

Original

Court of Appeals No. 36208-2-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

DAVID PAUL MELANCON,

Defendant/Appellant.

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COURT OF APPEALS
DIVISION TWO
TACOMA, WASHINGTON

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-04015-7
The Honorable Vicki Hogan, Presiding Judge**

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I. ASSIGNMENTS OF ERROR

1. The trial court entered insufficient findings of fact and conclusions of law to support the admission of M.J.'s statements to other witnesses under RCW 9A.44.120.
2. The trial court erred in failing to instruct the jury on fourth degree assault.
3. Mr. Melancon was deprived of his right to present a defense.
4. Cumulative error deprived Mr. Melancon of a fair trial.

II. ISSUES PRESENTED

1. When determining the admissibility of child hearsay statements under RCW 9A.44.120, must a trial court enter separate findings of fact as to each proposed witness or may the trial court enter blanket findings of fact applicable to all witnesses? (Assignment of Error No. 1)
2. Was Mr. Melancon entitled to a jury instruction on fourth degree assault as a lesser included crime of second degree assault? (Assignment of Error No. 2)
3. Did the trial court err in sustaining the State's objection to the testimony of Paula Curle on grounds that the testimony was hearsay where the testimony was not offered for the truth of the matter asserted? (Assignment of Error No. 3)
4. Did cumulative error deprive Mr. Melancon of his right to a fair trial? (Assignments of Error Nos. 1, 2, 3, & 4)

III. STATEMENT OF THE CASE

A. Procedural Background

On August 28, 2006, Mr. Melancon was charged with one count of assault of a child in the second degree. CP1-3.

On January 12, 2007, the State filed notice pursuant to RCW 9A.44.120 that the State intended to introduce the hearsay statements of M.J. and L.J. to numerous witnesses. CP 17-18. The State also filed a memorandum on the admissibility of the child hearsay. CP 19-27. On February 13, 2007, the court held a hearing to determine the admissibility of M.J.'s and L.J.'s statements to the witnesses. RP 1-93, 2-13-07 a.m., RP 1-88, 2-13-07 p.m.¹ At the close of the hearing the trial court made an oral ruling finding that M.J.'s statements to the "non-professional" witnesses (M.J.'s family members) met the Ryan factors for reliability and were admissible. RP 78-85, 12-13-07 p.m. Due to concerns for Mr. Melcon's confrontation rights under

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The report of proceedings for this hearing was prepared in two volumes, one for the morning session and one for the afternoon session. The volumes were not numbered continuously. Reference will be made by giving the page number, the date of the hearing, and whether the reference is to the morning or afternoon session.

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Crawford, the trial court delayed ruling on the admissibility of M.J.'s statements to the "professional" witnesses until after M.J. had testified at trial. RP 78, 2-13-07 p.m.

On February 20, 2007, the trial court entered an order finding M.J.'s statements to Patricia McMillan, Albert Ernest, Karen Hoye, Harold McMillan, and L.J. (the "non-professional" witnesses) admissible under RCW 9A.44.120. CP 39-40.

Jury trial began on February 21, 2007. RP 33, 2-21-07. Mr. Melancon requested that the jury be instructed on fourth degree assault as a lesser included crime of second degree assault. RP 397-399, 2-26-07, CP 44-57. The trial court declined to instruct the jury on fourth degree assault finding that the facts of the case did not support giving the instruction and that the instruction could not be given because the crime of fourth degree assault of a child does not exist. RP 399-400, 2-26-07.

The jury found Mr. Melancon guilty of third degree assault of a child. CP 136. Notice of Appeal was timely filed on April 18, 2007, and April 20, 2007. CP 156-159.

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B. Factual Background

In the summer of 2006, M.J. lived at Karen Hoye's house with her mother and her sister. RP 37, 59, 183. Ms. Heather Jamieson is the mother of M.J. and L.J. RP 132. Mr. Melancon was Ms. Jamieson's boyfriend. RP 133-134, 183-184. Ms. Jamieson would sometimes take her children to Mr. Melancon's residence. RP 135.

M.J. has been diagnosed with ADD/ADHD and is on medication for it. RP 60. M.J. is very hyperactive as a result. RP 60. M.J. was on medication for her ADD in the summer of 2006. RP 60-61.

One night at Mr. Melancon's residence, Ms. Jamieson was giving M.J. a bath and decided to clean M.J.'s ears. RP 141. M.J. "went ballistic," started screaming, ran into the living room and jumped on the back of the couch. RP 141. Ms. Jamieson told M.J. to come back to the bathroom so Ms. Jamieson could clean M.J.'s ears but M.J. would not let Ms. Jamieson clean her ears. RP 143. Ms. Jamieson then spanked M.J. with the rod from the curtain two to four times. RP 143. When Ms. Jamieson spanked M.J., M.J. was wearing

her pajamas. RP 143. Ms. Jamieson got the rod from the dining room.

RP 143.

When Ms. Jamieson spanked M.J., she was “really upset” with M.J. RP 172. After hitting M.J. with the rod, Ms. Jamieson told M.J. to sit down and then went outside to smoke a cigarette on the patio. RP 144, 170-171. While Ms. Jamieson was smoking a cigarette, Mr. Melancon told M.J. that she needed to listen to Ms. Jamieson, and then spanked M.J. a few times with the curtain rod. RP 40, 43, 144-145, 170-171. Mr. Melancon spanked M.J. the same number of times that Ms. Jamieson did. RP 145. While Ms. Jamieson was on the patio, M.J.’s crying and screaming never increased. RP 146.

After Ms. Jamieson spanked M.J., but before Mr. Melancon did, Ms. Jamieson did not check if M.J. had any injuries. RP 146. After Mr. Melancon spanked M.J., M.J.’s bottom was red but Ms. Jamieson did not see and marks on M.J.’s leg. RP 146. M.J. did not complain to Ms. Jamieson that she was hurt after the spanking. RP 163.

Ms. Jamieson did not discover M.J. was injured until she was called by M.J.’s father. RP 151. Ms. Jamieson testified that she could

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have been the one who caused the bruising because she spanked M.J. RP 165. Ms. Jamieson did not take M.J. to get any treatment because she didn't think M.J. was hurt. RP 162.

L.J. did not see M.J. being spanked by Mr. Melancon, but L.J. heard M.J. crying during the spanking. RP 107. M.J. did tell L.J. that M.J. got "a little" bruise on her bottom, and L.J. saw the bruise several days after the spanking while she and M.J. were changing. RP 107-108.

On July 26, 2007, M.J. told Ms. Hoye that she had a scratch on her butt from Mr. Melancon. RP 186. Ms. Hoye had M.J. come over and Ms. Hoye saw a scratch on M.J. a little below the buttocks on the thigh area. RP 187-188. M.J. told Ms. Hoye that Mr. Melancon had spanked her on the butt and asked Ms. Hoye to call M.J.'s uncle. RP 188. M.J. did not know what Mr. Melancon had spanked her with. RP 188. Ms. Hoye did not see any injuries on M.J. besides the scratch on her leg. RP 188-189.

M.J. told Ms. Hoye that Mr. Melancon had struck her during the day on July 25. RP 195. M.J. told Ms. Hoye that Mr. Melancon struck

her because M.J.'s mother was cleaning out M.J.'s ears and Mr. Melancon got mad at M.J., told M.J. to quit, and then spanked M.J. RP 191. M.J. told Ms. Hoye that Mr. Melancon spanked her with a stick. RP 191. M.J. told Ms. Hoye that Ms. Jamieson told M.J. not to tell anyone about the incident. RP 193.

After speaking to M.J., Ms. Hoye called M.J.'s uncles, Harold and Shawn, who came to Ms. Hoye's home. RP 193-194. Harold took pictures of M.J.'s injuries with a phone camera. RP 194.

Harold McMillan is M.J.'s uncle and godfather and he is L.J.'s uncle. RP 200. On July 26,2006, Harold McMillan received a phone call from Shawn McMillan. RP 200. Harold McMillan picked up Jessie Blackfeather and drove to Karen Hoye's residence. RP 201. Harold McMillan and Mr. Blackfeather arrived at Ms. Hoye's house and spoke with M.J. RP 201-202. M.J. said that "Dave" had "whooped" her which Harold McMillan understood to mean that "Dave" had beat M.J. RP 202. M.J. told Harold McMillan that "Dave" had struck her with the wand for the blinds. RP 202. M.J. did not tell Harold McMillan which "Dave" had hit her. RP 203. Harold

McMillan took pictures of M.J.'s injuries. RP 204. After observing M.J.'s injuries, Harold McMillan called his mother and then took M.J. to her father's house. RP 207-208. Harold McMillan sent the photos he took to his mother. RP 208.

Albert Ernest is M.J.'s father. RP 219. On July 26, 2006, Mr. Ernest received a phone call from Patricia McMillan and M.J. was brought to Mr. Ernest's home by Harold McMillan. RP 221-222. When M.J. was brought to Mr. Ernest's house, M.J. was acting like a normal child. RP 222.

Mr. Ernest asked M.J. what had happened and M.J. told Mr. Ernest that "David" had spanked her with a stick. RP 222-223. M.J. showed Mr. Ernest that the kind of stick that was used to hit her was a venetian blind rod. RP 226-227. M.J. did not say which David she was referring to, but Mr. Ernest assumed it was Mr. Melancon since Ms. Jamieson was dating Mr. Melancon at the time. RP 223. M.J. did not say how many times "David" had struck her with the stick or that M.J.'s mother had struck her. RP 224. M.J. said that David struck her a few days prior to M.J. being brought to Mr. Ernest's house. RP 224.

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Mr. Ernest took pictures of the bruises on M.J. RP 225-226. That night, Mr. Ernest called CPS and took M.J. to Auburn General hospital. RP 226.

Michael Beins is an ER physician at the Auburn Regional Medical Center. RP 75. On the evening of July 26, 2006, Dr. Beins examined and treated M.J. at the Auburn Medical Center. RP 78. The chief complaint was that M.J. had allegedly been abused by the boyfriend of M.J.'s mother and M.J. was complaining of bruises to her body. RP 79. Dr. Beins observed that M.J. had bruises on both buttocks and on the posterior portion of her left thigh there was a bruise with an abrasion. RP 79. M.J.'s chart indicated that M.J. had been struck by the stick from a blind control used to open and close the blinds. RP 80.

M.J. did not tell Dr. Beins how she was injured. RP 88. There were two adults in the room when Dr. Beins was examining M.J. and the adults answered Dr. Beins' questions. RP 88. M.J. did not tell Dr. Beins what she had been struck with. RP 88.

Plaintiff's exhibits 8, 9, 10, and 11, are pictures that are

consistent with the bruising observed by Dr. Beins. RP 81. Dr. Beins felt that the bruises were moderate to severe. RP 83.

M.J. said she was a little tender when Dr. Beins pushed over the bruised areas, but was not in extreme discomfort. RP 87. Dr. Beins prescribed ice for the swelling and bruising and prescribed Motrin and Tylenol for the pain as needed. RP 87.

The pattern of bruising is consistent with M.J. being struck with a control rod from a set of blinds. RP 83. M.J.'s bruising was not consistent with spanking by a hand. RP 85. The bruises were also not consistent with an injury sustained during a fall. RP 85. Dr. Beins assumed the force used to make the bruises was moderate to severe due to the skin being broken. RP 85-86. Dr. Beins spoke with an Auburn Police officer about M.J. RP 86-87.

When Mr. Ernest took M.J. to the hospital, M.J. was acting like a normal kid would act. RP 227. M.J. was upset that Dave had hit her, and didn't want to talk about it. RP 227.

While at the hospital, Mr. Ernest was contacted by law enforcement and spoke to Deputy Cline on the phone. RP 228, 280-

281. M.J.'s father told Dep. Cline that he had just received M.J. for visitation and that M.J. had some injuries on her leg so he took M.J. to the hospital to be evaluated. RP 281. When Mr. Ernest returned home with M.J., Deputy Cline came to Mr. Ernest's home and spoke with Deputy Cline. RP 229, 282-283. M.J. told Deputy Cline that David had struck her with a wand from the shades. RP 230, 285-287. M.J. told Dep. Kline that she had been hit on the butt and legs and that it hurt badly. RP 287. M.J. never explained her relationship with David to Deputy Cline. RP 230.

M.J. stayed at Mr. Ernest's house for a week and then went to live with her grandmother, Patricia. RP 230-231.

Ms. Patricia McMillan is M.J.'s grandmother. RP 59. Ms. McMillan is the mother of Heather, who is M.J.'s mother. RP 60. In late July, Ms. McMillan was sent pictures by her son, Harold. RP 61. Harold also goes by "Hap." RP 59. Three to five days after seeing the pictures, Ms. McMillan saw M.J. RP 62. At the end of July or early in August, 2006, M.J. moved in with Ms. McMillan. RP 66. At the time M.J. moved in, she had bruises on her buttocks and the bruises

remained for about a week. RP 66

Ms. Heidi Walker is a social worker with the Department of Children and Family Services. RP 305-306. On July 26, 2006, Ms. Walker was contacted by M.J.'s father who was concerned about physical abuse of M.J. RP 308. Ms. Walker's role in M.J.'s case was as an investigator for CPS. RP 308.

In the last week of July, 2006, Det. Shaviri was assigned to M.J.'s case. RP 236-237. Ms. Walker worked with Det. Shaviri and participated in the interviews of Heather Jamieson, Karen Hoye, M.J., and L.J.. RP 309-313. Ms. Walker and Det. Shaviri determined that M.J. and L.J. needed to be placed in protective custody with Patricia McMillan, M.J.'s grandmother. RP 312-314.

On July 31, 2006, Ms. Walker interviewed M.J. at M.J.'s grandmother's house. RP 68-69, 320. In the presence of a CPS worker, Ms. McMillan asked M.J. how she received the bruises. RP 62. M.J. told Ms. McMillan that Mr. Melancon hit her with wand from the venetian blinds because M.J.'s mother tried to clean M.J.'s ears and M.J. wouldn't let her. RP 62-64. M.J. never told Ms. McMillan when

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she was hit by Mr. Melancon. RP 72. M.J. told Ms. Walker that “Dave” had spanked M.J. with “one of those things that you close the blinds with.” RP 325. Ms. Walker established that “Dave” was Dave Melancon, M.J.’s mother’s boyfriend. RP 326. M.J. told Ms. Walker that “it’s not my mom that’s doing it, it’s Dave.” RP 328. M.J. told Ms. Walker that Mr. Melancon spanks M.J. on her butt and that M.J. had “owees” on her butt and the back of her leg from the spanking with the wand from the blinds. RP 328.

Dep. Cline contacted Heather Jamieson on July 31, 2006. RP 291-292. Ms. Jamieson told Dep. Cline that she had been attempting to clean M.J.’s ears when M.J. went crazy. RP 293. Ms. Jamieson told Dep. Cline that her boyfriend, David struck M.J. after Ms. Jamieson went outside to have a cigarette to calm down. RP 294. Ms. Jamieson said that Mr. Melancon had spanked M.J. with the plastic wand from a set of blinds. RP 294-295. Ms. Jamieson told Dep. Cline that she didn’t know M.J. was injured and she didn’t see any injuries on M.J. RP 298-299.

Ms. Brune is a child forensic interviewer with the Pierce County

Prosecutor's Office. RP 333. On August 2nd, 2006, Ms. Brune interviewed M.J. at the Child Advocacy Center and Det. Shaviri watched the interview from an adjacent room where he could hear and see M.J. RP 68, 237, 339. M.J. told Ms. Brune that M.J.'s mother was there, did nothing to stop the spanking, and told her not to tell anyone it had happened. RP 356-357.

Ms. Walker observed the August 2, 2006, interview of M.J. at the Child Advocacy Center. RP 330-331. M.J. gave the same account as she did on July 31 of how she was injured and did not accuse Ms. Jamieson of causing the bruising. RP 330-331.

On August 2, 2006, Ms. Hoye was interviewed by Det. Shaviri. RP 189, 239. Heidi Walker was present during the interview of Ms. Hoye. RP 239. Ms. Hoye told Det. Shaviri that she saw one bruise on M.J.'s bottom on the side opposite the side with the scratch. RP 189-190.

Det. Shaviri also interviewed M.J.'s mother, Heather Jamieson, on August 2, 2006. RP 151-152, 240. Ms. Jamieson was not under oath when she spoke to Det. Shaviri and did not sign a statement. RP

259. Ms. Jamieson had taken several hits of methamphetamine prior to the interview. RP 152. Ms. Jamieson told Det. Shaviri that Mr. Melancon had gotten the plastic rod from the blinds and given it to Ms. Jamieson. RP 154. Ms. Jamieson told Det. Shaviri that she didn't hit M.J. "that hard." RP 155. Ms. Jamieson told Det. Shaviri that she saw black and blue on M.J.'s butt after the spanking. RP 157. Det. Shaviri told Ms. Jamieson that bruises aren't black and blue right away and Ms. Jamieson corrected herself and said that the marks were dark red. RP 170.

Ms. Jamieson told Det. Shaviri that M.J. was screaming louder while she was being spanked by Mr. Melancon. RP 158-159. Ms. Jamieson told Det. Shaviri that she was wrong for letting Mr. Melancon spank M.J. RP 161. Ms. Jamieson did not hear or see Mr. Melancon spank M.J. RP 171

Det. Shaviri attempted to contact Mr. Melancon but was unsuccessful. RP 254-255.

M.J. testified that M.J.'s mother did not spank her that day and never talked to M.J. about the spanking. RP 51. M.J. also testified that

Ms. Hoyer saw the bruises on M.J. and took pictures of the bruises. RP 52.

IV. SUMMARY OF TESTIMONY

- ***M.J.***²

M.J. gives background information about herself. RP 33-34. M.J. testifies about telling the truth. RP 34-35. M.J. testifies about school. RP 36-37. M.J. testifies about where she was living in the summer of 2006, who was living with her, and the sleeping arrangements. RP 37-39.

M.J. discusses the time Mr. Melancon spanked her. RP 40-51. M.J. discusses how her family discovered she was spanked. RP 52-53.

- ***Patricia McMillan***

Ms. McMillan testifies regarding her relationship to M.J. and where M.J. lives. RP 58-60. Ms. McMillan discusses M.J.'s diagnosis of ADD/ADHD. RP 60-61.

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M.J. is the victim in his case and is a minor. For privacy reasons she will be referred to only by her initials.

Ms. McMillan discusses how she learned of M.J.'s injuries. RP 61-63. Ms. McMillan describes how M.J. said she received the bruises. RP 62-65. Ms. McMillan describes M.J.'s bruises and the difficulty with cleaning M.J.'s ears. RP 66-68. Ms. McMillan describes M.J. being interviewed by State agencies. RP 68-69.

- ***Michael Beins***

Michael Beins is an ER physician at the Auburn Regional Medical Center. RP 75. Dr. Beins describes his work history, training, and details his duties. RP 75-78. Dr. Beins describes his interaction with M.J. RP 78-83. Dr. Beins describes M.J.'s injuries. RP 83-86. Dr. Beins describes M.J.'s reaction to his examination and his prescription for her injuries. RP 87-88.

- ***L.J.***

L.J. testifies regarding where she goes to school, her family, and where she lives. RP 102-103. L.J. discusses living with Mr. Melancon. RP 103-104. L.J. discusses that Mr. Melancon spanked M.J. RP 106.

- *Heather Jamieson*

Ms. Jamieson is the mother of M.J. and L.J. RP 132. Ms. Jamieson describes her family relations and the names of her relatives. RP 131-132. Ms. Jamieson discusses where she and her children have lived over the past few years. RP 132-133. Ms. Jamieson discusses her relationship with Mr. Melancon. RP 133-135. Ms. Jamieson discusses taking her children with her to Mr. Melancon's residence. RP 134-135. Ms. Jamieson discusses M.J. and L.J. going to live with their grandmother and Ms. Jamieson living with Mr. Melancon after M.J. got hurt. RP 136.

Ms. Jamieson describes the incident where M.J. got hurt. RP 141- 146. Ms. Jamieson discusses examining M.J.'s injuries after M.J. was hurt. RP 146-147. Ms. Jamieson discusses talking with Deputy Cline. RP 149-151.

Ms. Jamieson discusses being interviewed by Det. Shaviri on August 2, 2006 and by Heidi walker when CPS was present. RP 151-159. Ms. Jamieson discusses meeting with CPS and signing a "safety plan" for M.J. RP 159-161.

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● ***Karen Hoye***

Ms. Hoye testifies concerning the period of time in the summer of 2006 when Ms. Jamieson, M.J. and L.J. lived with her. RP 183. Ms. Hoye discusses Ms. Jamieson's relationship with Mr. Melancon. RP 184.

Ms. Hoye discusses the incident where M.J. was spanked. RP 185-186. Ms. Hoye discusses how she learned M.J. had been injured. RP 185-189.

Ms. Hoye discusses being interviewed by Det. Shaviri. RP 189-190. Ms. Hoye discusses what M.J. told her about the incident. RP 191-193. Ms. Hoye discusses what she did after she talked to M.J. RP 193-194. Ms. Hoye again discusses what M.J. told her about the incident. RP 195.

● ***Harold McMillan***

Mr. McMillan discusses his employment and where he lives. RP 199-200.

Mr. McMillan discusses how he learned of M.J.'s injuries. RP 200-206.

Mr. McMillan discusses what he did after learning of M.J.'s injuries. RP 207-208.

- ***Albert Ernest***

Mr. Ernest is M.J.'s father. RP 219. Mr. Ernest discusses his relationship with M.J. and his visitation with M.J. RP 218-219. Mr. Ernest describes the events of July 26, 2006. RP 221-224. Mr. Ernest describes his response to M.J. telling him what had happened. RP 225-227. Mr. Ernest describes taking M.J. to the hospital and speaking to police. RP 227-229. Mr. Ernest testifies as to what M.J. told Deputy Cline. RP 230.

- ***Det. Shaviri***

Det. Shaviri discusses his professional background and training. RP 233-236. Det. Shaviri discusses his assignment to this case. RP 236-237. Det. Shaviri discusses the interview between M.J. and Kim Brune. RP 237.

Det. Shaviri discusses who he interviewed in relation to this case. RP 239. Det. Shaviri discusses the interview of Ms. Jamieson. RP 241-254. Det. Shaviri discusses attempting to contact Mr.

Melancon. RP 254-255.

- ***Deputy Bryan Cline***

Dep. Cline discusses his employment and training history. RP277-280. Dep. Cline discusses speaking with Dr. Beins and M.J.'s father. RP 281. Dep. Cline discusses interviewing M.J. and M.J.'s father at the father's home. RP 283-291. Dep Cline testifies regarding speaking to Heather Jamieson. RP 291-300.

- ***Corinne Meyer***

Ms. Meyer is the director of health information management at Auburn Regional Medical Center. RP 301. Ms. Meyer authenticates State's exhibit 30 as the emergency room treatment records of M.J. RP 302-304.

- ***Heidi Walker***

Ms. Walker is a social worker with the Department of Children and Family Services. RP 305-306. Ms. Walker discusses her employment history, her work duties, and her training and education. RP305-308. Ms. Walker discusses her involvement with M.J.'s case. RP 308-332.

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- *Kimberly Brune*

Ms. Brune is a child forensic interviewer with the Pierce County Prosecutor's Office. RP 333. Ms. Brune discusses her employment history and training. RP 333-338. Ms. Brune discusses her interview of M.J. on August 2, 2006. RP 339-342. A DVD of Ms. Brune's interview of M.J was played for the jury. RP 342-354.

- *Mary Melancon*

Ms. Melancon is Mr. Melancon's mother. RP 365-366. Ms. Melancon discusses her interaction with M.J. RP 366-372.

- *Paula Curle*

Ms. Curle is Mr. Melancon's sister. RP 381. Ms. Curle discusses her interaction with Ms. Jamieson on July 26, 2006. RP 381-383.

V. ARGUMENT

1. **M.J.S HEARSAY STATEMENTS TO PATRICIA MCMILLAN, ALBERT ERNEST, KAREN HOYE, HAROLD MCMILLAN, AND L.J. WERE NOT PROPERLY ADMITTED WHERE THE TRIAL COURT FAILED TO COMPLY WITH THE STATUTORY REQUIREMENT THAT THE TRIAL COURT MAKE SEPARATE FINDINGS**

**AS TO THE RELIABILITY OF EACH STATE-
MENT THE STATE SOUGHT TO HAVE
ADMITTED.**

Under RCW 9A.44.120,

A statement made by a child when under the age of ten 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...criminal proceedings...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.

When the State requests admission of multiple child hearsay statements made to numerous people at different times, the trial court is required to enter separate findings of reliability for each statement and it is error to enter blanket findings relating to all statements. *See State v. Stevens*, 58 Wn.App. 478, 485-487, 794 P.2d 38, review denied 115 Wn.2d 1025, 802 P.2d 128 (1990).

Here, the State sought admission of M.J.'s hearsay statements to Karen Hoye, L.J., Michael Biens, Albert Ernest, Kimberly Brune, Patricia McMillan, Harold McMillan, and Bryan Cline. CP 19-27. In both its oral and written rulings admitting M.J.'s hearsay statements to Patricia McMillan, Albert Ernest, Karen Hoye, Harold McMillan, and L.J., the trial court engaged in a blanket analysis of the reliability of M.J.'s statements to all those individuals, rather than a separate analysis for each statement as required by RCW 9A.44.120.

The trial court failed to follow the proper statutorily required procedure in admitting M.J.'s hearsay statements, therefore, M.J.'s hearsay statements to Karen Hoye, L.J., Michael Biens, Albert Ernest,

Kimberly Brune, Patricia McMillan, Harold McMillan, and Bryan Cline were not properly admitted.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON FOURTH DEGREE ASSAULT.

Mr. Melancon requested that the jury be given an instruction on fourth degree assault. RP 397-399, 2-26-07, CP 44-57. The trial court declined to instruct the jury on fourth degree assault, finding that the facts of the case did not support giving the instruction and that the instruction could not be given because the crime of fourth degree assault of a child does not exist. RP 399-400, 2-26-07.

A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-772, 966 P.2d 883 (1998).

A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable if it is outside the range of

acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

- a. *The instruction on fourth degree assault was warranted as an instruction on an inferior degree offense.*

An instruction on an inferior degree offense is properly admitted when:

(1) the statutes for both the charged offense and the inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

- i. The statutes for second degree assault of a child and fourth degree assault "proscribe but one offense."

Mr. Melancon was charged with committing assault of a child in

the second degree in violation of RCW 9A.36.021 and RCW 9A.36.130(1)(a).

RCW 9A.36.130(1)(a) provides: “A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person...[c]ommits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child.”

RCW 9A.36.021 provides, in pertinent part,

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm

“A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1).

Thus, the statutes for second degree assault of a child, second degree assault, and fourth degree assault, all “proscribe but one

offense”- assault.

- ii. The information charged an offense that is divided into degrees, and fourth degree assault is an inferior degree of second degree assault.

RCW 9A.36.041 defines fourth degree assault as an assault not amounting to first, second, or third degree assault. Thus, assault is an offense that is divided into degrees and fourth degree assault is an inferior degree of second degree assault. During argument, the State conceded that fourth degree assault was an inferior degree of second degree assault of a child. RP 398.

- iii. There is evidence that Mr. Melancon committed only fourth degree assault.

To meet the third or “factual” prong, the evidence must affirmatively establish the defendant's theory that only the inferior offense was committed-“the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *Fernandez-Medina*, 141 Wn.2d at 455, 6 P.3d 1150 (emphasis in original). “When determining if the evidence at trial was sufficient to support the giving of an instruction,

the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *Fernandez-Medina*, 141 Wn.2d at 455-456, 6 P.3d 1150.

The evidence introduced at trial clearly established that M.J. had been injured. The issues left for the jury to determine were: (1) whether or not the injuries were caused by Ms. Jamieson or Mr. Melancon; (2) whether the injuries constituted “substantial bodily harm” (necessary to convict Mr. Melancon of second degree assault) or simply “bodily harm” (necessary to convict Mr. Melancon of third degree assault); and whether or not Mr. Melancon acted recklessly (necessary to convict Mr. Melancon of second degree assault) or acted with criminal negligence (necessary to convict Mr. Melancon of third degree assault). The evidence presented was that Mr. Melancon had spanked M.J. with the plastic wand used to control horizontal blinds in order to discipline M.J. Given the evidence presented, a jury could have decided that he injuries were caused by Mr. Melancon, the bruising did not constitute bodily harm, and that Mr. Melancon did not act recklessly in disciplining M.J. Had the jury reached this

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conclusion, the jury could have convicted Mr. Melancon of fourth degree assault.

Mr. Melancon was entitled to have the jury instructed on fourth degree assault as an inferior degree offense.

b. The instruction on fourth degree assault was warranted as an instruction on a lesser included offense.

An instruction on a lesser included offense is warranted when two conditions are met: “[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978).

As discussed above, the elements of fourth degree assault are necessary elements to second degree assault, and the evidence in this case supported the inference that Mr. Melancon committed only fourth degree assault.

Mr. Melancon was entitled to have the jury instructed on fourth degree assault as a lesser included offense.

- c. *The trial court's refusal to instruct the jury on fourth degree assault was not harmless error.*

Where there is evidence to support giving a lesser included offense instruction, failure to give it has never been held harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

It is reversible error for the trial court to refuse to give a proposed instruction if the instruction states the proper law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

As discussed above, the evidence in this case supported the giving of the instruction on the lesser included offense of fourth degree assault. The trial court abused its discretion in failing to give the fourth degree assault instruction. This court should vacate Mr. Melancon's conviction and remand this case for a new trial.

3. MR. MELANCON WAS DEPRIVED OF HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT ERRONEOUSLY SUSTAINED THE STATE'S OBJECTION TO THE TESTIMONY OF PAULA CURLE ON GROUNDS THAT THE TESTIMONY WAS HEARSAY WHERE THE TESTIMONY WAS NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED

A criminal defendant has a constitutional right to present a defense.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The Washington court described the importance of the right as follows:

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

Washington, 388 U.S. at 9, 87 S.Ct. At 1923, *cited with approval* by *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Washington defines the right to present witnesses as a right to present material and relevant testimony. *See State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the

defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless. *State v. Maupin*, 128 Wn.2d 918, 928-929, 913 P.2d 808 (1996).

To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401. All relevant evidence is admissible, except as limited by constitutional requirements, state, the evidentiary rules, or other rules applicable in Washington courts. ER 402. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

Mr. Melancon called Paula Curle, Mr. Melancon's sister, as a witness for the defense. RP 380-383. Ms. Curle testified that she has known Ms. Jamieson, M.J.'s mother for about 20 years. RP 381. Ms.

Curle testified that on the night Mr. Melancon allegedly assaulted M.J., Ms. Jamieson came to Ms. Curle's house and was frantic and screaming. RP 381-382. Ms. Curle testified that Ms. Jamieson had come to her house between 8 and 10 p.m. and was frantic and screaming. RP 382-383. Ms. Curle testified that Ms. Jamieson had grabbed her arm and asked Ms. Curle to go outside and smoke with Ms. Jamieson. RP 382.

Counsel for Mr. Melancon then asked if Ms. Jamieson had said anything to Ms. Curle and the prosecutor objected on grounds that the response was hearsay. RP 382. Without waiting for counsel for Mr. Melancon to respond, the trial court sustained the State's objection. RP 382. Counsel for Mr. Melancon then informed the court that the testimony was being offered for impeachment purposes and not for the truth of the matter asserted. RP 382. The trial court informed defense counsel that the answer would be hearsay and did not permit defense counsel to elicit testimony from Ms. Curle as to what Ms. Jamieson told Ms. Curle about M.J. RP 382-383.

"A witness' credibility is always at issue." *State v. Froehlich*, 96

Wn.2d 301, 306, 635 P.2d 127 (1981). Therefore, evidence relevant to Ms. Jamieson's credibility was admissible since it was relevant to and probative of an issue before the jury.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay, which is admissible for impeachment purposes. *State v. Freigang*, 115 Wn.App. 496, 498 n. 2, 61 P.3d 343 (2002), *review denied* 149 Wn.2d 1028, 78 P.3d 656 (2003).

Here, Mr. Melancon was offering the testimony of Ms. Curle as impeachment evidence against Ms. Jamieson. Ms. Jamieson had testified that she had gone out onto her back patio to smoke a cigarette while Mr. Melancon allegedly beat M.J. RP 145, 156-157, 158, 170-171, 176. Ms. Jamieson's testimony was that she had stood on her own patio and had smoked a cigarette alone. RP 170-171. Ms. Curle's testimony that Ms. Jamieson had come to Ms. Curle's home already contradicted Ms. Jamieson's version of events. Ms. Jamieson's statements to Ms. Curle offered to impeach Ms. Jamieson's version of

event were highly relevant and probative of Ms. Jamieson's credibility.

The trial court's ruling excluding Ms. Curle's testimony was erroneous and deprived Mr. Melancon of his right to present material and relevant testimony. The trial court's ruling deprived Mr. Melancon of his right to present a defense.

4. CUMULATIVE ERROR DEPRIVE MR. MELANCON OF A FAIR TRIAL.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, ¶ 75, 121 P.3d 755 (2005).

Where the defendant cannot show prejudicial error occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *Stevens*, 58 Wn.App. at 498, 794 P.2d 38.

Should this court find that none of the errors described above warrant a new trial, this court should find that the prejudicial effect of these errors combined deprived Mr. Melancon of a fair trial. This court

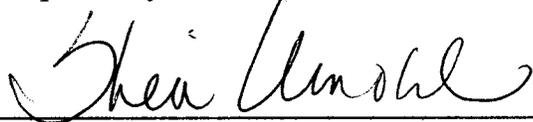
should vacate Mr. Melancon's convictions and remand for a new trial.

VI. CONCLUSION

For the reasons stated above, this Court should vacate Mr. Melancon's convictions and remand for a new trial.

DATED this 10th December, 2007.

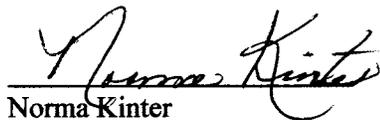
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on December 10, 2007, she delivered in person to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U.S. Mail to appellant, David P. Melancon, # 200706054, Pierce County Jail, 910 Tacoma Avenue South, Tacoma, Washington 98402, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on December 10, 2007.



Norma Kinter

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