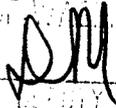


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COURT OF APPEALS
DIVISION TWO

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STATE OF WASHINGTON

BY  _____
Clerk

No. 31879-2-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANDRE ROACH HOPKINS,
Appellant.

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

The Honorable Katherine Stolz, Department 2

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

Issues Pertaining to Assignments of Error.....1-3

B. STATEMENT OF THE CASE.....3-20

C. ARGUMENT.....20

1. Appellant Andre Hopkins was denied his Sixth Amendment right to confront M. by the trial court’s admission of her hearsay statements, all of which were “testimonial,” through her mother, grandmother, and the CPS worker......20

2. Even if any of these child hearsay statements are deemed not to be “testimonial,” Hopkins was denied his Sixth Amendment right to confrontation because the State did not meet the statutory requirements of RCW 9A.44.120 for admission of the child hearsay statements, and they do not otherwise fall within any exception to the hearsay rule......35

3. The trial court erred by imposing an exceptional sentence, requiring remand for re-sentencing to a standard range indeterminate sentence, in the event Hopkins’ convictions are not vacated and reversed......43

D. CONCLUSION.....48

E. APPENDIX.....49

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	Page
<u>In re Personal Restraint of Lachapelle</u> , __ Wn.2d __, __ P.3d __ (Slip Op. No. 73794-1, 11/18/2004).....	48
<u>In re Personal Restraint of St. Pierre</u> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	34, 44
<u>Laudermilk v. Carpenter</u> , 78 Wn.2d 92, 469 P.2d 547 (1969).....	40
<u>State v. Allen</u> , 70 Wn.2d 690, 424 P.2d 1021 (1967).....	40
<u>State v. C.J.</u> , 148 Wn.2d 672, 63 P.3d 765 (2003).....	25, 35, 40
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	34, 35, 43
<u>State v. Rohrich</u> , 132 Wn.2d 472, 939 P.2d 697 (1997).....	41
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	9, 26, 32, 33, 36, 37, 38, 39, 41, 43
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	36
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	41
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004)	48
<u>State v. Bargas</u> , 52 Wn.App. 700, 763 P.2d 470 (1988).....	42, 43
<u>State v. Borboa</u> , __ Wn.App. __, __ P.3d __ (Slip Op. No. 30330-2-II, 12/07/04).....	45, 46, 47
<u>State v. Griffith</u> , 45 Wn. App. 728, 727 P.2d 247 (1986).....	41
<u>State v. Hieb</u> , 39 Wn.App. 273, 693 P.2d 145 (1984).....	42

<u>State v. Orndorff</u> , 122 Wn.App. 781, 95 P.3d 406 (2004).....	29, 30
<u>State v. Powers</u> , __ Wn.App. __, __ P.3d __ (Slip Op. 30364-7-II, 11/02/04).....	28, 29, 30
<u>State v. Sharp</u> , 80 Wn.App. 457, 909 P.2d 1333 (1996).....	42

**FEDERAL CASES AND CASES
FROM OTHER JURISDICTIONS**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 488, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	44, 46, 47
<u>Ring v. Arizona</u> , 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002).....	44
<u>Barber v. Page</u> , 390 U.S. 719, 20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).....	36, 37, 41
<u>Blakely v. Washington</u> , 542 U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	1, 2, 19, 43, 44, 45, 46, 47
<u>California v. Green</u> , 399 U.S. 149, 26 L.Ed. 2d 489, 90 S.Ct. 1930, 1935 (1970).....	22
<u>Crawford v. Washington</u> , 541 U.S. __, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	1, 2, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33
<u>Ohio v. Roberts</u> , 448 U.S. 56, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980).....	20, 21, 36
<u>Teague v. Lane</u> , 489 U.S. 288, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989).....	34
<u>White v. Illinois</u> , 502 U.S. 346, 112 S.Ct. 736, 111 L.Ed.2d 848 (1992).....	20, 23, 26

<u>People v. Griffin</u> , 33 Cal.4th 536, __ Cal.Rptr. __ (July 19, 2004).....	28
<u>People v. Sisavath</u> , 118 Cal.App.4th 1396, 13 Cal. Rptr. 3d 753 (2004)...	27
<u>People v. Vigil</u> , No. 02CA0833 (Colo.App. June 17, 2004).....	28
<u>People v. Warner</u> , __ Cal.App. 4 th __, 14 Cal. Rptr. 3d 419 (2004).....	27
<u>Snowden v. State</u> , 156 Md.App. 139, 846 A.2d 36 (2004).....	27
<u>State v. Harr</u> , No. 5771 (Ohio App. Dis.2 10/08/2004).....	28

CONSTITUTIONS

U.S. Const. Amend. 6.....	1, 2, 20, 21, 22, 24, 33, 35, 43
---------------------------	----------------------------------

STATUTES AND RULES

RCW 9.94A.535.....	45
RCW 9.94A.712.....	45, 46, 47
RCW 9A.44.120.....	1, 2, 3, 9, 25, 26, 27, 35, 36, 40, 41, 43
ER 803(a)(1).....	9, 41, 42
ER 803(a)(2).....	9, 42
ER 803(a)(3).....	9, 43
CrR 3.6.....	9
RAP 2.5(a)(3).....	33

OTHER AUTHORITIES

1 J. Bishop, <i>Criminal Procedure</i> (2d ed. 1872).....	44
Karl B. Tegland, <i>Courtroom Handbook on Washington Evidence</i> (2001 ed.).....	42, 43
5 J. Wigmore, <i>Evidence</i> §1367 (3d ed. 1940).....	20

A. ASSIGNMENTS OF ERROR

1. Appellant's Sixth Amendment right to confrontation was denied by the trial court's error of admitting child hearsay statements through the child's mother and grandmother, and the CPS social worker.

2. The trial court erred by concluding that the child hearsay statements were not "testimonial."

3. The trial court erred by concluding that the child hearsay statements were admissible under RCW 9A.44.120, without finding that the child was incompetent or unavailable to testify at trial.

4. The trial court erred by concluding that the child hearsay statements were admissible under the Rules of Evidence.

5. The trial court erred by denying appellant's motion for new trial based on Crawford v. Washington, 541 U.S. ___, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004).

6. Appellant's Sixth Amendment right to have a jury determine aggravating facts supporting an exceptional sentence beyond a reasonable doubt was violated by the trial court's imposition of exceptional indeterminate sentence based on facts found by a preponderance of the evidence.

7. The trial court erred by denying appellant's motion to reconsider imposition of an exceptional indeterminate sentence under Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403, 420 (2004).

Issues Pertaining to Assignments of Error

a) Were the hearsay statements admitted through the child's mother and grandmother "testimonial," where the initial disclosures were elicited only after repeated questioning by both mom and grandma

that lasted from ten to fifteen minutes, and later disclosures were made weeks after the incident, while the case had been referred to CPS for investigation? (*Assignments of Error 1-2*)

b) Were the hearsay statements admitted through the CPS worker “testimonial,” where her investigation was initiated by a referral from the sexual assault center, the purpose of the investigation was to determine whether the allegations were accurate, and the child’s disclosures were documented for the purpose of giving the information to law enforcement? (*Assignments of Error 1-2*)

c) Was appellant denied his Sixth Amendment right to confrontation, where the hearsay statements were admitted at trial but the child victim did not testify and was not found to be incompetent or unavailable for trial, and he was unable to cross examine her about the disclosures? (*Assignments of Error 1-2*)

d) Was appellant denied his Sixth Amendment right to confrontation where the trial court failed to determine whether the child was incompetent or unavailable to testify, the State made no effort to produce the child, and therefore the requirements of RCW 9A.44.120 were not satisfied, as prerequisites to admission of the child hearsay? (*Assignment of Error 3*)

e) Did the trial court err by concluding that the child hearsay statements were admissible under the Rules of Evidence, where the statements do not fall within any firmly rooted exception to the hearsay rules? (*Assignment of Error 4*)

f) Did the trial court err by denying appellant’s motion for new trial based on Crawford v. Washington, *supra*, which issued after his trial? (*Assignment of Error 5*)

g) Did the trial court err by imposing an exceptional indeterminate sentence and by denying appellant’s motion to reconsider the sentence, which he filed after Blakely v. Washington was issued, where the aggravating factors of abuse and trust and particular vulnerability of the victim were not found by the jury beyond a

reasonable doubt? (*Assignments of Error 6-7*)

B. STATEMENT OF CASE

1. Pre-trial.

Appellant Andre Hopkins was charged by Information filed on May 1, 2003, with one count of first degree child rape and first degree child molestation, with both counts involving his stepdaughter "M." which were alleged to have occurred between January 6-10, 2003, while his daughter and stepdaughter were in his care.¹ (CP 1-4)

M. was 2 ½ years old at the time of the alleged incident, and 3 ½ years old at the time of trial. (RP 17) The State alleged in pre-trial briefing and at a child hearsay hearing that she was not "competent" to testify, and defense counsel apparently conceded, that it was "[d]ue to her age." (RP 11, 16, 62,175; CP 7-15, 16-26) The State did not call M. to testify at the child hearsay hearing, and gave written notice of its intent to rely on her hearsay statements, pursuant to RCW 9A.44.120, which were made to her mother, grandmother, an emergency room physician at Mary Bridge Hospital who referred her for a sexual assault examination, a nurse

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Hopkins was also charged with one count of failure to register as a sex offender, Count III, which was dismissed at the time of trial. (RP 7, 191; CP 68)

practitioner who conducted the sexual assault examination, and a social worker who conducted an investigation after referral from Mary Bridge. (CP 5-6; RP 228, 251-52, 417-20, 423-24, 468) Hopkins objected to admission of the hearsay statements. (CP 7-15)

The matter came on for pretrial hearings and jury trial in the Pierce County Superior Court before the Honorable Katherine Stolz. (RP 1)

At the child hearsay hearing on January 5, 2004, the child's mother, Samantha Hannah, testified that M. was born on August 19, 2000, that Hopkins was not M.'s biological father, that she had another child by Hopkins whose birth date was June 22, 2002, that M. called Hopkins "daddy," and that they had all lived together from September of 2001 through December of 2002, when she and the girls moved in with her mother. (RP 16-19, 23) She testified that she had met Hopkins while she worked at Captain Nemo's, that after they split up he had visits with both girls on his two days off from work, which were overnight visits on Tuesdays and Wednesdays. (RP 19-20) She testified that there was animosity between her and Hopkins, which was visible to M., but that M. "absolutely adored Andre," whom she called daddy. (RP 21-23) She testified that they resumed living together in January of 2003, after M.'s

disclosure. (RP 19)

Hannah testified that on January 10, 2003, after the girls had been with Hopkins for their two-day visit, the girls didn't appear to have been bathed, and "smelled dirty." (RP 26) She testified, however, that there was nothing unusual about their behavior. (RP 26) She testified that while she was bathing M., she complained of pain while she was washing her vaginal area with a mesh bath sponge, but she saw no visible signs of injury. (RP 26-30) She testified that then she sat back down in the water, with no further sign of irritation. (RP 30)

Hannah testified that later, after the bath, while sitting on a bed M. jumped up and started screaming "owie, owie, my pee-pee hurt, my pee-pee hurt." (RP 32) She testified that she pulled her pull-up down, and saw "[j]ust a little bit" of blood on the pull-up. (RP 32) She testified that M. didn't say anything further, so she asked her "What happened," but M. didn't respond. (RP 33) She testified that she then took her into the living room where her mother was, "laid her on the floor" so she could examine her, and saw "blood in her vagina." (RP 33) She testified that M. did not respond when she asked her what happened until "[a] couple questions later." (RP 34-35) She testified that she and her mother were both asking

M. questions, and she finally responded "he did it." (RP 34-36) She testified that when she asked M. "He, who?" she responded "Daddy." (RP 36) She testified that M. said "Daddy hurt my pee-pee. And he's not going to do it again," and that she also said "that he was crying. She said that he said, 'I'm in big trouble.'" (RP 37) Hannah testified that she called Hopkins to confront him, and that M. spoke to him on the phone, asking him "Why did you hurt my pee-pee, Daddy? You hurt me." (RP 37)

Hannah testified that she took M. to Mary Bridge Hospital, where the emergency room doctor told her it was "vaginal irritation," and referred her to the sexual assault center, where she went the following morning. (RP 38-40) She testified that she moved back in with Hopkins after the exam at the sexual assault center, and that then M. told her that "daddy licked her pee-pee," but there was never any time that he was alone with her during that time. (RP 43-44) She testified that she moved back in with him because the sexual assault center's findings weren't positive for sexual abuse, and she "didn't believe it." (RP 46) She testified, however, that the incident had been reported to CPS, and that CPS imposed certain requirements upon her, such as "counseling, things like that." (RP 45)

On cross examination and re-direct, Hannah admitted that she

didn't give M. a bath until the following day after Hopkins returned the girls, and that M.'s statement about licking occurred after she received a phone call from a detective telling her that Hopkins had previously been convicted of rape of a four-year-old child. (RP 46-49, 77-79) She also admitted that it was Hopkins who asked her to move out from his house in December of 2002, that she had told a detective she believed the injury could have been due to her own rubbing during M.'s bath, and that her belief changed after she learned of Hopkins' prior conviction. (RP 58, 75, 85)

Janet Blake, Hannah's mother, testified similarly about M.'s statements, admitting that she had to ask M. three to four times before she stated "Daddy did it." (RP 94-100, 111) She admitted, like Hannah, that it was a phone call from a detective that changed her mind about Hopkins. (RP 103)

Patricia Mahaulu-Stevens, a CPS worker, testified that she contacted M. at her grandmother's house, but that she didn't conduct a forensic interview because "[w]e don't usually interview children that young." (RP 129) She testified that at her first contact, M. made no disclosures, but that at a second later contact, which was conducted

because the mother called her with different disclosures, M. told her “You know Daddy hurt me. He hurt me real bad. . . . With his finger, and his mouth.” (RP 131-35) She testified that she asked M. why he would do that, and M. told her “Because daddy is bad, bad, bad. He hurt my pee-pee.” (RP 136) She admitted that some of the questions she asked M. which preceded the disclosures were similar to those asked during a forensic interview. (RP 138) On cross examination, she testified that the Mary Bridge referral said that “Mom . . . was very angry with stepfather.” (RP 141) She also admitted that some of the statements made by M., such as where her daddy was, she verified as not being true. (RP 148)

The nurse practitioner and the emergency room doctor, identified on the State’s notice as witnesses through which child hearsay would be offered at trial, were not called to testify at the child hearsay hearing, but the State did not elicit hearsay through their testimony at trial.² RP 11-180) The State did not produce M. for questioning at the pretrial hearing, defense counsel didn’t voice any objections to her not being present, and the trial court did not address whether M. was incompetent at the time of

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The defense also called a witness at the child hearsay hearing, Julie Roth, who testified that she saw the girls prior to the incident date when they were in Hopkins’ care, and that nothing appeared to be out of the ordinary. (RP 153-55)

trial, or unavailable to testify. (RP 62, 179-80)

The trial court entered written findings of fact and conclusions of law³ after trial, ruling that M.'s hearsay statements were admissible under the Rules of Evidence as present sense impressions and/or excited utterances under ER 803(a)(1) and (2), and as statements of then-existing mental, emotional or physical condition under ER 803(a)(3); and that they were also admissible under the child hearsay statute, RCW 9A.44.120, because they met the *Ryan*⁴ factors for reliability and corroboration. (CP 360-66) The trial court's findings of fact and conclusions of law, however, fail to find the child either incompetent, or unavailable to testify.

2. Trial.

At trial, Samantha Hannah and Janet Blake testified substantially to the same facts as they had during the child hearsay hearing.

Doctor Davis, the child's pediatrician, testified that she saw M. in September of 2002, with a "complaint of perineal pain or pain with urination basically." (RP 281-82) She testified that the mother brought her

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Those findings and conclusions are erroneously titled "Findings and Conclusions on Admissibility of Evidence CrR 3.6." (CP 360-66)

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

in because M. had been telling her for three days that she hurt, that her complaints were consistent with having urinated, and that she also noticed a rash. (RP 282) She testified that the child had a red rash in her genital area. (RP 284-85) She testified that she prescribed an anti-fungal cream to treat yeast infections such as diaper rash. (RP 288) She testified that she saw the child again in October of 2002, for a “well-child” check. (RP 289-90) She testified that the mother noted that M. “had begun to vomit sometimes and she could make herself do this whenever she was upset.” (RP 290) She testified that she was doing this about twice a week. (RP 293) She testified that they “felt that it had to do with seeking attention with a new sibling in the family.” (RP 293)

Dr. Hurt, an emergency room physician, testified that he examined M. in the emergency room at Mary Bridge Children’s Hospital on January 9th, 2003. (RP 227-28) He testified that she did not appear to be in any kind of distress, and that she was accompanied by her mother and grandmother. (RP 234-35, 238) He testified that he was told by her caregivers that in the process of changing the child’s diaper at home earlier that evening, she complained of pain, and that there was blood in the diaper and vaginal area. (RP 237) He testified that the examination

revealed no discharge, but there was an abnormal finding of a “little bit of blood” in the vaginal area, which was “[v]ery scant,” and that the area was “much more red than normal.” (RP 244-46) He testified that there was “no obvious source” of the blood. (RP 247) He testified that there was no evidence of diaper rash. (RP 250-51) He testified that the only conclusion that he could reach from the examination was that “the physical examination of the genitalia was not normal,” and explained that “[t]here was something that indicated either a prior injury or prior contact or something of that nature.” (RP 251) He testified that because there was a parental concern for the possibility of abuse, he made a referral to the sexual abuse clinic. (RP 252) He testified that he did not conduct a forensic interview of the child. (RP 257)

On cross examination Dr. Hurt admitted that the source of the redness could have been an irritation from scrubbing or soap accumulation. (RP 259)

Lynn Jorgenson, a nurse practitioner at the Sexual Assault Center, testified that she examined M. on January 10, 2003. (RP 417-24) She testified that “[s]he was a typical two-year-old. Everything was no.” (RP 427) She testified that she asked M. a few questions, and “[s]he did

respond but the answer was the same to all the questions.” (RP 428) She testified that M.’s hymen was normal and not torn, and based on her examination, she was “99.8 percent” sure that there was no injury to the interior of her vagina. (RP 432, 436) She testified that she did not see anything abnormal or consistent with Dr. Hurt’s findings of redness and bleeding. (RP 434-36) She testified that her overall assessment was “no evidence of sexual abuse at this time in this child. However, the abnormal exam from the emergency room was a concern.” (RP 437) On cross examination, she testified that “[M] that day at the clinic had told her mom that not only did her pee-pee hurt but another little girl’s pee-pee hurt, and somebody named Caleb’s pee-pee hurt. And mom explained that Caleb was what she called all little girls.” (RP 444, 446) She also testified that she “got the impression that mom and grandma talked to this little girl a lot . . .” (RP 454)

Patricia Mahaulu-Stephens, the CPS social worker gave additional testimony that her job was “to investigate whether or not those allegations [of abuse and neglect] are accurate, if there is any truth to the referral.” (RP 465-67) She testified that she started an investigation on January 23, 2003, as a result of a referral from a hospital social worker, after M. was

taken for an examination at Mary Bridge Hospital. (RP 468, 470) She testified that she interviewed first M.'s mother at Hopkins' home, and that M. was then living with the grandmother. (RP 470) She testified that she conducted the second interview on February 5, 2003, again at the home, and at that time M. was living there, but Hopkins was not. (RP 471)

Mahaulu-Stephens testified that M. was "a talkative child," not shy or withdrawn, and that she recognized her from a prior contact at the grandmother's house, on February 3rd. (RP 472, 478) She testified that it was her practice to "document" information gained during such a talk, and "[a]sk them more questions if there's something they're talking about that's a little more concerning. Develop safety plans for the parents based on what the children say to me." (RP 473-74) She testified that a forensic interview by the prosecutor's office would be conducted only if the child was "over the age of four," and that "[b]ecause she's under that age, then CPS has to do it." (RP 474-75) She explained that a forensic interview "is tape recorded and an actual – the person who does the forensic interview is trained to do just interviews with children. They ask questions about whether or not the child knows the difference between the truth and a lie, and then go on to interview the child, confirming everything that the child

said was the truth.” (RP 475) She testified that a forensic interview couldn’t be done with M., due to your young age, because “children that young aren’t competent for an interview to really understand the questions and the way they’re laid out to them.” (RP 475)

Mahaulu-Stephens testified that while she was building rapport with M., “she made a spontaneous disclosure” while they were reading a book. (RP 480) She testified that “[s]he disclosed that her stepfather had hurt her pee-pee with his finger and his tongue.” (RP 480) She testified that M. asked her, “Do you know my daddy hurt my pee-pee?” and that when she asked her “How did he do that?” she responded “with his fingers and his mouth.” (RP 481) She testified that her practice is to document her notes of an interview by recording a Safety Episode Report (“SER”), and that its purpose was to “[d]ocument that she made a spontaneous disclosure and be able to give that information to law enforcement.” (RP 488)

After the State rested, the defense called Julie Roth, who testified that on January 8, 2003, Hopkins and the two girls came to visit at her home until it was time for the girls to go home from their visit, “about 9:25.” (RP 500-01) She testified that M. interacted with Hopkins “like he

was her dad,” and that she gave no indication that she was afraid of him.
(RP 502) She testified that M. appeared clean and well-dressed. (RP 502)

Andre Hopkins testified on his own behalf. He testified that he met Samantha Hannah at Captain Nemo’s through one of her coworkers.
(RP 508-09) He testified that they eventually moved in together in September of 2001. (RP 509) He testified that she had a daughter, M., and that M.’s father was not around. (RP 509) He testified that his salary at that time was “[f]ive hundred a week” and that Hannah was making “minimum wage.” (RP 510) He testified that they had a child together, who was born on June 22, 2002, and that her name was A. (RP 510) He testified that M. “was a little bit jealous, she lost some attention.” (RP 510) He testified that M. visited her biological father in July or August of 2002, and that after she came back they started experiencing behavioral problems with her, which included “gagging herself sometimes, and she was having nightmares occasionally or night tremors.” (RP 512)

Hopkins testified that he and Hannah decided to split up because they “just weren’t getting along.” (RP 512) He testified that it was his idea to split up, and that she went to her mother’s house, and he stayed in their home. (RP 512-13) He testified that although his intention was at first not

to reunite, eventually he asked her to come back to his house, “[b]ecause we had been talking about the girls and their behavior at her mom’s and it was good for them . . . [b]ecause [M] was having behavior problems, potty accidents, and it just wasn’t a comfortable place for that many people to be.” (RP 513)

Hopkins testified that it was not his practice to use a scrub sponge when giving the girls a bath, and instead he would use a washcloth. (RP 517) He testified that he did not bathe the girls when he had them the time of the incident. (RP 516) When asked whether he had ever touched M.’s vaginal area with his hand, he testified “Yes. To wipe her after she had to peed. To give her a bath.” (RP 518) He clarified that it was with a Baby wipe, not his hand, and he denied ever touching her vaginal area with his finger or his tongue. (RP 518-19, 530) He denied ever touching M. in a way that made him feel good in a sexual way. (RP 519) He denied telling M. that he was in trouble, or that she ever saw him cry. (RP 519)

No exceptions to the Court’s jury instructions were taken. (RP 544-45) The jury convicted Hopkins on both counts. (RP 609; CP 73, 74)

3. Posttrial.

A substitution of defense counsel was filed postconviction, and

Hopkins moved for a new trial and to continue sentencing. (CP 185-91, 196-219, 220-21, 222, 300-355) A hearing was held on May 14, 2004. (RP 615) Hopkins argued that he was denied his right to confront M. under Crawford v. Washington, 541 U.S. ___, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004), through the admission of her hearsay statements, which were “testimonial” in nature, and even if they were non-testimonial, they were unreliable and uncorroborated. (CP 185-91, 196-219, 300-355, 356-59; RP 617-21, 638-40) The State argued the statements were not testimonial, after noting that Crawford “is really a historical treatise about where the confrontation clause comes from. And it was certainly interesting reading, not real pertinent to today’s world” (CP 223-69, 270-99; RP 622, 623-29, 632-38) The prosecutor briefly noted that “in this case [M] was incompetent. She’s only 2-years-old and I think at time of trial she had actually turned 3, but there’s no question that she’s not competent.” (RP 632)

The trial court orally denied the motion, after noting that this case “revolves on” whether the child hearsay statements are “testimonial in nature.” (RP 641-42) The trial court found that the statements were not testimonial, but “spontaneous statements,” and that Crawford, supra “does

not apply in this case.” (RP 642, 644) The trial court entered a written order on June 11, 2004, denying the motion for new trial, finding that “the child hearsay statements admitted into evidence were not testimonial and thus were not subject to the requirement of a prior opportunity for cross examination under the *Confrontation Clause*.” (CP 383-84, emphasis in original) The order also found that “the statements were reliable under this state’s child hearsay law and prior authority regarding the admissibility of child hearsay.” (CP 384)

4. Sentencing.

The matter initially came on for sentencing on May 14, 2004. (RP 645) The State argued that Hopkins’ offender score was 6, given his prior adjudication for first degree child molestation as a juvenile. (RP 645) The State recommended that the minimum of his indeterminate sentence be set at 216 months, the high end of the standard range. (RP 646) Apparently based on additional materials which the trial court indicated the parties should review, the hearing was recessed, and sentencing resumed on June 11, 2004. (RP 647-48; CP 367-68) The trial court denied Hopkins’ request to continue sentencing to resolve an issue with regard to his prior juvenile adjudication, but noted that the issue of his offender score was

“preserve[d] . . . in the event that the conviction is vacated and he’s allowed to withdraw the plea.” (RP 649-657) The prosecutor pointed out that “there are a number of bases on which the court could” impose an exceptional sentence, including “abuse of the trust,” and “particular vulnerability of the victim.” (RP 658-59) Defense counsel requested “a low to mid-range” sentence. (RP 663) The trial court imposed an exceptional indeterminate sentence on Count I of 260 months, and 130 months on Count II. (RP 664)

On July 27, 2004, Hopkins filed a motion for reconsideration of the exceptional sentence, citing Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403, 420 (2004). (Supp CP 403 *et seq.*) His motion came on for hearing on September 3, 2004. (RP 666) He argued that Blakely applies to an exceptional indeterminate sentence, and that the trial court was limited when sentencing him to the standard sentencing range of 162 to 216 months. (RP 666-70) The prosecutor argued that Blakely does not apply “because the high end of the range is life in prison. It was and always has been under the indeterminate sentencing scheme since 2001.” (RP 670-71) The trial court ruled that “Blakely did not indicate to us whether or not it’s going to be retroactive and this court did sentence Mr.

Hopkins prior.” (RP 673-74) The trial court denied the motion to reconsider, noting that “whatever this court rules and it goes up on appeal there’s going to be plenty of time that it will be resolved before we even approach either the 216 months or the 260 months.” (RP 674) The trial court entered written factual findings and conclusions of law supporting the exceptional sentence on the bases of particular vulnerability of the victim and abuse of Hopkins’ position of trust. (Supp CP 403 *et seq.*)

This appeal timely follows.

C. **ARGUMENT**

1. Appellant Andre Hopkins was denied his Sixth Amendment right to confront M. by the trial court’s admission of her hearsay statements, all of which were “testimonial,” through her mother, grandmother, and the CPS worker.

At the time of Hopkins’ trial, for purposes of the Sixth Amendment Confrontation Clause, all hearsay statements were admissible if (1) the declarant was unavailable to testify, and (2) the statement bore “adequate indicia of reliability,” which was established if the statement fell within a firmly rooted hearsay exception or was accompanied by particularized guaranties of trustworthiness. Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980); White v. Illinois, 502 U.S. 346, 356-66, 112 S.Ct. 736, 111 L.Ed.2d 848 (1992). After his trial, however, the

United States Supreme Court overruled Roberts to the extent that it applies to “testimonial” hearsay, holding that the Sixth Amendment prohibits admission of testimonial evidence that is not subject to defense cross examination at trial. Crawford v. Washington, 541 U.S. ___, 124 S.Ct. 1354, 1369-1374, 158 L.Ed.2d 177 (2004).

In Crawford, the defendant stabbed a man who he believed had attempted to rape his wife. The wife witnessed the stabbing but was unavailable as a witness at trial because of spousal privilege. The prosecution offered the tape recording of the wife's pretrial statement to police, which did not support her husband's claim of self-defense. 124 S.Ct. at 1354, 1357-1358. In reversing that defendant's conviction, the Crawford Court held that the only indicium of reliability recognized by the framers of the Constitution was cross-examination, and that testimonial hearsay is consequently admissible in evidence only if (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the declarant. Id. at 1366, 1374.

The Crawford Court holding rests on its conclusion that the “adequate indicia of reliability” standard set forth in the second prong of the Roberts test is too amorphous to adequately prevent the improper

admission of “core testimonial statements that the Confrontation Clause plainly meant to exclude.” 124 S.Ct. at 1371. On the other hand, if the statement is not “testimonial” in nature, the Confrontation Clause is ordinarily not implicated, and in that case the statement's admissibility is merely a matter of applying evidentiary rules regarding hearsay and various hearsay exceptions. Id. at 1374 (“[I]t is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law” but when “testimonial evidence is at issue . . . , the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross examination.”) Id. at 1374.

Crawford confirms what our United States Supreme Court has previously stated -- that cross-examination is the “greatest legal engine ever invented for the discovery of truth.” California v. Green, 399 U.S. 149, 158, 26 L.Ed. 2d 489, 497, 90 S.Ct. 1930, 1935 (1970), quoting 5 J. Wigmore, Evidence §1367, at 29 (3d ed. 1940).

The Crawford Court did not fully define when an unavailable witness’s extra-judicial statement would be considered “testimonial,” stating instead, “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” Id. What the Crawford Court

did do was list three general categories of statements that it deemed facially testimonial: (1) “ex parte in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,” *Id.* at 1364 (quoting Brief for Petitioner, *Crawford*, at 23); (2) “extra-judicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” *Id.* (quoting *White v. Illinois*, 502 U.S. 346, 365 (1992)(Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)); and (3) a “[s]tatement[] . . . made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* (quoting Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3).

The *Crawford* Court explained that it used the term “interrogation” in “its colloquial, rather than any technical legal, sense,” and reasoned that the statement at issue in that particular case was testimonial because it was “knowingly given in response to structured police questioning” and consequently “qualifie[d] under any conceivable

definition.” Id. at 1365, fn. 4. The Court also emphasized that whether or not a statement was sworn is not a determinative factor in finding a statement to be testimonial. Id. at 1365-1366. However, a statement is more likely to be “testimonial” if the person who heard, recorded, and produced the out-of-court statement at trial is a government officer. Hence, casual remarks to acquaintances are generally non-testimonial, but if the person obtaining the statement is a government employee or police officer carrying out an investigative and prosecutorial function, the statement is “testimonial.” Id. at 1365.

The Crawford Court rationalized: “Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse -- a fact borne out time and again through a history with which the Framers [of the Constitution] were keenly familiar. This consideration does not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances.” Id. at 1367, fn. 7.

Crawford clearly holds that if out-of-court statements are of a testimonial nature, their mere “reliability” under traditional hearsay standards is not enough to satisfy the Sixth Amendment Confrontation

Clause. Id. at 1370-1371.

The Crawford decision stands our child hearsay statute, RCW 9A.44.120,⁵ and Washington cases interpreting it, on their head. For instance, in State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003), our Supreme Court held that “the proponent of a hearsay statement from a child abuse victim who is unavailable to testify at trial due to incompetency need only meet the statutory requirements of RCW 9A.44.120, and that no additional showing of competency at the time of

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The child hearsay statute, RCW 9A.44.120 provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

the hearsay statement is required.”

The child hearsay statute, however, is not even a “firmly rooted exception” to the hearsay rule. Ryan, 103 Wn.2d at 170(“RCW 9A.44.120 is not within the category of firmly rooted hearsay exceptions, and by its terms is to be used when the child’s out-of-court declaration is ‘not otherwise admissible by statute or court rule.’”) And under Crawford, now the relevant inquiry is not whether a hearsay statement falls into a well-rooted hearsay exception or the child hearsay statute, but rather whether it is testimonial in nature.

In White, supra, the United States Supreme Court previously relied on Ohio v. Roberts, supra, to hold that the prosecution need not produce the declarant child victim and the trial court need not find her unavailable before her out-of-court statements to her babysitter, mother, the investigating police officer, and the emergency room nurse and doctor would be admitted under state-law hearsay exceptions for spontaneous declarations and statements made in the course of securing medical treatment. 502 U.S. at 349. Crawford acknowledged that doubt has been cast on White’s viability by its holding. Id. at 1368 n. 8 (noting that White is “arguably in tension with the rule requiring a prior opportunity for cross-

examination when the proffered statement is testimonial.”).

To date, no Washington case has construed RCW 9A.44.120 in view of Crawford. Other jurisdictions have considered what constitutes testimonial hearsay evidence in the context of child sexual abuse. See, e.g., Snowden v. State, 156 Md.App. 139, 846 A.2d 36 (2004) (holding that the trial court erred under Crawford by allowing the admission of social worker’s hearsay statements to replace the testimony of children under twelve years of age, previously admissible under Maryland’s child hearsay statute, because they were made for purpose of developing evidence at trial); People v. Warner, ___ Cal. App. 4th ___, 14 Cal. Rptr. 3d 419 (2004) (statement of child to multi-disciplinary interview center specialist, observed by police investigator, was “testimonial” because it was intended to be used, at least in part, as an investigative tool for criminal prosecution), *review granted on other grounds*, 18 Cal. Rptr. 3d 869, 97 P.3d 811 (2004); People v. Sisavath, 118 Cal. App. 4th 1396, 13 Cal. Rptr. 3d 753 (2004) (statement of child who was suspected victim of child abuse to interviewer at facility for child sexual-abuse victims was “testimonial” because it was made under circumstances that would lead witness to believe that the statement would be available for use at trial);

People v. Vigil, No. 02CA0833 (Colo. App. June 17, 2004) (child's hearsay statements to a physician were testimonial where the physician who questioned the child was a member of a child protection team and a frequent prosecution witness in child abuse cases); State v. Harr, No. 5771 (Ohio App. Dist.2 10/08/2004) (relying on Crawford, holding that the Sixth Amendment right to confront his accuser was violated when after the child victim broke down on the stand and was unable to testify, her hearsay statements were admitted through her mother, but the statements were disclosed nearly two weeks after the incident, and only after the child was confronted for disobeying her mother's rules and interrogated with leading questions). Cf. People v. Griffin 33 Cal.4th 536, 579, fn. 19 (July 19, 2004)(holding that a deceased child victim's pre-offense hearsay statement to a school friend was non-testimonial, where the defendant had sexually molested the child and the child told her school friend that she would confront the defendant if he did it again).

In Washington to date, no court has determined what child hearsay statements might be, or might not be, testimonial. However, in State v. Powers, __ Wn.App. __, __ P.3d __ (Slip Op. 30364-7-II, 11/02/04), this Court of Appeals determined, under somewhat analogous circumstances,

that a tape recording of a 911 call was testimonial, and that admission of the tape violated the defendant's right to confrontation under Crawford, because it was not a call for help, but instead was to report a crime (the defendant's violation of a protection order) and to assist in his apprehension and prosecution, rather than to protect the victim or her child from his return. The Powers Court noted that if any significant time has passed since the event described, the statement is probably testimonial. Cf. State v. Orndorff, 122 Wn.App. 781, 95 P.3d 406 (2004)(admission of witness's testimony that the victim told him she saw a man with a pistol downstairs, saw two men leave, and she tried to call 911 but was panic stricken did not violate the defendant's confrontation rights under Crawford because the statements were an excited utterance made in response to the stressful incident she was experiencing, rather than made to establish or prove some fact, was not prior testimony or statement given in response to police questioning, and the victim had no reason to believe that her statement would be used prosecutorially).

In Hopkins' case, three weeks passed before M.'s hearsay statement to her mother that "Daddy licked her pee pee." (CP 360-66, Finding of Fact 10) Moreover, at least a month passed before M. disclosed

to the CPS worker on February 6, 2004, that “daddy had hurt her pee pee with his fingers and his mouth.” (CP 360-66, Findings of Fact 13-15) These disclosures were to report a crime and to assist in Hopkins’ apprehension and prosecution, rather than to protect M. or spontaneous “cries for help.” Powers, Orndorff, supra.

Moreover, M.’s statements to the CPS worker by their very nature, not just their timing, are clearly testimonial, because she is a governmental figure, and she testified that the statements were elicited in part to provide information to law enforcement, in that her job was “to investigate whether or not those allegations [of abuse and neglect] are accurate, if there is any truth to the referral.” (RP 465-67, emphasis added) She also testified that her investigation started as a result of a referral from Mary Bridge, and that her office is “physically on the premises of the Sexual Assault Center.” (RP 468) She testified that it was her practice to “document” information gained during her investigation, and “[a]sk them more questions if there’s something they’re talking about that’s a little more concerning.” (RP 473-74, emphasis added) She testified that her practice is to document her notes of an interview by recording a Safety Episode Report (“SER”), and that its purpose was to “[d]ocument that she

made a spontaneous disclosure and be able to give that information to law enforcement.” (RP 488, emphasis added). She also identified an exhibit (Exhibit 13, not admitted) as “a law enforcement report that’s generated from Child Protective Services, that’s sent to whatever appropriate law enforcement agency, whether it’s the Tacoma Police Department or the Pierce County Sheriff’s Office.” (RP 469) She also testified that the disclosures were not made until after she contacted M. a second time, after the mother called her about “different” allegations than those initially reported. (RP 130, 479) She testified at the pre-trial hearing that the allegations were “founded” by CPS as a result of her investigation. (RP 140)

M.’s initial statements to her mother and grandmother, although a “closer case to call,” also can be characterized as testimonial, where they were elicited only after repeated questions, after M failed to respond to initial questioning. Hannah testified that when she first asked M. “What happened,” M. didn’t respond. (RP 314) She testified that “I asked it to her more than once, yes, she did [respond] eventually.” (RP 314, emphasis added) She testified that she “couldn’t understand exactly what she was saying. I could just pick out the word he.” (RP 315) She testified

that she then asked her “He who,” and that she responded, “Daddy.” (RP 315) She testified that both she and her mother continued to ask M. questions. (RP 315-16) She admitted during trial that her questioning of M. lasted “for ten or 15 minutes.” (RP 323) Janet Blake’s testimony also confirmed M.’s disclosures were anything but “spontaneous,” but were produced after intense “grilling”: she testified that she “kept asking her who is he?” and that after “about two or three times more she said, ‘He did it,’ and something I couldn’t understand. And then the last time she said, ‘Daddy did it.’” (RP 400, emphasis added) Finally, Lynn Jorgenson testified that she “got the impression that mom and grandma talked to this little girl a lot” (RP 454)

These testimonial hearsay statements violated Hopkins’ Sixth Amendment rights to confrontation because there is no evidence that M. was, in fact, unavailable at the time of trial, and the trial court made no such findings or conclusions. As argued more fully below, the State’s belief that M. was “incompetent” and hence “unavailable” is insufficient to satisfy the constitutional requirement that she be made available for cross examination, under Crawford. See State v. Ryan, 103 Wn.2d 165, 172-73, 691 P.2d 197 (1984)(“[C]hildren under 10 are not statutorily

incompetent. . . and [s]tipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability”).

Because these hearsay statements were testimonial in nature, designed to elicit information which would be used against Hopkins at trial, Hopkins was deprived of his Sixth Amendment right to confrontation. The trial court’s conclusions of law, that these hearsay statements are admissible under the Rules of Evidence and Ryan, supra (CP 360-66, Conclusions of Law 17, 18, 19, 20), are erroneous. The trial court erred by denying Hopkins’ motion for a new trial based on Crawford, supra, and by finding that these hearsay statements “were not testimonial and thus were not subject to the requirement of a prior opportunity for cross examination under the *Confrontation Clause*” and “were reliable under the state’s child hearsay law and prior authority regarding the admissibility of child hearsay.” (CP 383-84)

Admission of these hearsay statements is evidentiary error affecting a constitutional right which may be raised for the first time on appeal. RAP 2.5(a)(3). Moreover, although Crawford was decided after Hopkins’ trial occurred, its holding is nevertheless applicable to this case,

because a “new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final” In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)(providing generally that a new rule is to be applied retroactively to cases pending on direct review or not yet final), citing with approval and adopting, Teague v. Lane, 489 U.S. 288, 103 L.Ed.2d 334, 109 S.Ct. 1060 (1989).

Such constitutional error is harmless only if, beyond a reasonable doubt, any reasonable jury would have reached the same result. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State bears the burden of proving the error was harmless and the reviewing court looks only to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wn.2d at 425-26.

Here, because the verdict depended so heavily on the credibility of witnesses, the error was not harmless as the hearsay statements were virtually the only evidence presented by the State to support the charges. Even if only *some* of the hearsay statements were excluded, the remaining untainted evidence is insufficient to guarantee the same verdict, where M. had been taken to Dr. Davis for severe diaper rash several months prior to

the incident (RP 284-85) and had behavioral problems associated with attention-seeking (RP 290-93), Dr. Hurt's examination was inconclusive (RP 261-52), Lynn Jorgenson testified that the very next day she saw nothing abnormal and "no evidence of sexual abuse" (RP 434-37), and Hannah admitted she moved back in with Hopkins right after the sexual assault exam because she didn't believe that anything occurred, based on the inconclusive results of the exam. (RP 336)

Absent even some of the child hearsay statements, this is not overwhelming evidence, such that the jury necessarily would have found Hopkins guilty. Guloy, supra. His convictions must be vacated and the matter remanded for new trial, excluding those statements.

2. Even if any of these child hearsay statements are deemed not to be "testimonial," Hopkins was denied his Sixth Amendment right to confrontation because the State did not meet the statutory requirements of RCW 9A.44.120 for admission of the child hearsay statements, and they do not otherwise fall within any exception to the hearsay rule.

Generally, the admission or exclusion of evidence lies within the sound discretion of the trial court and its decision will not be reversed absent an abuse of discretion. State v. C.J., 148 Wn.2d at 686. "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." Id. (citing

State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

The leading case in Washington concerning admission of child hearsay statements is State v. Ryan, *supra*. In Ryan, our Supreme Court considered whether hearsay statements of child victims of sexual abuse are conditionally admissible under RCW 9A.44.120. There, the defendant was charged with two counts of indecent liberties upon two boys, one 4 ½ years old and one 5 years old. 103 Wn.2d at 167. At trial neither boy testified, and both parties stipulated that they were incompetent. *Id.* The State argued that the boys were “statutorily incompetent.” *Id.* Consequently, out-of-court statements were offered through the testimony of other witnesses. The trial court “accepted the State’s argument that the children were statutorily incompetent and also unavailable.” *Id.* at 168.

The Ryan Court reversed, finding that the defendant’s Sixth Amendment’s confrontation clause was violated because the State did not comply with the requirements of RCW 9A.44.120, requiring “a demonstration of unavailability when the declarant is not produced,” and noting that “[a] witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness’ presence at trial. *Id.* at 170-71, citing Roberts, at 65 and Barber v. Page, 390 U.S. 719,

20 L.Ed.2d 255, 88 S.Ct. 1318 (1968).

Pertinent here, the Ryan Court stated:

The State accounted for the children's absence by saying they were not subpoenaed. . . . Apparently, they were not subpoenaed because the prosecutor believed they were 'statutorily incompetent,' and hence unavailable. . . . The State's equation of unavailability and incompetency is faulty in several respects. First, incompetency and unavailability serve separate purposes and mean different things. Second, as the discussion on reliability below indicates, a resolution that a witness is incompetent precludes most hearsay statements of that witness whether available or not. Third, the State has misconstrued the statutory definition of incompetency.

Unavailability means that the proponent is not presently able to obtain a confrontable witness' testimony. It is usually based on the physical absence of the witness, but may also arise when the witness has asserted a privilege, refuses to testify, or claims a lack of memory. . . .

Competency, on the other hand, means that the witness 'has sufficient mental capacity to understand the nature and obligation of an oath and possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard. . . .

It is clear that children under 10 are not statutorily incompetent. Only those children who are incapable of perceiving or truthfully relating the facts of the case are incompetent. Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050. . . . Guidelines for the trial court in reaching its determination presume that the court has examined the child, observed his manner, intelligence, and memory. . . .

Stipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability. To excuse production of a witness whose testimony is offered against a criminal defendant through hearsay repetition, a more certain showing is required. . . . The unexplained failure of the State to produce the children exemplifies the fears of one commentator that RCW 9A.44.120 may serve as a disincentive to call the child witness. . . . Because the State made no apparent effort to produce the children or to excuse their production, the first of Roberts requirements, production or demonstrated unavailability, is not met.

103 Wn.2d at 171-73 (citations omitted, emphasis added).

Here, the prosecutor informed the trial court early during the pretrial child hearsay hearing that “on behalf of the State we are not contending that the child is competent so we’ll not be offering her testimony as a witness. And we will be arguing to the Court that she’s unavailable as a witness as a result of that incompetency.” (RP 11) The State, however, was apparently following the same misguided route taken by the Ryan prosecutor, with a mistaken *personal* belief that M. is incompetent and therefore unavailable simply due to her young age, as borne out by his reiteration of a “conce[ssion] that we would not be calling the victim to testify as we do not believe she is competent,” and defense counsel’s comment “[d]ue to her age.” (RP 62) This *personal* belief, however, even if based on the social worker’s testimony during the hearing

that she doesn't "usually [forensically] interview children that young" (RP 128), is insufficient to disprove competency, which is the trial court's domain. Ryan, supra.

During arguments, neither the State nor defense counsel addressed M.'s competency or unavailability, and instead the arguments focused only on whether sufficient corroboration and reliability had been shown under Ryan to admit the hearsay statements. (RP 162-170, 170-176,) Like Ryan, defense counsel appears to have stipulated to the child's incompetency and unavailability based only on M.'s age, arguing "[t]he current concerns are the child's age, who is not able to testify." (RP 175) The trial court also failed to address either M.'s competency or unavailability, instead calling this "a classic case where we have a victim who is under the age of four." (RP 179-80) The age of four, however, is not mandated, either legislatively or by caselaw, as a "cut-off" for determining a child's incompetency or unavailability, as there is no statutory age of incompetency. Ryan, 103 Wn.2d at 171-72. To the contrary, Ryan holds that competency and/or availability is to be determined by "the trial court" after "examin[ing] the child, observ[ing] his manner, intelligence and memory." 103 Wn.2d at 172, citing

Laudermilk v. Carpenter, 78 Wn.2d 92, 457 P.2d 1004, 469 P.2d 547 (1969); State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967).

Moreover, the Supreme Court's recent decision in C.J., supra supports Hopkins' argument and reaffirms Ryan's holding, that neither competency or incompetency at the time hearsay statements are made dictates the trial court's determination, or relieves the State's burden of proving, incompetency or unavailability at the time of trial, which remains a statutory prerequisite to admission under RCW 9A.44.120. See C.J., 148 Wn.2d at 675, 682 ("We hold that the proponent of a hearsay statement from a child abuse victim who is unavailable to testify at trial due to incompetency need only meet the statutory requirements of RCW 9A.44.120, and that no additional showing of competency at the time of the hearsay statement is required. . . [and]. . . [t]he determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence." (Emphasis added.)

Although neither of Hopkins' defense attorneys raised this issue below, our Supreme Court has stated that "[a]rguably, the competency issue can be raised for the first time on appeal on the basis that the

showing of unavailability is constitutionally mandated when the declarant witness, whose testimony is to be used against the defendant, is not produced.” State v. Swan, 114 Wn.2d 613, 646, 790 P.2d 610 (1990), citing State v. Griffith, 45 Wn. App. 728, 732 n.1, 727 P.2d 247 (1986)(citing Barber v. Page, *supra*). See also State v. Rohrich, 132 Wn.2d 472, 476, 939 P.2d 697 (1997) (issue of admissibility of child hearsay went to heart of defendant's right of confrontation and thus was manifest error affecting constitutional right that defendant could raise for first time on appeal).

Like Ryan, the trial court erred here by admitting the child hearsay statements of M., after the State failed in its burden of producing her at trial or showing why she couldn't be made available, and by failing to make its required judicial determination under RCW 9A.44.120 that the child was either incompetent or unavailable at the time of trial, which are prerequisites to admission of the statements under the child hearsay statute.

These hearsay statements are not otherwise admissible under any Rule of Evidence. First, they do not constitute “present sense impressions,” admissible under ER 803(a)(1), because they were not made

“while” M. was perceiving the event or condition, or “immediately after.”
See Karl B. Tegland, *Courtroom Handbook on Washington Evidence*,
Rule 803(a)(1), p. 360 (2001 ed.), citing State v. Hieb, 39 Wn.App. 273,
693 P.2d 145 (1984), *rev'd on other grounds*, 107 Wn.2d 97, 727 P.2d 239
(1986)(statements by 3-year-old made several hours after the alleged
incident and in response to questions by prosecuting attorney held
inadmissible as present sense impressions). In this case, M.'s statements
were made at least a day after the time period in which the alleged incident
occurred, and in response to repeated questioning by both her mother and
grandmother. The statements to the mother about “licking” were made
three weeks later, and those to the CPS worker were made a month later.

Second, although M.'s statements on January 9, 2004, “Owie,
owie, my pee-pee hurts” may qualify as excited utterances under ER
803(a)(2), the remainder of her hearsay statements do not, because they
were not spontaneous, but were produced after intensive questioning by
the mother and grandmother, and some were made three weeks to a month
after the incident. Tegland, supra, at p. 363, citing State v. Sharp, 80
Wn.App. 457, 909 P.2d 1333 (1996)(statements during questioning given
30 to 35 minutes after attack held inadmissible); State v. Bargas, 52

Wn.App. 700, 763 P.2d 470 (1988)(rape victim's statements made one day after incident held inadmissible).

Finally, again, although M.'s initial statements, "Owie, owie, my pee-pee hurts" may fall within the hearsay exception for "then existing mental, emotional, or physical condition," the remainder of statements do not because they relate to past events, and the child's state of mind was not relevant to prove any issue in this case. Tegland, supra, at pp. 364-68.

The trial court's conclusions of law that all of her hearsay statements are admissible under the Rules of Evidence and RCW 9A.44.120 are erroneous, as is the denial of his motion for a new trial. These evidentiary errors denied Hopkins' Sixth Amendment right to confrontation. Ryan, 103 Wn.2d at 170-71. Absent the errors, it is unlikely that the jury's verdict would have been the same, because the evidence of sexual abuse is not overwhelming and there are other, non-criminal explanations for M.'s vaginal irritation. Guloy, supra. His convictions should be vacated and the matter remanded for a new trial.

3. The trial court erred by imposing an exceptional sentence, requiring remand for re-sentencing to a standard range indeterminate sentence, in the event Hopkins' convictions are not vacated and reversed.

In Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 159

L.Ed.2d 403, 420 (2004), the United States Supreme Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . [and], the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” 159 L.Ed.2d at 412-13, citing Apprendi v. New Jersey, 530 U.S. 466, 488, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 563, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002)(emphasis in original). The Blakely Court clarified that “[w]hen a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment,’ . . . and the judge exceeds his proper authority.” *Id.* at 413-14 (emphasis added), citing 1 J. Bishop, *Criminal Procedure* sec. 87, pp. 50-56 (2d ed. 1872)(“every fact which is legally essential to the punishment’ must be charged in the indictment and proved to a jury”).

The Blakely/Apprendi applies retroactively to cases pending on review or those not yet final. In re Personal Restraint of St. Pierre, *supra*. The trial court misconstrued the meaning of “retroactive” application of

Blakely, and erred by ruling that it did not apply “retroactively” to Hopkins’ case, because his case is currently pending review and is not yet final. (RP 673-74)

Under the Sentencing Reform Act (“SRA”) in effect when Hopkins’ crimes were allegedly committed, non-persistent offenders who are sentenced for specified sexual crimes are subject to imposition of indeterminate sentences according to the provisions of RCW 9.94A.712. RCW 9.94A.712(1)(a)(I) includes within those specified crimes first degree child rape and first degree child molestation, both of which are crimes of which Hopkins was convicted.

RCW 9.94A.712(3) provides that “[u]pon a finding that an offender is subject to sentencing under this statute, the court “shall impose a sentence to a maximum term consisting of the statutory maximum for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.” RCW 9.94A.535 is the section of the SRA providing for imposition of exceptional sentences which was struck down by Blakely.

Recently, in State v. Borboa, __ Wn.App. __, __ P.3d __ (Slip Op.

No. 30330-2-II, filed 12/07/04), this Court of Appeals considered whether Blakely and Apprendi applies to imposition of an exceptional minimum sentence, imposed as an indeterminate sentence under RCW 9.94A.712, and held that it does, and violates a criminal defendant's Sixth Amendment right to a jury trial, if any element supporting the exceptional sentence was not found by the jury, beyond a reasonable doubt. In Borboa, the defendant was convicted of first degree kidnapping (Count I) together with a special verdict that he committed the crime with sexual motivation, second degree assault of a child (Count II), and first degree rape (Count III). The trial court imposed an exceptional minimum sentence under RCW 9.94A.712 for all three counts. On review, the Borboa Court first held that the exceptional sentence on Count I was not erroneous either statutorily and constitutionally, because the jury found him guilty of each element of the crime by general verdict, and found an aggravating fact that was not an element of the crime by special verdict that he committed the crime with sexual motivation. Secondly, the Borboa Court found his sentence on Count II was erroneous both statutorily and constitutionally, because the crime (second degree assault of a child) is not listed within RCW 9.94A.712, and the jury did not find the aggravating factor needed to

support the exceptional minimum sentence. As to Count III, the Borboa Court held that it was erroneous constitutionally, because although the jury found each element of the crime by its guilty verdict, it did not find the additional aggravating fact needed to support the exceptional sentence.

Like Borboa, here the trial court imposed an exceptional minimum sentence of 260 months on Count I pursuant to RCW 9.94A.712, based on aggravating factors of abuse of trust and particular vulnerability of the victim. (Supp CP 403-06) Hopkins' sentence is erroneous because the jury did not find those aggravating facts needed to support the exceptional sentence beyond a reasonable doubt, as required by Blakely and Apprendi. Like Borboa, Hopkins did not waive his Sixth Amendment right to a jury trial on facts supporting his sentence, because he was tried by a jury and sentenced before Blakely was decided. Moreover, defense counsel timely brought a motion to vacate his exceptional sentence shortly after Blakely was issued, which the trial court erroneously denied. (CP 403 *et seq*; RP 673-74)

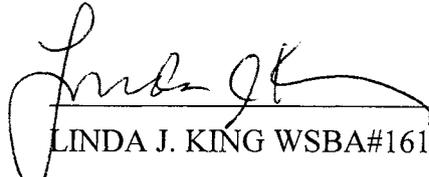
For these reasons, in the event Hopkins' convictions are not reversed, his sentence must be vacated and the matter remanded for re-

sentencing to a standard range indeterminate sentence.⁶

D. CONCLUSION

Based on the foregoing, appellant Andre Hopkins respectfully requests that his convictions be reversed and vacated, and that the matter be remanded for new trial. In the alternative, he requests that his exceptional indeterminate sentence be vacated and the matter remanded for re-sentencing.

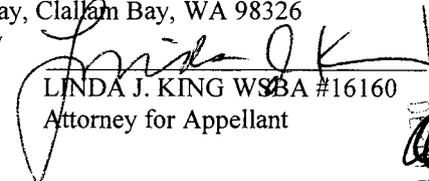
DATED: 12/20/04


LINDA J. KING WSBA#16160
Attorney for Appellant

CERTIFICATE OF SERVICE:

I certify under penalty of perjury under the laws of the State of Washington that on 12/20/04 filed the original and one copy of the Appellant's Opening Brief in the above-entitled court, and delivered a true and accurate copy of the same, together with five (5) volumes of the verbatim report of proceedings on the same date and in the same manner to Kathleen Proctor, Deputy Prosecuting Attorney, County-City Bldg., Rm. 946, 930 Tacoma Avenue South, Tacoma, WA 98402, and one copy of the same on the same date by U.S. Mail, Postage Pre-Paid to the appellant, Andre Hopkins #867577, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326

Signed at Tacoma, WA on 12/20/04


LINDA J. KING WSBA #16160
Attorney for Appellant

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Hopkins also claimed at his sentencing hearing that his juvenile conviction from 1994 should not be included in his offender score. However, since the crimes subject to this review were allegedly committed in 2003, his juvenile conviction must be counted in his offender score under amendments to the SRA, State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004), and In re Personal Restraint of Lachapelle, __ Wn.2d __, __ P.3d __ (Slip Op. No. 73794-1, filed 11/18/2004).

APPENDIX

APPENDIX "A"

**Findings of Fact and Conclusions of Law
For Exceptional Sentence (Supp CP)
Findings and Conclusions on Admissibility
of Evidence CrR 3.6 (CP 360-66)
Order Denying Defendant's Motion
for New Trial (CP 383-84)**

APPENDIX "B"

**RCW 9.94A.712
ER 803(a)(1), (2), (3)**

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-02018-6

SEP 07 2004

vs.

ANDRE ROACH HOPKINS,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

Defendant.

THIS MATTER having come on before the Honorable Katherine M. Stolz, Judge of the above entitled court, for sentencing on June 11, 2004, the defendant, ANDRE ROACH HOPKINS, having been present and represented by his attorney, JOHN C. CAIN, and the State being represented by Deputy Prosecuting Attorney JAMES S. SCHACHT, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law by a preponderance of the evidence.

FINDINGS OF FACT

I.

The defendant was found guilty at trial February 4, 2004. That the standard range sentence is 162-216 months to life on count one and 98-130 months to life on count two.

II.

3 The defendant in this case knew that victim MN was particularly vulnerable to a sexual
4 assault and was incapable of resistance due to extreme youth. At the time this offense was
5 committed MN was two years old and had the physical, emotional and mental capacity of an
6 average two year old; she was vulnerable to sexual intercourse and sexual contact as a
7 consequence of her extreme youth. These facts constitute an aggravating factor applicable to
8 count one. The legislature did not consider this factor in determining the standard range.

9
10 III.

11 The current offense was a sex offense committed by the defendant against two year old
12 MN. MN was not a biological child of the defendant but she nevertheless considered him her
13 father after he lived with her, cared for her and treated her as his own child for a period of
14 approximately five months until December 2002. After his relationship with Samantha Hanna
15 ended in December 2002, the defendant continued to treat MN as his own child through regular
16 visitation with MN and the defendant's infant daughter. At the time the defendant committed
17 these offenses he used he position of trust, confidence to facilitate commission of the offenses.
18 These facts constitute an aggravating factor for count one. The legislature did not consider this
19 factor in determining the standard range.
20

21 IV.

22 Because of the presence of the above aggravating factors, and considering the purposes of
23 the Sentencing Reform Act, sentencing within the standard range for count one is not an
24 appropriate sentence. 260 months to life in the Department of Corrections is an appropriate
25 sentence on count one
26
27
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CONCLUSIONS OF LAW

I.

That there are substantial and compelling reasons justifying an exceptional sentence outside the standard range.

II.

Defendant ANDRE ROACH HOPKINS, should be incarcerated in the Department of Corrections for a determinate period of 260 months to life on count one.

DONE IN OPEN COURT this ^{31st September} ~~31st day of July~~, 2004.

[Handwritten signature]
JUDGE

Presented by:

[Handwritten signature]
JAMES S. SCHACHT
Deputy Prosecuting Attorney
17298

Approved For Entry: *[Handwritten signature]*

[Handwritten signature]
JOHN C. CAIN
Attorney for Defendant
16164

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-02018-6

vs.

ANDRE ROACH HOPKINS,

**FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6**

Defendant.

MAY 17 2004

THIS MATTER having come on before the Honorable Katherine M. Stolz on the 5th day of January, 2004, for a hearing regarding the admissibility of statements by the child victim in this case. The court heard testimony from the following witnesses: Samantha Hanna, Janet Blake, Patricia Mahalu-Stephens, and Julie Roth. The court also considered the exhibits admitted at the hearing on this motion, including the reports of the examinations of the victim at Mary Bridge Children's Hospital and the Sexual Assault clinic. The court issued an oral ruling that the statements offered by the state were admissible in evidence at trial. The statements were offered and admitted in accordance with the court's oral ruling and the defendant was found guilty as charged by the jury on February 4, 2004. Now, the court makes the following findings of fact and conclusions of law regarding admissibility of the statements by the child victim:

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I. UNDISPUTED FINDINGS OF FACT.

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1. The defendant was charged with one count of Rape of a Child In The First Degree and Child Molestation In The First Degree. The victim of both counts was two year old MN. MN is the daughter of the defendant's former girlfriend, Samantha Hanna.

2. The sexual contact and intercourse underlying both counts took place during an approximate 3 day period in January 2003 when the defendant babysat MN and her baby sister. The defendant has maintained throughout these proceedings that no sexual contact or intercourse took place.

3. The day after MN came home from having been babysat by the defendant Ms. Hanna gave them a bath. She undressed the girls for the bath in the living room then bathed them in the tub in the bathroom.

4. Ms. Hanna used Johnson & Johnson lavender soap. This was a product that had never caused any irritation for the girls. At the time of the hearing on this motion it was a product that continued to be used for the girls' bath.

5. During the bath Ms. Hanna washed MN's genitals gently using a mesh puff. (The mesh puff was admitted as an exhibit at trial.) As soon as Ms. Hanna touched MN with the mesh puff MN spontaneously reacted by crying, "Owie!"

6. Ms. Hanna immediately stopped the washing. She saw no injury to MN's genitals. MN finished her bath with no further outcry.

7. Ms. Hanna got MN dressed in pajamas and a pull-up after the bath and then relaxed with her on a bed by reading books. While playing on the bed, MN began screaming that she had an owie. Ms. Hanna pulled down her pull-up and saw blood in the pull-up and on MN's skin. She asked MN what happened. MN did not respond.

3 8. Ms. Hanna took MN to the living room still crying and with the help of her mother, Janet
4 Blake, took a closer look at MN. They saw blood in her vagina and redness on the tissues
5 surrounding. They asked what happened, how it happened and who did it. MN responded "He
6 did it."; "Daddy"; "He hurt my pee pee."; "Daddy hurt my pee pee."; "He's not going to do it
7 agan."; "He was crying."; "He said, I'm in big trouble."

8 9. Ms. Hanna then either called the defendant on the phone or he called her. She confronted
9 him with what MN had said. MN also confronted the defendant by saying "Why did you hurt
10 me?" and "You hurt me." After the phone call Ms. Hanna and her mother took MN to Mary
11 Bridge Children's Hospital for an emergency examination. She took MN to the sexual assault
12 clinic for a follow-up examination the following day. The examination at the emergency room
13 included findings that there was blood in MN's vagina and abnormal redness in the surrounding
14 tissues.
15

16 10. MN made a further disclosure sometime later. This disclosure was made approximately
17 three weeks after Ms. Hanna had moved back in with the defendant. The location was Janet
18 Blake's apartment where MN was then living. This statement was made while Ms. Hanna was
19 changing MN. MN stated that, "Daddy licked her pee pee."
20

21 11. Patricia Mahaulu Stephens was a social worker from the Department of Social and Health
22 Services who was assigned to investigate an allegation of abuse or neglect by Ms. Hanna. Her
23 investigation lasted approximately three months. It included a requirement that Ms. Hanna sign
24 a protection contract with respect to care of MN and her sister.
25

26 12. One of Ms. Mahaulu Stephen's duties was to ensure the safety of MN and her sister while
27 they were in the care of Ms. Blake. A requirement of DSHS was that she meet face to face with
28

03-1-02018-6

3 the children and assess the safety of the care they were being given. The safety check was not
4 related to the prosecution or criminal investigation of the defendant.

5 13. On February 6, 2003, Ms. Mahaulu Stephens made a home visit and chatted with MN.
6 her purpose for the visit was to discuss the protection contract and assess the safety of MN's care
7 as of that date. She was able to observe Ms. Blake's interaction with MN and conducted a brief
8 safety assessment interview.

9 14. During the interview Ms. Mahaulu Stephens asked MN if she could talk to her. She then
10 interviewed MN as follows:

11 MS: Who lives here?

12 MN: Me, my sister, my mom, and my dad.

13 MS: Where is daddy now?

14 MN At the park

15 MS: Who takes care of you?

16 MN Mommy

MS: Does daddy help take care of you?

MN Yes

17 15. After these questions Ms. Mahaulu Stephens asked whether daddy read to MN. MN
18 responded to that question by saying that he did and went on to add that daddy had hurt her pee
19 pee with his fingers and his mouth. Ms Mahaulu Stephens followed up on that statement by
20 asking, "Do you hurt right now?" MN did not respond to that final question and instead got up
21 and began dancing.

22 II. DISPUTED FACTS.

23 16. The only disputed fact from the testimony and exhibits admitted at this hearing was
24 whether MN and her sister needed a bath when they returned from the three-day visit with the
25 defendant. (Ms. Hanna testified that she noticed an unhygienic odor while Julie Roth testified
26 that the girls had good hygiene while in the defendant's care.) This fact is not a fact of
27 consequence to this motion because there was no dispute that regardless of whether the girls had
28

3 good hygiene, Ms. Hanna in fact gave the girls a bath the day after they were returned from the
4 defendant.

5 III. CONCLUSIONS OF LAW AS TO ADMISSIBILITY.

6 17. The statements of MN to her mother and grandmother, Samantha Hanna and Janet Blake,
7 after the bath were spontaneous declarations in response to a sensation of pain made while
8 perceiving the pain and while MN was under stress or excitement. They are admissible under
9 ER 803(a)(1) and (2) as present sense impressions and/or excited utterances.

10 18. The statements of MN's physical condition made to her mother and grandmother after the
11 bath were of her then existing sensation or physical condition. They are admissible under ER
12 803(a)(3) as statements of then existing mental, emotional or physical condition.

13 19. The statements of MN to her mother and grandmother after the bath are admissible under
14 the child hearsay statute, RCW 9A.44.120. The statements were reliable under the *Ryan* factors
15 and there was corroborative evidence of the act from the ano-genital medical examinations. The
16 reliability of the statements is exemplified by the following circumstances:

17 a. MN had no apparent motive to lie about the contact with the defendant because she
18 loved him and considered him her father.

19 b. MN had a good general character, there was no indication of misbehavior or
20 maliciousness.

21 c. More than one person heard the statements and they were repeated over a period of
22 time that would not support fabrication by a two-year old.

23 d. The first statements were spontaneous statements in response to physical pain and the
24 subsequent statements were spontaneous declarations not prompted by any questioning
25 from adults. With regard to the statements to Ms. Mahaulu Stephens, the statements were
26 not prompted by leading questions. Instead they were non-responsive statements made
27 during a safety check.

28 e. The timing of the statements and the relationship with the persons they were made
demonstrate reliability. They are precisely what would be expected in the case of a two
year old seeking comfort from a caregiver or another adult. With respect to the

3 caregivers, the statements are comparable to statements any child would make about a
4 painful experience. With respect to the statements to Ms. Mahaulu Stepens the
5 statements were context appropriate for the safety check.

6 f. The possibility of faulty recollection is remote because the first statements were made
7 close in time to the infliction of the injury . Overall the statements were consistent over
8 time.

9 g. The overall circumstances of the statements strongly support reliability because the
10 age of the child, the caregivers to whom she spoke, and the reasons for her disclosure do
11 not indicate any reason other than physical injury an appropriate response to it.

12 With respect to whether the statements (a) contained express assertions about past facts; or (b)
13 could have been shown to have been the result of a lack of knowledge through cross
14 examination, the court does not find those factors useful. The statements in some respects do not
15 contain express assertions about past facts because they were a product of then current physical
16 sensation.

17 20. The statements of MN to her mother while her mother was changing her diaper are
18 admissible under the child hearsay statute, RCW 9A.44.120. The statements were reliable under
19 the *Ryan* factors as described above and there was corroborative evidence of the act from the
20 ano-genital medical examinations. The court reiterates its conclusions regarding the *Ryan*
21 factors in paragraph 19.

22 21. The statements of MN to Patricia Mahaulu Stephens are admissible under the child
23 hearsay statute, RCW 9A.44.120. The statements were reliable under the *Ryan* factors as
24 described above and there was corroborative evidence of the act from the ano-genital medical
25 examinations. The court reiterates its conclusions regarding the *Ryan* factors in paragraph 19.

26 22. ~~Admission of the MN's statements at trial did not violate the Confrontation Clause of the~~
27 ~~Sixth Amendment to the United States Constitution. None of the statements were testimonial~~
28 ~~and thus they were not subject to the requirement of a prior opportunity for cross examination~~

under the *Confrontation Clause*. The statements were also reliable under this state's child hearsay law and prior authority regarding admissibility of child hearsay.

DONE IN OPEN COURT this 14th day of May, 2004.

Albertus H. Hal

JUDGE

Presented by:

J. Schacht

JAMES S. SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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By *[Signature]*
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John C. Cain

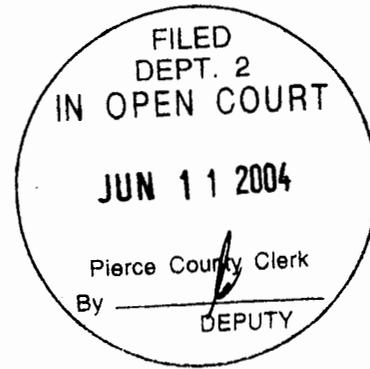
JOHN C. CAIN
Attorney for Defendant
WSB # 16164

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-02018-6

vs.

ANDRE ROACH HOPKINS,

ORDER DENYING DEFENDANT'S
MOTION FOR NEW TRIAL

Defendant.

THIS MATTER came before the court on the defendant's post-trial motion for a new trial under CrR 7.5. The court received and considered the following materials filed by the parties in support and in opposition to this motion:

1. Motion for New Trial dated March 22, 2004
2. Motion and Memorandum of Points and Authorities For New Trial dated March 23, 2004.
3. Memorandum in Opposition to Motion for New Trial dated April 15, 2004.
4. Defendant's Reply Memorandum dated May 12, 2004
5. Statement of Supplemental Authority Re: Motion For New Trial dated May 7, 2004
6. Strict Reply to State's Supplemental Authority dated May 13, 2004

In addition the court reviewed and considered the opinion of the United States Supreme Court in *Crawford V. Washington, No.02-9410*, along with the other authorities cited and discussed by the parties. Finally, the court considered the arguments of counsel at the hearing on this motion and all of the testimony offered in evidence in this case in both the pre-trial motions

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and at trial. From that testimony, the court finds that the child hearsay statements admitted into evidence were not testimonial and thus were not subject to the requirement of a prior opportunity for cross examination under the *Confrontation Clause*. Also, the statements were reliable under this state's child hearsay law and prior authority regarding the admissibility of child hearsay.

Now, therefore

It is hereby ORDERED that the defendant's motion to extend the deadline for filing a new trial motion was granted. It is further ORDERED that the defendant's motion for a new trial is denied. Under CrR 7.5, the *Confrontation Clause*, and *Crawford v. Washington*, the child hearsay statements of the victim were properly admitted into evidence at the trial in this case.

DONE IN OPEN COURT this 11th day of June, 2004.

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JUDGE

Presented by:

[Handwritten signature]
James S. Schacht
Deputy Prosecuting Attorney
WSB# 17298

Approved For Entry: *[Handwritten signature]*

[Handwritten signature]
John C. Cain
Attorney for Defendant
WSB# 16164

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APPENDIX B

Washington Statutes

Currency: 11/24/04

Title 9 Crimes and Punishments

Chapter 94A Sentencing Reform Act of 1981.

RCW 9.94A.712 Sentencing of Nonpersistent Offenders.

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);
committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to *RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include

those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435 .

[2001 2nd sp.s. c 12 § 303.]

NOTES:

***Reviser's note:** This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Intent -- Severability -- Effective dates -- 2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application -- 2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

RCW 9.94A.712

Sentencing of nonpersistent offenders. (*Effective July 1, 2005.*)

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a);

committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** [Reserved. See RCW 5.45.]

(7) **Absence of Entry in Records Kept in Accordance With RCW 5.45.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.