FILED
APR 14 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 28987-7-III

STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAVIER R. LOBOS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
Prosecuting Attorney

by: Frank W. Jenny, #11591
Deputy Prosecuting Attorney

1016 North Fourth Avenue
Pasco, WA 99301
Phone: (509) 545-3543

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COUNTERSTATEMENT OF THE CASE

Javier Lobos appeals his juvenile adjudication for child molestation in the first degree. His statement of the case is substantially correct as far as it goes. However, the State would make the following additions, corrections and amplifications. Except as indicated, report of proceedings (RP) citations relate to

the transcript of the adjudicatory hearing (bench trial). The RP citations for pre-trial proceedings will be distinguished by including the date of the hearing. The parties have also submitted an agreed partial report of proceedings, consisting of a transcript of a videotaped interview with the victim conducted by a trained child interviewer, which was played for the court during both pre-trial proceedings and the adjudicatory hearing. Page referenced to this document will be identified as "ARP" (agreed report of proceedings).

Court Commissioner Jerri G. Potts conducted pre-trial hearings to address competency of the child victim witness and admissibility of child hearsay statements pursuant to RCW 9A.44.120. Terri Taylor testified she is the mother of the complaining witness, A.T. (10/23/09 RP 6). Her daughter was seven years old at the time. Id. Under a parenting plan, A.T.'s father has visitation with her every other weekend. (10/23/09 RP 7). In April, 2009, A.T. arrived back on Sunday after a weekend visiting with her father. Id. On Wednesday, A.T. made her first disclosures regarding Javier Lobos. Id.

Ms. Taylor was getting A.T. undressed to take a bath. Id. A.T. asked her mother to shut the door because she didn't want

her brother to hear her. Id. She told her mother that she thinks she has a boyfriend. Id. Ms. Taylor told A.T. she is a little girl and too young to have a boyfriend. Id. Ms. Taylor then asked who she thinks is her boyfriend? Id. A.T. replied, "Javie". Id. Ms. Taylor asked, who is Javie? Id. A.T. said he is "Rod's son". Id. Ms. Taylor asked A.T. what Javie did to make her think he is her boyfriend, and A.T. replied that he picked her up and carried her into his bed. (10/23/09 RP 8). As Ms. Taylor was getting nervous and upset, she dropped the matter intending to discuss it further after her work and A.T.'s school. Id. This conversation occurred between 7:00 and 7:30 a.m. Id. Ms. Taylor described A.T.'s statements as completely spontaneous and "out of the blue." Id.

The next statements were made that evening after dinner. Id. Ms. Taylor called A.T. to come sit with her on the couch. Id. She reminded A.T. of what she had said that morning and asked if anything else happened after he put her into his bed? (10/23/09 RP 9). A.T. told her mother that "he kissed her, put his tongue in her mouth, touched her butt . . . lifted up her - - put his hands under her shirt and touched her boobies, [and] made her get on top of him[.]" Id. Ms. Taylor was so sickened and upset by what she had heard that she couldn't ask any more questions. Id. Ms.

Taylor was asked, "Do you know what day she was referring to or when it would have happened?" (10/23/09 RP 10). She answered, "Saturday night. The weekend prior." Id. The deputy prosecutor asked for clarification, "So the Saturday prior to that Wednesday?" to which Ms. Taylor replied, "Yes." Id. No objection was made to this testimony.

The following day, Ms. Taylor reported the matter to the authorities. Id. She took A.T. to Kids Haven to be interviewed by a trained specialist. Id.

Thereafter, A.T. spontaneously volunteered additional details regarding Javier Lobos: On one occasion, he was interrupted when the parents came home; he hurriedly got off the bed with her and got into another bed, and told her not to tell anybody what they did. Id. When A.T. was kissing her mother, she put her tongue in her mother's mouth and said Javier Lobos had done this to her; she had never done anything like that before. (10/23/09 RP 10-11). These statements were made two to three days after the interview at Kids Haven. (10/23/09 RP 11).

A.T. had previously always said she enjoyed going to the Lobos home, and had stated she jumped on the trampoline and played games there. (10/23/09 RP 14). A.T. understands the

difference between telling the truth and telling a lie; she is generally a very truthful little girl and is not inclined to make up stories. Id. A.T. has a very good memory. (10/23/09 RP 16).

A.T. was called as a witness at the pre-trial hearing. (10/23/09 RP 21). She stated she lives with her mother and her 17-year-old brother. (10/23/09 RP 22-23). She is in the first grade at King Riverview School and her teacher is Mrs. Long. (10/23/09 RP 23-24). Mrs. Long is nice and is a good teacher. (10/23/09 RP 24). One of the friends she plays with is Emma, who is six years old. Id. When asked if Emma is about the same age as she, she replied that she (A.T.) is seven. (10/23/09 RP 24-25). She recently had a birthday party at the park, where she got makeup and a desk from her dad; asked if the desk was for school work, she replied it was for her makeup. (10/23/09 RP 25-26). She knows that Hannah Montana is a singer. (10/23/09 RP 42). Asked if Hannah Montana is a friend of hers or is on T.V., she replied that she is on T.V. (10/23/09 RP 42).

She knows the difference between right and wrong and telling the truth and telling a lie. (10/23/09 RP 26). She correctly indicated the questioner's shirt was black and green. Id. She stated it would be a lie to say the shirt was purple. Id. She also

stated it would be lie to say today is Christmas. Id. It is better to tell the truth than to tell a lie. Id. She promised to tell the truth. Id.

On the last day she went to Javier Lobos' house, his father Rod was babysitting and in charge. (10/23/09 RP 29). Rod left at one point. (10/23/09 RP 30). She and her friend Myles were awake. Id. She was alone with Javie in the living room and in Myles' and Javie's room. (10/23/09 RP 31). Javie carried her into the bedroom. (10/23/09 RP 36). First she was on Myles' bed and then he moved her onto his bed. (10/23/09 RP 36-37). Javie was lying down and she was lying next to him. (10/23/09 RP 38). He made her touch tongues with him. (10/23/09 RP 45-46). He touched her "butt". (10/23/09 RP 55). He then made her get on top of him and he said, "What do you feel?" (10/23/23 RP 55-56). She replied, "I don't know," and he then said, "penis". (10/23/09 RP 55-57). When she got back to her Mom's house, she told her Mom everything that had happened. (10/23/09 RP 58).

Asked if she was scared because she was in a big courtroom or because Javie was in the room with her, A.T. said it was because Javie was in the room with her. (10/23/09 RP 49).

Mauri Murstig testified she is a trained child interviewer and has been for nine years. (11/04/09 RP 3-4). She conducted a videotaped interview with A.T. on April 15, 2009. (11/04/09 RP 4). She went through a standard truth and lie scenario with A.T.; A.T. answered the questions correctly, indicating an understanding of the difference between the truth and a lie. (11/04/09 RP 7). In keeping with the local protocol, she asked open-ended questions of A.T. (11/04/09 RP 6). A.T. was six years old at the time of the interview; it would not surprise Ms. Murstig for there to minor inconsistencies when a child of that age is interviewed. Id.

During the interview on April 15, 2009, A.T. stated she is six years old and her birthday is in the summertime. (ARP 1). She described what occurred at her last birthday party, including hitting a piñata and riding bumper cars. (ARP 2). At the time of the interview, she was in kindergarten. Id. Her teacher was Ms. Sorenson, who is really nice. (ARP 3). At school, she was learning about math and caterpillars; there is also some "free choice" time, which she likes to use to play with building blocks. Id. There is a daycare next to her house where she likes to play with her friends. (ARP 4).

Her mom and dad got a divorce, so she lives with her mom. Id. She visits her dad and likes to go motorcycle riding with him. (ARP 5). She likes to watch and feed her dad's fish. Id. She goes with her dad to Rod's house. (ARP 6). She has an older brother who is in high school and also lives with she and her mother; she knew her brother's last name, which is different than her own. (ARP 7).

A.T. was unable to respond when asked her gender. (ARP 7). She was then asked whether she is a boy or a girl; she replied that she is a girl. (ARP 8). Ms. Murstig explained that is what is meant by gender. Id. She was then asked the name of Ms. Murstig's dog; she was unable to respond. Id. Ms. Murstig reassured her that if she did not know the answer to a question, it was okay to so indicate. Id. A.T. said it was better to tell the truth than to tell a lie, so you won't get in trouble. (ARP 9). A.T. correctly identified a picture of a bear. Id. She was then told one boy said it was a bear and another boy said it was a book; A.T. correctly indicated the boy who said it was a book told a lie. Id. She also said the one who told a lie was the one who was going to get in trouble with the school principal. (ARP 10). A.T. promised to tell the truth to Ms. Murstig. Id.

A.T. said when she went to Rod's house, there were three kids in the house including one named Javie. (ARP 11). Javie was the big brother. Id. Javie touched A.T. on her private parts. Id. A.T. told him "no", but he did it anyway. Id. This happened at Rod's house in Javie's bedroom. (ARP 11-12). Javie forced her into the bedroom. (ARP 12). Javie touched her "butt" with his hand under her clothes and under her panties. (ARP 12-13). When he touched her butt, it hurt in the middle. (ARP 13). Javie's hand also touched her "boobies" under her clothes. (ARP 14). Javie and Miles share the same room, but Miles was there. (ARP 15). She was on Miles' bed when the touching occurred. Id. Javie kissed her mouth using his tongue. (ARP 17). He told her not to tell what happened. (ARP 18). He was wearing pajamas that looked like regular shorts and a t-shirt. Id. He wanted her to touch his penis, but she didn't want to do it. Id. When she was on top of him, his penis was touching her through his pant bottoms. (ARP 22).

Asked when the events happened, A.T. replied, "Like . . . just like a little bit ago." (ARP 19). She had been taken to Javie's house by her dad. (ARP 19-20). She explained that she and her

dad had been going there every week that she visited with her dad, "until just now . . . this now happened." (ARP 20).

The trial court balanced the factors of State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967), and found A.T. was competent to testify as a witness:

> Regarding my findings as to whether or not [A.T.] is a competent witness. In using the test as set forth in the Allen case, the Court makes a finding that [A.T.] did in fact have – does in fact have an understanding of the obligation to speak the truth on the witness stand and I don't think that is disputed even by the Defense.
>
> The mental capacity at the time the occurrence occurred to which [A.T.] has to testify. The Court also finds that she does in fact or did in fact – does have the mental capacity as demonstrated by the statements that she made. She was six, I think at the time of the occurrence, and even now at the time of testimony there won't be much of an age difference. There hasn't been any showing that any capacity has been diminished.
>
> Number 3, the memory sufficient to retain an independent recollection of the occurrence. [A.T.'s] testimony, although it was quiet, was not silent. Given the circumstances the Court believes that her independent recollection is sufficient to meet the competency under 3.
>
> Capacity expressed in words of the memory. That's a little bit more difficult, although, the Court, as we all struggled to listen to [A.T.] talk, she did have a difficult time in expressing the words of the memory, but the Court finds that the difficulty was more because of the, I guess, her surroundings and the intimidating

> atmosphere of this courtroom. Listening and hearing your voice come out loud is another intimidating factor.
>
> The capacity to understand simple questions. About that, [A.T.] appears to be a very bright young lady and understands what's being asked of her. Weighing those factors the Court finds she is competent as a witness.

(11/04/09 RP 36-37).

The trial court also entered a written order finding certain child hearsay statements to be admissible pursuant to RCW 9A.44.120. The following findings of fact were made:

> (1) The victim A.K.T. (9/27/02) made four (4) separate disclosures to her mother Terri Taylor and one (1) disclosure to Mari Murstig. The first statement to her mother Terri occurred on April 8th 2009 in the morning. A.K.T. told Terri Taylor that she thought she had a boyfriend and also that respondent carried her into his bedroom and put her on a bed. This statement was spontaneous.
>
> (2) Later the same day Terri Taylor spoke with A.K.T. and reminded her of the statement she made earlier that morning. She asked A.K.T. if anything happened after the respondent placed her on the bed. A.K.T. said that the respondent kissed her, put his tongue in her mouth, touched her butt, lifted up her shirt and touched her "boobies," and made her get on top of him and sit on his "private spot". Although A.K.T. was responding to a question, it was neither leading nor suggestive in nature.
>
> (3) The third statement occurred in the days or week following the initial disclosure on April 8th, 2009 after A.K.T. put her tongue in her mother's mouth

when they kissed. This was unusual and Terri Taylor asked if the respondent had done that to A.K.T. and she said yes. This statement was not spontaneous.

(4) Some time in the following days or week following the initial disclosure on April 8th 2009 A.K.T. was sitting on the couch and Terri Taylor was standing in the dining room. A.K.T. said there was something she forgot to tell her and stated that what had occurred between the respondent and her was interrupted because the parents returned home. She also stated the respondent told her not to tell anyone. This statement was spontaneous.

(5) On April 15th, 2009 A.K.T. was interviewed by child interviewer Mari Murstig at the Sexual Assault Response Center. A.K.T. successfully answered questions regarding knowing the difference the difference between the truth and a lie and promised to tell the truth. She stated that the respondent forced her into his room, that the respondent told her to sit on top of him, that he put his hand under clothes and panties and touched her butt, that he touched her "boobies" under her shirt, kissed her on the lips and put his tongue in her mouth. Although she was responding to questions the questions were neither leading nor suggestive and [the statements] are considered spontaneous.

(6) There was no apparent motive for A.K.T. to lie. She stated she liked the respondent and showed no ill will towards him.

(7) A.K.T. knew the difference between the truth and a lie and there was no reason to question her character in relation to honesty. Her mother testified she does not lie or make up stories.

(8) The statements were made to multiple people.

> (9) The statements were of past facts but this is not particularly relevant to whether they were reliable.
>
> (10) The possibility that cross examination would show inconsistencies in the statement is remote because her statements have been consistent throughout the number of times she has spoken about the event.
>
> (11) There is no reason to believe she misrepresented the respondent's involvement.

(CP 8-10). Based on these findings, the trial court made the following conclusions of law:

> (1) The time, content, and circumstances of the statements made by A.K.T., outlined in findings of fact number 1, 2, 4 and 5 provide sufficient indicia of reliability as required by RCW 9A.44.120 and the Ryan factors.
>
> (2) The statement outlined in finding of fact number 3 is not admissible because the statement lacks sufficient indicia of reliability as required by RCW 9A.44.120 and the Ryan factors.

(CP 10).

The matter proceeded to a juvenile adjudicatory hearing (bench trial) before Court Commissioner Lonna K. Malone beginning on November 9, 2009. The State's first witness was the victim's father, Jared Steven Taylor. He testified his daughter is seven years old. (RP 16). He is familiar with Javier (Javie) Lobos as his father, Rod Lobos, is the boyfriend of his (Mr. Taylor's)

sister. (RP 16-17). He had visited the Lobos home 12 to 14 times. (RP 17). He testified he knew Javier Lobos was 13 or 14 years old. Id.

In addition to Javier, other children living in the home were his two younger sisters and Myles, the son of Mr. Taylor's sister. (RP 18). The two Lobos sister are aged approximately six and eleven and Myles is six years old or perhaps recently turned seven. Id. The children were usually there when he took A.T. to the residence. Id. They would visit "pretty regularly every other weekend." (RP 17).

Javier was at the home the last time Mr. Taylor visited, which was five or six months before his testimony. (RP 19). Mr. Taylor showed up with A.T. around 6:00 p.m. on Friday evening. Id. Those there when they arrived were Rod Lobos, Mr. Taylor's sister, a friend of hers named Sheila Jones, and the four children: Javier, his two sisters, and Myles. Id. The four adults left for an hour at approximately 7:00 p.m. Id. Javier was left in charge as he was the oldest. (RP 20). The adults returned home for 15 minutes to check on the children. Id. Myles and the two Lobos sisters were downstairs on the couch and Javier and A.T. were alone upstairs playing Xbox Live. Id. Mr. Taylor immediately went

upstairs to locate A.T.; he told Javier that this wasn't appropriate and they weren't allowed to be up there alone, and he took A.T. downstairs to the other children. Id. The adults then left for another two to three hours. Id.

When the adults returned around midnight, the Lobos sisters and Myles were asleep on the couch and Javier and A.T. were alone upstairs in Javier's bedroom. (RP 21). Javier was in his bed and A.T. was on a bed on the floor next to his bed. Id. Javier and A.T. were both awake. (RP 21-22). He immediately picked up A.T. and took her downstairs. (RP 22). She was "distraught" in that she "wasn't herself" and "wasn't happy"; she clung to her father and grabbed him very tightly. Id. He returned A.T. to her mother's house at the end of the weekend visitation. (RP 23). He has not been back to the Lobos home since. Id.

Terri Taylor, the victim's mother, testified that Jered Taylor had A.T. for weekend visitation on Saturday, April 4, 2009. (RP 32). He brought A.T. back at 2:00 p.m. Sunday. Id. A.T. was asleep when she was brought home and slept until 6:00 p.m., which was very unusual for her. Id. Ms. Taylor noticed other behavioral changes in A.T.: She closed the door to the bathroom and refused to let her mother help her wipe her bottom. (RP 33).

Ms. Taylor testified to statements A.T. made to her the following Wednesday concerning what happened with Javier. (RP 33-34). The following exchange occurred during her testimony:

> Q: Did she say when this had occurred?
>
> A. That Saturday when she was over at Rod's house.
>
> Q: So to be clear, when she first said this statement to you this was the first Wednesday following the Saturday, April 4?
>
> A: Correct.

(RP 34). Ms. Taylor testified consistently with her testimony at the pre-trial hearing concerning the statements make to her by A.T. and the actions she took in light of those statements. (RP 34-42). After A.T. had related the details of the incident with Javier Lobos, Ms. Taylor confided in her that she, too, had been molested as a child. (RP 126-27). She had never discussed the experience with A.T. prior to that time. (RP 127). She did not tell A.T. any particulars other than that the perpetrator was a man named Bill. Id. Her only purpose in telling A.T. that limited information was to provide her a little bit of comfort in knowing she was not along and that she could be strong in the face of such an experience. Id.

Mauri Murstig, the trained child interviewer, was called as a witness. (RP 139). Ms. Murstig has a bachelor's degree in psychology, and master's degree in social work, and has had over 200 hours of specific training for child interviewing. Id. She has been employed for nine years conducting interviews of children where there is a concern of sexual or physical abuse. Id. She undergoes peer review every two to three months. (RP 148). The DVD of the videotaped interview was played for the court. (RP 143). (See ARP for transcript of the interview.)

The victim, A.T., testified consistently with her earlier statements to her mother and the trained child interviewer regarding the actions of Javier Lobos. (RP 57-71). She remembered having talked to a lady named Mauri (the child interviewer) shortly after the events occurred and telling her about what happened. (RP 70). She also recalled having been at Javie's house on a morning it snowed and the children having played in the snow. (RP 69-70). She thought it was around Christmas time because it was snowing. (RP 121). She additionally remembered having carved pumpkins. (RP 84). She stated she knows the difference between right and wrong and telling the truth and telling a lie. (RP 60). She stated it would be

a lie if she said the deputy prosecutor's shirt was orange and pants were purple, but the truth to say her shirt was black. Id. She stated it was wrong to tell a lie, and she gets in trouble when she tells a lie. (RP 61). She also stated that her mother wants her to tell the truth. Id. She promised to tell the truth in court. Id. A.T. was extensively questioned by defense counsel in a cross-examination extending over 54 pages of transcript. (RP 71-125).

The victim's father was recalled for a few clarifying questions. He stated he and A.T. had spent the night at the Lobos home approximately 12 to 14 times. (RP 135). The reason for spending the night was so he did not have to drive after consuming alcoholic beverages. (RP 135-36). The children carved pumpkins at the Lobos home at Halloween time in 2008, which was around the time they first started going to the Lobos home. (RP 136). He also recalled a day when it snowed and the children played in the snow at the Lobos residence; he did not recall the exact date, but it was "Januaryish". Id.

After the defense presented its case and counsel made their closing arguments, the trial court took a recess and thereafter announced its decision as follows:

The Court finds that [A.T.'s] father, Jered Taylor and his daughter [A.T.] went to Rod Lobos' home in Pasco, Franklin County, Washington, on Saturday April 4 of this year. And that occurred sometime between mid afternoon and early evening. [A.T.] was six years old at the time. She is now seven years old when she testified in this Court.

There were a number of adults present sometime during that evening. They arrived at different times. In addition to Mr. Taylor, Rod Lobos was present, Shelia Jones and Lore Elliot. There also were a number of children present. Myles, Miranda, the Respondent, and Jesselynn Lobos, the Respondent's sister. The Court finds that J.J. Chavez was not there that day.

The adults went to Rod's sister's home at approximately 7 p.m. and they left the Respondent and his sister in charge of the younger kids while the adults were away. They came back a short while later to check on the children and at that time Jered Taylor found his daughter, [A.T.], playing Xbox upstairs with the Respondent. Mr. Taylor took [A.T.] downstairs to be with the younger children. He had been consuming alcohol but there was no indication at that stage that he was intoxicated upon his first return to the home.

A while later the adults left again and this time they went to a friend of Jered Taylor's to play poker at his residence and they arrived back home at the Lobos' residence about 1 a.m. At that time Mr. Taylor was loud and drunk and smelled of marijuana. This was when the adults arrived back the second time.

Jesselynn, the younger sister of the Respondent, fell asleep about 10:30 that evening before the younger children and had no recollection of what happened thereafter until she awoke on the couch in the morning and [A.T.] was also on the couch with

her. Prior to her falling asleep the younger children were downstairs and the Respondent was upstairs

When Mr. Taylor arrived home form the poker game he found [A.T.] on the trundle bed beside the defendant's bed in the Respondent's room - - excuse me - - Respondent. The lights were off in the room but both kids were awake. He took his daughter downstairs to sleep on the couch and went upstairs to bed with Ms. Jones without mentioning to her that he had found [A.T.] in the Respondent's room.

On Sunday morning the adults and the kids had breakfast and Mr. Taylor returned his daughter to her mother in the early afternoon. [A.T.] did not want to leave on Sunday as she was playing with the younger children. This was her routine. She usually did not want to leave and she seemed okay to her father on Sunday afternoon. Once [A.T.] was back home in her mother's care [A.T.] took a nap for the remainder of the afternoon until 6 p.m. which was not her normal routine. After she awoke from her nap she had a bowel movement and did not allow her mother to assist in cleaning her as was the normal practice between mom and daughter.

The Wednesday following when mother and [A.T.] were in the bathroom together [A.T] told her mother that she had a boyfriend. When her mom inquired why she thought she had a boyfriend [A.T.] told her that the Respondent had picked her up and carried her to his bed. Later that same day, that evening, if you will, of that day, Terri Taylor asked [A.T.] if anything else happened. The Court finds there was nothing inappropriate in her questioning. [A.T.] relayed to her mother that the Respondent had kissed her, had touched her boobies under her shirt, had touched her buttocks and had placed her on top of him with his words.

[A.T.] testified in this Court. She testified here that the Respondent put her on top of his stomach and at this time asked her what did she feel and she said he didn't know and she said his penis. He made her touch tongues with him. He touched her butt under her clothes, he told her not to tell. No one else was in the bedroom when this occurred and this was while her dad was away for a while.

Mauri Murstig, a trained forensic child interviewer for both law enforcement and CPS, testified before the Court. [A.T.] told her that the Respondent touched her private parts, that he touched her butt under her clothes, that he told her to get on top of him and she did, that he put his tongue in her mouth and that he told her not to tell. The Court found that Ms. Murstig used open-ended questions and is trained in child interviewing techniques. [A.T.] also told Ms. Murstig that his penis was touching her on her bottom when she was on top of him and it felt weird. He asked her to touch his penis but she did not. In the days following the Kids Haven interview [A.T.] also told her mother that the Respondent had told her not to tell anyone and that she kissed her mom and put her tongue in her mom's mouth which she had never done before.

There is no indication to this Court that Terri Taylor telling her daughter that she had also been molested has caused [A.T.] to lie or that she has been coached in her testimony. There is no indication to this Court that [A.T.] is lying or telling fairy tales even though there were inconsistencies in her story. It is not uncommon for a child of this age to confuse events, days, times and holidays. And the testimony was clear that [A.T.] had spent time at the Lobos home when there was snow on the ground, when they had played outside in the snow and when they had carved Halloween pumpkins.

> Overall there is complete consistency in terms of what she experienced with the Respondent as told to her mother, Ms. Murstig, and this Court. The State has proven beyond a reasonable doubt that [A.T.] was less than 12 years of age on April 4 of this year. That she was not married to the Respondent. That the Respondent was 13 to 14 years of age at the time of the incident and that there was sexual contact on April 4 of this year in Franklin County, Washington between the Respondent and [A.T.]. Accordingly, the Court finds the Respondent guilty of the charge of child molestation in the first degree.

(RP 340-44).

Commissioner Malone entered written findings of fact and conclusions of law on February 18, 2010. (CP 11-14). They included finding of fact 23 that "[t]he contact described by A.K.T. (DOB 9/27/02) was sexual contact" and conclusion of law 1 that "[o]n or about April 4, 2009 the respondent had sexual contact with A.K.T. (DOB 9/27/09)." (CP 14).

Mr. Lobos moved to revise the court commissioner's decision, contending *inter alia* that Commissioner Malone failed to find he acted with a purpose of sexual gratification. (CP 578, 86-107).

On March 19, 2010, Superior Court Judge Vic L. VanderSchoor entered the following memorandum order:

> State v. Lorenz, 152 Wn.2d 22 (2004) holds that sexual contact is an element of first degree child

> molestation, and that sexual gratification is not an element. State v. Stevens, 158 Wn.2d 304 (2006) holds that although sexual gratification is not an element, it is still necessary that the State establish sexual gratification as part of its burden to prove sexual contact.
>
> Commissioner Malone specifically found the element of sexual contact had been proven, and found respondent guilty. The record fails to include any finding regarding sexual gratification.
>
> The juvenile court's findings and conclusions must specifically state the ultimate facts necessary to support a conviction, and failure to comply with JuCR 7.11(d) results in remand for entry of appropriate findings and conclusions. State v. Avila, 102 Wn. App. 882 (2000). From the record herein, a reasonable trier of fact could find that the purpose of the sexual contact herein was for respondent's sexual gratification. The matter is remanded for revision of findings to adequately state ultimate facts – no additional evidence may be taken.

(CP 49).

Commissioner Malone thereafter on March 26, 2010 entered revised findings of fact and conclusions of law. (CP 16-19). Finding of fact 23 now read that "[t]he respondent's contact with A.K.T. (DOB 9/27/02) was of the sexual or intimate parts. The respondent's contact with A.K.T. (DOB 9/27/02) was done for sexual gratification."

On August 12, 2010, Judge VanderSchoor entered findings of fact and conclusions of law on the motion for revision. (CP

665-67). Judge VanderSchoor adopted the findings of fact that had been made by Commissioners Potts and Malone. (CP 666).

Other facts will be developed from the record as they relate to individual issues.

RESPONSE TO ARGUMENT

A, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE CHILD WITNESS COMPETENT TO TESTIFY.

Mr. Lobos correctly sets forth the legal standard for review of a trial court's ruling finding a child witness competent, but then fails to reach the obvious conclusion in this case. He admits great deference is given to such a finding and it will not be disturbed absent manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). He also acknowledges inconsistencies in a child's testimony do not necessarily call into question witness competency. Rather, such inconsistencies generally relate to the witness's credibility and the weight to be given her testimony. State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d 536 (1991). "Intelligence, not age, is the proper criterion for determining the competency of a witness of tender years." Allen, 70 Wn.2d at 692 (upholding testimony of 6-year-old victim in prosecution for indecent liberties). Here, the witness was an

elementary school student. (10/23/09 RP 24). The entire premise of elementary school is that by that age children are able to receive and remember impressions. The trial court did not abuse its discretion here.

The test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which the witness is to testify; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in his or her memory of the occurrence; and (5) the capacity to understand simple questions about it. Allen, 70 Wn.2d at 692; Carlson, 61 Wn. App. at 874. Moreover:

> The determination of the witness's ability to meet the requirements of the [competency] test rests primarily with the trial judge who sees the witness, notices his manner, and considers the witness's capacity and intelligence. Because such matters are not reflected in a written record for appellate review, their determination lies within the sound discretion of the trial judge.

Carlson, 61 Wn. App. at 874 (quoting State v. Justino, 48 Wn. App. 572, 578, 740 P.2d 872 (1987)). Accord, Allen, 70 Wn.2d at 692. In Carlson, the trial court did not abuse its discretion in

finding competent a child witness who was 3 ½ years old at the time the abuse occurred, where the child demonstrated her ability to distinguish between the truth and a lie, gave consistent testimony about the defendant's acts, and was able to testify accurately about her age and her friends' names and identify people in the courtroom. See Carlson, 61 Wn. App. at 874-75.

Mr. Lobos emphasizes the victim's testimony that she and the other children played in the snow at the Lobos residence. He argues it is unlikely that it snowed in Pasco on April 4, 2009. First, there is nothing in the record to indicate it did not snow on that day. More importantly, the testimony was coming some seven months after the incident. In her initial statements to her mother and the child interviewer in the immediate aftermath of the incident, she made no mention of snow. (10/23/09 RP 6-15; ARP 1-24). The victim's father testified that he and his daughter first started going to the Lobos residence around Halloween, 2008, and the children carved pumpkins at that time; there was also a day that the children played in the snow at the Lobos residence approximately in January, 2009. (RP 138). If in her testimony seven months after the offense she was thinking of another visit to

the Lobos home when it snowed, that merely went to the weight to be given the testimony and not competency.

As an example, the author of this brief remembers playing the role of Santa Claus in a school play when he was in the third grade. He also remembers many occasions in his youth when it snowed. Assuming arguendo that he mistakenly thought it snowed on the day of the school play, it would not keep him from accurately testifying that he played Santa Claus in the third-grade school play.

Mr. Lobos also claims it was not established at the pre-trial hearing when the abuse occurred, making it impossible to determine A.T.'s capacity at the time of the events. However, A.T. specifically testified it happened the last time she was at the Lobos home. (10/23/09 RP 29). The timing of that last visit was established through her mothers' testimony: Terri Taylor testified that in April, 2009, A.T. returned home on Sunday following a weekend visitation with her father. (10/23/09 RP 7). On Wednesday, A.T. made her first disclosures regarding the acts committed against her by Mr. Lobos. Id. Ms. Taylor was asked, "Do you know what day she was referring to or when it would have happened?" (10/23/09 RP 10). She answered, "Saturday

night. The weekend prior." Id. The deputy prosecutor asked for clarification, "So the Saturday prior to that Wednesday?", to which Ms. Taylor replied, "Yes." Id. No objection was made to his testimony. Id.

Mr. Lobos argues there was no foundation laid to show Ms. Taylor's basis for knowing when the events occurred. However, his failure to object precludes this argument. RAP 2.5(a); State v. Henthorn, 85 Wn. App. 235, 239, 932 P.2d 662 (1997); State v. Newbern, 95 Wn. App. 277, 288-89, 975 P.2d 1041 (1999); Estate of Stalkup v. Vancouver Clinic, 145 Wn. App. 572, 584-85, 187 P.3d 291 (2008) (failure to object to witness's testimony on the basis of foundation waives the issue for appeal). In any event, since Ms. Taylor was relating statements made to her by A.T., it was obvious this information came from A.T. Indeed, Ms. Taylor later testified during the adjudicatory hearing as follows:

> Q: Did she say when this occurred?
>
> A: That Saturday when she was over at Rod's house.
>
> Q: So to be clear, when she first said this statement to you was the first Wednesday following the Saturday, April 4?
>
> A: Correct.

(RP 34). If Mr. Lobos had made a timely objection at the pre-trial hearing, the State could have clarified any confusion at that time. His failure to object left the testimony before the trial court for its consideration. The issue is not preserved for appeal.

In addition, in her interview with the child interviewer on April 15, 2009, A.T. was asked, "[W]hen did this happen with Javi?" (ARP 19). She replied that it happened "just like a little bit ago." Id. She was taken to the Lobos residence by her dad. (ARP 19-20). Asked if she told anyone what happened, she relied, "My mom." (ARP 20). She also made clear that she had not been back to the Lobos home since it happened. She stated: "[M]e and my dad go there every week . . . when I go to [my dad's] house but until just now it . . . this now happened." (ARP 20). Her mom had told her that she was not going back there anymore. (ARP 23). The record of the pre-trial hearing clearly shows the abuse occurred during A.T.'s last visit to the Lobos residence in early April, 2009.

For that reason, there is no merit to Mr. Lobos' claim that the child's competency at the time of the occurrence was not established. The interview with the trained forensic interviewer just 11 days after the incident showed A.T.'s capacity at that time.

(ARP 1-23). The trained forensic interview also went through an exercise to verify A.T.'s capacity to speak truthfully. (ARP 9-10).

Mr. Lobos argues the victim "hardly spoke at all" at the pre-trial hearing. However, a child's reluctance to testify about specific acts of abuse does not render him or her incompetent. Carlson, 61 Wn. App. at 875. In any event, it is simply not true that the victim hardly spoke at the pre-trial hearing. While the victim initially appeared nervous, she explained that by saying she was uncomfortable being in the same room with Javier Lobos. (10/23/09 RP 49). She became more comfortable as time went on and actually became quite expressive. Among the events occurring on the day of the offense to which she testified at the pre-trial hearing (with page reference to the 10/23/09 RP) were the following: Javier Lobos' father Rod was originally home and in charge but left at one point (29-30); she was alone with Javier Lobos in the living room and in his bedroom (31); he carried her into the bedroom (36); she was on Myles' bed at first and then he moved her onto his bed (36-37); he was lying down and she was lying next to him (38); he made her touch tongues with him (45-46); he touched her "butt" (55); he then made her get on top of him and he said, "What do you feel?" (55-56); she replied, "I don't

know," and he then said, "penis" (55-57). She further testified that after returning home to her mom's house, she told her mom everything that had happened. (58).

A.T. was also very expressive at the pre-trial hearing concerning things other than the abuse. She testified that she lives with her mother and her 17-year-old brother (22-23); that she is in the first grade at King Riverview School and her teacher is Mrs. Long (23-24); Mrs. Long is nice and is a good teacher (24); one of the friends she plays with is Emma, who is six years old (24); asked if she was the same age as Emma, she replied that she is seven (24-25); she recently had a birthday party at the park, where she got makeup and a desk from her dad; asked if her desk was for school work, she replied it was for her makeup (25-26); that Hannah Montana is a singer (42); and when asked if Hannah Montana is a friend of hers or is on T.V., she said she is on T.V. (42).

Defense counsel was given an opportunity to cross-examine A.T. at the pre-trial hearing. The cross-examination covers only five pages of transcript and does not include any questions about the actual child molestation. (48-53). However, A.T.'s answers on direct examination and especially in the more

comfortable setting of the interview with Ms. Murstig show her ability to respond to questions.

The instant case in no way resembles State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999), where the child was "manifesting his long-standing, often-observed inability to distinguish what was true from what was not." Id. at 106. The evidence summarized in the statement of the case shows nothing similar can be said regarding A.T. As the trial court noted, the defense did not dispute that A.T. had an understanding of the obligation to speak the truth. (11/04/09 RP 36). Defense counsel had stated:

> Let's go back over those Allen factors again. I believe that she does have an understanding of what it means to speak the truth. She demonstrated that not only in the Kids Haven video but in her colloquy with Ms. Harris [the deputy prosecutor]. I

(11/04/09 RP 29). Defense counsel further acknowledged that "she had the mental capacity at the time of the occurrence, if it occurred, to know what did or didn't happen[.]" (11/04/09 RP 29-30).

Finally, Mr. Lobos fails to explain how, if A.T. was not competent to be a witness, it was possible for his attorney to cross-examine her at trial for 54 pages. (RP 71-125). A reading

of the transcript of A.T.'s cross-examination shows the claim is patently frivolous.

B. ADMISSION OF CHILD HEARSAY DID NOT IMPLICATE CONFRONTATION RIGHTS BECAUSE THE VICTIM TESTIFIED AT THE ADJUDICATORY HEARING AND WAS AVAILABLE FOR CROSS-EXAMINATION.

Mr. Lobos argues that the victim's statements were testimonial in nature and their admission violated his confrontation rights. However, the confrontation clause is not violated by admitting a declarant's out of court statements, as long as the declarant is testifying as a witness and is available for cross-examination concerning the statements. State v. Price, 158 Wn.2d 630, 639-47, 146 P.3d 1183 (2006). Here, the victim testified as a witness and was subject to rigorous cross-examination. (RP 71-125).

C. THE TRIAL COURT PROPERLY ADMITTED CHILD HEARSAY STATEMENTS.

Mr. Lobos next argues the trial court erred in admitting child hearsay statements. "Child hearsay is admissible where the child is available and competent to testify." State v. Dunn, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005) (citing RCW 9A.44.120). "The statute eliminates difficult proof problems that often frustrate

prosecution of child sex abuse cases." Id. The admission of child hearsay statements is reviewed only for abuse of discretion. Id. at 589; State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). The court abuses its discretion when it bases its decision on unreasonable or untenable grounds. State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003). Factual findings supporting the admission are reviewed for substantial evidence. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the premise asserted. Id. at 129.

Properly admitted child hearsay may include videotaped interviews of the child conducted as part of the investigation. Dunn, 125 Wn. App. at 588. Such videotapes are not cumulative as they "also provide the [fact-finder] with visual and audio information ([the child's] demeanor and voice inflections) that [go] beyond repetition of other hearsay statements." Id. They also show the natural progression of the investigation. Id. at 588-89. Drawings used during the interview for the child to identify the body parts on which he or she was touched may also be introduced into evidence. Id. at 588. In the instant case, both the

audio/visual DVD of the interview and the diagram used during the interview were admitted. (RP 143-46).

A statement made by a child under the age of ten describing any act of sexual contact with the child by another not otherwise admissible by statute or court rule is admissible in "criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if . . . [t]he court finds . . . that the time, content and circumstances of the statement provide sufficient indicial or reliability" and the child "[t]estifies at the proceedings[.]" RCW 9A.44.120(1)&(2)(a). This statute remains constitutional notwithstanding Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), as that case only applies to the admission of testimonial statements where the accused is unable to confront the declarant. See Price, 158 Wn.2d at 239-47; State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006).

Case law has indentified several factors that may be examined in determining the reliability of a child hearsay statement, including: (1) whether there is an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) whether the statements

were spontaneous, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contains express assertions about past facts, (7) whether cross-examination could show the declarant's lack of knowledge, (8) whether the possibility that the declarant's recollection is faulty is remote, and (9) whether the circumstances surrounding the statement are such that there in no reason to suppose the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984); State v. Swan, 114 Wn.2d 613, 647-48, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991). To be admissible, the statements need only substantially meet these factors. Swan, 114 Wn.2d at 652; Woods, 154 Wn.2d at 623-24.

Here, the detailed findings entered by the trial court at CP 8-10 show the trial court carefully considered the relevant factors. Because Mr. Lobos does not assign error to the trial court's findings of fact, they are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Other matters of which Mr. Lobos complains merely go the weight to be given the statements and not their admissibility.

A.T. had no apparent motive to lie. A.T. had previously always enjoyed going to the Lobos home, and had stated she jumped on the trampoline and played games there. (10/23/09 RP 14). In Swan, this factor was satisfied where the victim "enjoyed playing with [her friend] at the defendants' home." Swan, 114 Wn.2d at 648. The same is true here.

Uncontradicted testimony presented by A.T.'s mother showed she is generally a very truthful little girl, understands the difference between telling the truth and telling a lie, and is not inclined to make up stories. (10/23/09 RP 14, 16). Thus, the second factor supports the trial court's decision to admit the statements. See Swan, 114 Wn.2d at 648 (second factor favored admissibility where testimony showed child had reputation for truthfulness).

The statements of A.T., which gave consistent accounts of the acts of Mr. Lobos, were heard by both A.T.'s mother and the trained forensic interviewer. The third factor also favors admissibility.

The statements were made spontaneously. In Swan, 114 Wn.2d at 649, the Supreme Court quoted from State v. Madison, 53 Wn. App. 754, 559, 770 P.2d 662 (1989) as follows:

> The details of the event and the identity of the defendant were not suggested and were "spontaneously" volunteered. Indeed, the foster mother testified she was "a little stunned' by the child's accusations.

In the instant case, A.T.'s disclosures to her mother came "out of the blue", the details of the event and the identity of the perpetrator were not suggested, and A.T's mother was more than a little stunned by what she heard. (10/23/09 RP 6-10). While later statements to the mother and the forensic interviewer were made in response to questions, such questions were neither leading nor suggestive. "For purposes of a child hearsay analysis, spontaneous statements are statements the child volunteered in response to questions that were not leading and did not in any way suggest an answer." Carlson, 61 Wn. App. at 872. "Unlike an excited utterance, the statements need not be contemporaneous with the events in question." Id. Mr. Lobos states at 24 that "[w]hen Ms. Taylor wouldn't accept the answer that AKT provided her she pressed her to change her recollection of events." However, he provides no citation to the record and in fact nothing in the record supports this statement. The fourth factor favors admissibility.

The timing of the statements supports reliability. The first disclosures were made just four days after the events. (10/23/09 RP 10). The interview with the forensic interviewer was only seven days later on April 15, 2009. (ARP 1). The initial disclosures were to her mother, a person with whom she obviously has a trusting relationship. The fact that statements were to a person with such a relationship with the child supports reliability. Swan, 114 Wn.2d at 650. While A.T. had no prior relationship with forensic interviewer Mauri Murstig, the arraignments for that interview were made by A.T.'s mother. (10/23/09 RP 10). See also ARP 10, where Ms. Murstig noted, "So your mom brought you here to see me today . . ." The fact that an interview with a professional person occurred at the behest of someone the child trusts enhances the reliability of statements to the professional. Swan, 114 Wn.2d at 650. In addition, professionals are, by definition, trained to be objective in assessing a child's complaint of sexual abuse and surely understand the importance of not suggesting a particular answer to the child. State v. Henderson, 48 Wn. App. 543, 551, 740 P.2d 329 (1987).

While the Ryan case listed "whether the statement contains express assertions about past facts" as a factor to be considered, later case law recognized that child hearsay statements are, by their nature, express assertions about past facts. Thus, that factor weighs neither in favor of reliability or unreliability of the statements. Swan, 114 Wn.2d at 650-51; State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988).

The seventh factor, whether the child's lack of knowledge could be established through cross-examination, need not be considered at all in a case where, as here, the child does in fact testify. Woods, 154 Wn.2d at 624.

In Swan, 114 Wn.2d at 651, the court noted that in Leavitt, 111 Wn.2d at 75, "we observed that because the child's statements to a social worker were made soon after the event and were consistent with statements made to her aunt and mother, the possibility that she was speaking from faulty recollection was remote." The same rationale applies here regarding the statements to A.T.'s mother and Mauri Murstig. Moreover, in Woods, the court stated:

> Testimony from the foster mother established that the girls had a normal memory and ability to perceive. Woods does not point to evidence demonstrating

> otherwise, nor is such evidence found in our review of the record. The trial court did not abuse its discretion in finding factor eight satisfied.

Woods, 154 Wn.2d at 624. The same can be said for the testimony of A.T.'s mother that A.T. has a good memory. (10/23/09 RP 16). The eighth factor favors admissibility here.

Finally, the surrounding circumstances suggest no reason to believe A.T. misrepresented the involvement of Javier Lobos. A.T.'s mother did not know him at all and had to ask, "Who is Javie?" (10/23/09 RP 7). If A.T. had wanted to misrepresent the involvement of someone to gain favor with her mother, it certainly would not have been Javier Lobos.

The trial court did not abuse its discretion in finding Ryan factors substantially established the reliability of A.T.'s out-of-court statements. The statements were properly admitted under the child victim hearsay statute.

D. THE TRIAL COURT PROPERLY DENIED A MISTRIAL.

Mr. Lobos next claims the trial court erred in denying his motion for a mistrial. The issue arose during the testimony of A.T.'s mother. She was asked, "So can you describe for us the next statement that you recall in chronological order . . . and

describe the circumstances surrounding it?" (RP 37). The witness testified:

> [A.T] gave me a kiss and she put her tongue in my mouth and she's never done that before and I said, [A.T.], why would you do that? And she kind of went like that and I said is that something Javi did to you?

(RP 37). Defense counsel immediately objected and moved for a mistrial, contending the testimony was getting into matters that were not authorized by Commissioner Potts' ruling on child hearsay. Id. The deputy prosecutor had a different understanding of Commissioner Potts' ruling, which had not yet been reduced to writing. While the commissioner had found the statement was not spontaneous, that is only one of the factors to be considered; the deputy prosecutor did not understand the commissioner to have excluded the statement. (RP 38). What Commissioner Potts actually said in her oral ruling was the following:

> Statement number 3 is regarding the tongue touching. That statement is more problematic to the Court. The Court does not find that that statement was made spontaneously. That was in response to a direct question, "Is that something that Javi did to you?"

(11/04/09 RP 38). However, when making her final ruling, Commissioner Potts stated:

> Given the totality of the entire circumstances, the statements made, the Court finds that any

> inconsistencies perhaps go more to the credibility rather than the admissibility and reliability. Based upon the foregoing statements made and the reliability, those statements may be used at trial.

(RP 39-40). The commissioner's oral ruling admitting the statements did not expressly exclude "statement number 3".

After defense counsel made the objection at trial, the trial court noted that regardless of whether the statement was admitted, A.T.'s mother could properly testify that "the child kissed her and put her tongue in her mouth"; that was a behavioral change and not a statement. (RP 39). Commissioner Malone noted she had no way of knowing what Commissioner Potts ruled at the pre-trial hearing, as she was not there and had no written findings. (RP 38). The trial court took a recess so that counsel could obtain clarification from Commissioner Potts, who was hearing matters in the same courthouse. (RP 40).

When Commissioner Potts' ruling was eventually reduced to writing, it included finding of fact 3:

> The third statement occurred in the days or week following the initial disclosure on April 8th 2009 after A.K.T. put her tongue in her mother's mouth when they kissed. This was unusual and Terri Taylor asked if the respondent had done that to A.K.T. and she said yes.

(CP 9). Commissioner Potts also entered conclusion of law 2 as follows:

> The statement outlined in finding of fact number 3 is not admissible because the statement lacks sufficient indicia of reliability as required by [RCW] 9A.44.120 and the Ryan factors.

(CP 10). Once the pre-trial ruling was clarified in this fashion, the State did not return to the matter and the answer A.T. gave to her mother's question was never introduced into evidence.

A trial court's denial of a mistrial is reviewed only for abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). Trial courts should grant a mistrial only when the accused has been so prejudiced that noting short of a new trial can insure that the accused will be tried fairly. Id. at 270.

A mistrial was not necessary here. First, as quoted above, defense counsel's timely objection cut off the witness before she could relate A.T.'s answer to her question. (RP 37). Thus, no inadmissible statement ever came before the trial court. The only thing to which the witness testified was that A.T. used her tongue when kissing the witness; as noted by the trial court, this testimony was completely proper and did not relate a hearsay statement. (RP 39).

Second, in denying the motion for mistrial, the trial court stated: "The Court is able to separate what is admissible and what is not. Even though prior information has come in through the official record of this Court, this Court will not consider those matters that were excluded by Commissioner Potts in the 9A-44." (RP 42).

In a bench trial, the trial judge is presumed to not consider inadmissible evidence in reaching the verdict. State v. Miles, 77 Wn.2d 593, 602, 464 P.2d 723 (1970); State v. Read, 147 Wn.2d 238, 244-46, 53 P.3d 26 (2002). Especially since the instant case involved a non-jury juvenile adjudicatory hearing, there was no necessity to declare a mistrial.

E. THE TRIAL COURT FOUND THE NECESSARY ULTIMATE FACTS TO SUPPORT THE GUILTY VERDICT IN THE FIRST INSTANCE. EVEN IF IT DID NOT, THE SUPERIOR COURT JUDGE PROPERLY REMANDED THE MATTER TO THE COMMISSIONER TO CLARIFY THE FINDING.

While "sexual contact" is an essential element of first degree child molestation, "sexual gratification" is not. Rather, "sexual gratification" is merely a definitional term that clarifies the meaning of "sexual contact." State v. Lorenz, 152 Wn.2d 22, 34-

36, 93 P.3d 133 (2004). In its initial finding of fact 23 (CP 14) the trial court found: "The contact described by A.K.T. (DOB: 09/27/02) was sexual contact." RCW 9A.44.010(2) defines "sexual contact" as "any touching of the sexual or other intimate parts of any person done for the purpose of gratifying sexual desire of either party or a third party." Thus, the finding necessarily encompasses a purpose of sexual gratification. Since the initial finding was adequate, it is unnecessary to consider whether the superior court judge erred in remanding to the commissioner for clarification of the finding.

Mr. Lobos' reliance on State v. B.J.S., 72 Wn. App. 368, 864 P.2d 432 (1994) is misplaced. In B.J.S., the findings made no mention of either "sexual contact" or "sexual gratification"; rather, the findings only stated the respondent engaged in "oral sex". See B.J.S., 72 Wn. App. at 370 n.2. The court acknowledged "it may be reasonable to assume, even highly probable, that the acts were done for sexual gratification[.]" Id. at 372. But without a finding of "sexual gratification", the appellate court could not infer the existence of "sexual contact" (which was also not mentioned in the findings). Accordingly, the conviction was reversed and the case dismissed. Id. at 373. "Oral sex" is a

colloquialism with no statutory definition. In contrast, as noted above, "sexual contact" is defined by statute and necessarily includes a purpose of sexual gratification. B.J.S. is clearly distinguishable on this basis.

Another way in which B.J.S. in not helpful here is that it predates State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995) and State v. Avila, 102 Wn. App. 882, 10 P.3d 486 (2000). In Alvarez, the Supreme Court held that a juvenile case may properly be remanded where "[t]he only purpose in remanding the matter is to allow the trial court an opportunity to enter more adequate findings from the evidence already heard." Alvarez, 128 Wn.2d at 20-21. In Avila, this court recognized that Alvarez requires that "[f]ailure to adhere to JuCR 7.11(d) will result in remand for entry of sufficient findings of fact and conclusions of law." Avila, 102 Wn. App. at 896 (citing Alvarez, 128 Wn.2d at 19). This court concluded:

> In sum, although the evidence is sufficient to support Mr. Avila's conviction, we must, consistent with Alvarez, remand for revision of findings to adequately state ultimate facts. However, no additional evidence may be taken; the findings and conclusions are to be based on the evidence already taken.

Avila, 102 Wn. App. at 897 (citations and quotes omitted). If B.J.S. was decided today, the charge would not be dismissed. Rather, the matter would be remanded for clarification of findings pursuant to Alvarez and Avila. Thus, B.J.S. is no longer good law.

A superior court judge acts in an appellate capacity when considering a motion to revise a commissioner's decision. In re Moody, 137 Wn.2d 979, 992, 976 P.2d 1240 (1999). "In an appropriate case, a superior court judge may determine that remand to the commissioner for further proceedings is necessary." Id. "Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner." Id. at 992-93. Here, the remand was expressly limited to the evidence already heard. (CP 15). There was no error.

Upon remand, Commissioner Malone amended the finding of fact to read that "[t]he respondent's contact with A.K.T. (DOB 9/27/02) was of the sexual or intimate parts. The respondent's contact with A.K.T. (DOB 9/27/02) was done for sexual gratification." (CP 19). Findings of fact that are actually conclusions of law are treated as conclusions of law, and vice

versa. Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 584-85 n.10, 980 P.2d 1234 (1999). Thus, it makes no difference whether this was properly listed as a finding of fact.

After revision, the superior court judge adopted the commissioner's findings as his own. (CP 666). In lieu of remanding, the judge could have independently made a finding that the contact was for sexual gratification. On the other hand, the judge could have adopted the commissioner's findings without modification; if this court found them to be inadequate, the remedy would have been to remand for clarification under Alvarez and Avila. Regardless of what procedure was utilized, the end result would have been the same. "An accused cannot avail himself of error as a ground of reversal unless it has been prejudicial." State v. Eaton, 30 Wn. App. 288, 295, 633 P.2d 921 (1981). "A prejudicial error is one that affects or presumptively affects the final result of the trial." Id. Mr. Lobos was not prejudiced by the procedure followed.

F. THE STATE PROVED IN ITS CASE IN CHIEF THAT MR. LOBOS IS AT LEAST 36 MONTHS OLDER THAN THE VICTIM.

The victim's father, Jared Taylor, testified without objection in the case in chief that Javier Lobos is "13 or 14 years old." (RP

17). He testified that he knew the Lobos family and had visited their home 12 to 14 times. Id. Mr. Lobos' father Rod is the boyfriend of Mr. Taylor's sister; they live together and Mr. Taylor's nephew also lives with them. (RP 18). In effect, Mr. Lobos is part of Mr. Taylor's extended family. It is not surprising that Mr. Taylor would have personal knowledge of his age. Mr. Taylor further testified his own daughter is seven years old (six at the time of the incident). (RP 16). On a challenge to the sufficiency of evidence, all reasonable inferences are drawn in the State's favor and the evidence is interpreted most strongly against the accused. State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.3d 157 (2003). The same standard applies regardless of whether the case is tried to a jury or to the court. Id. Thus, the age element was properly established.

G. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE TO ASK MR. LOBOS' FATHER THE RESPONDENT'S DATE OF BIRTH. IN ANY EVENT, ANY ERROR WAS HARMLESS SINCE HIS AGE WAS ESTABLISHED IN THE CASE IN CHIEF.

When in direct examination a general subject is unfolded, the cross-examiner may develop and explore the various phases of the subject. 5A KARL B. TEGLAND, WASHINGTON

PRACTICE: EVIDENCE § 611.9 at 532 (5th ed. 2007). The precise scope of the cross-examination is left to the discretion of the trial court. Id. at 533.

Rod Lobos testified on direct examination that he is the father of the respondent, Javier Lobos. (RP 216). He also testified regarding the events of Saturday, April 4, 2009. (RP 216-17). He testified that when the adults left that night, Javier Lobos and his sister Jesselynn were left in charge of babysitting. (RP 222). He also said it was a common occurrence for that to happen. (RP 222). This testimony suggested Javier Lobos was of suitable age to act in that capacity. Even without any further examination by the prosecutor, this testimony implied that Javier Lobos was more than 36 months older than the 6-year-old child he was babysitting. The prosecutor merely inquired as to his exact age, which the trial court in its discretion allowed. There was no error.

In any event, any error was harmless. As noted above, the age of Mr. Lobos was already established in the case in chief.

H. MR. LOBOS RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Lobos correctly recites the law on effective assistance of counsel, but fails to reach the obvious conclusion here. In order to prevail on an ineffectiveness claim, both deficient performance and resulting prejudice must be shown. State v. Day, 51 Wn. App. 544, 553, 754 P.2d 1021 (1988).

Mr. Lobos seems to argue that his attorney gave up any challenge to the sufficiency of the evidence by presenting a defense case. When an accused elects to introduce substantive evidence on his own behalf following denial of a motion to dismiss at the close of the State's case, he waives his challenge to the sufficiency of the evidence as it stood at that point; however, he can still seek appellate review of the sufficiency of the evidence as a whole to support a criminal conviction. State v. Liles-Heide, 94 Wn. App. 569, 572 n.7, 970 P.2d 349 (1999).

To clarify, his attorney did make a motion to dismiss at the close of the State's case. (RP 168-69). As explained above, the motion was properly denied because it was established in the case in chief that Mr. Lobos is at least 36 months older than the victim. Thus, Mr. Lobos suffered no prejudice from the

presentation of a defense case. On the contrary, his attorney would have been derelict to have not presented all available substantive evidence on his behalf.

L. THERE WAS NO ERROR IN NOT REQUIRING THE VICTIM TO LOOK AT MR. LOBOS. NOTHING IN THE RECORD SUGGESTS THE ABILITY OF MR. LOBOS TO CONFER WITH COUNSEL WAS IMPAIRED.

Mr. Lobos argues that his confrontation rights were violated by permitting the victim to not look at him while testifying. The confrontation issue was not raised in the trial court. The only time the confrontation clause was mentioned was by the deputy prosecutor, Ms. Harris. (11/09/09 RP 6). It was not mentioned by the defense lawyer, Ms. Magan. (RP 4-7).

Generally, appellate courts will not consider issues raised for the first time on appeal, but a claim of error may be raised for the first time on appeal under RAP 2.5(a)(3) if it is manifest error affecting a constitutional right. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). In order to invoke the exception under RAP 2.5(a)(3), the facts necessary to adjudicate the claimed error must be in the record on appeal; if they are not, no actual prejudice is shown and the error is not manifest. Id. at

333. To show ineffective assistance of counsel, a defendant must show both deficient representation and resulting prejudice. Id. at 334-35. As with other constitutional issues raised for the first time on appeal, it can only be considered if there are sufficient facts in the record to decide the question. Id. at 333.

Here, defense counsel for tactical reason invited informality in positioning the victim. The defense lawyer, Ms. Magan, stated:

> During the 9A-44 hearing I found that it was very effective in communicating with the alleged victim in this case to seat myself lower than she was. In courtroom 1 it worked to be able to sit on the floor so that I wasn't towering over her. I don't know whether that would work in this courtroom but I would ask permission to arrange myself when I'm questioning her so that I'm, I guess, the least intimidating to her as possible and make her as comfortable as possible.

(11/09/09 RP 4-5). Defense counsel further stated:

> Your Honor, if the Court is unable to see the child's face and if the defense counsel is unable to see the child's face, the Court especially is put in a difficult position because it's part of the Court's job to ascertain whether or not witnesses are being truthful and a lot of that is body language. So I would ask that the child be placed in a fashion so that the Court can see her face, can see her facial expressions and so that at least Defense Counsel can do the same,

(RP 6). The Court then ruled:

> Well, the first issue, in terms of how the child will testify, she may not look at the Respondent directly but she is going to have to position herself so that I

> can at least see her face. And, Ms. Magan, you may re-position yourself so that you, as the defense attorney, have the same advantage.

(RP 6-7). The trial court granted defense counsel precisely what she requested. Under the "invited error" rule, a party may not set up error in the trial court and then complain about on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). Any error here was invited error.

In any event, there was no violation of Mr. Lobos' constitutional rights. In State v. Foster, 81 Wn. App. 444, 458, 915 P.2d 520 (1996), aff'd, 135 Wn.2d 441, 957 P.2d 712 (1998), the court quoted from the Ohio Supreme Court's discussion of that state's constitutional provision (which, like Washington's const. art. 1, § 22, guarantees the right of an accused to meet the witnesses "face to face"):

> [T]he value that lies at the core of the Confrontation Clause does not depend on an "eyeball to eyeball" stare-down. Rather, the underlying value is grounded upon the opportunity to observe and to cross-examine. The physical distance between the witness and the accused, and the particular seating arrangement of the courtroom, are not at the heart of the confrontation right.

State v. Self, 56 Ohio St.3d 73, 564 N.E.2d 226, 452 (1990). As another court has stated in a case where the victim testified in such a way that she did not look at the defendant:

> [A] defendant does not have a constitutional right to force eye contact with his accuser, and we refuse to fashion a bright-line rule that the lack of such an opportunity, in and of itself, automatically translates into a constitutional violation. Most other courts that have considered the question have reached a similar conclusion. Moreover, some courts have found that the lack of an easy opportunity for eye contact is palliated to a significant degree by a seating arrangement such as the one employed in this case (which preserves the line of sight and allows a witness to turn to make eye contact with the defendant.)
>
> We summarize succinctly. Although the lack of eye contact weighs in the petitioner's favor, all the other Confrontation Clause safeguards were present here. Mindful, as we are, that trial judges have some leeway to move a witness around a courtroom as long as those shifts retain an unobstructed line of sight between the defendant and the witness [citing case law suggesting that "many such procedures may raise no substantial confrontation clause problem since they involve testimony in the presence of the defendant"], we cannot say [the lower court's] core conclusion – that no Confrontation Clause violation occurred – was either unreasonable or obviously wrong.

Ellis v. United States, 313 F.3d 636, 652 (1st Cir. 2002) (citations omitted). The Ellis court also noted "the record here contains no evidence suggesting that what the petitioner actually saw of [the

victim's] face at trial was substantially less than what he would have seen had she testified from the witness stand." Id. at 651-52.

While the Washington provision is given an independent interpretation from its federal counterpart, the Washington Supreme Court has upheld testimony of a child victim by closed-circuit television. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). A defendant clearly has no constitutional right to force a witness to look at him. The testimony occurred in the presence of Mr. Lobos and there is nothing in this record to suggest Mr. Lobos' ability to view the victim's face was substantially different than it otherwise would have been. Moreover, since this was a non-jury juvenile adjudication, there was no issue of making a bad impression on a jury.

Mr. Lobos also argues his ability to confer with counsel was impaired, but nothing in the record so suggests. In the absence of an adequate record, the issue cannot be considered on appeal. McFarland, 127 Wn.2d at 333. In any event, he fails to explain how his ability to confer with counsel was impaired since they were in the same courtroom. Mr. Lobos could have easily signaled his attorney if he wished to discuss something. In many

courtrooms, counsel questions the witness from a podium. How was the ability to communicate with counsel different here? Even if Mr. Lobos was seated directly next to his attorney, it would have been necessary for him to signal his attorney if he wanted to interrupt the questioning to confer. There is no showing of impairment.

CONCLUSION

On the basis of the arguments set forth above, it is respectfully requested that the juvenile adjudication of Javier Lobos for first degree child molestation be affirmed.

Dated this 11th day of April, 2011.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: Frank W. Jenny
Frank W. Jenny
WSBA #11591
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Deborah L. Ford, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 13th day of April, 2011, a copy of the foregoing was delivered to Javier R. Lobos, Appellant, Echo Glen Children's Center, Willapa Living Unit, 33010 Southeast 99th Street, Snoqualmie WA 98065-9798 by depositing in the mail of the United States of America a properly stamped and addressed envelope and to Norma Rodriguez, Attorney, 7502 West Deschutes Place, Kennewick WA 99336 by placing same in Inter-City Legal Messenger Service for delivery.

Deborah L. Ford

Signed and sworn to before me this 13th day of April, 2011.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2014

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