

70144-4

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NO. 70144-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON EARL,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
THE COURT ERRED IN EXCLUDING EVIDENCE THAT WAS NECESSARY FOR THE JURY TO ASSESS THE CREDIBILITY AND ACCURACY OF THE CHILD HEARSAY STATEMENTS ON WHICH THE STATE’S CASE RESTS. ....	1
B. <u>CONCLUSION</u> .....	4

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Darden  
145 Wn.2d 612, 41 P.3d 1189 (2002)..... 3

State v. Foster  
135 Wn.2d 441, 957 P.2d 712 (1998)..... 4

State v. Wilder  
4 Wn. App. 850, 486 P.2d 319 (1971)..... 2, 4

OTHER AUTHORITIES

State v. Albert  
50 Conn. App. 715, 719 A.2d 1183 (1998) ..... 2

State v. MacKinnon  
288 Mont. 329, 957 P.2d 23 (1998)..... 2

A. ARGUMENT IN REPLY

THE COURT ERRED IN EXCLUDING EVIDENCE THAT WAS NECESSARY FOR THE JURY TO ASSESS THE CREDIBILITY AND ACCURACY OF THE CHILD HEARSAY STATEMENTS ON WHICH THE STATE'S CASE RESTS.

Appellant Brandon Earl was convicted of first-degree rape of a child based largely on the child's out-of-court hearsay statements to her mother and grandmother. CP 76; RP 284, 360, 362. The court excluded evidence that the family member who had abused the child's mother when she was a child, in very similar circumstances, was present in the home the night the accusations in this case arose. RP 136-37, 187.

The State argues what the mother's experience and what she was predisposed to believe was irrelevant because witnesses may not opine as to the credibility of other witnesses. Brief of Respondent at 9. But this case is not about whether the mother could testify that she believed her daughter. It is about circumstances that affect how the mother interpreted what her daughter said and how she interpreted what she saw happen.

The circumstances and conditions under which the mother heard the statements and perceived the events of that evening are directly relevant to the credibility and accuracy of the mother's testimony. Defendants are afforded wide latitude to explore, on cross-examination, factors such as bias and factors that could affect the witness' perception of events. State v.

Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971). The child's statements were only presented to the jury through the mother's reporting of how she interpreted what her child said. The jury was entitled to know why the mother may have been inclined to leap to unwarranted conclusions.

The State cites to State v. MacKinnon, 288 Mont. 329, 957 P.2d 23 (1998), in which similar cross-examination was not permitted. BoR at 10-12. But the prejudice of exclusion is far greater in this case because in MacKinnon, the alleged victim was nine years old and capable of testifying in her own words as to what happened. 288 Mont. at 332, 336. The jury did not, as here, have to rely on child hearsay statements reported by the child's mother. Thus, factors affecting the mother's bias and perception of events was far less crucial to the case.

The same is true of the second case cited by the state. In State v. Albert, 50 Conn. App. 715, 718, 719 A.2d 1183 (1998), the child also directly testified regarding what happened to her, making her mother's interpretation of her statements, and factors potentially affecting that perception, far less crucial to the case.

Additionally, in MacKinnon, the defense's reasons for wanting to admit the evidence did not pertain to relevant facts. The defense in MacKinnon argued that, absent the prior abuse, the mother might have "made more detailed inquiries into what happened and might have taken

M.G. to an expert before she rushed to call the authorities.” 288 Mont. At 342. The court correctly concluded that what the mother opted to do in response was not a fact of consequence to determining whether the abuse occurred. Id. In MacKinnon there was no suggestion that the prior abuse in any way related to the facts of the current case.

Here, by contrast, the witnesses agree that the family member who abused A.M. was present in the home the night Earl was accused. RP 136-37. And in this case, the primary evidence of guilt consists of family members’ interpretations of the circumstances of that night and of what the child said. The child herself could not testify. Facts such as the presence of the mother’s own abuser in the home that night are directly relevant to how family members, particularly the child’s mother and grandmother, perceived both the circumstances and the child’s statements.

The jury would not have been confused because there was no suggestion the mother’s abuser was a suspect in this case. The evidence went solely to the mother and grandmother’s perceptions of circumstances and of the child’s statements. This could have been made clear in a jury instruction if necessary. The State has pointed to no compelling state interest in precluding the jury from hearing that the mother’s abuser was a family member and was there that night. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The circumstances of the mother's abuse affect the credibility of her perceptions of her daughter's statements and the events of that night. These circumstances were crucial to the defense's ability to meaningfully cross-examine her. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). Under the "wide-latitude" that must be afforded defendants in exploring credibility of witnesses, this evidence should have been admitted. Wilder, 4 Wn. App. at 854.

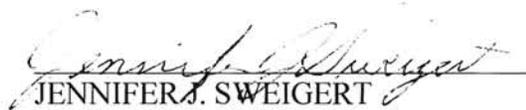
B. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opening Brief of Appellant, Earl requests this Court reverse his conviction.

DATED this 23<sup>rd</sup> day of December, 2013.

Respectfully submitted,

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STATE OF WASHINGTON	)	
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Respondent,	)	
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vs.	)	COA NO. 70144-4-I
	)	
BRANDON EARL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF DECEMBER, 2013.

X *Patrick Mayovsky*