

No. 26677-0-III

83415-6

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,
Respondent,

vs.

WILLIAM AUSTIN BROUSSEAU,
Appellant.

SUPPLEMENTAL OPENING BRIEF

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A. INTRODUCTION

William Brousseau, Appellant, submits this supplemental opening brief on the issues of whether he was denied his state and federal constitutional rights to due process of law at a hearing where her competency was in issue and whether the trial court erred by failing to comply with the statutorily specified requirements of a child hearsay hearing when the trial court refused to permit the child witness to be examined—by anyone—despite defense counsel’s repeated requests.¹

Washington courts have long held that the determination of the competency of a witness rests with a trial judge who “sees” the witness, “notices” her manner, and “considers” her capacity and intelligence. A trial court violates its “threshold obligation” to ensure competence when it refuses to hear from the child witness for no stated (much less compelling) reason, especially where the testimony at the competency hearing supports the conclusion that the

¹ In his opening brief (written by former counsel), Brousseau assigned error both to the conduct of the competency hearing (Assignment of Error, No. 2) and the admission of child hearsay (No. 1). In his response to the State’s motion on the merits (written by current counsel), Brousseau clarified the former argument. In this brief, Brousseau further clarifies his child hearsay argument—changing the focus to the failure to call the child at the hearing (the same issue raised in his challenge to the conduct of the competency hearing). Mr. Brousseau has contemporaneously filed a motion for leave to file this supplemental brief.

witness is incompetent. In addition, because there was no showing whatsoever of unavailability, the trial court erred by conducting the child hearsay hearing without the testimony of the child witness.

This Court should reverse and remand for a new trial because the erroneously admitted child hearsay statements were harmful. Alternatively, this Court should reverse and remand for a competency hearing before a different judge where the challenged witness will be required to testify. If the trial court determines the witness was competent at the time of trial, then Brousseau's convictions should stand. However, if the witness is determined to have been incompetent at the time of trial or if it is impossible to conduct a meaningful hearing (given the retrospective analysis of the witness' competence at the time of the trial), reversal is required.

B. FACTS

Brousseau submits a brief recitation of the facts—focusing on the conduct of the competency and child hearsay hearings.

Seven-year old J.R. accused Brousseau of raping and molesting her.

Prior to trial, the Court directed a Commissioner to conduct a hearing to determine whether J.R. was competent to testify. At that hearing, a child psychologist testified that J.R.'s capacity for offering accurate testimony was impaired. RP (3/27/07) 43, 48, 95. Defense then sought to have J.R. appear, so that either counsel *or* the trial court could examine her. The trial court denied the defense request. The trial court then determined that J.R. was competent to testify without ever hearing or seeing the witness. CP 69.

J.R. was thereafter permitted to testify at trial. Her answers at trial generally ranged from one ("yes" or "no") to several words. RP 103-30.

Shortly after the competency hearing, the Court held a hearing regarding the admissibility of several "child hearsay" statements. Once again, the child witness did not appear and testify. The State did not even attempt to establish unavailability.

After the hearing, the trial court found the following numerous statements admissible (RP 122-3) pursuant to the child hearsay statute. The following witnesses testified to the following child hearsay statements based on that ruling:

Carla Metcalf, a school counselor, testified that the alleged victim told her that defendant "made her rub his penis." RP 197. In addition, Ms. Metcalf stated that the alleged victim told her that "he had asked her to rub her penis before." "She gets mad and doesn't like it," and that "sometimes it hurts." RP 198.

Ellen Klein testified, while driving the alleged victim to school, the alleged victim told her the defendant "asked me to play with his penis." RP 171. Later, the alleged victim stated that defendant had previously touched her "in" her "privates." RP 172.

Janet Beitelspacher testified that the alleged victim related similar incidents, but also testified that she stated defendant "opened it and he put his finger in it." RP 413.

Asotin County Deputy Sheriff Jackie Nichols testified similarly. RP 236-41.

Brousseau testified, denying that he had sexually abused J.R. in any manner. RP 630-35. His testimony was bolstered by testimony that J.R. had previously made an accusation of sexual abuse, as well as the testimony of Dr. Phillip Esplin, an internationally recognized expert on accusations of child sexual

abuse, who testified that young children often transfer a core element of an accusation from the actual perpetrator to an innocent person.

RP 518-82.

C. ARGUMENT

1. Conducting a Competency Hearing Without the Challenged Witness' Testimony Violates Due Process.

Introduction

Brousseau starts by clearly framing his claim of error: the trial court's refusal to permit any examination of the witness whose competence was questioned constituted a violation of the state and federal constitutions' due process requirements. In short, where the court holds a competency hearing, it violates due process to refuse to permit the testimony of the challenged witness. Thus, Appellant's claim of error focuses on the procedure, not the outcome of the hearing—making most of the State's arguments irrelevant.

Competency Hearings and the Requirements of Due Process

A trial court has a threshold obligation to ensure witnesses are competent to testify. Competency is thus a question of fact to be determined by the trial court. *State v. Watkins*, 71 Wash.App. 164, 170, 857 P.2d 300 (1993). The burden of proving incompetency is

857 P.2d 300 (citing 5A KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE § 208, at 122 (3d ed.1989)). Such determinations obviously depend on the facts of each case, and make general rules elusive. No single method of determining competency can be prescribed for all situations.

Courts consider five factors when determining competency of a child witness; absence of any one of which renders the child incompetent to testify: (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 he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. *State v. Allen*, 70 Wash.2d 690, 692, 424 P.2d 1021 (1967); *see also In re Dependency of A.E.P.*, 135 Wash.2d 208, 223, 226, 956 P.2d 297 (1998).

Although governed by broad due process limits, every Washington appellate case affirming a trial court's competency finding involved the live testimony of the questioned witness before

the judge making the legal determination. *See e.g., State v. Maule*, 112 Wash. App. 887, 51 P.3d 811 (2002) (and cases cited therein).

While the conduct of the hearing may differ, the testimony of the questioned witness is at the core of the due process requirement. The procedure for determining competency, including the nature of the questioning, “rest[s] primarily with the trial judge who *sees the witness, notices his manner, and considers his capacity and intelligence.*” *See e.g., Allen*, 70 Wash.2d at 692, 424 P.2d 1021 (emphasis added). *See also* RCW 5.60.050(2). While the trial court may find it appropriate to limit *voir dire* to its own questions (*see United States v. Spoonhunter*, 476 F.2d 1050, 1055 (1973), *superseded by rule on other grounds as stated in United States v. Allen J.*, 127 F.3d 1292 (10th Cir.1997)), especially where the witness is a child who is particularly vulnerable, the due process cases all rest on the factual premise that the child witness has testified before the court.

Maule is particularly instructive. While affirming the trial court’s decision to preclude defense counsel’s questioning of the witness, it did so only because the Court had an adequate

opportunity to see and hear the witness without that questioning. If the witness had not testified at the hearing, as happened here, the case would likely have turned out differently—as both the plain logic and language of the decision, as well as its reliance on caselaw, demonstrate. On appeal, Maule contended due process required that *defense counsel* be permitted to cross-examine a child witness at a competency hearing, particularly where the prosecutor has been permitted to do so. The Court rejected this claim, noting: “Due process is a flexible concept calling for those procedural protections demanded by the nature of the interest affected and the context in which the alleged deprivation occurs.” *Id.* at 893; *Stone v. Prosser Consol. School Dist.*, 94 Wash.App. 73, 76, 971 P.2d 125 (1999) (citing *Morris v. Blaker*, 118 Wash.2d 133, 144, 821 P.2d 482 (1992) and *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

Maule noted that courts balance three factors when determining the scope of due process protections: (1) the significance of the private interest to be protected; (2) the risk of erroneous deprivation of that interest through the procedures used;

and (3) the fiscal and administrative burdens that the additional procedural safeguards would entail. *Mathews*, 424 U.S. at 335. In holding that due process did not require an examination of the witness by defense counsel in every case, the reviewing court recognized the first and third factors favor procedural safeguards. The interest Maule sought to protect is his liberty, an “obviously substantial” interest; the State’s interest in testimony from a witness who is incompetent is nil, and allowing defense cross-examination in a competency hearing would impose nothing in the way of additional fiscal or administrative burdens. Nevertheless, the Court held that the risk of erroneous deprivation of liberty was not “unjustifiably high” if defense counsel was not permitted to cross-examine the child in every competency hearing.

However, the Court of Appeals’ holding was unquestionably premised on the foundation that the witness would be questioned by or before the court. “But the issue is not who conducts the questioning—judges may conduct all the questioning themselves.” 112 Wn. App. at 892. The Court of Appeals further noted that “(i)f counsel suggests a line of questioning that will help determine

whether the child is competent, the court may permit counsel to examine, or may conduct the questioning itself.” *Id. citing with approval United States v. Spoonhunter*, 476 F.2d 1050, 1055 (1973), *superseded by rule on other grounds as stated in United States v. Allen J.*, 127 F.3d 1292 (10th Cir.1997) (when counsel is not included in competence *voir dire*, it becomes counsel's obligation to suggest questions); *see also* VI WIGMORE, EVIDENCE § 1820, at 397-98 (Chadbourn rev.1976). In short, the guidelines necessary to make a competency finding “presume that the court has examined the child, observed his manner, intelligence, and memory.” *State v. Ryan*, 103 Wn.2d 165, 172, 691 P.2d 197 (1984).

Historically Speaking, Due Process Has Always Mandated the Testimony of the Questioned Witness

The requirement of producing the witness whose competency is in issue is a longstanding element of due process. The general rule stated in 70 C.J., Witnesses, Section 254, in which it is said: “When an objection is raised to the competency of a witness the court should examine into and determine the question of

competency before the witness is allowed to testify;....when the witness is a very young child *it is the duty of the court to examine him* in order to determine his competency before allowing him to testify, *at least where the party against whom he is to testify demands such examination.*” (emphasis added). This has been the rule for over half of a century. 3 Wharton, Criminal Evidence (11th Ed.1935), Section 1151 stated that “if a party is in doubt as to the qualification of a witness, he should examine him in that regard preliminarily.... Whenever possible, the competency of a witness should be determined when he is produced.”

In brief, the general rule recognized by all of the authorities is that a defendant, when he asks for it and makes some minimal showing, is entitled as a matter of due process to a preliminary examination into the mental capacity and competency to testify of the proffered witness and to a decision on that issue by the trial judge.

This is not to say “that *every* allusion as to incompetency of a witness [is to] be exhaustively explored by the trial judge, particularly where all other evidence substantiates competency.”

United States v. Crosby, 462 F.2d 1201, 1203 n. 5 (D.C.Cir.1972).

But where, as in *Crosby*, 462 at 1203, there is a colorable competency question raised, the Due Process Clause of the state and Federal Constitution require the Court to conduct or observe some examination of the witness. *See also Sinclair v. Wainwright*, 814 F.2d 1516 (11th Cir. 1987) (“An opposing party may challenge competency, whereupon it becomes the duty of the court to make such an examination as will satisfy the court of the competency of the proposed witness. If the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness.”).

Brousseau crossed that threshold. Thus, the failure to produce the witness was error and any subsequent conclusion was the product of that error. Indeed, the trial court, which had the obligation to determine competency, foreclosed hearing from the most critical witness (the complaining witness) and offered no reason for doing so. Thus, the conduct of the competency hearing violated due process.

Application of the Proper Harm Standard

The State argues that this Court should review the witness' trial testimony and determine that the trial court's ultimate decision was proper (or harmless), citing *State v. Guerin*, 63 Wn. App. 117, 816 P.2d 1249 (1991). *Guerin* does not support the State's argument. Instead, the only proper method of determining harm is to remand for the proper conduct of a competency hearing.

In *Guerin*, the only case cited by the State in support of its harmless analysis, the reviewing court expressly noted that the trial court "conducted the appropriate pre-trial hearings and entered detailed findings covering the competency and hearsay issues in those hearings," none of which were challenged on appeal. 63 Wn. App. at 121-2. Instead, the defendant argued that the witness was incompetent only at the time of trial. Contrary to the State's argument that the appellate court conducted its own competency hearing for the first time on appeal, the appellate court merely cited to the evidence at trial as support for the trial court's decision: "*We agree with the trial court and find that the child was competent to testify at trial because her previous testimony on direct examination*

established her independent recollection.” *Id.* at 123 (emphasis added). Thus, the decision in *Guerin* simply reflects the deference owed to a trial court where the trial court has heard from and observed the witness whose competence is in question.

Indeed, *de novo* or first time review of the record by an appellate court in order to determine competence is directly contrary to a long line of cases which emphasize the unique ability of the trial court to assess competency only after seeing and hearing from the witness. Indeed, the trial court is the only court that sees the child and listens to her. As a result, there “is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.”

State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1134 (2005). It is for this precise reason that the court in *State v. C.M.B.*, 130 Wn. App. 831, 125 P.3d 211 (2005) held that the competency of a witness cannot, in a criminal case, be raised for the first time on appeal.

In addition, *State v. Hopkins*, 137 Wn. App. 441, 154 P.3d 250 (2007), provides strong support for the conclusion that this Court cannot determine that the trial court would have found the

child competent (if she had testified at the competency hearing) by reviewing the child's trial testimony. In *Hopkins*, the State argued that even if the trial court's failure to conduct a competency hearing (in determining the admissibility of child hearsay) was error, the error was harmless because there was "overwhelming evidence" that the witness was incompetent. Instead, the appellate court simply applied a harm standard by starting from the proposition that the evidence was inadmissible based on the failure to conduct an adequate hearing. *Hopkins* is discussed in further detail in the next section.

For these reasons, the only method to determine harm is by remanding this case for a proper competency hearing. This is the remedy applied when a district court unreasonably fails to conduct a hearing inquiring into the competency of a defendant. In those cases, the appellate court reverses and remands to the trial court for a proper competency hearing. *See State v. Mahaffey*, 3 Wn. App. 988, 478 P.2d 787 (1970). *See also Morris v. United States*, 414 F.2d 258, 259 (9th Cir.1969); *Blazak v. Ricketts*, 1 F.3d 891, 900 (9th Cir.1993). The *Mahaffey* court held: "Having found no error except for

the failure to hold a competency hearing, the verdict of guilty shall stand if it is found that Mahaffey was competent to stand trial. In the event that it is found that Mahaffey was not competent to stand trial, or if it cannot be determined whether he was or was not competent as of the time of trial, the judgment and sentence shall be vacated and a new trial held, if and when the defendant is found to be competent to stand trial.” *Id.* at 996-7. *See also Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Thus, this Court should reverse and remand for the conduct of a proper hearing to determine whether the complaining witness was competent at the time of trial. If she was, then no error occurred. If she was not, then Brousseau is entitled to a new trial. If her competency at the time of trial cannot now be determined, Brousseau is also entitled to a new trial. Because the trial judge has already expressed an opinion on the matter, the hearing should be before a different judge. *State v. Sledge*, 133 Wn.2d 828, 846 n. 9, 947 P.2d 1199 (1997).

2. Conducting a Child Hearsay Hearing Without the Child Witness’ Testimony Violates the Statute Where There Was No Showing of Unavailability.

There is a simpler route to reversal. In this case, the trial court admitted several child hearsay statements after conducting a

“child hearsay” hearing, where the child did not testify and where there was no showing of unavailability.

RCW 9A.44.120 provides, in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, ... not otherwise admissible by statute or court rule, is admissible in evidence in ... criminal proceedings ... in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) *The child either:*

(a) *Testifies at the proceedings; or*

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

(Emphasis added.). Here, there was no showing of unavailability.

Indeed, the court had just found the child competent to testify.

Thus, it was clear error to conduct the hearing and admit the child hearsay without the testimony of the child at the pretrial hearing. For example, in *Hopkins*, the child witness did not testify because parties stipulated that the child was incompetent.

Nevertheless, the appellate court reversed: “The record before us

does not reflect that the trial court here conducted a hearing to determine whether MH was incompetent as a witness on any ground. On the contrary, it appears that the trial court neither interviewed nor evaluated this child victim.” 137 Wn. App. at 450. As a result, reversal was required. “Although the trial court's conclusion may appear reasonable under the circumstances here, such conclusion does not satisfy the legislatively-prescribed prerequisites for the admissibility of child hearsay under RCW 9A.44.120.” *Id.*

Failure to follow the statute mandates reversal where the evidence admitted is harmful. This Court cannot review the child's trial testimony for purposes of harmless error analysis. *Hopkins*, 137 Wn. App. at 450, n.12 (“Furthermore, not even the possibility of the trial court's reaching this same conclusion, after it conducts the statutorily required competency hearing on remand, obviates the statutory necessity for conducting the hearing”); *State v. Young*, 62 Wn. App. 895, 900, 802 P.2d 829 (1991) (“(T)he trial court's assessment of J.'s truthfulness must be judged by the information presented at the hearsay hearing... Thus, J.'s recantation at trial does

not undermine the court's assessment of her truthfulness at the earlier hearsay hearing.

Instead, this Court must assess the harm based on the erroneous admission of several hearsay statements. In other words, the alleged victim's hearsay statements were inadmissible (based on the failure to conduct a proper hearing). The harm test where hearsay is erroneously admitted is whether the untainted evidence (untainted by the offending hearsay) is so overwhelming that any error is harmless. *State v. Guloy*, 104 Wash.2d 412, 426, 705 P.2d 1182 (1985). Here, the error was clearly harmful. Although the complaining witness testified, her credibility was bolstered by the introduction of numerous statements by her to several additional witnesses. Absent those hearsay statements, this was a close case, falling far short of the overwhelming untainted evidence standard. In fact, even under the non-constitutional harm² standard, reversal is required.

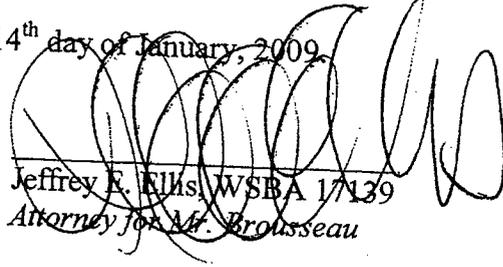
² A non-constitutional error is prejudicial when it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). In other words, the improper admission of evidence is considered harmless error "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

C. CONCLUSION

Without any explanation or justification, the trial court conducted both a competency and child hearsay hearing—refusing to permit the testimony of the child witness. Conducting both hearings in this manner violated both due process and the plain language of the child hearsay statute. These errors resulted in admission of virtually the State's entire case.

As a result, this Court should either reverse and remand for a new trial or reverse and remand for a new competency hearing.

Respectfully submitted this 14th day of January, 2009.



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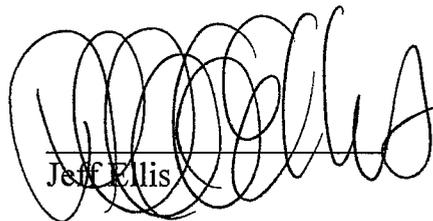
CERTIFICATE OF SERVICE

I, Jeff Ellis, certify that on January 14, 2009, I served the party listed below and the Appellant with copies of the attached *Supplemental Opening Brief* and *Motion for Leave to File Opening Brief* by mailing it, postage pre-paid to:

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