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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 35988-0-II

STATE OF WASHINGTON

Respondent.

vs.

Jerry Curtis Bergman

Appellant.

STATE'S RESPONSE BRIEF

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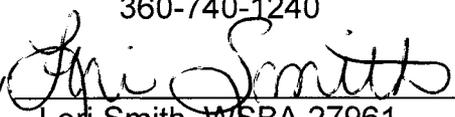
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STATEMENT OF THE CASE

Appellant's version of the facts is adequate for purposes of responding to this appeal, except for the following correction as to the sentence imposed in this case.

Appellant Jerry Bergman states that he received a sentence of "life imprisonment and assessed [sic] penalty of \$50,000." Brief of Appellant, 9. This is not correct. Mr. Bergman was sentenced to "120 months to life" in prison. Bergman did not receive a "\$50,000 penalty." Judgment and Sentence, pg. 6.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE HEARSAY STATEMENTS OF THE CHILD BECAUSE SHE TESTIFIED AT TRIAL AND WAS AVAILABLE FOR CROSS EXAMINATION SO THERE WAS NO "CONFRONTATION" VIOLATION, AND BECAUSE THE STATEMENTS WERE OTHERWISE ADMISSIBLE.

Bergman claims, among other things, a "confrontation" violation because hearsay statements made by the child victim to her mother, a medical examiner, a counselor and the investigating officer were admitted, citing to the landmark Crawford decision. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374, L. Ed. 2d 177 (2004). Bergman's reliance on the Crawford case is incorrect. Just as the trial court noted in the present case at the

child hearsay hearing, Crawford is simply not implicated here because the victim in this case testified at trial and was thus available for full cross examination by Bergman. 7/11/06 RP 128, 134. Accordingly, there was no "confrontation" violation here. By claiming there was a "confrontation" violation in the present case when the victim testified, Bergman quite simply misreads the holding of Crawford.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citations omitted). The burden is on the appellant to prove an abuse of discretion. State v. Hentz, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), rev. on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). A reviewing court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

In Crawford, the Supreme Court ruled that the confrontation clause bars the admission of testimonial hearsay statements made

by a non-testifying witness unless the hearsay declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1374, L. Ed. 2d 177 (2004). As the Crawford Court explained, "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.' . . . the Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Crawford, 541 U.S. at 59, n. 9 (other citations omitted, emphasis added); In re Personal Restraint of Grasso, 151 Wn.2d 1, 14,84 P.3d 859 (2004) (The confrontation clause is not violated when the court admits a declarant's out-of-court statements, so long as the declarant testifies as a witness at trial and is subject to cross examination); State v. Price, 158 Wn.2d 630, 639, 146 P.3d 1183 (2006) ("Significantly, prior statements must be excluded under the Crawford rule only if a witness is unavailable at trial for purposes of the confrontation clause")(emphasis added).

The bottom line here is that Bergman's protestation that his right to "confront witnesses" under Crawford was violated by admission of S.B.'s hearsay statements is simply the wrong analysis because in this case the victim testified at trial and Crawford just does not apply.

1. S.B.'s Hearsay Statements to her Mother Are Nontestimonial and Were Properly Admitted.

Bergman also argues that it was improper to allow the victim's mother, Brianna Ramsey, to testify about what seven-year-old S.B. disclosed to her about being molested. First of all, it should be noted that at the child hearsay hearing in this case, Mr. Bergman conceded that the child's statements to her mother and to her counselor Mr. Williams were admissible, with Bergman's counsel stating, "and that's pursuant to the case law that I've reviewed judge. There's no way we have an argument regarding those two individuals." 7/11/06 RP, 131 (emphasis added).

Even if Bergman had not agreed at the hearsay hearing that the child's statements to her mother were admissible, admitting a child's hearsay statements to family members is not error under Washington law. See e.g., State v. Hopkins, 137 Wn.App. 441, 453, 154 P.3d 250 (2007) (child's hearsay statements to family members

nontestimonial and admissible). Nor were Brianna Ramsey's questions which prompted her daughter's disclosure of the abuse suggestive or leading.

In the Hopkins case the court stated that "[a] child's hearsay statements made to family members are nontestimonial and, thus, do not violate a criminal defendant's Sixth Amendment Rights." State v. Hopkins, 137 Wn.App. at 453, citing State v. Shafer, 156 Wn.2d 381, 389-90, 128 P.3d 87 and Crawford, 541 U.S. at 51, 124 S.Ct. 1354. See also State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006)(child victim's statements to her mother disclosing the abuse were nontestimonial). The same is true in the present case: because S.B.'s statements to Brianna Ramsey were to a family member, her statements were thus nontestimonial so there was no "confrontation" violation when Brianna Ramsey testified about S.B.'s statements to her.

2. Brianna Ramsey's Questioning of S.B. Was Not Leading or Suggestive.

But Bergman also complains that S.B.'s disclosures to her mother were somehow tainted because the girl's mother Brianna supposedly used leading or suggestive questions. The record does not support this argument. Furthermore, questioning alone does

not remove spontaneity from a statement of a child for purposes of the child hearsay statute. So long as the questioning is neither leading or suggestive, the child's response is considered spontaneous. State v. Swan, 114 Wn.2d 613, 649-50, 790 P.2d 610 (1990)(open-ended questioning of the child does not defeat spontaneity of child's statements); State v. McKinney, 50 Wn.App. 56, 63 n.4, 747 P.2d 1113 (1987) (same); State v. Young, 62 Wn.App. 895, 901, 802 P.2d 829, 817 P.2d 412 (1991); State v. Henderson, 48 Wn.App. 543, 550, 740 P.2d 329, rev. den. 109 Wn.2d 1008 (1987). See also State v. Shafer, where that court found no problem in a similar situation, commenting, "[the victim's] mother then responded in a manner that one would expect of a concerned parent under the circumstances-she inquired further. While [the victim's] statements in response to her mother's questioning were not entirely spontaneous, they were not the result of leading questions or a structured interrogation." State v. Shafer 156 Wash.2d 381, 389-390, 128 P.3d 87(2006).

The reasoning of the above-referenced cases applies here. In the present case, the record shows that Brianna Ramsey asked S.B. open-ended questions about the abuse incident. 7/7/06 RP 97-99. Ms. Ramsey also testified at trial that the child, S.B., had

come into the room where Brianna was watching an Oprah television show about child molestation. RP1(trial), 89. S.B. then asked her mother Brianna what the word "molestation" meant. Id. Brianna explained in response to this question that, "it's when someone touches you in your private area or hurts you." Id., 90. Brianna said that S.B. then "whipped her head and looked away" from her. Id. When Brianna saw this reaction she asked S.B. the open-ended question, "has this ever happened to you?" Id. And S.B. responded, "yes," and began to cry. Brianna then asked S.B. "who did this to you?" And S.B. responded, "JC" [Bergman] and "I didn't want it to happen." Id. Brianna then asked where it had happened, and if she remembered what had happened. Id., 90, 91; RP2(trial), 13, 14. These were simple, non-leading, "who? what? when? where?" questions that any concerned parent would ask upon seeing such a reaction from a child. This type of open-ended questioning certainly does not represent leading or prodding the child to give a desired response. Further, Brianna Ramsey testified at trial that she did not make up these allegations and that she did not talk S.B. into fabricating the allegations. RP2(trial), 58. Ms. Ramsey's questioning of S.B. was not improper and there is no

evidence that Ms. Ramsey planted the abuse ideas in S.B.'s mind. This argument by Bergman should be disregarded.

Bergman further complains about the delayed disclosure by S.B. in this case. But delayed disclosure of sexual abuse is not at all uncommon in cases of this nature. See e.g., State v. Petrich, 101 Wn.2d 566, 569, 575-76, 683 P.2d 173 (1983) (delayed reporting was found in more than 50% of child sex abuse cases and the length of the delay correlates with the relationship between the abuser and the child); State v. Holland, 77 Wn.App. 420, 423, 427-28, 891 P.2d 49 (1995) (it is not uncommon for child victim of sex abuse to delay reporting); State v. Clafin, 38 Wn.App. 847, 852, 690 P.2d 1186 (1984) (late reporting was not unusual among sexually abused children).

Bergman also attempts to distinguish the Shafer case by claiming that because the victim in the present case was seven years old, that she should have known her statements would be used at trial. State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006). Except for her statements to Deputy Nelson, it seems a stretch to suggest that a child as young as seven (S.B.'s age here) would be able to expect that her statements to anyone else would be used in litigation.

3. S.B. Testified Sufficiently On Direct to Allow Full Cross Examination as to the Details of the Abuse and the Content of Her Hearsay Statements About the Abuse.

Bergman argues that the State failed to inquire in its direct examination of S.B. as to the "contents" of S.B.'s hearsay statements to Deputy Nelson and Dr. Hall. However, it should be noted that Bergman's counsel below specifically stated he "would not be arguing" the issue of sufficient opportunity to cross examine S.B. 7/11/06 RP, 123. In any event, Bergman's reading of the record at this point is an incorrect and illogical reading of the testimony elicited from S.B. on direct examination by the State at trial in this case. In fact the child S.B. did "testify about the abuse" including the acts of sexual contact alleged in the hearsay statements, as further set out below. See also State v. Rohrich, 132 Wn.2d 472, 474, 939 P.2d 697 (1997).

In Rohrich the Court explained that a child "testifies" within the context of RCW 9A.44.120(2)(a) when the "child takes the stand and *describes the acts of sexual contact alleged in the hearsay.*" Id. at 481 (emphasis added). But Rohrich--which is

relied upon by Bergman here--is different from the instant case because in Rohrich the child was not asked about the alleged abuse. Id. at 474. Moreover, a child who takes the witness stand and testifies that she "can't remember" details of the events in question, has given a "constitutionally acceptable" response and such an answer does not trigger a denial of the defendant's right to confrontation. State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006).

As set out in more detail by the court in State v. Kilgore, 107 Wn.App. 160, 174, 26 P.3d 308 (2001):

[t]o satisfy the confrontation clause when admitting hearsay statements under RCW 9A.44.120 when the child is available to testify, the child must take the stand and either (1) testify about the abuse or (2) if the child has recanted or does not remember the events described in the hearsay statement, the State must ask the child about the events and hearsay statements and the defendant must have an opportunity to cross-examine the child about the statements.

Id. citing State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999).

It is not necessary for the child to go into great detail about the event. State v. Montgomery, 95 Wn.App. 192, 199, 974 P.2d 904, rev. den. 139 Wn.2d 1006, 989 P.2d 1139 (1999).

In the present case, the child took the stand and "testified about the abuse." State v. Williams, 137 Wn.App. 736, 745, 154

P.3d 322 (2007); State v. Kilgore, 107 Wn.App. at 174, as can be seen from the transcript. On direct, the prosecutor elicited the following information from S.B. about the abuse: That "JC" [the Defendant Bergman] did something really bad to her. RP1(trial), 38. JC touched her private spot with his hand. Id. 38, 39. S.B. thinks she was six, or could have been 4 or 5. Id. 38, 39. It happened at JC's old house where his mom and dad used to live. Id., 39. JC told S.B. to take off her clothes and he touched her private spot. Id. 41. JC also had his clothes off. Id. S.B. saw JC's privates. Id. JC's private was "round and it had a circle and it was kind of pinkish." Id., 42. JC told S.B. to watch a video about "trading private spots." Id., 43. When watching the movie, JC told S.B. that "there was like a little hole to put his in and like then trade. . ." Id., 44. After the movie, JC put lotion on S.B.'s private spot with his hand. Id., 45. S.B. thought JC was holding his private and that his hand went inside. Id. 45, 47. S.B. thought that JC tried to put his private in her private but that his mother came home so JC told her to get her clothes on. Id., 46, 47. Then, *immediately after S.B. had discussed the details of the abuse*, the prosecutor asked S.B., "Who else have you told?" S.B. replied, "Deputy Bob, Toni."

Id., 49. The prosecutor then asked S.B., "Did you talk to a doctor as well?" S.B. replied, "yes." Id.

Thus, through her direct examination of the victim S.B., the prosecutor in this case properly elicited testimony from S.B. as to all of the details that S.B. was able to recall about the molestation of S.B. by Jerry Bergman. Then, immediately after S.B. described in the best detail she could what Bergman did to her, the prosecutor asked S.B. *who she told*--obviously referring to who the child had told about the details of the abuse that S.B. had just testified about. RP1(trial) 34-49. This direct examination was completely proper and sufficiently elicited the details of the abuse so that Bergman could fully cross examine S.B. about the abuse and who she had told about it. This is precisely what occurred in State v. Williams, 137 Wn.App. at 745, where that court found that the testimony about the abuse by the victim satisfied the confrontation clause, and the defendant's opportunity to cross examine her about statements she made to" another when the appellate court noted, "[a]t trial [the victim] testified extensively about how [the defendant] had raped her, *which was what her statements to Jacobsen were mostly about.*" Id. (emphasis added). And that is exactly what happened in the present case: S.B. testified about how Bergman

molested her, which was what her statements to her mother, Dr. Hall and Mr. Williams were about. Thus, S.B.'s testimony satisfied all requirements of the confrontation clause and the defendant's right to cross examine her. Williams, and Kilgore, supra. The prosecutor in the present case did not at any time engage in improper "shielding" of the child; nor did the prosecutor deliberately avoid asking the child about the facts of the abuse. In short, the prosecutor here did nothing to limit Bergman's right to cross examine the child. State v. Price, supra.

To claim now that these details about the abuse and who the victim told--all elicited by the State on direct examination-- showed that the prosecutor somehow "failed to inquire as to the contents of S.B.'s statements" is at the least disingenuous (not to mention an illogical reading of the record, since clearly when the prosecutor asked, "who else have you told?" she was referring to who else the victim had told about the abuse that she had *just given the details about*--not who the victim told about some innocuous event). Williams, supra. Bergman's misguided interpretation of the State's direct examination of S.B. is set out this way in his brief:

The State failed entirely in its direct exam of S.T.B. to inquire as to the contents of her statements to Dr.

Hall, Deputy Nelson and Phillip Williams, as indicated by the State's questions to S.T.B. on direct:

Q: Okay, And who have you told?

A: Deputy Bob, Toni.

Q: This guy here?

A: (Witness nods head affirmatively)

Q: And Toni? Did you talk to a doctor as well?

A: Okay. Go ahead. That's all?

MS. GAILFUS. Nothing further . . .

Brief of Appellant, 16 (citing RPII at 49). Bergman never points out that the above-quoted section of testimony as to who S.B. "told" came *immediately* after S.B.'s testimony describing the details of the abuse. RPI(trial) 34-49. A complete reading of S.B.'s testimony and questioning by the prosecutor shows that S.B. absolutely testified about the details of the abuse and in so doing she related the "contents" of her out-of-court statements to Dr. Hall, Deputy Nelson, and Phillip Williams, as contemplated by the above-referenced passage in State v. Kilgore, 107 Wn.App. 160, 174, 26 P.3d 308 (2001) (the child took the stand and testified about the abuse and thus satisfied the confrontation clause and the hearsay statute);

Moreover, Bergman did not object to the manner of, or any alleged deficiencies in, the prosecutor's direct examination of S.B. at trial. RP1(trial) 38-49. Bergman should not be able to stand by without objection and allow the State to make some supposed error

in procedure and then try to benefit on appeal by his failure to object.

In any event, the prosecutor's questions to the child about who she told in this case do not evidence any intent by the prosecutor to "shield" the child from cross examination about those statements. The prosecutor's direct examination of S.B. was proper and allowed the defense the full *opportunity* for cross examination. State v. Price, 127 Wn.App. 193, 110 P.3d 1171 (2005); Kilgore and Williams, supra. Accordingly, this argument is without merit.

4. The Child's Statements to Dr. Hall and the Child's Counselor, Phillip Williams, Were Properly Ruled Admissible at the Child Hearsay Hearing But Are Also Admissible Under the Medical Diagnosis and Treatment Exception to the Hearsay Rule.

Bergman argues that the hearsay statements admitted through the testimony of Dr. Hall and the child's counselor, Phillip Williams, were improperly admitted. The State disputes this, as argued elsewhere in this brief. Furthermore, Bergman conceded at the child hearsay hearing that S.B.'s statements to her counselor Phillip Williams were admissible. 7/11/06 RP, 131. Nonetheless, even if these statements were admitted on an improper basis at trial, this Court may find that the statements are admissible on

alternative grounds, and thus no prejudice to the defendant will result. State v. Grasso, 151 Wn. 2d 1, 19, 84 P.3d 859 (2004); State v. Butler, 53 Wn.App. 214, 217, 766 P.2d 505 (1989) (admission of evidence on incorrect basis does not constitute error as a proper basis existed for admission). In other words, a reviewing court will affirm the ruling if there are other proper grounds to admit the testimony. State v. Rohrich, 149 Wash.2d 647, 654, 71 P.3d 638 (2003); , State v. Bowen 48 Wash.App. 187, 194, 738 P.2d 316 (1987).

Here, the child's statements to both the sexual assault evaluator, Dr. Hall, and the child's counselor, Phillip Williams, are admissible on an alternative basis under the medical diagnosis and treatment exception to the hearsay rule. Bergman also admitted at the child hearsay hearing that if S.B.'s statements to Dr. Hall and Phillip Williams "fit within Evidence Rule 803, of course I . . . [won't] have any objection." 7/11/06 RP 126, 128.

The medical diagnosis exception applies to statements that are "reasonably pertinent to diagnosis or treatment." ER 803(a)(4). "A party demonstrates a statement to be reasonably pertinent when (1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the

statement for purposes of treatment." State v. Williams, 137 Wn.App. 736, 746, 154 P.3d 322 (2007), *citing* State v. Butler, 53 Wn.App. 214, 220, 766 P.2d 505 (1989). One Washington court explains this hearsay exception in sexual abuse cases in this passage:

The advisory committee to the parallel federal rule of evidence notes that "[u]nder the exception the statement need not have been made to a physician." Fed. R.Evid. 803(4) advisory committee's note. Therapy for sexual abuse qualifies as medical treatment for purposes of ER 803(a)(4). In re Dependency of M.P., 76 Wn.App. 87, 882 P.2d 1180 (1994), rev. den. 126 Wn.2d 1012, 892 P.2d 1089 (1995); *see also* State v. Rushton 172 Ariz. 454, 837 P.2d 1189, 1192 (1992). Also, some courts have held a child's statements identifying the abuser as a member of his or her family are "reasonably pertinent to . . . treatment." ER 803(a)(4). These courts reason that the abuser's identify is relevant to determining the scope of the child's emotional and psychological injuries and the appropriate treatment. *See* State v. Ashcraft, 71 Wn. App. 444, 456-47, 859 P.2d 60 (1993); United States v. Tome, 61 F.3d 1446, 1450 (10th Cir. 1995); United States v. Renville, 779 F.2d 430, 437-38 (8th Cir. 1985).

State v. Carol M.D., 89 Wn.App. 77, 84, 85, 948 P.2d 837 (1998). Another Court describes the rule this way:

[S]tatements 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" are admissible. To be

admissible, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis.

State v. Fisher, 130 Wn.App., 13, 14, 108 P.3d 1262 (2005) *quoting* State v. Lopez, 95 Wn.App. 842, 849, 980 P.2d 224 (1999). "In determining whether an injury is intentional or accidental, to prevent further child abuse, a physician must attempt to get a history from the child and determine whether the history adequately explains the injury." In the Matter of the Dependency of S.S., 61 Wn.App. 488, 501, 814 P.2d 204, *rev.den.* 117 Wn.2d 1011, 816 P.2d 1224 (1991). Additionally, "the hearsay exception for medical treatment is a firmly rooted hearsay exception and hearsay statements admitted under it do not violate the confrontation clause." State v. Grasso, 151 Wn.2d at 19.

Our courts have also held that statements made to a sex abuse therapist are admissible under ER 803(a)(4). State v. Carol M.D., 89 Wash.App. 77, 84, 948 P.2d 837 (1997), *withdrawn in part on other grounds*, 97 Wash.App. 355, 983 P.2d 1165 (1999); State v. Florczak, 76 Wash.App. 55, 64-67, 882 P.2d 199 (1994); State v. Perez 137 Wash.App. 97, 106, 151 P.3d 249(2007). But, when the child declarant is very young, the Carol M.D. court explained,

Division One has required an additional showing of reliability for admission of statements of children too young to understand the need for accurate responses to a doctor or therapist's questions. . . . [I]n cases where a showing of reliability is needed, we believe the preferable approach is to conduct a child sexual abuse hearsay hearing pursuant to RCW 9A.44.120. The procedure provided for in that statute has been upheld against Confrontation Clause challenges. State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), cert. den., 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

State v. Carol M.D., 89 Wn.App. at 87, citing State v. Florczak, 76 Wn.App. 55, 882 P.2d 199(1994), rev.den. 126 Wn.2d 1010, 892 P.2d 1089 (1995).

Thus, if the child is quite young--as here where S.B. was just seven years old--and there has not been any testimony about whether the doctor, therapist or parents told the child about the importance of being truthful when giving information to these professionals, the proper procedure is to hold a child hearsay hearing pursuant to RCW 9A.44.120. *That was done in this case*, and the Court found S.B.'s statements to these professionals reliable and admissible. 7/11/06 RP 132, 133. To be sure, the statements made by S.B. to both Dr. Hall and her counselor Phillip Williams in the present case were statements that both of these individuals needed to hear from S.B. in order to effectively treat her. RP2(trial), 104-119; 88-99. But because S.B. was only seven years

old when she saw both of these medical professionals, it seems bizarre to expect such a young child to have understood the exact reasons she was seeing the doctor and the counselor--although there is certainly nothing in the record to indicate that S.B. did anything but tell the truth to both of these professionals. As such, S.B.'s statements to both Dr. Hall and Phillip Williams should be otherwise admissible under the medical diagnosis and treatment hearsay exception. Additionally, although the trial court *did* hold the child hearsay hearing as suggested by the Carol M.D. case, supra, it is also true that S.B.'s statements to the medical providers "have other indicia of reliability" as set out by the Florczak court regarding young children and the medical diagnosis exception. State v. Florczak, 76 Wn.App. at 65. That is, in the present case, S.B. exhibited emotional changes when discussing the abuse with both Dr. Hall and Phillip Williams. 7/7/06 RP, 48; RP1(trial), 97. She also told more than one person the same facts about the abuse. State v. Swan 114 Wash.2d 613, 790 P.2d 610 (1990) ("The girls' repetition of similar and unusual details of abuse tends to establish that their descriptions were credible"), citing State v. Leavitt, 111 Wash.2d 66, 75, 758 P.2d 982 (1988). So, as in Florczak, it was S.B.'s range of emotions exhibited while making the statements that

provided additional indicia of reliability. Florczak, 76 Wn.App. at 67. In addition, the fact that S.B. told more than one person nearly the same facts about the abuse is another indicator of reliability.

Again, the admissibility of S.B.'s statements to Dr. Hall and Phillip Williams should be upheld by this court because, as suggested by the In re Carol M.D. case, these statements were ruled admissible at the child hearsay hearing held in this case pursuant to RCW 9A.44.120, and because her statements had other indicia of reliability under Florczak her statements to Dr. Hall and Phillip Williams are alternatively admissible under the medical diagnosis and treatment exception. Additionally, Bergman himself agreed at the child hearsay hearing that the statements to Williams would be admissible. 7/11/06 RP, 131. Therefore, Bergman's arguments to the contrary are without merit.

5. Counselor Phillip Williams' Testimony Does Not Indicate That He Used Improper Leading Questions During His Interview of S.B.

Bergman claims that S.B.'s counselor, Mr. Williams, used improper leading questions in his initial interview of S.B. This allegation is simply not supported by the record.

Williams testified at the child hearsay hearing about how S.B. disclosed the abuse to him:

Williams: That was in the context of talking with her about her relationship with her father, how he was involved in her life, and she suddenly became frightened, rigid. Her eyes became big. She began to stammer.

* * *

[Her] behavior--her behavior changed. She was clearly upset, the physiological signs of upset that we all know. Tears came to her eyes. She looked at the floor. She didn't--her mother was present in the room; I was present in the room. She did not make eye contact with any of us, and she said I can't see my father anymore. I at that point stayed silent. . .

Her mother said to her . . . Is there something you need to say? And [S.B.] said my father touched me in my private areas. . . . Regarding that, she pretty well started crying and tears came, and we stepped back from that topic entirely at that point because there wasn't any treatment. There wasn't any purpose to continue. This isn't a forensic evaluation. This was a treatment evaluation, and so there wasn't a purpose served in continuing to talk about that at that point.

7/7/06 RP, 55, 57, 58. Then, at trial, Williams testified similarly, explaining that when he first interviewed S.B. he said he noted that S.B. had a different last name than her mother so he asked her why, and S.B. said, "well, I can't see my father." RP1(trial), 92.

Williams went on to explain:

I asked her about her father, yes. . . . at that point, to my surprise, she became fairly upset, and I paused with her. . . . And she said, "I can't see my father anymore." And I said, "Why is that?" . . . and her reply was, "Because my father touched me in my

private area." She had begun to cry at that point. She was clearly agitated and upset.

RP1(trial), 97, 98. Williams then went on to explain that he then talked to S.B. about things she could do for herself to calm down if she felt like that again. Id., 98.

Looking at the testimony of Williams at both the child hearsay hearing and at trial in the context of what he asked S.B. before she told him about the abuse, it does not appear that Williams used leading questions before S.B. disclosed the abuse to him. In this way, Williams did not use any "improper" or leading questions. And, although Williams said on cross examination that he does use leading questions in treatment, Williams' testimony on direct in regards to what he asked S.B. specifically in this case does not support any allegation that he used improper questions to get S.B. to talk about the abuse incident. Accordingly, this argument by Bergman is also without merit.

6. S.B.'s Statements to Deputy Nelson Are Otherwise Admissible Under ER 801 As Prior Consistent Statements to Rebut a Claim of Fabrication.

At the child hearsay hearing in this case, the trial court found that S.B.'s statements to Deputy Nelson were admissible. 7/11/06 RP 132, 133.; RP2(trial), 155 (trial court referring to his

prior ruling as to admissibility of Nelson's testimony and overruling defense objection). The trial court held that Deputy Nelson's testimony regarding S.B.'s statements to him as to the abuse were admissible under the child hearsay statute. RCW 9A.44.120. Bergman objected to Deputy Nelson's testifying about S.B.'s statements to him at trial on the basis that the statements were hearsay. Id.

Under a Crawford analysis, when Deputy Nelson interviewed S.B. in the course of his investigation in this case in a non-emergency situation, S.B.'s statements to him were testimonial. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); see also, State v. Bird, 136 Wn.App. 127, 137, 148 P.3d 1058 (2006), which stated that, "Statements made in the course of a police interrogation are *testimonial* if the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution and there is *no ongoing emergency*" (emphasis in original).

But even if the child's hearsay statements to Deputy Nelson were improperly admitted under a Crawford analysis, the State submits there is another basis for this Court to admit them here. In a child sex abuse case, credibility is a central issue, and the trial

court has broad discretion to admit evidence corroborating a child's testimony if the child's credibility is attacked in even the slightest manner. As the Court noted in State v. Kirkman, 159 Wn.2d 918, 933, 155 P.3d 125 (2007), "Cases involving alleged child sex abuse make the child's credibility `an inevitable, central issue.' Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony," citing State v. Petrich, 101 Wn.2d, 566, 575, 683 P.2d 173 (1984). The child's prior consistent statement to an officer can serve as such corroborating evidence once the defendant is claiming the victim is making up the story or otherwise challenges her credibility.

Under ER 801(d)(1)(ii), a testifying declarant's prior consistent statements are not hearsay if they are offered to rebut an express or implied charge of fabrication. In the present case, defendant Bergman's defense was apparently that he didn't do it and that either S.B. or her mother Brianna fabricated the allegations against Bergman. 7/11/06 RP 101, 102, 119.; RP2(trial), 58; RP3(trial), 105. Thus, since Bergman's defense was that he didn't do it (general denial) and/or that S.B. had fabricated the allegations or that she was otherwise not telling the truth, the State was allowed to bring in S.B.'s prior consistent statements to Deputy

Nelson to help rebut Bergman's defense that S.B. was making up the story about his abuse of her. Kirkman and Petrich, supra. Accordingly, this Court should find that S.B.'s hearsay statements to Deputy Nelson were either properly admitted under the child hearsays statute or were admissible under the alternative basis as a prior consistent statement to rebut Bergman's claim that S.B. was making up the allegation.

B. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THE CHILD VICTIM COMPETENT TO TESTIFY NOR WHEN IT FOUND HER STATEMENTS RELIABLE AND ADMISSIBLE UNDER THE CHILD HEARSAY STATUTE.

Bergman now claims that it was error for the trial court to find that the seven-year-old victim, S.B., was competent to testify, that it was error to fail to enter written findings after the child hearsay hearing, and that the court erred in admitting her hearsay statements. This argument is without merit.

1. The Child Was Properly Found Competent to Testify.

Significantly, Bergman did not contest the issue of S.B.'s competency at the child hearsay hearing. 7/11/06 RP, 117, 118. Because there was no objection below to the issue of the child's competency, this issue has been waived for appeal.* Even if Bergman had objected below, the record and the trial court's oral

ruling on the issue of competency shows that S.B. was undoubtedly competent.

The determination of competency is within the sound discretion of the trial court and it will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005); In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998); State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Indeed, "[t]here is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." Id., citing State v. Borland, 57 Wn.App. 7, 11, 786 P.2d 810 (1990). This is because the competency of a child witness is not easily shown in the record of the proceedings, "and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." Id. citing Allen, 70 Wn.2d at 692; State v. Przbylski, 48 Wn.App. 661, 665, 739 P.2d 1203 (1987). While the trial court determines competency in a pretrial hearing, a reviewing court may examine the entire record to review the decision as to competency. State v. Woods, 154 Wn.2d at 617; State v. Avila, 78 Wn.App. 731, 737, 899 P.2d 11 (1995). The

Defendant bears the burden of proving that the trial court abused its broad discretion in finding a child victim competent. Woods, 154 Wn.2d at 622. The Allen factors are applied to determine child competency. State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967). It is important to note that "[t]he competency of a witness to testify must be distinguished from the reliability requirements of RCW 9A.44.120. The test and the reasons for the two requirements, while similar, are not the same." State v. Gribble, 60 Wn.App. 374, 381, 804 P.2d 634 (1991). A child is competent to testify if he or she (1) understands the obligation to tell the truth on the witness stand; (2) has the mental capacity at the time of the occurrence of the event he is to testify about to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence." State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); Woods, 154 Wn.2d at 618. A child's age alone is not determinative of a child's competency. Id., at 617. To be competent, a child must have the mental capacity at the time of the alleged abuse to receive an accurate impression of it. In re Dependency of A.E.P., 135 Wn.2d 208,223, 956 P.2d 297

(1998). And while the court must have in mind a fixed time period when the abuse occurred in order to determine if the child was competent at the time, it is also true that the court can *infer competency* at the time of the abuse if the child can relate contemporaneous events. A.E.P., 135 Wn.2d at 225, 226 (emphasis added). Furthermore, "[o]ur cases have established that the trial court may infer the child's ability to accurately perceive events from the 'child witness's overall demeanor and manner of her answers,' thus satisfying the second *Allen* factor." Woods, 154 Wn.2d at 621, 622, quoting State v. Sardinia, 42 Wn.App. 533, 537, 713 P.2d 122 (1986). There is no requirement in the child hearsay statute of a finding of competency at the time the statements are made. State v. Gribble, 60 Wn.App. 374, 382804 P.2d 634 (1991). See also State v. Perez, 137 Wn.App. 97, 151 P.3d 249 (2007) (court found four-year-old child competent to testify despite "fantastic statements" child made during pretrial hearing).

Moreover, a written ruling as to the child's competency is not required. Matter of Dependency of A.E.P. 135 Wash.2d 208, 223, 956 P.2d 297, (1998).

As to the issue of the child S.B.'s competency in this case, the trial court stated in its oral ruling as follows:

Yes, I am going to find she is competent. All the Allen factors are present here. I would be hard pressed to find a child witness who displayed more competence than she did. Dealing with them specifically, that she has the ability to recall and answer questions about the issues and her history. She had the capacity to understand simple questions about it and she had the ability to testify and to receive accurate impressions of the event and a sufficient memory to retain an independent recollection of the occurrence. I think those are all the factors. She displayed all of them. As far as I'm concerned, she's competent.

7/11/06 RP, 126 (emphasis added). At the child hearsay hearing, S.B. knew her age, her birthday, what she did for her birthday, what her house looked like, who her sister was, where she went to school, who her teacher was, that she went to kindergarten, the difference between truth and a lie and the consequences for telling a lie. She also related in clear fashion the details of the abuse by Bergman ("JC"). 7/7/06 RP 4-19.

Given the testimony of S.B. and the strongly- worded findings by the court as to the competency of the seven-year-old victim in this case, plus the fact that the trial court obviously had the benefit of seeing the victim in person and thus could judge her demeanor, tone and energy, and given the lack of defense

objection as to her competency, the court's ruling that the victim was competent in this case should be upheld. See e.g., Allen, 70 Wn.2d at 692.

2. Because Bergman's Defense Was That he Did Not Commit the Crime At All, S.B.'s Inability to Recall Precise Dates of the Crime Is Not Fatal to the Admission of Her Hearsay Statements.

Bergman also argues that S.B.'s inability to recall the actual dates of the abuse means that the Allen factors were improperly found and that her hearsay statements could not be admitted. Brief of Appellant, 20, citing In re Dependency of A.E.P., 135 Wn.2d 208, 224-25, 956 P.2d 297 (1998). It is not unusual for a young child to be unable to recall the dates that sexual abuse occurred. State v. Holland, 77 Wn.App. 420, 427, 891 P.2d 49 (1995). Washington courts have also recognized in other contexts that children may have a difficult time remembering the exact date that sexual abuse occurred. See State v. DeBolt, 61 Wn.App. 58, 62, 808 P.2d 794 (1991); State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984). In the Holland case, the court commented as to the lack of specificity about the dates of the abuse that, "[Holland's] defense was that he did not commit the offenses at any time; specific dates

would not have aided that defense. There was therefore no prejudice." Id. (emphasis added).

The same is true in the present case. First of all, as to the time frame, S.B. testified that the abuse occurred "at the old house on Woodard Road where his [Bergman's] parents lived" and there was other testimony which allowed the jury to narrow the time period when Bergman lived at that residence. RP3(trial) 22, 27,28, 30,31, 45-46. For example, Bergman's step father testified that he Bergman began living with them at the Woodard Road house (where S.B. said the abuse occurred) on January 6, 2003, until February of 2004. RP3(trial), 27, 28. The dates of the crime alleged by the State in this case were on or between January 1st, 2003 and June 5th, 2005. RP3(trial), 119. S.B. said that the abuse occurred in Bergman's room upstairs at the Woodard Road house and that there was a bathroom across the hall from Bergman's room. RP1(trial), 47, 53. Others confirmed that there was a bathroom across from Bergman's room in the Woodard Road house. RP3(trial), 99. Secondly, Bergman's defense was that the victim's mother coached S.B. to make up the offense because she was angry that Bergman was "going to court" to gain more visitation with S.B., and Bergman also told a detective that the abuse "didn't

happen." RP3(trial), 105. In other words, Bergman's defense, as in Holland, was that he "did not commit the offense at any time," so precise dates would not have aided in such a defense in any event. Therefore, there was no prejudice. Id.

3. The Trial Court Properly Found S.B.'s Statements Reliable Using the *Ryan* Factors.

Appellant Bergman finds fault with the trial court's findings on the reliability of victim S.B.'s hearsay statements, claiming that S.B.'s statements were "tainted" by alleged improper interviewing techniques by S.B.'s counselor Phillip Williams, and that S.B.'s statements to her mother were improperly admitted because they were not "spontaneous." These arguments are without merit.

Reliability is analyzed according to the nine *Ryan* factors. State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1983). If the child testifies at trial, "corroboration" of her statements is not necessary and the issue is whether her statements were sufficiently reliable. RCW 9A.44.120; Id. "Not every factor need be satisfied; it is enough that the factor are substantially met." State v. Woods, 154 Wn.2d 623, 624, 114 P.3d 1174 (2005) *quoting* State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990) (it is not necessary to satisfy all nine factors to find the statements reliable). No single factor is

decisive; rather, reliability is based upon an overall evaluation of the factors. State v. C.M.B., 130 Wn.App. 841, 848, 125 P.3d 211 (2005), citing State v. Young, 62 Wn.App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). Additionally, it has been noted by our courts that the presence of trained professionals, like law enforcement officers or CPS workers, enhances the reliability of a statement. State v. Young, 62 Wn.App. at 901; State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988)(statements to more than one person suggest reliability).

In the present case, as to the issue of reliability, the trial court orally ruled, in pertinent part, as follows:

Under the record we currently have the statements to Detective Nelson and to Dr. Hall are admissible under the statute in my opinion. * * *

I can't find an apparent motive to lie. there may be something shown at the trial, but nothing that I've heard here today would as a matter of law find that she has an apparent motive to lie. There's been no attack on her general character, and in fact I don't think that it could be. I don't really know how one attacks the character of a seven-year-old in any event. Whether more than one person heard the statements. I've never really quite understood whether that means one person hearing, well, whether it was one statement heard by several or whether it was one person hearing one statement and then another person hearing the same statement at a later time. In any event, it appears to me that these particular statements satisfy both. . .

Whether the statements were made spontaneously. This always creates a bit of an issue when there is an interview done for purposes of an investigation. However, that's . . . not controlling. It was in response to questions, nor [sic] is it controlling that it was done in an investigation. So I'm going to find that the statements were, in the way that the statute contemplates and the case law contemplates, made spontaneously.

* * *

[W]hether circumstances surrounding the statement leave reason to suppose the declarant misrepresented the defendant's involvement. I find no indication of that whatsoever. So that's all of the factors.

7/11/06 RP (Judge's oral ruling), 132-134. As discussed elsewhere in this brief, S.B.'s statements were spontaneous--her mother did not use improper questioning and instead used an open-ended question, "has this ever happened to you?" and "who did this to you?" 7/11/06 RP 98, 99. These questions were not improper. Nor does Phillip Williams' testimony indicate that he somehow improperly interviewed S.B. in order to "suggest" answers to her about the abuse. Furthermore, S.B. told Dr. Hall, her counselor Phillip Williams, her mother Brianna Ramsey, and Deputy Nelson all nearly identical versions of what Bergman did to her. 7/7/06 RP 43-50; RP1(trial), 89-91; RP2(trial) 13,14, 97, 98; RP3(trial) 156, 157, 158. The trial court's findings as to the reliability of S.B.'s

statements are supported by the record. Bergman's argument to the contrary is incorrect.

4. Failure to Enter Written Findings After the Child Hearsay Hearing Was Not Error Where the Record Contains the Court's Oral Ruling and is Sufficient to Permit Meaningful Review.

Bergman also claims it was error to fail to enter written findings after the child hearsay hearing in this case. While it is true that no written findings were entered in the child hearsay hearing in this case, absent prejudice to the defendant, if this is indeed error here given the detailed oral findings, such error should be considered harmless and not reversible error. State v. Thompson, 73 Wn.App. 122, 130, 867 P.2d 691 (1994)(even if written findings are required, a trial court's failure to enter such findings can be found harmless if the court's oral findings are sufficient to permit review of the issues on appeal.) Absent prejudice to the defendant, a trial court's failure to enter written findings is not grounds for reversal. Id. at 130.

In the present case the trial court entered detailed oral findings which are more than adequate to permit a meaningful review of the issues at the child hearsay hearing. Therefore, this

argument as to the lack of written findings made by the Appellant is without merit.

C. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Bergman argues that because it was error to find S.B. competent to testify and because all of S.B.'s out-of-court statements were improperly admitted, that there was "no admissible substantial evidence to support the verdict." Brief of Appellant, 24. This argument, too, is without merit.

The standard used to determine if the evidence supports a criminal verdict is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 839 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. State v. McNeal, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). Circumstantial evidence is as reliable as direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The State has the burden of proving all the elements of the crime charged beyond a reasonable doubt. State v. Teal, 152

Wn.2d 333, 337, 96 P.3d 974 (2004). A reviewing court must defer to the trier of fact regarding a witness's credibility or conflicting testimony. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In other words, It is generally "the role of the trier of fact, not the appellate court, to resolve conflicts in the testimony and to evaluate the credibility of witnesses and the persuasiveness of material evidence." State v. Williams, 137 Wn.App. 736, 743, 744, 154 P.3d 322 (2007), citing State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989), *amended*, 113 Wn.2d 591, 789 P.2d 306 (1990).

Here, as is common in cases involving sexual assault, the only two people present when the molestation occurred were the victim and Mr. Bergman--there were no witnesses to the crime and the sexual assault exam was normal. RP1(trial). In most cases of child sexual abuse, however, there is no direct physical or testimonial evidence. See.e.g. State v. Swan 114 Wash.2d at 623(990) (notes 10 & 11, "[t]he child victim is often the only eyewitness to the crime, and physical corroboration is rare because the sex offenses committed against children tend to be nonviolent offenses such as petting, exhibitionism, fondling and oral copulation.") Thus, this case hinges on the determination of

credibility of the victim. Here, the jury obviously believed the victim over the Defendant Jerry Bergman. Credibility determinations are within the sole province of the finder of fact--and will not be disturbed on appeal. State v. Camarillo, 115 Wn.2d at 71. The victim, S.B. told essentially the same details about Bergman's improper touching of her to Dr. Hall, her counselor Mr. Williams, her mother Brianna Ramsey, and to Deputy Nelson. Bergman bases his argument that the evidence was insufficient to support the verdict on his claims that S.B. was not competent to testify and that none of her hearsay statements were properly admissible. The State addressed these arguments elsewhere in this response and for the reasons stated there, Bergman's arguments are incorrect. S.B. was properly found competent by the trial court, her hearsay statements were properly admitted under the child hearsay statute and the medical diagnosis and treatment exception to the hearsay rule. And, the jury in this case obviously found S.B. credible and the jury properly convicted Bergman based on S.B.'s testimony and the other evidence presented by the State. The verdict should stand.

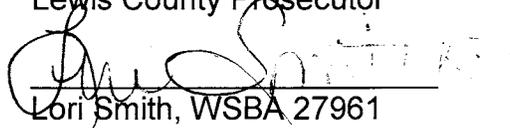
CONCLUSION

Because the victim testified at trial and was available for full cross examination, there was no Crawford confrontation violation here. And, because the out-of-court statements of the victim were either non-testimonial, were properly admitted under the child hearsay statute, the medical diagnosis exception, as prior inconsistent statements, or were otherwise admissible, and because the victim testified at trial, there was no error in admitting her statements. Finally, because the evidence, when viewed in the light most favorable to the State, supports the elements of the crime beyond a reasonable doubt, there is sufficient evidence to support the verdict. Accordingly, the conviction should be affirmed in all respects.

Respectfully submitted this 21st day of September, 2007.

L. MICHAEL GOLDEN
Lewis County Prosecutor

by:


Lori Smith, WSBA 27961

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 35988-0-II
Respondent,)
vs.)
JERRY CURTIS BERGMAN) DECLARATION OF MAILING
Appellant.)
_____)

STATE OF WASHINGTON
BY: *Cmm*

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On this 24 September 2007, I mailed a copy of the Respondent's Brief by depositing same in the United States Mail, postage pre-paid, to the attorney for the Appellant addressed as follows:

Alan Mark Singer
Attorney at Law
16000 Christensen Rd. Ste. 308
Tukwila, WA 98188-2928

Dated this 25th day of September, 2007, at Chehalis, Washington.

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Declaration of
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