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41027-3-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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State of Washington  
Respondent

v.

**CLAYTON T. ROBINSON**  
Appellant

41027-3-II

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On Appeal from the Superior Court of Lewis County

Cause Number 09-1-00213-9

The Hons. Nelson Hunt & James Lawler

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**REPLY BRIEF**

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I. STATEMENT OF THE CASE

The State charged Clayton T. Robinson with Count I, one act of first degree child molestation between December 1, 2008 and Dec 25, 2008; Count 2, one attempted act of first degree child molestation between December 1, 2008 and Dec 25, 2008; and Count 3, one act of first degree child molestation sometime in December, 2007. CP 1-2; HRP 2.<sup>1</sup>

Robinson was convicted by jury on the uncorroborated hearsay testimony of the then-five-year-old alleged victim. The pertinent facts are incorporated herein from the Appellant's Brief, pp. 1-4. Relevant citations to the record are included with the arguments.

Robinson's primary assignment of error is that the trial court abused its discretion and violated the fundamental premises of a fair trial by declaring testimonially competent a child witness who manifestly failed to meet the *Allen*<sup>2</sup> factors and failing to exclude the child's hearsay allegations for lack of corroboration.

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<sup>1</sup> The verbatim report of proceedings is in one blue volume for Judge Hunt containing pretrial motions (MRP), and six green volumes for Judge Lawler. Of the latter, HRP contains continuously-paginated hearings dated 5/21/09; 1/21/10; 2/25/10; and 3/4/10. A hearing on 1/14/10 is in its own green volume (1/14RP). Jury trial is in three continuously-paginated green volumes I, II and III (JRP). Sentencing is SRP. An unbound volume for January 28, 2010, is designated 1/28 RP.

<sup>2</sup> *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

II. ARGUMENTS IN REPLY

1. LH WAS NOT COMPETENT TO TESTIFY.

By statute, “those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly” are not competent to testify. RCW 5.60.050(2). A young child is competent as a witness only if she exhibits the following: (1) the capacity to understand and speak the truth in court; (2) the capacity at the time of the occurrence to receive an accurate impression of it; (3) the ability to retain an independent recollection of the occurrence; (4) the capacity to express her memory of the occurrence in words; and (5) the capacity to understand and answer simple questions about it. *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990); *Allen*, 70 Wn.2d at 692.

This Court examines the entire record in reviewing the pretrial competency determination. *State v. Avila*, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). As evidence of competency, the State presents a patchwork of statements elicited from LH at various times in the course of the investigation, pretrial, and trial and characterizes this as coherent, competent testimony. Brief of Respondent (BR) 2-4; 12-13. But the record shows otherwise. The State produced no evidence to support a ruling that LH was testimonially competent.

To be competent to testify, a young child must exhibit all five *Allen* factors.<sup>3</sup> *In re Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998). LH barely exhibited a single one. Because of her extreme immaturity, she had no grasp of the concept of truth, believing it is what you say to stay out of trouble. MRP 38, 39. She also did not know basic facts. She thought her great grandmother's first name, Rosealice, was her own last name. MRP 32. She thought she and her mother moved out of Rosealice's home a week before instead of ten months. MRP 32, 146. She thought she had ten sisters. MRP 55. She also thought CPS worker Jeffrey Copeland interviewed her one or two days before instead of ten months before. MRP 56.

Significantly, LH did not demonstrate a contemporaneous ability to perceive events at Christmas, 2008, let alone Christmas, 2007. MRP 32, 55, 56, 146. She clearly had no independent memory of the facts. MRP 124. During an interview a few days before the competency hearing, LH could not remember why she had said she did not like Robinson; had no memory of Robinson's touching her crotch; and did not remember ever telling either her grandmother or her mother that he did. She remembered nothing at all about being touched. MRP 92-95. But in

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<sup>3</sup> *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

court just a few days later, immediately upon entering the witness box, LH spontaneously blurted out:

LH: You know my Uncle Clayton?

Ct: I know who he is, yes.

LH: He touched me in the wrong spot. MRP 31.

Defense counsel merely stated the obvious when he said, “Something happened to this little girl in the intervening week.” MRP 113.

The prosecutor tried and failed three times to get LH to say in court that Robinson had upset her by touching her. MRP 43. He even reminded her that she had just said he touched her in the wrong spot. In response, LH categorically disavowed that statement and said she did not know why she said it. MRP 44. LH also could not remember what she talked about to investigators Copeland and Young. MRP 45, 53.

LH was totally unable to express herself in words. Throughout the hearing, she nodded and shook her head randomly, sometimes for yes, sometimes for no. The court reporter noted that the extensive yes-nods were indistinguishable from the no-nods. MRP 30. The prosecutor repeatedly had to ask, was that a yes? Was that a no? MRP 30-56. He explained to LH that it was important to answer in words, but to no avail. MRP 32, 43. The court stated on the record that LH was completely nonverbal when asked about the actual events. MRP 125.

Failure to meet the *Allen* test does not get any clearer than this.

Neither does the child's trial testimony validate the pretrial competency ruling. LH contradicted herself repeatedly on essential facts. She had told Copeland and Young that Robinson touched her skin inside her clothes, but she testified that there was only one touch and that was on top of her clothes. Contrary to her out-of-court statements, she said Robinson never asked her to touch him; she never saw his penis; she did not remember watching a movie with him, but if she did, there was no touching. And she did not remember a time when her Uncle Clayton was not nice to her. JRP 53.

The determination of competency lies within the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of a manifest abuse of discretion. *Swan*, 114 Wn.2d at 645; *Allen*, 70 Wn.2d at 692. But the court's discretion is not unfettered. The court abuses its discretion where, as here, its ruling is "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Mines*, 35 Wn. App. 932, 936, 671 P.2d 273 (1983), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the competency court recognized that LH could not answer simple questions about the allegations and that she was effectively mute concerning them. Accordingly, the court manifestly abused its discretion in declaring LH competent with the proviso that the State must rehabilitate

her by trial time so that she would be able to do at trial what she manifestly could not do at the competency hearing — testify meaningfully. Concl. 2.6–2.9, CP 31-32.

The State claims the court ruled on LH’s competency at the conclusion of the competency hearing, as required by the rule, and found her competent. BR 5; 13. This is wrong. The court advised counsel to prepare for either contingency — either LH would testify meaningfully or she would not. MRP 127. In this way, the court deferred its competency determination until the trial. Moreover, this judge did not preside at trial. A new judge who was a stranger to the pretrial proceedings, observed on the record that both counsel were able to induce LH to say pretty much anything they wanted her to say. JRP 60-61. LH agreed that a lot of people had helped her remember and told her what to say in court. JRP 55. This is the epitome of testimonial incompetence.

In *Swan*, the court likewise found it clear that the child was not able to answer the questions put to her. On that basis, the Court ruled she did not meet the statutory definition of testimonial competence. *Swan*, 114 Wn.2d at 646. Here, the court made the exact same constituent findings establishing that the statutory basis was not met, but, instead of entering the only legitimate ultimate finding or conclusion, the court declared it was finding LH competent. The court thinly veiled the

cognitive dissonance inherent in its ruling by adding the proviso that the State could try to remedy her testimonial incapacity before trial to avoid a similar performance.

Allowing LH to testify was an abuse of discretion that denied Robinson a fair trial. The record shows the court doubted whether LH would be able to use words at trial: “So the real question here to my mind is what happens if she gets on the stand and does similar to what she did at this hearing, and that is not answer questions having to do with the actual events that are the basis of the trial.” MRP 126. The court nevertheless said it was finding LH competent despite its specific findings to the contrary. The plain meaning of the court’s determination is that the State had failed to meet its burden under RCW 5.60.050(2) and *Allen* to show LH was competent but would receive another chance to do so at trial.

Robinson finds no precedent for such a ruling, and the State suggests none. When no authority is cited, the reviewing court may presume that counsel, “after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000).

The only fair remedy is to reverse.

## 2. THE CHILD HEARSAY WAS UNRELIABLE

LH made statements to her grandmother, Debbie; her mother, LR, CPS Investigator Jeff Copeland; Winlock police chief Terry Williams; and

a sexual assault nurse, Nancy Young. MRP 20, 21, 8, 78. A review of the entire record makes manifest that these witnesses and LH's statements to them were unreliable. The State disputes this. BR 16. But pretrial evidence establishes grounds for grave concerns about the reliability of the witnesses and their interview techniques.

Moreover, this Court cannot even meaningfully review which *Ryan*<sup>4</sup> factors the pretrial court deemed established or the relative weight attributed to them. Concl. 2.3, CP 31; Concl. 2.1, CP 41.

The Young tape shows LH's motive to lie — or at least to withhold the whole truth — about her uncle's touching her to avoid mentioning an apparent potty accident, which would get her into trouble. MRP 83; Ex. 7 at 9.<sup>5</sup>

LH's mother, LR, changed her stories between the first and second hearsay hearings. She first said she had no concerns before December 25, 2008. MRP 24, 29. Six months later at the State's second-bite hearsay hearing, LR said she had learned in October, 2008, that Robinson showed LH a "dirty movie." MRP 142.<sup>6</sup>

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<sup>4</sup> State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

<sup>5</sup> By LH's definition, she would consider this telling the truth. MRP 38, 39.

<sup>6</sup> She repeated this at trial. JRP 189, 190. But she also said LH told her about the movie for the first time on Christmas Day, 2008. JRP 182. She also first heard in January, 2010. JRP 192.

CPS investigator Copeland, based solely on an anonymous phone call, showed up to interview LH in the company of the police chief. MP 8. The chief, at least, made no bones about the fact they were there for a criminal investigation. MRP 50. This is simply not conducive to eliciting reliable statements from a four-year old. It shows that Copeland had made up his mind what he needed to elicit from LH and casts doubt on the reliability of her statements to him.

Most importantly, if the court had drawn the single legitimate conclusion supported by the competency findings, it would have excluded the hearsay for want of corroboration. The court clearly understood that there was no corroboration whatsoever. MRP 118, 128; Concl. 2.4, CP 31; Concl. 2.3, CP 41.

The impact on the verdict is obvious. Reversal is required.

3. WITHDRAWAL OF DEFENSE COUNSEL IN  
VIOLATION OF THE COURT RULES  
CONSTRUCTIVELY DENIED ROBINSON  
EFFECTIVE CONTINUING REPRESENTATION.

“Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown. CrR 3.1(2)(e).

The State argues that so long as counsel can articulate a conflict — however immaterial and avoidable — this justifies removing, on the eve of

trial, the sole defense lawyer who is familiar with the extensive pretrial proceedings, contrary to CrR 3.1. The State does not claim there was an actual conflict that warranted this extraordinary lapse of due process. BR 23-24.

And the State is wrong in asserting that Robinson did not show prejudice. BR 24. It was not that substitute counsel lacked time to prepare or did anything wrong. The denial of effective counsel was constructive. New counsel could not possibly achieve the competence of the lawyer who actually prepared the massive amount pretrial material and participated in the proceedings. This was demonstrated at trial, where not only defense counsel, but the State's lawyer and the judge also were substituted. The result was that Robinson was tried by an entire crew of judicial officers who had neither seen nor heard the essential hearings. AB 37.

This resulted in numerous rulings that would not have passed muster if even one officer of the court had been present from the outset. For example, Kari Tjersland testified to hearsay that the court had expressly and specifically excluded. JRP 89-92; Concl. 2.7, CP 42. Most prejudicial was the inability of the new trial judge to appreciate or follow through on the pretrial court's conditional competency ruling. JRP 60-61.

4. THE SUPPLEMENTAL HEARSAY  
HEARING VIOLATED DUE PROCESS.

The State does not dispute that Due Process was violated when the court allowed the State a second bite at the apple in a re-do of the child hearsay proceedings.

As discussed at page 26 of Appellant's Brief, CR 7(b) governs motions practice in criminal cases, and motions for reconsideration fall under CR 59. The motion must be in writing. CR 7(b). It must be filed within 10 days. CR 59(b). The court should hold the new hearing within 30 days and may not extend the time. CR 6(b); CR 59(b). A court may extend certain time limits for excusable neglect, but not motions under CR 59(b). CR 6(b)(2). The motion must be based on specific reasons from the list in CR 59. CR 59(b).

The only such reason that was remotely applicable here was that for newly discovered evidence. CR 59(a)(4). But there was no newly discovered evidence. Everything had been disclosed months earlier.

As with its competency ruling, the court tried to call the State's motion something other than what it was. MRP 135. But, if it was not a motion to reconsider, the rules include no other motion procedure to grant the State a "do-over" based on existing evidence.

This procedural violation prejudiced Robinson because it allowed mental health counsellor Tjiersland to imply at trial that LH told her Robinson touched her. JRP 46. This was directly contrary to the court's original findings. Findings 1.6-1.9, CP 41. And the State also was able to hint that something happened in a park in September, 2009, without LR's actually saying so.

5. THE EVIDENCE WAS INSUFFICIENT  
TO PROVE 3 COUNTS.

The State charged Robinson with two offenses in December, 2008. But LH was adamant that only one touch happened.

The only evidence for Counts 2 and 3 was inadmissible hearsay, as discussed in Issues 2-4. Even if that evidence was properly considered, the sole basis for Count 2 — a second 2008 incident — is LR's confused and inconsistent testimony as to whether the single incident happened on December 25<sup>th</sup> or 24<sup>th</sup>. MRP 20; JRP 202. This is not evidence for two counts. LH described only one incident. JRP 37-39, 40, 42. She gave Copeland and Williams the idea something also happened on Christmas 2007, but did not testify to this and no factual basis was ever produced. Moreover, the court did not inquire into her competence in 2007, and Copeland's hearsay fails *Ryan*. The court heard no testimony and made no findings about the events charged in Count 3. The only evidence for

Count 3 is confused hearsay Copeland allegedly heard a year later. MRP 16; JRP 130, 214. Count 3 should be dismissed.

Dismissal is the remedy following reversal for insufficient evidence. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

#### 6. PROSECUTORIAL MISCONDUCT

It is flagrant and ill-intentioned misconduct to tell the jury that order to acquit, they must find the State's witnesses are lying. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997).

In closing, the prosecutor said there were only two possible scenarios: Either LH and LR woke up one day and decided to hatch an evil plan to frame Robinson for absolutely no reason and “coach this tiny, tiny girl to say these horrible things for no reason,” or Robinson “did terrible, terrible, terrible things to [LH] and that she’s been telling an accurate story ever since. I would submit to that the second option is a lot more reasonable than the first one.” JRP 287.

The Court found precisely this sort of misinformation about deliberative process was reversible error in *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010). The State does not address *Venegas*. BR 25. But that case is controlling. Reversal is required.

7. THE OFFENDER SCORE INCLUDED  
UNPROVEN FOREIGN CONVICTIONS.

The State disputes Robinson's challenge to the foundation for the sentencing exhibits. BR at 29. The exhibits speak for themselves. Sentencing Exhibits 1-23. Ex. 1 and 2 are certified by Lewis County. Exhibits 3 and 4 are accompanied by an affidavit by a records custodian. (No. 4 was not the custodian at the relevant time.) The rest bear no recognizable certification, and, as discussed in Appellant's brief, many are signed by a court clerk.

8. CUMULATIVE ERROR REQUIRES REVERSAL.

This prosecution was set in motion by insinuations from a person whose death prevented any inquiry into her potential bias or the nature of her questioning of or miscommunication with a very young child. This was passed on to a person who was profoundly deaf, and cemented by investigators whose methods were more likely to elicit evidence of a crime than to discover what really happened. The pretrial judge entered an equivocal and unfounded competency ruling that not only allowed unreliable hearsay to be admitted without corroboration and prevented the defense from exposing the weaknesses of the State's evidence at trial but also brought into play decisions insulating the evidence from challenge on appeal. See AB at 20-23. Allowing the State to reopen the hearsay

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hearing in violation of the rules brought in more hearsay that was even less reliable. Doing the trial with a new judge, new prosecutor and new defense counsel caused the pre-trial testimony effectively to disappear. New counsel was in the dark regarding crucial inconsistencies. The judge, also, was not able fairly to carry out the pretrial judge's conditional competency ruling. Finally, Robinson was sentenced based on an offender score derived from unproven foreign convictions.

IV. CONCLUSION

For the foregoing reasons, Mr. Robinson asks the Court to reverse his convictions and dismiss the prosecution for insufficient evidence. In the alternative, he seeks remand for a new trial, or, at minimum, resentencing.

Respectfully submitted this 15<sup>th</sup> day of April, 2011.

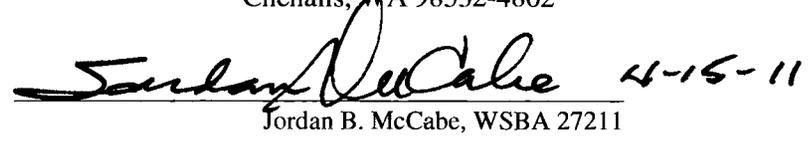


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