

No. 42787-7

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

Vs.

JAMES A. OLIVER

Appellant.

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APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 09-1-05834-4

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OPENING BRIEF OF APPELLANT

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## **I. INTRODUCTION**

James Oliver was convicted of one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree as alleged by his daughter, D.O. Mr. Oliver testified at trial and was allowed to introduce some evidence to support his innocence claim. When the defense offered to introduce evidence that would have fully explained why Mr. Oliver's daughter assembled such serious allegations against him, the court denied the defense introducing into evidence that the complaining witness' mother's husband was a convicted sex offender. D.O. was aware of her mother's husband's sex offender status, wanted to live with her mother anyway, and the jury was denied the opportunity to see that it took allegations as extreme as D.O.'s allegations against Mr. Oliver to overcome a history of living with what appeared to be a safer alternative with James and his parents.

Additionally, the trial court allowed inadmissible hearsay that was cloaked as child hearsay under the child hearsay statute. Ultimately, admitting the hearsay resulted in inadmissible cumulative testimony as the complaining witness whose hearsay testimony was admitted (D.O.) also testified live at trial.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred when Mr. Oliver was denied a complete defense.
2. The trial court erred when it granted the State's motion in limine barring evidence of Glenn Whitworth's background as a sex offender.
3. The trial court erred when it admitted hearsay evidence.
4. The trial court erred when it admitted cumulative evidence through the State's use of the child hearsay statute.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court erred when it granted the State's motion in limine excluding references to Glenn Whitworth's sex offender status. (Assignments of Error #1 and 2).

2. Whether the trial court erred when it admitted testimony that was both inadmissible hearsay and cumulative evidence. (Assignments of Error #3 and 4).

#### **IV. STATEMENT OF THE CASE**

##### **A. Procedural History**

On December 31, 2009, the State of Washington charged James Oliver with one count of Rape of a Child in the First Degree and five counts of Child Molestation in the First Degree. CP 1-3.

On July 11, 2011, the State filed an Amended Information changing its charges against Mr. Oliver to include one count of Rape of a Child in the First Degree, one count of Child Molestation in the First Degree, and one count of Attempted Child Molestation in the First Degree. CP 49-51. On August 23, 2011, Mr. Oliver was arraigned on the Amended Information, at which time he entered not guilty pleas to all three charges. RP 15, 16. The trial began on August 23, 2011, as well. See RP 12.

At the start of the trial, on August 23, 2011, trial initially proceeded with a child hearsay hearing that included testimony from two witnesses. RP 18, 37.

After jury voir dire, the court addressed motions in limine. RP 77.

Trial testimony lasted several days. On August 31, 2012, the jury returned guilty verdicts on the rape of a child in the first degree count and the child molestation in the first-degree count. RP 580. The jury did not reach a verdict on the attempted child molestation in the first degree count.

Mr. Oliver was sentenced on October 14, 2012. CP 265-279. In addition to standard sentencing conditions, the court sentenced Mr. Oliver to 129 months to life, an indeterminate sentence. CP 269.

On November 10, 2012, Mr. Oliver timely filed his Notice of Appeal to this court. CP 289.

## **B. Facts**

On September 5, 2009, then nine-year-old D.O. told her older half-sister, D.M., that their father, James Oliver, had been touching D.O. RP 330. This led to an investigation that ultimately culminated in the trial that is the subject of this appeal.

By way of background, James Oliver was, for a time, married to Jeannie Whitworth<sup>1</sup>. James and Jeannie have since divorced. When they married, Jeannie brought to the marriage two children from two previous relationships. RP 118. One of those children was a girl named D.M., and the other child from a different relationship was named Tyler. RP 118. James and Jeannie had two children together, E.O. and D.O. RP 127, 128-129. Jeannie left James for a then-friend of James's named Glenn Whitworth, and they married. RP 265. Jeannie's relationship with Glenn Whitworth was essentially at the expense of her children. See, RP 133. That is to say, Glenn's past history as a sex offender presented issues that left James as the only custodial parent fit for the bunch. (See, RP 89-95 and CP 113-142 for defense position on this issue, including oral

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<sup>1</sup> Jeannie Whitworth was her name at the time of trial. When married to the James Oliver, her last name was Oliver.



representations for proof offers.) This was just as true for the older two children that were not James' natural born children. While in James' custody, Jeannie had weekend visitation, but only under circumstances of Glenn having to be away from the home when the children were present. RP 264.

James parents, Bonnie and Maynard Oliver, allowed him and the children to live with them in Bonney Lake, Washington. RP 241-242. When D.M. and Tyler were a little older and during their teen years, both bounced around residence a bit, including a time when permission was granted for D.M. to live with her mother and Glenn. RP 135, RP 264.

During the times when all of the Oliver children lived in the Bonnie and Maynard Oliver residence (including D.M. and Tyler), the bedroom arrangement was as follows: Bonnie and Maynard had their own room upstairs; D.M. had her own room upstairs; E.O. and D.O. shared a room upstairs; and James and Tyler resided downstairs. RP 134, RP 245-246.

By the time D.O. told D.M. that her dad, James, had touched her, D.M. was not living in Bonnie and Maynard Oliver's' house. Tyler was living there from time to time, including a time when he spent a great deal of time sleeping on the upstairs couch. RP 272.

At trial, D.O. testified that James Oliver touched, "my chest and my vagina." RP 248, 250. She then told the jury that her brother Tyler also touched her. RP 249. She indicated Tyler touched her vagina, that it

was on the skin and not over clothing, and that she knew it was Tyler because she could see him. RP 249-250.

Regarding D.O.'s claims that her dad, James, touched her, D.O. specified he used his hand, that it occurred several times in both her room and in James' bed, that she was wearing pajamas, that he would feel around both her breasts and her vagina area, that it began when she was about five years old, and it stopped when she told somebody. RP 250-254. She also testified that on more than five occasions James put his finger inside her vagina and that it hurt. RP 255-256. She said it always happened at night. RP 257. She added that James told her not to tell anybody because she wouldn't be able to see him again. RP 258, 261.

During her testimony D.O. indicated that if James caught her looking at him while he was touching her he would hit her on her arm. RP 259.

During cross examination D.O. admitted to the following inconsistencies in her testimony: that she had previously made statements that any described abuse did not begin until she was six or seven years old (as opposed to trial testimony being five years old) (RP 266); and that she had previously testified that any of the alleged touching by Jim was always in her room (as opposed to downstairs) (RP 265).

D.O. admitted that during her years in Bonnie and Maynard's house she wanted to live with her mother. RP 264.

Prior to the start of trial testimony, both the State and the defense filed motions in limine. CP 26-31, 108-112.

Among the state's motions was a request to preclude reference to the prior conviction of Glenn Whitworth, his status as a convicted sex offender, or his prior status as a registered sex offender. CP 27. The defense responded to the State's motions in limine, requesting the court allow trial testimony and examination to include Mr. Whitworth's sex offender status, including that fact as an explanation of why D.O. was unable to live with her mother despite her desire to live with her. CP 113-142. This would have shown that D.O. knew it would take an accusation against James Oliver of greater magnitude than Mr. Whitworth's sex offender status to move her into her mother's home. See, CP 121-122. (See also, defense oral argument at RP 88-95.) The court granted the State's motion in limine on this issue and prohibited the defense from offering Glenn Whitworth's testimony as to his sex offender status in support of the defense theory of the case. RP 95. Specifically, the defense was not allowed to refer to Glenn Whitworth's sex offender status, conviction history, and former registration requirement.

During the defense case, James Oliver testified. RP 466. He proclaimed his love for his children. RP 477, 481, 495-496. He denied allegations brought by D.O., as well as the allegation brought by D.M.. RP 492-496, 505-506. James testified at length about the depth of interaction he and his parents had with the children and their activities.

RP 481-483. He professed his love for the children, with a particular focus on D.O. and E.O., as they were the two who were constant residents of his household. RP 481, 487-488. He also testified about D.O.'s persistent expressed desire to live with her mother, Jeannie Whitworth, and he documented her persistence toward achieving that move. RP 517. James offered testimony about Tyler Montgomery's anger issues, his tendency toward violent displays, and his history of deviant behavior related to D.O. RP 474-481.

In the end, the jury returned guilty verdicts on the two counts related to D.O. (rape of a child in the first degree and child molestation in the first degree). CP 231-232. The jury did not reach a decision as to the count related to D.M.'s allegation. CP 233.

Mr. Oliver was sentenced on October 14, 2012. CP 265-279. In addition to standard sentencing conditions, the court sentenced Mr. Oliver to serve time in the Department of Corrections for a period of 129 months to life. CP 269.

On November 10, 2012, Mr. Oliver timely filed his Notice of Appeal to this court. CP 289.

**V. ARGUMENT**

**A. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION IN LIMINE EXCLUDING REFERENCES TO GLENN WHITWORTH'S SEX OFENDER HISTORY.**

During pre-trial motions, the defense articulated in briefing and oral argument, that its defense would include presenting D.O.'s motivation for making false claims against Mr. Oliver. CP 121, RP 89-95.

As it was explained to the court, D.O.'s motive was to relocate from Bonnie and Maynard Oliver's house where she lived with her dad, James Oliver and others, and move into a home with her mother. CP 121, RP 90. That necessarily included moving in with her mother's husband, Glenn Whitworth, a sex offender. The defense candidly alerted the court to the fact that its defense required the jury to see the broad picture regarding D.O.'s quest to relocate with her mother. Included in the defense presentation were (1) of all the reasons that D.O. wanted out of the Bonnie and Maynard Oliver house, (2) the obvious reason why she could not live there, (3) the sources of hope for the continuing possibility of living there, (4) the fact of her relocating with her mother after the allegations against James were brought, and (5) the magnitude of the allegation it took to get her there. CP 121, RP 89-95.

The Supreme Court has held that a defendant's right to present a defense stems both from the right to due process provided by the Fourteenth Amendment, see Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct 1038, 35 L.Ed.2d 297 (1973), and from the right "to have compulsory process for obtaining witnesses in his favor," provided by the

Sixth Amendment, see Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (explaining that the right to compulsory process would be meaningless if the defendant lacked the right to use the witnesses whose presence he compelled). The Court stated:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id.

Because a defendant's right to a complete defense is a due process due process right and falls under his right to defend (14<sup>th</sup> and 6<sup>th</sup> Amendments), the court reviews using the de novo standard. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

“A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,” such as procedural and evidentiary rules. United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). Evidentiary rules do not violate a defendant's constitutional rights unless they “infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks omitted). Generally, it takes “unusually compelling circumstances . . . to

outweigh the strong state interest in administration of its trials.” Perry v. Rushen, 713 F.2d 1447, 1452 (9<sup>th</sup> Cir. 1983).

The Supreme Court has elaborated upon these principles in cases where defendants have alleged that local or state court rules, or state evidentiary rules, by their own terms, intrude upon their constitutional right to present a complete defense. For example, in Holmes, the Court held that a defendant’s constitutional rights were violated by an evidentiary rule that prevented the defendant from presenting evidence that a third party had committed the crime if the judge determined that the prosecutor’s case was strong. 547 U.S. at 328-31. The Court determined that this evidentiary rule did not “rationally serve” the goal of “excluding evidence that has only a very weak logical connection to the central issues.” Id. at 330.

In Su Chia v. Cambra, 360 F.3d 997 (9<sup>th</sup> Cir. 2004), two DEA agents were murdered during an undercover sting operation. Id. at 999. The defendant, Mr. Chia, repeatedly claimed that he had not conspired with co-defendants, but rather had tried to talk them out of the plot to kill. Id. One of the co-defendants confirmed that Mr. Chia was not involved but would not testify for Mr. Chia on Fifth Amendment grounds. Id. at 1002. When Chia sought to introduce evidence of the co-defendant’s statements in his defense, the trial court suppressed them as inadmissible hearsay. Id.

In evaluating Chia's claim, the Ninth Circuit first set-forth the standards for review of such cases before applying a five-part balancing test:

In a habeas proceeding, we have traditionally applied a balancing test to determine whether the exclusion of evidence in the trial court violated petitioner's due process rights, weighing the importance of the evidence against the state's interest in exclusion. Miller v. Stagner, 757 F.2d 988, 994 (9<sup>th</sup> Cir.), amended on other grounds, 768 F.2d 1090 (9<sup>th</sup> Cir. 1985). In balancing these interests, we must, on the one hand, afford "due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable . . . evidence." Miller, 757 F.2d at 995. On the other hand, we must stand vigilant guard over the principle that "the right to present a defense is fundamental" in our system of constitutional jurisprudence. Perry v. Rushen, 713 F.2d 1447, 1450-51 (9<sup>th</sup> Cir. 1983) (noting that "because this right is so important, language from some cases and commentary suggests that the defendant's right carries conclusive weight, and that the exclusion of any relevant evidence is unconstitutional"). In light of these competing interests, federal habeas courts must "determine what weight the various interests will carry when placed on the scales," Id. at 1450, and ultimately determine whether the decision of the state court to exclude the evidence in question was reasonable or unreasonable. In assessing the interests at issue in this case, we invoke the five-part balancing test formulated in Miller. These factors include: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or is merely cumulative; and (5) whether it constitutes a major part of the attempted defense. Miller, 757 F.2d at 994.

Chia, 360 F.3d at 1003-04.

Finally, a recent Ninth Circuit case, United States v. Stever, 603 F.3d 747 (9<sup>th</sup> Cir. 2010), is on point. In that case, the defendant, Stever, lived on a 400 acre piece of land where, on an isolated corner of the property, a marijuana grow operation was discovered. Id. at 750. Prior to



trial, Stever sought discovery from the government relating to the existence of Mexican drug trafficking organizations (DTO's) that were known to infiltrate public and private property and secretly grow marijuana there. Id. at 751. Additionally, Stever sought to proffer evidence at trial suggesting that the DTO's had recently infiltrated eastern Oregon, and were responsible for the marijuana on his property. Id. at 751. The district court first ruled that the government was not required to comply with the discovery request, stating that "evidence about who else was responsible for the grow was not relevant to assessing the likelihood that Stever was involved." Id. at 752-53. The Court also forbade Mr. Stever from presenting any evidence suggesting that Mexican DTO's were involved with the grow on his property. Id. Stever was convicted. Id. at 752.

The Ninth Circuit reversed, first holding that the district court's conclusion that the discovery request was "irrelevant" was "illogical" given the definition of relevant evidence within the Rules of Evidence. Id. at 753. The Court also concluded that the district court erred by suppressing Mr. Stever's attempt to proffer evidence that DTO's were involved with the grow operation on his land. Id. at 757. In reaching this conclusion, the Court first emphasized the important constitutional right to present a complete defense afforded by the 6<sup>th</sup> and 5<sup>th</sup> Amendments. Id. at 755. Additionally, the Court referenced the Miller factors (Miller v. Stagner, 757 F.2d 988, 994 (9<sup>th</sup> Cir.)) and applied each of them to the facts

in the case. Id. at 756. Specifically, the Court held that the DTO evidence was obviously probative on the central issue because the evidence would have “rebut[ed] the inference that [Stever] must have committed the [crime] because no one else was in a position to do so.” Id. at 756 (*quoting United States v. Crosby*, 75 F.3d 1343, 1346-47 (9<sup>th</sup> Cir. 1996)).

The Court found that the evidence was reliable because the existence of DTO’s was known and investigated by the government. Id. at 756. The Court also found that the evidence was capable of being evaluated by the trier of fact because Mr. Stever could have an expert testify as to the existence of DTO’s. Id. at 756-57. Regarding the last two Miller factors, the Court stated:

The last two Miller factors weigh most strongly in favor of finding that Stever’s evidence was important to his attempted defense. Because the district court ruled *sua sponte* that Stever could not make his preferred defense *in any form*, it excluded “the sole evidence on [an] issue” that constitute[ed] a major part of the attempted defense.” Precluded from pointing to any alternative explanation for the operation on his mother’s property, Stever was confined to poking holes in the Government’s case and, as his lawyer argued to no avail in closing, holding the prosecution to its burden of proof. Stever was, quite literally, prevented from making his defense.

Id. at 757 (internal citations omitted).

Evidence that a defendant seeks to introduce “must be of at least minimal relevance.” Id. at 622. Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006). “[I]f relevant, the burden is on the State to show the evidence is so

prejudicial as to disrupt the fairness of the fact-finding process at trial.” State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002) . The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.” Id. “[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial” are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). If the evidence has *high* probative value “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22.” Id. at 16.

In State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), the defendant's niece accused him of rape. The defense sought to present evidence that he and his niece were at a drug induced sex party and that the sex was, thus, consensual. The trial court excluded the evidence as irrelevant. The Supreme Court stated, “this was not marginally relevant evidence,” but rather “of extremely high probative value [constituting] Jones's entire defense.” Id. at 721. The Court elaborated:

Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence ... These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense. The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment.

Id.

In the present case, Mr. Oliver offered evidence that was relevant and would have provided an absolutely necessary ingredient toward his complete defense. Without the evidence of Mr. Glenn Whitworth's status as a sex offender, Mr. Oliver was only able to partially defend the state's case against him.

That evidence would have shown the jury that D.O. knew the reason she couldn't live with her mother was because her mother's husband was a convicted sex offender. For years her desire to live with her mother had been denied because the stability of her father and grandparents' home appeared to be a less vulnerable environment than a home with a mother and a former sex offender. Testimony from D.O. would have exposed that knowledge and testimony from Glenn Woodworth would have confirmed the truth of D.O.'s understanding of it.

Upon hearing the testimony, the jury would then have had before it the complete defense that Mr. Oliver had to offer.

Absent the above evidence, the jury was left with the following partial defense. The defense exposed inconsistencies in D.O.'s testimony when compared to previous interviews and transcripts. RP 265, 266, 272, The defense also exposed the fact that Tyler Montgomery abused D.O. during times when he lived in Bonnie and Maynard Oliver's home as well. RP 264, 268-269. D.O. conceded she had wanted to move to live with her mother for a long time. RP 264. And trial testimony acknowledged that Jeannie remarried, but that Jeannie was alone when the kids would visit

her on the weekends prior to the allegation in this case. RP 264. The defense was only a fraction of a full defense because it merely showed the reasons D.O. wanted to leave the home and her desire to live with her mother. It did not introduce the jury to the specific obstacle that D.O. had to overcome in order to live with her mother – a sex offender named Glenn Whitworth.

For the reasons cited above, the Constitution entitled Mr. Oliver to a complete defense. The trial court erred when it refused to allow the defense to introduce evidence of Mr. Glenn Whitworth’s sex offender status and former prohibition from contacting children as it would have enlightened the jury to the magnitude of claim D.O. needed to provide in order to overcome the issues related to her joining her mother in the company of Mr. Whitworth. Like the Jones court, infra., this court should recognize that the evidence Mr. Oliver sought, “was not marginally relevant evidence, [but] of extremely high probative value [constituting] [his] entire defense.” Jones at 721. Anything less – proceeding with what remained of his defense – was merely a partial defense to the charges against Mr. Oliver. Accordingly this court should reverse the trial court’s order in limine excluding such evidence and remand the matter for a new trial with instruction to proceed with such testimony about Mr. Whitworth.

#### B. THE TRIAL COURT ERRED WHEN IT ALLOWED THE HEARSAY TESTIMONY OF D.O.

Before testimony began, at the request of the State, the court held a child hearsay hearing. RP 18, 37. CP 32-48. The State explicitly sought

to introduce as substantive evidence D.O.'s hearsay testimony through her sisters, her mother, a forensic child interviewer, and a nurse. CP 33, 47.

In support of offering the video-recorded testimony of D.O.'s interview with a forensic child interviewer, the State offered the testimony of Patricia Mahaulu-Stephens. RP 18, 29. During the hearing, the State offered D.M., D.O.'s sister, as a witness to one of D.O.'s initial disclosures of having been touched by her father. RP 37, 43-45.

After introducing the above testimony and video-recorded interview, the State took the position that D.O.'s video-recorded testimony was admissible for substantive purposes. See, CP 47, RP 54-62.

The defense argued against the admissibility of the hearsay testimony. See, RP 62-66. In short, the defense pointed out significant reliability, spontaneity, and veracity issues should have excluded the hearsay evidence. RP 65. The court's ruling admitted the hearsay. RP 66-70.

Trial proceeded with Patricia Mahaulu-Stephens testifying about the child interview process. After telling the jury about the interview process, interviewing techniques, experiences with other children's interviews, and her interview of D.O., her testimony included admission and publication of the video-recording of D.O.'s child interview. RP 198-229, (Published to the jury at RP 218.) The defense objected. See, RP 218 (referencing its reliance on previous argument from the time of the

child hearsay hearing.) Again, the recording was offered and admitted for substantive evidence purposes. CP 47, RP 54-62.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

D.O. testified at trial. Patricia Mahaulu Stephens and D.O.’s sister D.M. were allowed to repeat what D.O. said to them. The purpose of their testimony was to prove the truth of the matter asserted. These were prior consistent statements, which are only allowable, “when offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, ...” ER 801(d). Because the testimony of Ms. Mahaulu-Stephens and D.M. were offered during the State’s case in chief, it can not be said that ER 801(d) was invoked. The testimony was purely inadmissible hearsay.

When D.O. testified about the alleged abuse by her father, her testimony was cumulative to the hearsay previously offered through Patricia Mahaulu-Stephens. See, RP 252-260.

**EXCLUDING RELEVANT EVIDENCE FOR  
PREJUDICE, CONFUSION, WASTE OF TIME, OR  
OTHER REASONS**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

ER 403.

A trial court's admission of child hearsay is reviewed for abuse of discretion. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). The court's explicit ruling admitting the child hearsay testimony was obviously done while recognizing the live testimony of D.O. would be cumulative. As ER 403 makes perfectly clear, cumulative evidence is to be excluded. Id. When the court admitted D.O.'s video-recorded testimony, under circumstances recognizing that D.O. would be testifying live at the time of trial, it's ruling inherently admitted cumulative evidence. This fundamental violation of the Rules of Evidence can only be said to be an abuse of the court's discretion. The state candidly represented that D.O. would be testifying live. The statements D.O. made to Patricia Muhaulo-Stephens were purely cumulative to what she had to say live at trial and were in no way necessary for the jury to scrutinize. The same can be said for the statements made to D.M. and the nurse practitioner. By the time the trial concluded, the jury was exposed to several recitations of the same claims made by Drew, which is cumulative evidence in its most obvious form. Allowing this to occur was an abuse of the trial court's discretion and this court should now reverse on these grounds as well.




**VI. CONCLUSION**

For the reasons cited above and the authority cited herein, the court should reverse Mr. Oliver's convictions.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of August, 2012.

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CERTIFICATE OF SERVICE

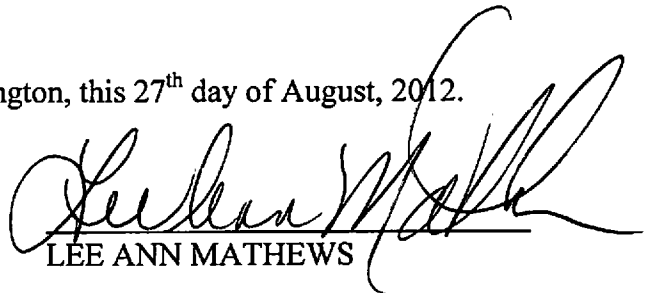
Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor  
Deputy Prosecuting Attorney  
930 Tacoma Avenue South, #946  
Tacoma, WA 98402

James A. Oliver  
DOC #343901  
Washington Corrections Center  
P. O. Box 900  
Shelton, WA 98584

James A. Oliver  
c/o Maynard & Bonetta Oliver  
8908 – 181<sup>st</sup> Avenue East  
Bonney Lake, WA 98391

Signed at Tacoma, Washington, this 27<sup>th</sup> day of August, 2012.

  
LEE ANN MATHEWS

# HESTER LAW OFFICES

**August 27, 2012 - 3:14 PM**

## Transmittal Letter

Document Uploaded: 427877-Appellant's Brief.pdf

Case Name: State v. Oliver

Court of Appeals Case Number: 42787-7

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Leeann Mathews - Email: [leeann@hesterlawgroup.com](mailto:leeann@hesterlawgroup.com)

A copy of this document has been emailed to the following addresses:

[pccpatcecf@co.pierce.wa.us](mailto:pccpatcecf@co.pierce.wa.us)