IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FARON WILLIAM ROPER, AKA FARON WILLIAMS ROPER, Appellant.	))))))))))	No. 63840-8-I DIVISION ONE UNPUBLISHED OPINION FILED: November 9, 2009

Grosse, J. — A child witness is competent to testify if she understands the obligation to tell the truth and demonstrates she has sufficient recall of past events. Here, the child witness promised to tell the truth and was able to recall the allegations with sufficient detail. Thus, the trial court did not abuse its discretion by finding her competent. We affirm.

FACTS

In 2007, S.H. turned five years old and lived in a house in Vancouver, Washington, with her mother, Angela Hall, four other siblings and Hall's boyfriend, Chris Dawson. Dawson's uncle, Faron Roper, stayed overnight at Hall's house on many occasions, but lived at an apartment he shared with a woman named Donna Schymanski.[1] According to Hall, Roper was very attached to her children, especially S.H., and played with them frequently. S.H. and the other children often spent time with Roper and visited him at the apartment he shared with Donna. By July 2007, Hall became involved in a sexual relationship

[1] We refer to her as "Donna" because that is how the witnesses identify her.

with Roper that they kept secret from Dawson.

On July 20, 2007, Roper took S.H. with him to a storage unit and then to Donna's apartment. When they returned to Hall's house, Hall noticed that S.H. was upset and asked her what was wrong. S.H. said she was mad because she was disciplined at Donna's house for playing with some blinds that she was not supposed to touch. S.H. then told Hall that she had a secret that she was not supposed to tell. When Hall asked what the secret was, S.H. told her Roper "kisses my privates." Hall then called 911 and reported S.H.'s disclosure.

Cynthia Bull, a detective from the Clark County Sheriff's Office, interviewed S.H. Bull asked S.H. if she ever had a problem with someone touching her private parts and S.H. told her yes, that "[w]hat Faron did was kissing me . . . [h]e was licking me, . . . not in the butt private, but [in] the front private down there," pointing to her vaginal area, and that he touched her on her skin. S.H. said, "He always loves me because I'm so beautiful, and he thinks I look like a princess." She also demonstrated how he put his hands on her knees and said "open them," and that she put her knees up, "like the splits," and spread her knees really wide. She then leaned forward toward the table like she was putting her head toward something and said, "then he began to flick" and flicked her tongue in and out like she was slurping and said, "[h]e did that."

When Bull asked her how many times he did this, S.H. said, "[f]our" and held up four fingers. Bull then asked her if it had been four times or less times or more times, and she responded "[m]ore." When Bull asked where it happened,

she said in my family room and at his friend's house, Donna, and said that Donna was in a wheelchair. S.H. also told Bull that one time he tried to put his finger "in the hole in the bottom where you pee," and that it hurt.

Bull then arrested Roper and read him his Miranda[2] rights. Roper agreed to talk to her and admitted the allegations, stating:

> I have a problem relating love to sex. They are the same to me. And if you love someone, it always leads to sex. [S.H.] and I were beginning – [S.H.] and I in the beginning had a strong, loving relationship that – well, obviously turned bad. I never hurt her in any way. It wasn't about that. I didn't do anything she didn't want me to or didn't ask me for. I shouldn't have ever done anything though.

He admitted that he had kissed her vagina on the skin "a few" times and that he put his fingers inside her vagina once, but that she did not like it. He also told Bull that the first incident occurred at Hall's house in S.H.'s bedroom, that another one occurred in the family room at Hall's house and another one occurred at Donna's house in his bedroom.

The State charged Roper with four counts of first degree rape of a child, each alleged to have occurred between February 1, 2007 and July 20, 2007. Over Roper's objections, the trial court ruled that S.H. was competent to testify and that her statements to Hall and Bull were admissible under the child hearsay statute.

At trial, S.H. testified that Roper touched her privates with his mouth "lots," and that sometimes it happened "at Donna's, at my house." But she also testified that he did not use anything else to touch her privates and that he did

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

not ever put anything in her privates. Bull also testified about her interviews with both S.H. and Roper and the statements they made to her.

Hall testified to S.H.'s disclosure to her and also testified that Roper later admitted to Hall that he kissed S.H. on her privates because she wanted to play a kissing game with him. Hall said that Roper also told her that "it had been going on" from the time after S.H.'s birthday up until Hall reported him. S.H. had her fifth birthday on May 19, 2007. Hall also said Roper told her that the incidents happened in S.H.'s bedroom, in the family room and in his room at Donna's apartment.

Dawson testified that Roper spoke with him several times about the allegations and described three of the incidents. He described the first incident as a time when S.H. was swinging on the bunk bed in her bedroom and he played a kissing game with her that ended up with him kissing her private parts. The next incident he described was when S.H. came to him in the middle of the night while he was sleeping in the living room and asked him to kiss her privates, and he said, "it tasted like pee." The third incident he described was when they were playing "tent" and made a tent out of the bed with blankets draped over it and he said they were both under the bed and he was doing "it," but did not say exactly what "it" meant. Dawson further testified that Roper said it happened "a good 17, 18, 19 times."

The State also called Rafael Gonzales, a friend of Hall, who testified that he was at Hall's house once in the summer and walked in on Roper and S.H. in

one of the children's bedrooms. According to Gonzalez, the bedroom door was shut and the lights were off and when he opened the door he saw Roper lying on his stomach partly inside a closet and S.H. lying on her back inside the closet, with Roper's hand across her neck.

Roper testified on his own behalf and denied the allegations. He also testified that he and S.H. had a "special bond," and that Dawson seemed jealous of this. Roper further testified that he told Dawson about his relationship with Hall, which Hall continued to deny to Dawson. Roper argued that Hall testified against him because she was upset with him for not going along with her denial of their relationship to Dawson.

Roper also testified about the closet incident and admitted that most of what Gonzalez said was true, except that they were not alone because S.H.'s brother was there, too. He denied that anything inappropriate happened, claiming that his hand was on S.H. because he was reaching by her to get something on the other side of her. He also said that Gonzalez did not like him because Roper had to chase him away in the past when he was drunk and belligerent.

The jury found him guilty of all four counts. The court found him to be a persistent offender and sentenced him to life without parole.

ANALYSIS

I. Competency of Child Witness

Roper first contends that S.H. was incompetent to testify because she did

not voluntarily take the oath to testify truthfully, did not have the mental capacity to receive an accurate impression of the incidents and did not have sufficient memory to retain an independent recollection of them. We will not disturb a trial court's competency determination on appeal absent a manifest abuse of discretion.[3] Because "[t]he competency of a youthful witness is not easily reflected in a written record," we defer to the trial judge "who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence."[4]

In State v. Allen, the court established a test to determine whether a child witness is competent to testify.[5] The child must demonstrate: "(1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence . . . to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words [her] memory of the occurrence; and (5) the capacity to understand simple questions about it."[6]

Here, the trial court found S.H. competent and made the following oral findings:

> I thought, frankly, as far as her age goes, she is a very receptive witness. She under – she was very (inaudible). What I'm saying is we can actually understand her, and I think she tracked pretty well taking into consideration of her age. . . .
>
> But as far as the first thing we have to look at is, is competency and was she able to speak the truth. Yeah. I think that was established. She was able to speak the truth. She knew the

[3] In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998).
[4] State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).
[5] 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).
[6] Allen, 70 Wn.2d at 692.

> difference between the truth and a lie; and, in fact, when asked various questions she was able to say, "No, that is not what happened." So middle count – "capacity to receive an accurate impression." She did, and was able to recite what she alleges happened.
>
> "Memory sufficient to retain independent recollection of the occurrence." Well, yeah, because she recited and knew what the occurrence was. "Capacity to express in words her memory of the occurrence." Yeah. She expressed that. "Capacity to understand simple questions about the occurrence." We didn't get into that too much other than she was able to say that to Officer Bull and her mother. On the stand, there wasn't inquiry about that. So I think that probably there might be reserve on that, but with the understanding that she repeated this to her mother, repeated to the officer. She has the capacity to understand simple questions.

The prosecutor then reminded the court that in fact S.H. was asked about "the privates" and talked about how many times it happened, stating that it happened more than once and that it happened at his house and her house. The court agreed and then found that she had capacity to understand simple questions about the occurrence.[7]

Roper first contends that S.H. was not competent to testify because she did not voluntarily take an oath to testify truthfully. This contention is not supported by the record. At the pretrial competency hearing, the court asked S.H. if she promised to tell the truth and she responded, "I'm shy." The court then stated, "[W]ell, so am I, but do you promise to tell the truth while you are up here?" and she responded, "Sure." Thus, she sufficiently demonstrated her understanding of the obligation to tell the truth at the competency hearing.[8]

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[7] The court stated, "So I think there's enough there to give you – lead you to that."

[8] Roper instead refers to S.H.'s testimony at trial, when the court stated: "I know you are shy, but you promise to tell the truth, don't you? Say, 'yes.'" But viewed in context, this indicates that the court was simply guiding S.H. through taking

Roper next contends that S.H. lacked the capacity to receive an accurate impression of the incidents and did not have sufficient memory to retain an independent recollection of them because she was inaccurate about the timing of alleged events, and could not accurately report facts about her life, such as her birthday and the state she lived in. But being inaccurate about the timing of events is not an indicator of incompetency. Rather, she only had to demonstrate that she had the capacity to remember the event when it happened and retained an independent memory of it. As the trial court found, this was established: she was able to recite what she alleged happened and was also able to say, "No, that is not what happened." Additionally, she was able to say how many times and where it happened, stating that it happened more than once and that it happened at his house and her house. The trial court's competency findings are supported by the record and are not an abuse of discretion.

II. Child Hearsay

Roper next contends that S.H.'s statements to Hall and Bull were inadmissible because they did not meet the requirements for admitting child hearsay under RCW 9A.44.120. That statute allows the trial court to admit statements made by a child under the age of ten describing any act of sexual

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the oath, as it did during pretrials. Based on her answers at the pretrial hearing, the court knew she was shy about speaking, but also knew that she understood that she had to tell the truth. Thus, by telling her to say "yes," the court was not ordering her to answer the question affirmatively, as Roper suggests, but was nudging her along to speak her answer audibly for the record. In fact, there are other instances when she had to be reminded to answer audibly for the record. In any event, Roper points to no authority requiring that a child witness must formally take the oath. Rather, as noted above, the standard is whether she is able to convey that she understands the obligation to tell the truth on the stand.

contact with the child if the court finds after a hearing that "the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child either (1) testifies at the proceedings or (2) is unavailable and there is other corroborative evidence of the act.[9]

In State v. Ryan, the court established the following nine factors to consider when determining whether the statements are reliable: (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 at the timing of the statement and the relationship between the child and the witness, (6) whether the statement 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 the child misrepresented the defendant's involvement.[10]

The State need not prove the existence of every factor, but the evidence must show that the factors are "substantially met."[11] We review a trial court's ruling on the admissibility of child hearsay for an abuse of discretion.[12]

Here, the trial court ruled:

> Now, going to the Ryan factors. "An apparent motive to lie." Well, I guess she was in trouble. I don't know if she was in trouble. She had been yelled at before, but, okay. And there may have been

[9] RCW 9A.44.120.
[10] 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).
[11] State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).
[12] State v. Grogan, 147 Wn. App. 511, 520, 195 P.3d 1017 (2008).

> something there. "The general character of the declarant." Again, I think it's kind of – I don't think we have a bad reputation here. That's a silly factor.
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> "Did more than one person hear the statements?" Yeah. Well, that – you're right. The mother heard it. She was able to repeat it. Then: "The statements were made spontaneously." There's testimony by the mother – was that, "It came out of the blue," so that makes kind of – because we're talking about one issue, and out of the blue she said something else.
>
> "Timely, the declaration and the relationship between the declarant and the witness." Again, sounds like it was fairly close in time. "The relationship between the declarant and the witness," the mother – okay. (Inaudible) that is supposed to cut. I'll swift [sic] to number seven. "Cross-examination could not show." I think Mr. Kurtz was being very careful with that. I thought he did a very good job in trying to relate to that. Yes. She may have been a little – well, excuse me, may have been a little reserved about that; but, again, she didn't waiver from her statement that it didn't happen.
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> "Possibility of the declarant [sic] faulty recollection is remote." Don't know. I agree with you. We don't know. We don't know how remote in time it was. She wasn't able to pinpoint the times very well other than it's happened here and there, and I live in the yellow house. We don't know that one.
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> "Circumstances surrounding the statement are such that the declarant has no reason to suppose." And I think that I disagree with the counsel on that one because all the indication is it was a good relationship, considered a very close relationship. That they – you know, they consider themselves boyfriend and girlfriend, whatever that means, so the – there is no motive to turn on her uncle. It sounds like a favorite uncle.

Roper contends that under most of the factors, the statements were not sufficiently reliable. He contends that she had a motive to lie because she had made the statement after being disciplined by Roper, that the court did not consider her general character, that only one person heard the statements, and that they were not spontaneous because they were made in response to Hall's questioning. He further contends that cross-examination demonstrated that she had a faulty and inaccurate recollection of the alleged events.

But in State v. Grogan, child hearsay statements were sufficiently reliable even though only one person heard the statement and cross-examination did not elicit details.[13] The court concluded that there were other factors suggesting reliability, noting that the victim got along with the defendant and had no motive to lie, the statement was spontaneous and made to a witness who was in a caretaking position and the victim pointed at the defendant when asked who touched her after she made the statements.[14] Similarly, here, the trial court's findings provide sufficient indicia of the statements' reliability and are supported by the record.

As the trial court found, S.H. and Roper had a close relationship and she had no motive to lie because she considered him her boyfriend and a favorite uncle. Additionally, S.H. made the statements spontaneously. Hall testified that she made them "out of the blue" and they were not made in response to leading questions, just a general question about what was wrong. S.H. also volunteered details to Bull that were not prompted by leading questions, such as demonstrating what Roper did with his tongue and how she had her legs "[in] the splits." Further, while she may have been a little confused about specific dates on cross-examination, she did not waiver from her statement that it happened. Finally, the court made a finding of her general character, stating: "I don't think we have a bad reputation here."[15] Thus, as in Grogan, on balance, the trial

[13] 147 Wn. App. 511, 195 P.3d 1017 (2008).
[14] Grogan, 147 Wn. App. at 520-22.
[15] The court's comment that this was "a silly factor" suggests that it was obvious that there were no issues with her character, not that the court did not consider this factor, as Roper contends.

court's consideration of the Ryan factors established sufficient reliability and does not amount to an abuse of discretion.

III. Unanimity Instruction

Roper further contends that the trial court erred by failing to give a unanimity instruction because the State presented evidence of multiple acts that could have supported the four charged crimes. We agree, but hold that the error was harmless.

When the State presents evidence of several acts, any of which could form the basis for a charged count, the State must elect the act upon which it relies to convict the defendant or the court must instruct the jury that it must be unanimous as to which act constitutes the charged crime.[16] Failure to do so is constitutional error because "'[t]he error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act,] resulting in a lack of unanimity on all of the elements necessary for a valid conviction.'"[17]

Here, there was evidence of multiple acts that could support each charge and the State failed to elect the acts upon which it was relying. In fact, the prosecutor asserted in closing that there were more than four acts that could support the charges: "What incidents were there? I think there are several. . . . and there were five that I can think of that were defined off the top of my head." The prosecutor then listed the following incidents: (1) the "kissing game"

[16] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).
[17] State v. Bobenhouse, __ Wn.2d __, 214 P.3d 907, 912 (2009) (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

described by both S.H. and Roper; (2) the "tent incident" Roper described to Dawson; (3) the "peeing incident" in the middle of the night Roper described to Dawson; (4) the "finger incident" S.H. described to Bull and (5) the "bunk bed incident" when S.H. was swinging from her bunk bed and she wrapped her legs around his neck, to which Bull testified. The prosecutor then stated:

> Now that's five incidents. All you have to do is find that there were four. Clearly, there were more. We heard that it happened in the family room. I don't know which one happened in the family room or if another one happened in the family room. We heard that it happened in her bedroom. Maybe that was the bunk bed incident, maybe that was a different one. We also heard that it happened at Donna's house. That could have been a different one. That could have been one of those incidents that happened at Donna's house, but we heard it from the defendant, from [S.H.], from Chris, that happened in those three places. Everyone was very specific that it happened in those three places.

While the "kissing game" incident and the "bunk bed incident" appear to have been the same incident,[18] a review of the trial testimony also indicates an additional incident that occurred "at Donna's [house]," which was not one of the five incidents listed by the prosecutor's closing argument. Thus, there were more than four incidents that could have supported the four counts and a unanimity instruction was required. The trial court's failure to give the instruction was error.

[18] Dawson testified that Roper described the first incident as one when S.H. was swinging from her bunk bed and had dress on. He said that she would ask him for a kiss and pick where she wanted him to kiss her, and eventually she pointed to her privates and asked him to kiss her there. Bull also testified that Roper said the first time he kissed her privates was when she was swinging from her bunk bed with a dress on and she swung down in his face. Finally, Hall testified that Roper described the "kissing game" incident as when she had a dress on, was swinging from the bunk bed, and initiated a kissing game that involved him asking her where he could kiss her.

But because there was overwhelming evidence from which a rational juror could find beyond a reasonable doubt that all of the incidents established the charged crime, the error was harmless. Omission of a unanimity instruction in multiple acts cases is harmless if "'a rational trier of fact could find that each incident was proved beyond a reasonable doubt.'"[19] Here, viewing the evidence in its entirety, no rational trier of fact could have a reasonable doubt that any of the incidents occurred. Roper's admissions to three different witnesses established that each of these incidents occurred and corroborated S.H.'s disclosures.

IV. Statement of Additional Grounds

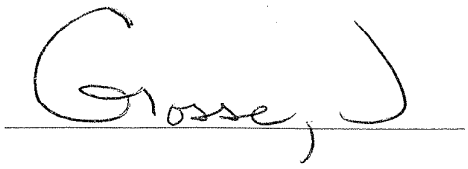
In a statement of additional grounds, Roper challenges the testimony of "four state's witnesses" that allowed him continued contact and access to S.H. and the other children for another month and a half after learning of the allegations. But these arguments relate to the credibility of the witnesses and go to the weight, not admissibility, of the evidence. Thus, such arguments are properly explored on cross-examination; they are not a basis for excluding the testimony. He further challenges the admission of Bull's testimony, contending that this violated S.H.'s Fifth and Sixth Amendment rights to remain silent because S.H. stated she did not want to speak to Bull. But because Roper lacks standing to assert S.H.'s rights and challenge Bull's questioning of her, this claim is without basis.[20]

[19] State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990) (quoting State v. Gitchel, 41 Wn. App. 820, 823, 706 P.2d 1091 (1985)).
[20] See State v. Williams, 142 Wn.2d 17, 23, 11 P.3d 714 (2000) (holding that the

Roper also contends he was denied effective assistance of counsel because his lawyer failed to impeach Bull about the destruction of her notes. Bull testified that she did not have her notes from the interview because they are destroyed once they are put in report form. But Roper fails to show that not conducting further cross-examination about the absence of the notes amounts to a conduct falling below an objective standard of reasonableness. Counsel elicited this fact and it was before the jury as evidence bearing on Bull's credibility. Thus, it was legitimate trial strategy.

Nor can Roper show that counsel denied him effective assistance by limiting closing argument to the burden of proof. In fact, the burden of proof was his strongest argument because the details of the allegations were based largely on child testimony that could be challenged as unreliable. Thus, counsel's closing argument was legitimate trial strategy and does not amount to ineffective assistance.

We affirm.



WE CONCUR:

automatic standing doctrine applies only when the defendant is asserting that his or her own rights are violated).

Becker, J.

Ajid, J.