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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, when it entered judgment against him for second degree assault of a child because this conviction was not supported by substantial evidence.

2. The trial court erred when it admitted third-party hearsay under ER 803(a)(4) "Statement for Purposes of Medical Diagnosis or Treatment" exception because the statements admitted were not reliable and were not given for the purpose of diagnosis or treatment.

3. The trial court violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when it admitted testimonial statements of a non-witness to prove an element of the crime.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against that defendant after a jury trial for a crime unsupported by substantial evidence?

2. Does a trial court err if it substantively admits third-party hearsay under the under ER 803(a)(4) when the statements admitted were not made for purposes of medical diagnosis or treatment?

3. Does a trial court violate a defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment if it substantively admits testimonial statements of a non-testifying witness without proof that the witness is unavailable?

## STATEMENT OF THE CASE

### *Factual History*

At about 1:30 on the afternoon of August 30, 2007, Kristina Rondeau left her apartment on Russell Road in Centralia with her 10-year-old son Bradley in order to go on a number of errands. RP I 78-79.<sup>1</sup> She left her four other children in the care of the defendant Jose Alvarez-Abrego, who periodically lives with her. RP I 75-76. The names of these other children are Rebecca, Junior, Jonathan and Matthew. RP I 74-75. Matthew is the youngest at six-months-old and Bradley is the oldest at 10-years-old. *Id.* When Kristina left, she did not see any injuries to Matthew. RP I 81-82; RP II 24-25. Kristina returned with Bradley at about 6:00 or 6:30 that evening and saw Matthew sleeping in his crib. RP I 79-80. She did not notice anything unusual about him. *Id.*

Once Kristina arrived home, she told the defendant that they needed to go to the store. RP I 78-79. In reply, the defendant got Matthew out of his crib and put him in a baby stroller and took him with them as he and Kristina went to the store to fill a prescription. *Id.* Once again, Kristina did not notice

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<sup>1</sup>The record in this case includes five volumes of verbatim reports, including one volume for the first day of trial on June 9, 2008, and one volume for the second day of trial on June 10, 2008. The former is referred to herein as "RP I [#]" and the second as "RP II [#]." The other volumes are referred to by date.

anything unusual about Matthew. *Id.* However, once they returned home, Kristina took Matthew out of his stroller and noticed for the first time that the left side of Matthew's head was swollen behind his ear and he had a black eye. RP I 81-82. Upon seeing this, Kristina took Matthew to a neighbor and got a ride to the hospital in Centralia. *Id.* Following an x-ray and CAT scan, the hospital in Centralia transported Matthew to Mary Bridge Children's Hospital in Tacoma. RP I 82-83.

Once at Mary Bridge in Tacoma, Dr. Yolanda Duralde examined Matthew, spoke with Kristina, and examined the x-ray and CAT scan. RP I 38-40. After reviewing the x-ray and CAT scan, Dr. Yolanda Duralde determined that Matthew had suffered a star fracture to his cranium behind his left ear, and had a significant hematoma at that area between his scalp and cranium. RP I 40-42. According to Dr. Duralde, the amount of blunt force trauma necessary to cause this type of injury was the equivalent of a fall from 10 to 20 feet. RP I 43. She also diagnosed a healing fracture to a rib, and healing "chip fractures" to an ankle and a wrist. RP I 52.

While Kristina was at the hospital with Matthew, members of the Centralia Police Department twice interviewed the defendant, once at home, and once at the Lewis County Jail after arresting him for assault of a child. RPI95-99, 11-112, 121-123. During these interviews, he stated that at some point during the day, he was inside a bedroom putting on shoes and socks

when he heard Matthew crying and came out in the living room to find that he had fallen on the floor. *Id.* He denied either intentionally or accidentally injuring Matthew, and stated that one of the other children might have hurt him, but he did not actually see anything of that nature. *Id.* In addition, Kristina also asked the defendant what had happened to Matthew and he stated that one of the other children might have injured him, but he did not know for sure. RP I 81-83.

### ***Procedural History***

By information filed November 29, 2007, the Lewis County Prosecutor charged the defendant Jose Alvarez-Abrego with one count of second degree assault of a child committed by one or both of two alternative methods of committing the crime. CP 13-14. Under the first alternative, the state alleged as follows:

[T]hat the defendant, then being a person eighteen years of age or older on or about August 30, 2007, in Lewis County, Washington, did intentionally assault a child, to-wit: M.J.S., DOB: 2/14/07, who at the time of the assault was under the age of thirteen years, and thereby did recklessly inflicting [sic] substantial bodily harm; against the peace and dignity of the State of Washington.

CP 13.

Under the second alternative, the state alleged that the defendant committed the following conduct:

[T]hat the defendant, then being a person eighteen years of age or older, intentionally assaulted a child, to-wit: M.J.S., DOB 2/14/07,

who at the time of the assault was under the age of thirteen years, and did thereby cause bodily harm that was greater than transient physical pain or minor temporary marks, the defendant having previously engaged in a pattern or practice of either assaulting the child which had resulted in bodily harm that was greater than transient pain or minor temporary marks, or causing the child physical pain or agony that was equivalent to that produced by torture; against the peace and dignity of the State of Washington.

CP 13-14.

This case eventually proceeded to jury trial on June 9, 2008, with the state calling six witnesses over two days. CP I 35-131, CP II 7-31. These witnesses included Dr. Duralde, Kristina Rondeau, Officer Ramirez, and Officer Brister. CP I 35, 74, 95, 104. The witnesses testified to the facts contained in the preceding *Factual History*. See *Factual History*. In addition, the state called Vicky Moore, a neighbor of Kristina Rondeau, and Bradley Cox, Kristina Rondeau's son, as witnesses. RP I 61, 89. Ms Moore testified that on August 29<sup>th</sup> or 30<sup>th</sup>, she was outside the apartment complex and heard Matthew in his apartment crying very loudly and then stop. RP I 61-74. Bradley Cox testified that when his mother isn't around, the defendant sometimes swings Matthew by his ankles. RP 95-104.

In addition, during Officer Buster's testimony, he identified Exhibit No. 3 as a certified copy of a Washington State Identity Card for a person by the name of Jose Alvarez-Abrego. RP I 107-108. The court admitted this exhibit into evidence over the defense objection that the state had failed to

establish a proper foundation for its admission. RP I 108-109.

Prior to trial, the defense made a motion in limine, seeking to exclude Dr. Duralde from testifying that at Mary Bridge Hospital, Kristina Rondeau told her that Kristina's four-year-old daughter told her that the defendant had hit Matthew's head against a wall. RP I 23-34. The court denied the motion. *Id.* The defense renewed this motion and made an objection during Dr. Duralde's testimony, but the court overruled the defendant's objection and allowed the Doctor to testify to what Kristina Rondeau told her that her four-year-old daughter had told Kristina about how the baby's injuries occurred. RP I 55-58. However, this testimony did not come into the record as both the state and the defense apparently anticipated because Dr. Duralde did not testify to any statement concerning who had injured the child. *Id.* Rather, her testimony went as follows:

Q. When you talked to Matthew's mother Kristina, did she tell you about any possible causes of the injury?

A. Yes.

Q. What did she tell you?

A. She told me that one of her children had told her earlier that day that the baby had been thrown against the wall

Q. Did she say how old the child was that told her that?

A. Her four-year-old.

RP I 59.

In spite of the fact that Dr. Duralde had not claimed that anyone had identified that a specific person was responsible for the child's injuries, the state argued that Dr. Duralde had identified the defendant as the perpetrator. RP II 62. Specifically, the state made the following claim to the jury during the last portion of its closing argument.

We also know he was thrown against the wall from the doctor learning her patient's history. The doctor was told by Kristina that her four-year-old daughter had told her the defendant threw the baby against the wall.

RP II 62.

The defense objected to this argument, but the court overruled the objection. *Id.* The state then modified its claim, and argued the following during rebuttal.

It's evidence, the mother, for purposes of medical diagnosis and help, to get help, told the doctor her four-year-old said the baby was thrown against the wall. That is evidence for you to consider.

RP II 74.

Based upon these arguments, the defense moved for a mistrial. RP II 83-84. The court denied this motion. *Id.*

Following instruction, the jury returned a general verdict of "guilty" to the charge of second degree assault of a child. CP 116. The jury also returned a special verdict, finding the defendant guilty beyond a reasonable doubt under both charged alternative methods of committing the offense. RP

116. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 126-135, 137-148.

## ARGUMENT

### I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR SECOND DEGREE ASSAULT OF A CHILD BECAUSE THIS CONVICTION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with second degree assault of a child under both alternatives to RCW 9A.36.021(1). This statute states:

(1) 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:

(a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or

(b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and

the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

RCW 9A.36.031.

Under this statute, the gravamen of the offense is for a person eighteen years or older to commit an assault against a person who is under thirteen years old that otherwise qualifies as a second degree assault under RCW 9A.36.021, or meets the special requirements of RCW 9A.36.031(b). One might well argue the special requirements of RCW 9A.36.031(b) redundant, as every commission of such acts would also constitute a second degree assault under RCW 9A.36.021, thus automatically qualifying as a violation of RCW 9A.36.031(a). However, the point the appellant in this case make is that under both alternatives, a conviction for second degree assault of a child cannot be sustained unless the record necessarily contains substantial evidence that the defendant was eighteen years of age or older. As the following explains, in the case at bar the admissible evidence did not prove this element of the offense.

In the case at bar, the state called six separate witnesses, and then recalled two of those witnesses for further testimony. However, not a single witness claimed to know the defendant's age. Rather, the state's sole attempt to prove the defendant's age was through the admission of Exhibit No. 3.

This exhibit purported to be a certified copy of a Washington Identification Card for a person by the name of Jose Alvarez Abrego, born on April 12, 1971, bearing that person's signature and photograph. However, no witness ever testified that the defendant was the person shown in the identity card and the defendant objected to the admission of this exhibit on the basis that the state had failed to establish a proper foundation for its admission. As the decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), explains, absent some evidence that the defendant was the person named in the document, there is insufficient evidence on identity to warrant admission of the exhibit.

In *State v. Hunter, supra*, the court addressed the issue of what constitutes substantial evidence on this issue of identity. In this case the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held "pursuant to a felony conviction," as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named "Dallas E. Hunter" as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

*State v. Hunter*, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this "independent" evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the Probation Officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the

identity of the person named in the documents. *State v. Brezillac, supra.*

*State v. Hunter*, 29 Wn.App. At 221-222.

In the case at bar, the state bore the burden of proving the defendant's age. It attempted to do so by presenting the court with a document that stated that a person by the name of Jose Alvarez Abrego was born on April 12, 1971. This evidence would have been sufficient to prove that the defendant was over eighteen years of age, had the state presented any independent evidence that the defendant was the person named in the exhibit. However, the state presented no such evidence. Thus, in the same manner a judgment and sentence bearing the same name as the defendant is not admissible to prove the truthfulness of the facts contained therein without independent evidence that the defendant is the person named in the document, so in the case at bar, the identity card bearing the same name as the defendant is not admissible to prove the truthfulness of the facts contained therein without independent evidence that the defendant was the person named in the identity card. As a result, the trial court erred when it admitted Exhibit No. 3, and it further erred when it entered judgment against him on the charge of second degree assault of a child because the record does not contain substantial evidence on the element of the defendant's age.

Since the record in this case does not include substantial evidence on

one of the elements of the crime of second degree assault of a child, this court should vacate that conviction. However, the defense does concede that in light of the jury's special verdicts in this case, it is clear that the state proved beyond a reasonable doubt that the defendant committed the crime of second degree assault, which is a lesser included offense to second degree assault of a child under the first alternative method for committing this offense. As a result, this court should remand this case for entry of a judgment against the defendant on the lesser included charge of second degree assault and for sentencing within the standard range on that offense.

**II. THE TRIAL COURT ERRED UNDER ER 803(a)(4) AND VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT WHEN IT ADMITTED TESTIMONIAL STATEMENTS OF A NON-WITNESS TO PROVE AN ELEMENT OF THE CRIME.**

In the case at bar, the trial court allowed Dr. Yolanda Duralde to testify that Kristina Rondeau told her that Kristina's daughter told Kristina that the defendant had thrown Kristina's baby against a wall. The defense moved *in limine* prior to trial to exclude this evidence and objected to it during trial. In addition, during closing argument, the court allowed the state to argue that this evidence proved that the defendant assaulted Kristina's baby by throwing him against a wall. The defense objected to this argument and unsuccessfully moved for a mistrial based upon it. As the following explains,

this evidence was not admissible under the “Statements for Purposes of Medical Diagnosis or Treatment” found in ER 803(a)(4), its admission denied the defendant a fair trial, and its admission denied the defendant his right to confront witnesses under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

***(1) Doctor Duralde’s Testimony That Kristina Rondeau Told Her That Kristina’s Four-year-old Daughter Told Kristina That the Defendant Had Thrown Her Younger Brother Against a Wall Was Unreliable and Not Admissible under ER 803(a)(4) or Any Other Hearsay Exception.***

Under ER 801(c) hearsay is defined as “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.” Under ER 802 hearsay is “not admissible except as provided by these rules, by other court rules, or by statute.” One of these exceptions is found in ER 803(a)(4), which allows the admission over a hearsay exception of a “Statement for Purposes of Medical Diagnosis or Treatment.” The following examines this hearsay exception.

Under ER 803(a)(4) statements made for the purpose of medical diagnosis or treatment are considered an exception to the hearsay rule. This rule states:

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

...

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

ER 803(a)(4).

Traditionally, this exception “applies only to statements ‘reasonably pertinent to diagnosis or treatment.’ Thus, statements as to causation (“I was hit by a car”) would normally be allowed under this exception, while statements as to fault (“. . . which ran a red light”) would not. 5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982).

However, over the last few decades, the courts of this state have carved out an exception which allows a health care provider, under appropriate circumstances, to testify to a child’s identification of the perpetrator of a crime against the child. In a 1993 case, Division I of the Court of Appeals described this exception as follows:

ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, *review denied*, 112 Wn.2d 1014 (1989).

In *Butler*, this court examined at length the purposes of ER 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor’s testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that

the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home. *Butler*, 53 Wn.App. at 222-23, 766 P.2d 505; *see also In re Dependency of S.S.*, 61 Wn.App. 488, 503, 814 P.2d 204, *review denied*, 117 Wn.2d 1011, 816 P.2d 1224 (1991).

*State v. Ashcraft*, 71 Wn.App. 444, 456, 859 P.2d 60 (1993).

As is apparent from the court's comments in *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989), and *Ashcraft*, the justification for allowing a treatment provider to testify to the child's identification of the alleged perpetrator of abuse lies within the court's belief that part of the treatment provider's duty and function is to identify the abuser, thereby allowing the treatment provider to gauge what type of psychological damage occurred, what type of treatment is necessary, and what steps will be necessary to prevent future abuse. As such, the courts have held that these statements, in the context of child abuse cases, fall generally within the category of those made "for the purpose of diagnosis or treatment."

For example, in *State v. Butler*, *supra*, the babysitter of a 2½-year-old child took the infant to the hospital after noting several bruises about the child's face. During the examination the child told the attending physician that his "daddy" (meaning his mother's boyfriend) had thrown him off the bunk bed. When questioned about this, the defendant stated that the child,

whom he had been watching, fell off the bed. At trial the court allowed the physician to testify to the child's statement of who caused her injuries. Following conviction the defendant appealed, arguing that the trial court erred when it allowed the physician to testify as to what the child said.

On appeal the court of appeals first reviewed the similar fact patterns in *State v. Bouchard*, 31 Wn.App. 381, 639 P.2d 761 (1982), and *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986). The *Butler* court stated the following concerning these cases:

In *State v. Bouchard*, 31 Wn.App. 381, 382, 639 P.2d 761, review denied, 97 Wn.2d 1021 (1982), Bouchard was convicted of indecent liberties with his 3-year-old granddaughter. The child suffered a perforated hymen. The incident occurred when the child was visiting her grandparents. *Bouchard*, at 382, 639 P.2d 761. When the child returned home, her mother noticed blood on her daughter's body. Her mother testified that when she questioned her daughter, she told her mother that "grandpa did it." The attending physicians also testified that the child made similar statements to them. *Bouchard*, at 383, 639 P.2d 761.

Bouchard argued on appeal that the child's statements to the physicians were inadmissible hearsay. *Bouchard*, at 383, 639 P.2d 761. Without analysis, the court held that "[t]he statements to the attending doctors are clearly admissible under ER 803(a)(4) as statements 'of the cause or external source' of the injury and as necessary to proper treatment." *Bouchard*, at 384, 639 P.2d 761.

In *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379, review denied, 107 Wn.2d 1009 (1986), the facts were very similar. Robinson was found guilty of indecent liberties with a 3-year-old girl. *Robinson*, at 615, 722 P.2d 1379. Robinson argued on appeal that admission of the child's statements made to the nurse and doctor at the hospital where she was treated were inadmissible hearsay. *Robinson*, at 615, 722 P.2d 1379. The statements to the nurse and

doctor identified Robinson as the abuser. The court disposed of Robinson's argument in a footnote by holding that "[t]he statements to Nurse Billings and Dr. Kania are also admissible as statements made for purposes of diagnosis and treatment. ER 803(a)(4)." *Robinson*, at 616 n. 1, 722 P.2d 1379.

*State v. Butler*, 53 Wn.App. 219-220 (footnotes omitted).

In *Butler* the court went on to examine the application of the rule under analogous federal cases. The court noted:

This approach to child hearsay in the context of ER 803(a)(4) was further refined in *United States v. Renville*, 779 F.2d 430 (8th Cir.1985). *Renville* was convicted by a jury of two counts of sexual abuse of his 11-year-old stepdaughter. *Renville*, at 431. *Renville* argued on appeal that the trial court erred by permitting a physician to testify to statements by the victim during his examination identifying *Renville* as her abuser. *Renville*, at 435. Specifically, *Renville* argued that the hearsay exception found in Fed.R.Evid. 803(4) did not encompass statements of fault or identity made to medical personnel. *Renville*, at 435-36.

The *Renville* court pointed out that the crucial question under the rule was whether the out-of-court statement of the declarant was "reasonably pertinent" to diagnosis or treatment. *Renville*, at 436. The court began its analysis by stating the two-part test for the admissibility of hearsay statements under Fed.R.Evid. 803(4) that the court set forth in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

"[F]irst, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Renville*, at 436.

The test reflects the twin policy justifications advanced to support the rule. First, it is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's

motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule. *Iron Shell*, 633 F.2d at 84. Second, we have recognized that “a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

*State v. Butler*, 53 Wn.App. at 219-220.

After reviewing these cases, the court in *Butler* went on to affirm, noting that, as in *Bouchard* and *Robinson*, the child’s statements to the treatment provider were necessary to determine the source of the injuries, and thereby determine what treatment to provide and what steps to take to protect the child from further injury.

Similarly, in *State v. Ashcraft*, *supra*, the babysitter of a 3-year-old child called the police after she discovered a number of bruises on the infant. After the initial investigation, CPS took custody of the child and had her examined by a physician. During this examination, the physician found numerous injuries and bruises of a type commonly associated with physical abuse. The state then charged the mother with numerous counts of assault after the child told the physician that her mother had hurt her. Following conviction, the mother appealed, assigning error to the court’s admission of the physician’s testimony that the child told him that “My mama did it.”

After reviewing the history behind ER 803(a)(4), and the recent expansion of it for child abuse cases, the court held as follows:

Similarly, in the present case, the victim lived in the accused’s

home. The child had been determined to be the victim of probable abuse, raising questions of possible psychological injuries, as well as questions with respect to her safety. Therefore, as in *Butler*, [the child's] identification was necessary to allow for her proper diagnosis and treatment.

*State v. Ashcraft*, 71 Wn.App. at 456-67.

In each of these cases just cited, *Butler*, *Robinson*, *Bouchard*, *Renville*, and *Ashcraft*, the common thread that runs throughout is the immediate need to determine the source of the injuries in order to determine what treatment is appropriate, and what steps are necessary to shield the child from further abuse. As the court notes in both *Butler* and *Renville*, "first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be consistent with the purposes of promoting treatment or diagnosis." *Butler*, 53 Wn.App. at 220.

In each of these cases these two criteria were met in that the suspicious injuries had just been discovered and the placement of the child back into the home of the alleged perpetrator was an imminent possibility. By contrast, in the case at bar, unlike any of the cited cases, there was no question as to the identity of the alleged perpetrator. Neither was there a need to protect the child from the alleged perpetrator because both the mother and the police knew the identity of that person. In addition, the four-year-old child's alleged statement to the mother was not given for the purpose of

medical diagnosis or treatment and it was not the type of statement, when made through a third party, that a physician would use for the purpose of diagnosis or treatment. Thus, in the case at bar, the trial court erred when it overruled the defendant's repeated objections to allowing the doctor to testify to what Kristina Rondeau told her that Kristina Rondeau's four-year-old child told her had happened to the baby.

In the case at bar, the physician's testimony as to what Kristina Rondeau told her that Kristina Rondeau's four-year-old child told her had happened to the baby was the only evidence that identified a specific cause to the child's injuries. The state realized this weakness in its case and emphasized this evidence in both closing argument and rebuttal argument. Thus, absent the admission of this improper evidence, it is more likely than not that the jury would have entered a verdict of "not guilty," finding that the state had just not met its burden of proving beyond a reasonable doubt that the defendant was the person who injured the baby. Thus, the error in this case caused prejudice and the defendant is entitled to a new trial.

***(2) Admission of Doctor Duralde's Testimony That Kristina Rondeau Told Her That Kristina's Four-year-old Daughter Told Kristina That the Defendant Had Thrown Her Younger Brother Against a Wall Violated the Defendant's Right to Confrontation.***

The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with witnesses against him." Similarly Article 1,

§ 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” While case law indicates that analysis is similar under both clauses, five justices of our Supreme Court have concluded that Article 1, § 22 is more protective of a defendant’s confrontation rights than the Sixth Amendment. *State v. Foster*, 135 Wn.2d 441, 474-484, 957 P.2d 712 (1998) (See concurrence/dissent opinion of Alexander, J., at 474-481, dissenting opinion of Johnson, J. at 481-484).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause in relation to the admission of a prior hearsay statement made by a witness who did not testify in the case. In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant’s wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant’s wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant’s right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'".

The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was not confrontation violation because the statements bore sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Washington Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the "right to confront one's accusers is a concept that dates back to Roman times." The court then examined the common law origins of the right to confrontation, particularly in relation to the "infamous political trials" such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator's statement, in spite of Sir Walter

Raleigh's call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford*, the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness was no longer available.

In *Crawford*, the United States Supreme Court overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a "firmly rooted hearsay exception," or was given under circumstances showing it to be trustworthy. 124 S.Ct. at 1364, 1369. *Crawford* rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the reliability of evidence. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 1370. Thus in *Crawford*, the court "reject[ed]" the view that the reliability-based framework of *Roberts* or the rules of evidence,

govern the admissibility of out-of-court statements. The court held:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

124 S.Ct. at 1374.

In *Crawford* the Court did not definitively explain the scope of what “testimonial evidence” is. *Id.* at 1374 (“we leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”). However, the Court did set out a “core class of ‘testimonial’ statements,” the admission of which would violate the confrontation clause without the in court testimony of the proponent.” *Id.* at 1364. This “core class” of “testimonial statements” includes not only formal affidavits and confessions to police officers, but also “pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 1364. Thus, the “common nucleus” of the confrontation clause includes “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* This definition includes at its core statements elicited in response to police questioning during an investigation. *State v. Walker*, 129 Wn.App. 258, 268, 118 P.3d 935 (2005); *see also State v. Moses*, 129 Wn.App. 718, 119 P.3d 906 (2005) (Domestic violence victim’s statements in response to police questioning are testimonial for purposes of confrontation under the Sixth

Amendment).

In the case at bar, the court allowed the state to elicit statements that the attending physician testified the baby's mother claimed her four-year-old daughter made to her when the mother questioned her about what had happened. In the mind of the four-year-old, her mother's purpose in questioning her concerning who had hurt her brother bear all of the indicia that one would normally associate with the prosecutorial function. While a four-year-old child would certainly not think in terms of police investigations and prosecutorial interrogation, a four-year-old certainly is capable of thinking in terms of a sibling being hurt and their mother wanting to know who did it. In the mind of the child, the purpose of this questioning is not to obtain or seek aid. Rather, it is to determine guilt and apportion punishment. Thus, the child's statements are "testimonial" in nature and not admissible unless the child testified or the state produced such evidence to explain why she could not testify.

In the case at bar, the state presented no evidence that the four-year-old child was incompetent or incapable of testifying on her own behalf. While many four-year-old children might well not be competent testify, our case law contains a number of cases in which four-year-old and younger children have been found competent. *See, e.g., State v. Carlson*, 61 Wn.App. 865, 874, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022,

844 P.2d 1017 (1993) (finding no abuse of discretion when trial court found three-and-one-half year old sexual abuse victim competent to testify) and *State v. Borland*, 57 Wn.App. 7, 11, 786 P.2d 810, review denied, 114 Wn.2d 1026, 793 P.2d 974 (1990) (no abuse of discretion in finding four year old competent to testify). Thus, in the case at bar, the trial court's admission of the doctor's claim as to what Kristina Rondeau told her that Kristina's four-year-old daughter told Kristina violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

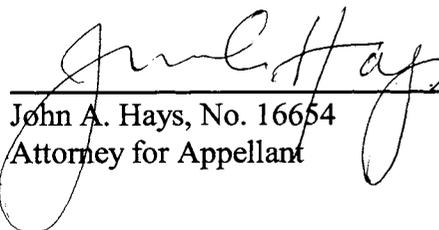
The denial of the right to confrontation is an error of constitutional magnitude and requires a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). In this case the state cannot meet this burden because absent the inadmissible hearsay, there was no evidence as to the method by which the child was injured and there was not evidence that the defendant injured the child. Thus, this court should reverse the defendant's conviction and remand for a new trial.

**CONCLUSION**

This court should reverse and remand with instructions to grant the defendant a new trial based upon the trial court's error in allowing the state to elicit inadmissible hearsay that violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In the alternative, this court should vacate the defendant's conviction and remand with instructions to enter judgement on the lesser included offense of second degree assault based upon the absence of substantial evidence on the issue of the defendant's age.

DATED this 13th day of February, 2006.

Respectfully submitted,



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**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**ER 803(a)(4)**

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

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

