IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. C.C., DOB: 1/30/1993 Appellant.	)))))))))))	DIVISION ONE No. 67361-1-I UNPUBLISHED OPINION FILED: November 14, 2011

Dwyer, C.J. — C.C. appeals from his juvenile court conviction of child molestation in the first degree. Because C.C. points to no evidence that can reasonably be construed as demonstrating actual or potential bias on the part of the trial court, there was no violation of the appearance of fairness doctrine. Moreover, contrary to C.C.'s contention, the trial court was not required to weigh on the record each of the nine factors set forth in State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), prior to admitting the out-of-court statements of C.C.'s victim. Finding no error, we affirm.

I

Sixteen-year-old C.C. was charged with child molestation in the first degree, in violation of RCW 9A.44.083.[1] During the juvenile court fact-finding

[1] "A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1).

hearing, K.S.—eight years old at the time of C.C.'s conduct—testified that C.C. had entered her bedroom on multiple occasions and touched her buttocks and chest.[2] The court found K.S. to be a competent witness. Thereafter, the State sought to introduce out-of-court statements made by K.S. to her father, grandmother, uncle, investigator Olga Lozano, and a family friend, Patricia Halk, regarding C.C.'s behavior. The trial court determined that K.S.'s statements to her father, grandmother, Lozano, and Halk were admissible pursuant to RCW 9A.44.120, the statute governing child hearsay. The trial court excluded K.S.'s statements to her uncle because these statements were prompted by suggestive questioning. The court found that C.C. committed the offense.

C.C. appeals.

II

C.C. first contends that the appearance of fairness doctrine was violated because, in determining the admissibility of K.S.'s out-of-court statements, the trial court opined that the spontaneous statements of children regarding injury are generally reliable. We disagree.[3]

"To prevail under the appearance of fairness doctrine, the claimant must

[2] C.C. was 15 years old at the time of the alleged conduct.

[3] C.C. raises the issue of judicial bias for the first time on appeal. C.C. did not object to the trial court's remarks during the hearing; nor did he ask the trial judge to recuse himself. In general, an appellate court may refuse to entertain a claim of error not raised before the trial court. RAP 2.5(a). However, an exception exists where the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to fall within this exception, the error must be of constitutional magnitude, cause actual prejudice, and be "'so obvious on the record that the error warrants appellate review.'" State v. Gordon, ___ Wn.2d ___, 260 P.3d 884, 886 n.2 (2011) (quoting State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)). Because the State does not contest C.C.'s right to raise this claim of judicial bias on appeal, we assume, without deciding, that this standard was met.

provide some evidence of the judge's . . . actual or potential bias." State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999). Prejudice is not presumed. State v. Dominguez, 81 Wn. App. 325, 329–30, 914 P.2d 141 (1996). Only after a claimant presents sufficient evidence of potential bias do we consider whether the appearance of fairness doctrine was violated. Dominguez, 81 Wn. App. at 330. "'Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.'" State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting State v. Ladenburg, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)). We consider allegedly improper or biased comments in context. See, e.g., In re Dependency of O.J., 88 Wn. App. 690, 697, 947 P.2d 252 (1997).

C.C. contends that two comments by the trial court, made in the process of determining the admissibility of K.S.'s out-of-court statements, demonstrate that it impermissibly prejudged K.S.'s credibility. In the first instance, the court observed that "[w]hen children . . . make spontaneous statements about how they were hurt . . . there is generally a pretty good basis for it." Report of Proceedings (RP) at 352. In the second instance, the court remarked that, "I do think we ought to have a rule, though, when small children say they were hurt in a spontaneous sort of way, the common experience is they are telling the truth." RP at 353. C.C. asserts that these comments would cause a disinterested

observer to question the judge's impartiality regarding K.S.'s credibility. Thus, C.C. asserts, the appearance of fairness doctrine was violated. This contention is not, however, supported by any reasonable reading of the trial record.

When considered in context, the trial court's comments do not evidence any actual or potential bias. The comments were made during the court's analysis of the admissibility of K.S.'s out-of-court statements. Pursuant to RCW 9A.44.120(1), a child's out-of-court statement may be admitted at a criminal trial where "the time, content, and circumstances of the statement provide sufficient indicia of reliability." Here, it is clear that the trial court's comments concerning the general truthfulness of a child's spontaneous statements pertained strictly to its analysis of the admissibility requirements of RCW 9A.44.120. Indeed, the court made clear that its evaluation of K.S.'s out-of-court statements was limited to the issue of admissibility—in ruling that several of the statements were admissible, the court further explained that, "[w]hat weight I am going to give them is a totally different matter." RP at 353. Because the trial court's remarks cannot reasonably be construed to indicate that it prejudged K.S.'s credibility, C.C. has failed to provide sufficient evidence of actual or potential judicial bias. Accordingly, there was no violation of the appearance of fairness doctrine.[4]

III

C.C. next contends that the trial court abused its discretion by admitting

[4] Because we conclude that C.C. has failed to adduce evidence of actual or potential judicial bias, there was similarly no violation of his due process right to a fair and impartial judge.

K.S.'s out-of-court statements without weighing on the record each of the nine factors set forth in Ryan, 103 Wn.2d 165. We disagree.

We review a trial court's decision to admit child hearsay evidence for an 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 or is based on untenable reasons or grounds." C.J., 148 Wn.2d at 686 (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

Our courts have applied the nine factors set forth in Ryan to determine whether a statement is sufficiently reliable to be admissible pursuant to RCW 9A.44.120.[5] 103 Wn.2d at 175-76. To admit the challenged evidence, not every factor listed in Ryan must favor reliability, but the factors as a whole must do so. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). Moreover, even where a trial court has misapplied the Ryan factors in admitting an out-of-court statement, we will affirm the admissibility ruling where the reliability of the statement is apparent from the record. State v. Stevens, 58 Wn. App. 478, 487, 794 P.2d 38 (1990).

C.C. contends that the trial court abused its discretion by weighing on the

[5] "The nine factors are (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested that the child misrepresented the defendant's involvement." State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (citing Ryan, 103 Wn.2d at 175-76).

record only three of the nine Ryan factors prior to admitting K.S.'s out-of-court statements. The court explicitly considered whether K.S. had a motive to lie, whether more than one person heard the statements, and whether K.S.'s statements were spontaneous. C.C. concedes that it was unnecessary for the trial court to consider factors six, seven, and nine, as these factors are either unhelpful, State v. Young, 62 Wn. App. 895, 901-02, 802 P.2d 829, 817 P.2d 412 (1991), redundant, In re Dependency of S.S., 61 Wn. App. 488, 520, 814 P.2d 204 (1991), or are not implicated when a child testifies. State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Thus, the only factors truly at issue are K.S.'s general character, whether trustworthiness was suggested by the timing of the statement and the relationship between K.S. and the various witnesses, and the likelihood that K.S.'s statements were based on faulty recollection.[6]

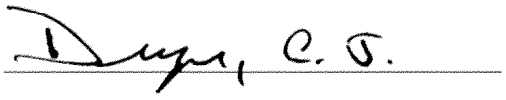
Here, the record contains sufficient evidence to support each of these factors. There is ample evidence in the record of K.S.'s good general character. Indeed, at trial, defense counsel conceded that K.S. "probably has a good character."[7] RP at 346. The timing of K.S.'s statements and her relationship to

[6] C.C. also contends that the trial court ignored the Ryan factors in favor of its own standard when it stated that "I do think we ought to have a rule, though, when small children say they were hurt in a spontaneous sort of way, the common experience is [that] they are telling the truth." RP at 353. However, "[n]ot all words uttered by judges in courtrooms constitute rulings." State v. Hunter, 147 Wn. App. 177, 187, 195 P.3d 556 (2008), review granted, State v. R.P.H., 169 Wn.2d 1005, 236 P.3d 206 (2010). The trial court explained that the admissibility of K.S.'s statements would be analyzed "obviously . . . in terms of Ryan." RP at 351. Accordingly, C.C.'s assertion that the court adopted its own standard is contrary to the record.

[7] By agreement of the court and the parties, in this juvenile court proceeding, the evidentiary phase of the fact-finding hearing was combined with the hearing as to admissibility. The court heard the evidence, made necessary evidentiary rulings, found the facts, and rendered its

the witnesses likewise supports their reliability. All of the statements were made to trusted adults or trained professionals within several months of C.C's conduct. Finally, the record supports the conclusion that K.S.'s statements were unlikely to be based on faulty memory. In finding that K.S. was competent to testify, the court determined that she had the ability to "comprehend, to remember, and to relate." RP at 336. The trial court implicitly rejected C.C.'s contention that K.S.'s memory was "shaped and basically determined by her father," RP at 336, when it found that her spontaneous statements were made without prompting. Because the trial court's decision to admit K.S.'s out-of-court statements was neither manifestly unreasonable nor made for untenable reasons, we will not disturb this evidentiary determination. There was no error.

Affirmed.



We concur:

decision, in that order.

Appelwick, J. Grosse, J.