) at 90.

The court held an evidentiary hearing to address the pretrial motions. With respect to the child hearsay issue, the State presented testimony from P.D.'s mother, the video interviewer, a detective, and P.D. No testimony was presented with respect to the State's motions in limine. Instead, the State proffered C.I.'s statements that (1) no one had ever touched her inappropriately other than Mr. Leppert, and (2) C.I. had never seen any inappropriate materials on her father's computer.

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[1] The State did not seek admission of pretrial interviews of the other two girls as they were too old to fall under the child hearsay statute.

During oral argument on the child hearsay issue, the defense again conceded that at least some of the video interview of P.A. was "probably admissible" under the child hearsay statute. 1 Report of Proceedings (RP) (Mar. 15, 2018) at 39-40; *see also id.* at 34 ("[T]here's a lot in the interview that . . . probably is still admissible."). Instead of focusing on admissibility, the defense emphasized the need for redactions.

In analyzing the State's child hearsay motion, the trial court pointed out that defense counsel had not argued against admissibility under the *Ryan*[2] factors. The court asked if that was because the defense was "basically okay . . . with admitting the forensic interview so long as it's redacted." 1 RP (Mar. 15, 2018) at 34. The defense responded that if the court found P.D. competent, counsel was "not going to waste the next hour" arguing the child hearsay rule. *Id.* at 35. The defense also noted "the best defense against these charges is pointing out all the inconsistencies" in P.D.'s statements. *Id.* at 39. "So I guess the more of their statements that come up, the more ammunition I have for cross-examination." *Id.*

The trial court determined that P.D. was competent to testify, but that defense counsel's requests for redactions were "very well taken." *Id.* at 37. The court went through the transcript of the video interview and identified numerous areas for redaction.

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[2] *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

At the conclusion of this process, the court stated "[i]f there's anything else that is not compliant with the rules of evidence, it probably ought to come out." *Id.* at 56.

The trial court granted the State's motion in limine regarding C.I.'s father. The court explained that the father's child pornography conviction was not relevant, as there was no evidence C.I. had ever been molested by her father or that she had observed any pornography or child pornography in his possession.

At trial, the State introduced testimony from all three girls, the redacted interview of P.D., and other evidence. The jury convicted Mr. Leppert of all charges. He now timely appeals.

ANALYSIS

Child hearsay statements

For the first time on appeal, Mr. Leppert argues P.D.'s recorded statements were unreliable and should have been excluded under the child hearsay statute and *Ryan* factors. We decline to address the merits of these claims. Mr. Leppert's child hearsay arguments have been waived under the invited error doctrine, which "prohibits a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

Throughout the trial court proceedings, Mr. Leppert consistently conceded portions of P.D.'s recorded statements were admissible under the child hearsay statute, so long as the court found P.D. competent. Defense counsel specifically declined the trial court's invitation to assess the admissibility of P.D.'s statements under the *Ryan* factors. This was apparently a tactical decision; defense counsel explained that if P.D. was found competent and allowed to testify, she would need to be impeached with her video statements. Given the trial court found P.D. competent and permitted her testimony (a determination that has not been challenged on appeal), Mr. Leppert is now precluded from arguing the trial court abused its discretion in admitting a redacted version of the video interview pursuant to the child hearsay statute and *Ryan*.

Evidence regarding the child pornography conviction

Mr. Leppert claims the trial court abused its discretion in excluding evidence that C.I.'s father was in prison for child pornography offenses. We disagree.

As recognized by trial counsel, the information regarding C.I.'s father does not fall under the category of other suspect evidence. The defense never claimed C.I.'s father was the true perpetrator of crimes against H.D., P.D., and C.I.[3] Instead, citing *State v. Carver*,

[3] Defense counsel specifically said, "I wouldn't intend to make any argument that [C.I.] had been molested by her dad or anything like that." 1 RP (Mar. 9, 2018) at 65.

37 Wn. App. 122, 124-25, 678 P.2d 842 (1984), the defense claim was that the activities of C.I.'s father provided an explanation for C.I.'s precocious knowledge. This is a theory of impeachment, not one of substantive evidence.

The trial court properly prohibited the defense from attacking C.I.'s credibility by introducing evidence of her father's child pornography activities. There was no indication C.I. was aware of the specifics of her father's crime. During her pretrial interview, C.I. stated she knew her father had "'inappropriate stuff'" on his computer, such as "'*Star Trek, Star Wars, Aragon* and *Harry Potter.*'" 1 RP (Mar. 9, 2018) at 65-66. But she denied seeing any of the "stuff" herself. *Id.* The defense theory that C.I. might have been aware of more of her father's activities than she had been willing to admit was purely speculative. As such, the trial court properly granted the State's motion in limine.

Statement of additional grounds for review

Mr. Leppert has filed a statement of additional grounds for review (SAG) reciting his physical infirmities and criticisms of C.I.'s credibility. Because the SAG does not identify any legal errors pertaining to his convictions, it does not merit appellate review. RAP 10.10(c).

CONCLUSION

The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Maxa, J.[4]

[4] The Honorable Bradley Maxa is a Court of Appeals, Division Two, judge serving in Division Three under CAR 21(a).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36108-0-III
	)	
KURT BRODERICK LEPPERT, SR.,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JENNIFER STUTZER, STATE THAT ON THE 14th DAY OF MAY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] KURT B. LEPPERT SR. DOC NO. 407444 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-FILED AND E-DELIVERED TO OPPOSING COUNSEL VIA COURT'S PORTAL

SIGNED IN MT. VERNON, WASHINGTON THIS 14TH DAY OF MAY, 2020.

X_____

STUTZER LAW PLLC

May 14, 2020 - 8:38 AM

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Appellate Court Case Title:	State of Washington v. Kurt Broderick Leppert Sr.
Superior Court Case Number:	17-1-01822-9

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