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NO. 52001-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

KYLA MARIE TILL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The State presented sufficient evidence for the trial court to find the Appellant guilty of Assault of a Child in the Second Degree.**
- 2. The trial court did not abuse its discretion by admitting child hearsay statements pursuant to RCW 9A.44.120.**
- 3. The trial court did not abuse its discretion by allowing the child victim to testify when the Appellant did not prove incompetency.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

On August 14, 2017, at approximately 1:30 PM Officers Cody Blodgett and Chad Pearsall of the Aberdeen Police Department were dispatched to Wunderland Daycare Center at 1901 Simpson Avenue in Aberdeen for a welfare check. VRP 30-31, 36. A daycare employee had requested contact in reference to suspicious bruising on S.W.T. VRP 22-23, 31, 36. S.W.T. was six years old on this date, and is the Appellant's biological son (DOB 04/17/2011). VRP 8-9, 70.

Upon arrival, Officer Blodgett spoke with the reporting party, Melissa Stevenson. VRP 31. Stevenson had daily contact with S.W.T. from March through August of 2017. VRP 21-22. When S.W.T. was dropped off on August 14, 2017, Stevenson notice that there were markings on his face and that they had been covered up with makeup. VRP 22. Stevenson took S.W.T. into her office and, in the brighter

light, saw that the marking were a lot deeper than she originally believed. VRP 22.

Stevenson took photographs of S.W.T.'s face with the makeup, and then gently removed the makeup. After a few minutes, Stevenson took an additional photograph documenting the bruising covering the right side of S.W.T.'s face. VRP 22-23. Stevenson described what she observed as "...welting, the bruising was very deep, dark, especially where it was welted at." VRP 23. The photographs were admitted as Exhibit 5. VRP 32-33.

When Stevenson asked S.W.T. what happened he said, "Now don't go getting mom in trouble, she said dad did hit me real strong!" VRP 23. Stevenson found that odd, because S.W.T. does not live with his father and Stevenson was unaware that S.W.T. even knew his father. VRP 24.

Stevenson testified that before S.W.T. and his sisters were dropped off on August 14, she received a phone call from the Defendant. The Defendant said that wanted to give the daycare a warning as S.W.T. "was coming in with a rather large bruise" as a result of a vehicle door hitting him at Safeway the night before. VRP 24-25.

Stevenson testified that she could still see bruising on S.W.T.'s face more than a month later when S.W.T. returned to daycare. VRP 29. When she saw him again, Stevenson observed S.W.T. "still had bruising...where you can see the dark purple mark on his forehead that was still bruised, and it was a yellow, faded bruise a month and a half later." VRP 29.

Officer Blodgett had an opportunity to observe S.W.T. at the daycare over the course of about an hour. VRP 32. He testified that the injuries depicted in Exhibit 5 were consistent with what he saw in person on August 14, 2017. VRP 32. In addition to the bruising, Officer Blodgett also saw that S.W.T. "had some redness around his neck as well." VRP 35.

A decision was made to take the Appellant's children into protective custody, and Officer Blodgett contacted her by phone. VRP 33. The Appellant was asked about the bruising to S.W.T.'s face and "[s]he said that she had already explained to the staff what happened" and gave the story about S.W.T. being hit with a car door. VRP 34.

As Officer Blodgett spoke with Stevenson, Officer Pearsall spoke with S.W.T. in an effort to get him to open up. VRP 37. At

first, S.W.T. said his dad threw him against the floor. VRP 37.

However, Officer Pearsall knew that S.W.T. did not live with his father, and when pressed, S.W.T. could only identify his dad as

“Kyle.” VRP 37. S.W.T. “kept talking about a toy he would get.”

VRP 37. Officer Pearsall asked S.W.T. if he would get a toy if he lied about what happened and S.W.T. “kind of said yes¹.” VRP 37-38.

S.W.T. told Officer Pearsall that he was grabbed and thrown into the air. VRP 38. When asked if his mom grabbed him by the neck, S.W.T. stated his mom had grabbed him and then hit him a few times. VRP 38.

Officer Pearsall observed redness on the right side of S.W.T.’s face and bruising towards the top of his head. VRP 38. He also saw some redness towards S.W.T.’s neck. VRP 38. Officer Pearsall also confirmed that the photographs admitted as Exhibit 5 were accurate depictions. VRP 39.

CPS worker Hollee Haney also observed S.W.T. on August 14, 2017. VRP 53. She observed that S.W.T. had a “really dark red linear bruise on the temple” all the way down to his chin. She also

¹ The language used “kind of” should not be read as an equivocal statement by S.W.T. Rather, when reading the transcript as a whole, it appears to be a quirk of Officer Pearsall’s speech pattern.

observed petechial bruising along his cheeks that went “all the way back to his hairline and behind his ears”, a linear bruise by his mouth, and linear petechial bruising across his collarbones and the back of his neck. VRP 53, 55.

On August 15, 2017, Officer Pearsall made contact with the Appellant and took a statement. VRP 39-40. This written statement was admitted as Exhibit 2. VRP 40-41. In this statement, the Appellant admitted that she became frustrated when S.W.T. would not sit still for a haircut, and she “slapped him with my right opened hand. I slapped him 3 or 4 times.” Exhibit 2; VRP 41-42. When asked about the bruising around S.W.T.’s neck, she denied any knowledge. Exhibit 2.

The Appellant said she made up a “random excuse” and covered S.W.T.’s bruises with makeup in an attempt to avoid having her children removed from her care. Exhibit 2. The Appellant told S.W.T. “to tell daycare that he fell from my car door at Safeway and was hit by another door.” Exhibit 2; VRP 42. The Appellant also instructed S.W.T. to lie about what happened, otherwise he would “go bye bye.” Exhibit 2.

Eventually the Appellant admitted that she held S.W.T.’s chin,

squeezed hard, and left a bruise. Exhibit 2. The Appellant then put S.W.T.'s head in the crease of her elbow "in a chokehold fashion" to keep him from moving and she was "not sure how hard I squeezed him." Exhibit 2; VRP 42. The Appellant stated that her actions were from frustration, and that S.W.T. was screaming and crying the entire time. Exhibit 2; VRP 42.

The Defendant noticed the redness to S.W.T.'s head and began crying and apologizing. Exhibit 2. She went outside to smoke and text her mother about what she had done. The Defendant was "freaking out" because she had hurt S.W.T. Exhibit 2.

On September 8, 2017, S.W.T. was interviewed by Mike Clark of Connections (formerly the Children's Advocacy Center of Grays Harbor). VRP 48. The video of this interview was admitted into evidence as Exhibit 4. VRP 48-49. Additionally, a transcript, for use as a listening aid, was marked for identification as number 6. Clark could not recall any observing any bruising on S.W.T. at the time of the interview. VRP 50.

During this interview, S.W.T. told Clark that his "mom's in trouble already 'cause she been mean to me and my sisters." S.W.T. also said that the Defendant "hit me right on my lips" and hit him on

his cheek. Later, he disclosed that the Defendant choked him. When S.W.T. told the Defendant to stop, she did not stop. Exhibit 5.

Dr. Joyce Gilbert of the Sexual Assault Clinic and Child Maltreatment Center in Olympia, WA reviewed S.W.T.'s medical records and the reports and photographs in this case. VRP 60-61.

Dr. Gilbert opined that S.W.T.'s facial injuries could not have occurred from being struck in the face with a vehicle door because the bruising involved too many planes of the face. VRP 61-62. Dr. Gilbert classified the bruising to S.W.T. as "serious" based on the amount of the face and the body that were involved. VRP 64.

Dr. Gilbert noted that S.W.T. has a serious hereditary neurological condition (metopic craniosynostosis) that has necessitated him having brain surgery in the past. VRP 67. This condition and history of brain surgery makes it more likely that an injury to S.W.T.'s neck/head injury will be serious. VRP 67-68.

ARGUMENT

- 1. Did the State present sufficient evidence for the trial court to find the Appellant guilty of Assault of a Child in the Second Degree?**

Yes. The serious bruising inflicted on the child victim constitutes “substantial bodily harm” and the Appellant strangled the child victim.

Standard of review.

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068, 1074 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980).) “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wash.2d 899, 906–07, 567 P.2d 1136 (1977).)

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wash.2d 385, 622 P.2d 1240 (1980).) Appellate courts “defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence.” *State v. Homan*, 181 Wn. 2d 102, 106, 330 P.3d 182, 185 (2014) (citing *State v. Jackson*, 129 Wash.App. 95, 109, 117 P.3d 1182 (2005)).

Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wash.App. 179, 193, 114 P.3d 699 (2005); *State v. Homan*, 181 Wash. 2d at 105–06.

In this case, the State had to prove the following elements to convict the Appellant of Assault of a Child in the Second Degree:

- (1) That on or about August 13, 2017, the defendant
 - (a) intentionally assaulted S.W.T. and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted S.W.T. by strangulation;
- (2) That the defendant was eighteen years of age or older and S.W.T. was under the age of thirteen; and
- (3) That this act occurred in the State of Washington.

CP 27-28; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.37 (4th Ed).

The Appellant only challenges the trial court’s finding of (1)(a) and (b), “substantial bodily harm” and “strangulation.”

Substantial Bodily Harm

“Substantial bodily harm” means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part. RCW 9A.04.110(4)(b); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.03.01 (4th Ed).

In the case at bar, the State relied on the significant bruising, redness, and other markings that the Appellant’s assault left on her child. The Appellant erroneously argues that the courts “...have historically required harm greater than what was presented to the trial court in Ms. Till’s case.” Appellant’s Brief at 10.

In *State v. McKague*, the victim was punched in the head several times and pushed to the ground, causing him to strike his head on the pavement. *State v. McKague*, 172 Wash. 2d 802, 804, 262 P.3d 1225, 1226 (2011). This assault left the victim dizzy and unable to stand for a period of time. His face was extremely puffy and he appeared distracted and stunned. *State v. McKague*, 172 Wash. at 804.

Later, the victim reported a headache and severe neck and shoulder pain to his doctor. Ultimately, the victim was diagnosed with a

concussion, a scalp contusion and lacerations, head and neck pain, lacerations to his arm, and a possible fracture of facial bones. *Id.*

McKague appealed his conviction arguing that there was insufficient evidence to prove “substantial bodily harm.” *Id.* at 804-805. The Court held “that the term “substantial,” as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.” *Id.* at 806. Further, the Court did not limit the meaning of “substantial” to any particular dictionary definition, but did approve of the definition cited by the dissent: “considerable in amount, value, or worth.” *Id.*

The Appellant argues that bruising is not “substantial bodily harm”. Appellant’s Brief at 10-11. However, the Appellant overlooks two cases that are more factually similar to the case at bar, and that are cited with approval by the *McKague* court. *Id.*

The first of these is *State v. Ashcraft*. Ashcraft was the custodian of an approximately five-year-old child, J. In October 1989, a babysitter called the police and reported bruise marks on J. The police officers found bruises and decided to take J. to Children's Hospital for further

investigation. *State v. Ashcraft*, 71 Wash. App. 444, 448, 859 P.2d 60, 63 (1993).

During a medical examination, two doctors noted bruises on J.'s body, some of which were over 3 days old. The doctors also noted bite marks consistent with the size of an adult mouth. At trial, one of the doctors opined that the location of the bruises and their appearance were not consistent with accidental trauma and could only have resulted from being hit with an object. The doctor also identified certain bruise marks, which were consistent with being hit by a shoe that had a rigid sole. *State v. Ashcraft*, 71 Wash. App. at 448–49.

The doctor further testified that some of the bruises were consistent with being hit with a cord or rope and others which were consistent with being hit with a belt or ruler. When J. was asked if anyone had hurt her, she replied, “Yes, Mommy did.” J. also stated that “My mama did it.” Both doctors concluded that J.'s injuries had been caused by child abuse. *Id.*

Based on these facts, the Ashcraft was convicted of two counts of Assault in the Second Degree and one count of simple assault. *Id.* at 450. Ashcraft appealed her conviction, arguing that there was insufficient evidence to support a finding of “substantial bodily harm.” *Id.* at 455.

The *Ashcraft* court held that “[t]he presence of the bruise marks indicates temporary but substantial disfigurement.” *Id.* at 455. The court found this evidence sufficient to support a conviction for assault in the second degree. *Id.* at 456.

In a later case, *State v. Hovig*, this Court found that “Division One of our court held in *State v. Ashcraft*..., that serious bruising can constitute “substantial” bodily harm when the State produces sufficient evidence to persuade the trier of fact that the bruising rises to the level of “substantial disfigurement.”” *State v. Hovig*, 149 Wash. App. 1, 12, 202 P.3d 318, 323 (2009).

Jessie Hovig was caring for his four-month-old son, M.H., when he intentionally bit the baby's face, leaving a large, mouth-shaped bruise covering MH's right cheek. Hovig concealed the baby's bruise with makeup so that the baby's mother, Hope Forbes, would not yell at him when she returned. *State v. Hovig*, 149 Wash. App. 1, 5, 202 P.3d 318, 320 (2009).

When Forbes returned home, with her sister and mother, they put M.H. in the car and intended to take him to the sister's home. Once in the car, Forbes's sister wiped-off the makeup, revealing a bright red, mouth-

shaped bite mark covering M.H.'s right cheek. *State v. Hovig*, 149 Wash. App. at 5.

The women called the police and the responding officer observed the bruising and discoloration on M.H.'s face. The officer's photos depict a mouth-shaped injury that begins at the base of M.H.'s jawbone and circles up to the top of his right cheekbone. Individual red and violet teeth-marks line the upper and lower circumference of the injury. MH's entire right cheek is colored with yellow-brown bruising. The officer noted that this large left-cheek bruise appeared to darken in color as he conducted his investigation. *Id.* at 5-6.

The next day, Doctor W.S. Hutton examined M.H., and described M.H.'s injury as a teeth-mark-bruise from an adult bite. Although the bite had not broken the skin, Dr. Hutton concluded that the injury likely caused the infant pain and discomfort, and that the bruising would persist for 7 to 14 days. *Id.*

Hovig was charged with Assault of a Child in the Second Degree under RCW 9A.36.130(a) and convicted as charged at a bench trial. *Id.* at 6. Hovig appealed, contending that the State failed to provide sufficient evidence to prove beyond a reasonable doubt that he was guilty of second-degree assault of a child. *Id.* at 7.

Relying on *Ashcraft*, the Court held that that “serious bruising can rise to the level of “substantial bodily injury” if the State produces sufficient evidence of temporary but substantial disfigurement, as required under RCW 9A.36.021 and RCW 9A.04.110(4)(b).” *Id.* at 13. In *Hovig*, as in *Ashcraft*, the State presented sufficient evidence of “substantial bodily harm.”

In *Hovig*, the Court found that the State’s “persuasive photographic evidence and medical testimony...fit squarely within the statutory definition of “substantial bodily harm...” and that Hovig's actions “...caused MH to suffer from substantial, although temporary, disfigurement.” *Id.*

In the case at bar, multiple witnesses observed extensive “deep” and “dark” bruising on the child victim’s head and face. They also observed redness on his chin and neck. The doctor testified that the bruising was “serious” based on the extensive nature of the bruising. Also, Melissa Stevenson observed the remains of this bruising more than a month after the assault.

Based on the evidence presented, the trial court ruled as follows:

I have seen the photographs of Scott that were taken immediately following this incident on the day, at least Ms.

Stevenson's photographs were taken the day after the incident. I think there were some additional photographs taken by CPS, either that day or the next day, and they depict injuries that are clearly substantial injuries. This was not a situation where a parent was attempting to control her child and simply caused unforeseeable injury. This was an assault. This was a beating.

The Appellant did not designate the photographs used at trial as an exhibit to be transferred to the Court of Appeals. The State believes that these photographs speak for themselves and constitute the “substantial bodily injury” defined in *Ashcraft* and *Hovig*.

Strangulation

The trial court also found that the Appellant committed Assault of a Child in the Second Degree under the strangulation prong. As used in the case at bar, “strangulation” means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.53 (4th Ed). There is no specific intent to obstruct breathing required.

In this case, S.W.T. told Mike Clark that his mother “choked” him and demonstrated this by pulling his shirt up around his neck. Exhibit 5; Exhibit 6 at page 12. The Appellant admitted that, in an attempt to cut his hair, she held S.W.T. “in a chokehold fashion” to keep him from moving and she was “not sure how hard I squeezed him.” Exhibit 2; VRP 42.

S.W.T. testified that what his mother did during the haircut “hurt so bad.”
VRP 18. The officers later observed redness to the victim’s neck. The trial court’s finding regarding strangulation, when taking all evidence in a light most favorable to the State, is supported by substantial evidence.

2. Did the trial court abuse its discretion when it admitted child hearsay statements into evidence and the acts described in those statements did not result in substantial bodily harm?

No. As detailed above, the victim suffered “substantial bodily harm” and his statements were properly admitted pursuant to RCW 9A.44.120.

The State concurs that admission of child hearsay is subject to review under an abuse of discretion standard. *State v. Woods*, 154 Wash.2d 613, 623, 114 P.3d 1174 (2005) (quoting *State v. Jackson*, 42 Wash.App. 393, 396, 711 P.2d 1086 (1985)). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

RCW 9A.44.120 allows admission of 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. The statute require certain findings that were made by the trial court in this case, and the child testified at trial. CP 38-45.

The Appellant challenges admission of these statements only under the theory that there was no “substantial bodily harm.” Appellant’s Brief at 14-16. However, as outlined above, the injuries suffered by S.W.T. were “substantial bodily harm” and his hearsay statements were properly admitted pursuant to RCW 9A.44.120.

3. Did the trial court abuse its discretion by allowing the child victim to testify?

No. The Appellant did not prove incompetency.

RCW 5.60 defines who may testify in court proceedings. RCW 5.60.020 states in pertinent part that “[e]very person of sound mind and discretion, except as hereinafter provided, may be a witness in any action or proceeding.”

RCW 5.60.050 provides:

The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

Evidence Rule 601 is the General Rule of Competency and provides that [e]very person is competent to be a witness except as otherwise provided by statute or by court rule.

State v. Allen, 70 Wn. 2d 690-692, 424, P.2d 1021 (1967) sets forth the test on competency of a child witness, as follows,:

an understanding of the obligation to speak the truth on the witness stand; the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it: a memory sufficient to retain an independent recollection of the occurrence; the capacity to express in words his memory of the occurrence; and the capacity to understand simple questions about it.

The *Allen* test has been upheld. *State v. Swan*, 114 Wn. 2d 613, 790 P.2d 610 (1990); *State v. Gribble*, 60 Wn. App. 374; *State v. Bailey*, 52 Wn.App. 42, 757 P.2d 541 (1988); *State v. Tuffree*, 35 Wn. App. 243, 666 P.2d 912, *rev. den.*, 100 Wn. 2d 1015 (1983); *State v. S.J.W.*, 170 Wn.2d 92; 239 P.3d 568 (2010).

Previously it was presumed that a child witness under ten (10) years of age was incompetent to testify. The statute and rule have removed this barrier. They now address whether the witness is capable of receiving just impressions about the facts they are to be examined about or whether they are not capable of relating them truly. This requirement fits into the *Allen* test as set out above.

Trial judges have the primary determination of competency because they can observe the witness' manner, which is not reflected in the written record. *Allen* at 692; *State v. Riley*, 61 Wn. 2d. 457, 378 P.2d 700 (1963). The United States Supreme Court has recognized the importance of the trial court's observations in making the determination of competency. *Wheeler v. United States*, 159 U.S. 523, 40 L. Ed. 244, 16 S.Ct. 93 (1985). The Court stated that the decision of competency rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. *Id.* at 524-525. The Court found that to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice. *Wheeler v. United States*, 159 U.S. 523, 526 (1985).

The court's decision on competency will be considered on the standard of manifest abuse of discretion. By a manifest abuse of discretion the courts mean that no reasonable person would take the view adopted by the trial court. *State v. Huelett*, 92 Wn. 2d 967, 603 P.2d 1258

(1979). The competency hearing should be held outside the presence of the jury. *State v. Clark*, 53 Wn. App. 120, 765 P.2d 916 (1988) *superseded on other grounds* by *State v. C.M.B.*, 130 Wn. App. 841 (Div. I., 2005). Pursuant to ER 104(a) and ER 1101 (c)(3), the rules of evidence do not apply.

The competency determination may be made by asking the child general questions, rather than questions regarding the specific offense. *State v. Prszybylski*, 48 Wn. App. 661, 739 P.2d 1203 (1987). It is better to test against objective facts known to the court, rather than disputed facts and events in the case itself. *Id.* at 665. As long as the witness demonstrates the ability to accurately relate events that occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well. *State v. Avila*, 78 Wn.App. 731, 734, 736-77, 899 P.2d 11 (1995). In both *Avila* and *Prszybylski*, the courts emphasized that the test was the child's ability to meet the test of *Allen*. It was sufficient that the child understood the obligation to tell the truth and demonstrated the ability to testify to events contemporaneous with the offense.

The fact that there may be inconsistencies and contradictions in a child's testimony goes to the weight of a child's testimony and not to its

admissibility. The child may still be found competent. *State v. Stange*, 53 Wn.App. 638, 769 P.2d 873 (1989), *State v. McKinney*, 50 Wn.App. 56, 747 P.2d 1113 (1987). The child's reluctance to testify regarding the assault at the competency hearing does not undermine the finding of competency. *State v. Prszybylski*, 48 Wn.App.661, 739 P.2d 1203 (1987), *State v. Carlson*, 61 Wn.App. 865 (1991), *rev. denied*, 120 W. 2d. 1022 (1993).

If the child witness is competent for direct examination at trial, he will remain so even if he cannot answer questions under cross-examination. *State v. Guerin*, 63 Wn.App. 117, 122-123 (1991). In *Guerin*, the child victim testified to her daddy touching her inside her underwear and being told she would get a spanking if she told. *Id.* The court held that those statements established her independent recollection of the crime and her inability to answer the defense's questions could be attributed to other factors. *Id.*

The child in this case is presumed competent. The Appellant now claims that the child is not competent to testify. There is no evidence to support this assertion. The child demonstrated an understanding of his obligation to tell the truth when he was asked by the interviewer, Mike Clark, if he promised to tell the truth and the child agreed. This was

followed up by the following:

Interviewer: If I said this book is colored white, am I telling the truth?

Child: No.

Interviewer: No. If I'm not telling the truth what am I doing?

Child: Lying.

Exhibits 5 and 6. The trial court also asked S.W.T. if he would promise to tell the truth and S.W.T. answered "yes." VRP 7-8.

The Appellant contends that the child's "recollection of the incident changed" and that he was questioned with "various leading question interviews." Appellant's Brief at 20. However, this does not go to the child's competency, but perhaps to his credibility. The trial court was best situated to determine what weight to give to the child's statements.

In fact, the child was not asked leading questions, and he spontaneously stated that "...my mom's in trouble already 'cause she been mean to me and my sisters." This exchange continued:

Interviewer: What does "mean" to you mean? I don't understand what mean to you—

Child: When she mean to me?

Interviewer: Yeah.

Child: Oh, she hit me right on my lips.

The description of the physical contact originated with the child and was not suggested by the interviewer. Exhibits 5 and 6.

The trial court was able to observe the child's demeanor firsthand and ruled:

Well, there is certainly a difference, both in reality, and in the law, between having a child having an imagination and the child lacking the ability to be truthful, and it is certainly clear that [S.W.T.] understands the difference between the truth and a lie, and he can recognize the difference between a truth and a lie, and has done so, and the fact that in his imagination that he believes the tooth fairy exists, or that monsters exist, I don't think is at all out of character for someone his age, and I don't believe that it mitigates against the finding of competency. I am finding him to be competent to testify.

The Appellant has not shown a manifest abuse of discretion that would justify disturbing the trial court's ruling on competency.

CONCLUSION

Based on the foregoing, the verdict of the trial court should be affirmed and the appeal denied.

DATED this _____ day of November, 2018.

Respectfully Submitted,



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