

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION TWO

JIMMY WOODBEE PIERCE,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent.

NO. 49596-1-II

APPELLANT'S REPLY BRIEF TO
STATE'S RESPONSE

Appellant provides the following limited additional argument in reply to the State's response.

A. LAW AND ARGUMENT

1. PP AND JF WERE NOT COMPETENT TO TESTIFY AT TRIAL.

Although a trial court determines competency pretrial, this Court examines the entire record to review that determination. *State v. Avila*, 78 Wn.App. 731, 737, (1995). The State argues that despite the defendant's alleged failure to challenge competency, apparently suggesting that the State, "nevertheless introduced comprehensive evidence supporting competency." Respondent's brief, page 16. Of course, the proponent of evidence in a child sex case where the State intends to offer child hearsay pursuant to RCW 9.94A.120, the State

1 almost without exception conducts a competency hearing as it is relevant to analysis of the
2 *Ryan*¹ factors.

3 The *Allen*² factors require the proponent of the child’s testimony to prove that the child
4 (1) understands the obligation to speak the truth on the witness stand; (2) had the mental
5 capacity at the time of the occurrence to receive an accurate impression of the matter; (3) has a
6 memory sufficient to retain an independent recollection of the matter; (4) has the capacity to
7 express in words her memory of the occurrence; and (5) has the capacity to understand simple
8 questions about the occurrence. *State v. Allen*, 70 Wn.2d at 694. A child’s age is not
9 determinative. *Allen, supra*.

10 PP attended Little Bear daycare during her school years from first grade through third
11 grade. RP 32. Yet she could not accurately recall the names of her teachers during these years.
12 RP 8-10, 31. Thus, PP had no demonstrated accurate memory of contemporaneous events from
13 the time of the alleged abuse. In addition, PP did not demonstrate that she had the mental
14 capacity at the time of the occurrence to receive an accurate impression of the matter and also
15 that she had a memory sufficient to retain an independent recollection of the matter, both
16 required under *Allen, supra*. PP also initially believed and continued to do so for a very long
17 period of time that what had happened was “a dream”; however, she had decided by time of
18 trial that it was real. RP 635.

19
20 Similarly, JF, who was nine years old at the time of trial and about to start fifth grade,
21 testified that the last incident occurred just prior to the start of third grade. RP 297-98, 452. She
22 could not recall the names of her teachers from kindergarten, first or second grade, and the
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25 ¹ *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984)

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

1 years when the alleged abuse occurred nor could she recall which school she attended. RP 298-
2 300. The last incident occurred when she was seven years old at the end of second grade,
3 approximately two years before she testified. RP 452. JF had no demonstrated accurate
4 memory of contemporaneous events from the time of the alleged abuse. JF so lacked memory
5 of what had happened to her that at the competency hearing the prosecutor assured her she
6 could watch her forensic interview before she testified “to refresh her memory.” RP 325. Thus,
7 JF did not demonstrate that she had the mental capacity at the time of the occurrence to receive
8 an accurate impression of the matter and also that she had a memory sufficient to retain an
9 independent recollection of the matter, both required under *Allen, supra*. Further, JF did not
10 understand the obligation to speak the truth on the witness stand, repeatedly stating her
11 willingness to “guess” at the right answer. RP 320.

12
13 This court should reject the State’s argument that the children’s inability to recall their
14 teachers’ name is not demonstrative of lack of competence because “few adults could rattle off
15 the names of their teachers in each grade.”³ Of course, significance of the children’s inability
16 to provide this information is that they were in these grades during the very time that they were
17 allegedly being sexually abused by defendant. The State had to establish that they had the
18 mental capacity at the time of the occurrence to receive an accurate impression of the matter
19 and that they had memory sufficient to retain an independent recollection of the matter. *Allen,*
20 *supra*. Attending primary school is a major activity in the lives of young children. It is more
21 than fair to ask young children to name their teachers during years when the children are
22 claiming that significant events occurred. Such questions ask for facts that should have been
23 reinforced by months of classroom attendance with a single teacher, facts that result from
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25 ³ Respondent’s brief, page 17.
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1 relatively “fresh” or “new” experiences to young children who being taught reading, math,
2 science, etc., for the first time by these very teachers, and who are making these memories
3 contemporaneous with the events about which they are testifying.

4 Appellant’s other arguments from the opening brief provide further authority mandating
5 reversal of the trial court’s finding that PP and JF were competent to testify.

6 2. The trial court erred when it admitted the child hearsay as argued in the opening
7 brief.

8 Respondent argues in this section that by failing to cross-examine some State’s
9 witnesses, defense counsel did not “directly challenge” the accuracy of their testimony⁴. Of
10 course, defense counsel does not have to cross-examine witnesses to challenge their accuracy
11 or reliability and the State can cite no case law in support of this proposition. Whether or not to
12 cross-examine a witness is a matter of trial tactics. Sometimes a witness’s direct examination
13 has been sufficient for argument. Sometimes the comparison of various witnesses’ testimony
14 makes strong argument. Trial tactics are counsel’s prerogative and hardly constitute waiver.
15 Thus the State’s argument fails.

16 Appellant relies on this court’s detailed review of the record as set forth in his statement
17 of the case to establish that AP relentlessly questioned PP such that even she agreed that her
18 questioning may have been “suggestible”, that she failed to tell law enforcement that PP had
19 denied that anything happened with defendant, that PP did not tell a psychologist that anything
20 had happened with defendant, that she had been instructed by CPS to stop questioning her
21 daughter but she did not and that she failed to tell CPS that PP denied that anyone had touched
22 her. RP 705, 725, 730, 731,741,759 768, 770.

25 ⁴ *E.g., respondent’s brief, pg. 25, 26,28,*
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1 Further, PP was wildly inconsistent in her testimony. Some inconsistency in details,
2 perhaps dates, always to be expected. However, inconsistencies in whether events were real or
3 dreams and admissions of irreconcilable differences in statements given to various adults who
4 were questioning her about the allegations in significant.

5 The trial court abused its discretion when it admitted child hearsay from JF because, as
6 argued in the opening brief, the *Ryan* factors were not satisfied. At that time that JF made the
7 statements [before the competency hearing], she did not understand that she needed to be
8 truthful. Thus, when people were questioning her, she likely indulged her desire to “guess” in
9 hopes of getting the right answer. This is especially significant regarding her disclosure to her
10 aunt, who had been instructed not to discuss the of sexual touching with her. RP 921, 1084.
11 However, the aunt, who intensely disliked defendant, could not restraint herself and told JF’s
12 mother that “had to” ask JF about the touching RP 922. DP asked JF the next day when she
13 was alone with the young girls in her car. RP 922. JF stated that that defendant “tickled her on
14 her privates.” RP 924. JF’s words were the used the same words PP had used. RP 963. 964,
15 968.
16

17 DP later gave this information to JF’s mother, AP, and PP[father] RP 926. DP
18 previously broke off contact with her sister for eight months after an incident at birthday party
19 at the Pierce home in September or October 2012 when she reportedly heard Liz and defendant
20 scream and use the “f-word” at JF. RP 932-933, 935, 966. That was sometime in 2012. RP 933-
21 934.
22

23 Of course, DP had never seen appellant sexually touch a child. RP 965-966, 973.
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1 Finally, the State has failed to respond to appellant’s argument that the admission of the
2 so-called forensic interview video violated the child hearsay statute, RCW 9A.44.120. It did so
3 because the video contained material that exceeded the content admissible under the statute,
4 which is defined as “a statement made by a child when under the age of ten describing any act
5 of sexual contact performed with or on the child by another, describing any attempted act of
6 sexual contact with or on the child by another, or describing any act of physical abuse of the
7 child by another that results in substantial bodily harm as defined by [RCW 9A.04.110](#), not
8 otherwise admissible by statute or court rule, is admissible in evidence in dependency
9 proceedings under Title 13 RCW and criminal proceedings, including juvenile offense
10 adjudications, in the courts of the state of Washington. . .” provided certain criteria are
11 satisfied.

12 The forensic interviews contain substantial information completely unrelated to “acts of
13 sexual contact performed with or on the child by another”, as alleged in this case. The
14 interviews contained information about family, pets, school, birthdays, and subjects that should
15 not have been put before the factfinder. At a minimum the irrelevant content of the interview is
16 put before the factfinder to maximize the jury’s exposure to the child and to generate sympathy
17 for the alleged victim. The prosecutor has a duty to ensure a verdict free from prejudice and
18 based on reason. Putting on evidence with no probative purpose under the guise of RCW
19 9A.44.120 is an abuse of the statute.
20

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25 **B** CONCLUSION
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1 For the foregoing reasons argued in this reply brief and in his opening brief, Appellant
2 respectfully ask this court to grant the relief requested.

3
4 Respectfully submitted this 8th day of February, 2018.

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10
11 CERTIFICATE OF SERVICE:

12 I declare under penalty of perjury under the laws
13 Of the State of Washington that the following is a true
and correct: That on this date, I delivered via the filing portal
a copy of this Document to: Pierce County
Prosecutor's Office, Room W554, 516 Third Avenue
Seattle, WA 98104

14 02/8/18 /s/William Dummitt
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