

65332-6

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NO. 65332-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

M.G.H. (DOB: 12-29-1993),

Appellant.

2011 MAR 29 AM 9:53

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BRIEF OF RESPONDENT

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## I. ISSUES

(1) A witness's testimony demonstrated her ability to recollect her experiences and answer questions about them. Although there were inconsistencies in the witness's testimony, the witness explained some of them by saying that she was scared. Did the trial court abuse its discretion in determining that the witness was competent to testify?

(2) Following contact with the appellant, the victim spontaneously said that he had touched her vagina. When questioned by her parents and by a police interviewer, she provided further information about what had occurred. Did the trial court abuse its discretion in admitting these statements under the child hearsay statute?

(3) The appellant was questioned in a school office by a police officer. Before the questioning began, the officer told him that he wasn't under arrest and could go back to class at any time. Was the appellant in custody to a degree associated with formal arrest, so as to require administration of Miranda warnings?

(4) In its oral ruling finding the appellant guilty, the court remarked that the appellant's statements would have been more

credible if they had been corroborated. Does this remark demonstrate that the court misunderstood the burden of proof?

(5) If any of the evidence in this case is held inadmissible, should that evidence nonetheless be considered in determining whether the evidence was sufficient to support a conviction?

## **II. STATEMENT OF THE CASE**

On the weekend of October 3-5, 2008, the H. family visited the P. family at their home in Monroe. The H. family includes M.H. (the appellant), who was then 14 years old. The P. family includes M.P., who was then 7 years old. The visit lasted from Friday night through Sunday evening. On Sunday afternoon, October 5, the appellant and M.P. spent part of the afternoon playing together. RP 39-41.

After the H. family left, M.P. started helping her mother unload the dishwasher. Without preamble, she told her mother that the appellant had touched her. When asked where, she pointed to her vaginal region. Her mother asked M.P. to go upstairs so she could talk to her father. RP 42-43.

A few minutes later, her mother heard M.P. crying in her room. She called her down and asked why she was crying. M.P. said that she was afraid she was going to get in trouble. She said

that the appellant had told her that she would get in trouble if she said anything. Her parents assured her that she would not get into trouble. They asked her what had happened. M.P. said that the appellant had touched her with his penis and his hand. He had also touched her chest. Her mother testified that M.P. said that the appellant had kissed her. Her father testified that she said he had kissed her stomach. RP 43-45, 68-69.

Two days later, the parents reported this incident to police. The father brought M.P. to the police station. Monroe Police Officer Kenneth Sahlstrom asked M.P. to tell her father what had happened. In Officer Sahlstrom's presence, M.P. said that the appellant had suggested that they play doctor. They started giving each other shots with her pretend doctor's kit. After giving her pretend shots in several places, he rubbed her potty, had her lift her skirt, and kissed her boobie. This happened in the closet in the bedroom. RP 101-02.

On October 9, M.P. was interviewed by LaDonna Whalen, a child interviewer employed by the Monroe Police Department. M.P. told her that she had played doctor with the appellant in her brother's closet. The appellant told her to pull her pants down and her shirt up. He kissed her booby and scratched her potty with his

hand. He pulled his pants down and told her that he wanted their potties to touch each other. He kissed her on the lips and their potties touched. M.P. also talked about another occasion when they played doctor in the closet and the appellant touched her potty with his hand. Ex. 3.

On October 28, the appellant was interviewed at school by Monroe Police Detective Barry Hatch. Det. Hatch testified that at the beginning of the interview, he told the appellant "he was not under arrest, I had no intention of arresting him today, and that he could go back to class whenever he wanted." RP 150-51. The appellant testified at a 3.5 hearing that Det. Hatch never told him that he could go at any time. He claimed that he believed that he could not choose to leave. RP 171-72. The trial court disbelieved this testimony and believed the testimony of Det. Hatch. RP 178.

The appellant provided a written statement. He said that he had played doctor with his cousins, but he was never in any closet. He said that he never kissed M.P. and never touched her anywhere but her stomach. "I think her mom might have prevoct [*sic*] to say these things because her mom hates me and is always making me out to be the bad guy." Ex. 4.

On November 24, M.P. was examined by Caryn Young, a nurse practitioner at Providence Intervention Center for Assault and Abuse. Young asked M.P. if she knew why she was there. M.P. said no. Young told her that she was there for a checkup. She asked about M.P.'s health, the people she lived with, and her visitors. M.P. said that her cousins come and visit, but there was one that she couldn't be around. When asked what he did wrong, she said that he touched her potty with his hand. RP 118-19. Young observed genital irritation, but in view of the lapse of time, this could not be associated with sexual abuse. RP 120-22, 126-28.

On February 24, 2009, an information was filed charging the appellant with first degree child molestation. 1 CP 134. The case came to trial over a year later, on March 30, 2010. At trial, M.P. testified that she had played doctor in the closet with the appellant. He had touched her on the potty with his hand. He had also touched her boobies with his hand. She testified that he had not touched her potty with anything other than his hand. RP 80-87. The defense did not offer any evidence. The court found the appellant guilty. RP 216-24.

### **III. ARGUMENT**

#### **A. BASED ON THE TRIAL COURT'S OBSERVATIONS OF A WITNESS'S DEemeanOR, THE COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE DEFENDANT HAD FAILED TO ESTABLISH HER INCOMPETENCY.**

The appellant claims that the victim was incompetent to testify. All witnesses, regardless of their age, are presumed to be competent. State v. S.J.W., 170 Wn.2d 92 ¶ 18, 239 P.3d 568 (2010). "A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly." Id. ¶ 20.

A former version of the competency statute created a special rule for determining competency of children under ten years of age. Former RCW 5.60.050. That language was, however, removed from the statute in 1986. Laws of 1986, ch. 195, § 2. The current statute does not distinguish between the competency of children and that of adults. S.J.W. ¶¶ 16-17.

Under the former statute, the court had outlined the following test:

The true 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 he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). These factors “continue to be a guide when competency is challenged.” S.J.W. ¶ 20.

A determination of competency “rests primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review.” Allen, 70 Wn.2d at 690. Consequently, the trial court’s determination will not be disturbed on appeal absent abuse of discretion. S.J.W. ¶ 11. The existence of inconsistencies and contradictions in a witness’s testimony do not render the witness incompetent. State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989).

The appellant relies on Jenkins v. Snohomish County P.U.D. No. 1, 105 Wn.2d 99, 713 P.2d 79 (1986). In that case, the court held that inconsistencies in a child’s testimony did render him incompetent. This holding reflects an unusual circumstance: the witness testified solely by deposition. Because the trial judge never

observed the witness, the Supreme Court reviewed the competency determination de novo. Id. at 102. The court expressly noted that the result may have been different if the trial judge had seen the witness and further questioning had demonstrated his independent recollection. Id. at 103. Consequently, the analysis of Jenkins has little relevance under the circumstances of the present case. Indeed, it is questionable whether Jenkins has any continuing validity at all. As the Supreme Court has pointed out, that case was based on the former version of RCW 5.60.050, before that statute was amended to eliminate any presumption of incompetency. S.J.W. ¶ 13.

Here, the witness's testimony at the competency hearing showed her ability to recollect events and to answer questions about them. RP 12-18. On cross-examination, the witness did admit that she had said at a pre-trial interview that she couldn't remember what the appellant had done to her. RP 20-1. She also testified that her parents had helped her remember. RP 26. On re-direct, however, she testified that she said she didn't remember because she was scared. RP 25. She also testified that her parents had not told her what to say, beyond telling her to tell the truth. RP 27.

The trial court heard all of this testimony and observed the witness's demeanor when she was testifying. The court was entitled to decide whether the inconsistent statements reflected fear, lack of credibility, or lack of competency. The court did not abuse its discretion in determining that the witness was competent.

On appeal, the appellant claims that the witness's trial testimony demonstrated her lack of competence. At trial, however, he did not ask the court to reconsider its competency determination on the basis of the trial testimony. When a court is never asked to make a ruling, failure to make that ruling is not an abuse of discretion. In any event, the court was entitled to determine that the inconsistencies did not demonstrate the witness's incompetence.

**B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE VICTIM'S STATEMENTS UNDER THE CHILD HEARSAY STATUTE.**

**1. Considering All The Relevant Factors, The Court Properly Determined That The Circumstances Of The Statement Provided Sufficient Indicia Of Reliability.**

Under the child hearsay statute, statements made by a child who testifies are admissible only if "the time, content, and circumstances of the statement provide sufficient indicia of

reliability.” RCW 9A.44.120(1). The appellant claims that this requirement was not satisfied.

In determining the reliability of child hearsay, the court will consider nine factors:

(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; ... (5) the timing of the declaration and the relationship between the declarant and the witness; ... [6] the statement contains no express assertion about past fact, [7] cross-examination could not show the declarant's lack of knowledge, [8] the possibility of the declarant's faulty recollection is remote, and [9] the circumstances surrounding the statement ... are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

Determining the admissibility of child hearsay lies within the discretion of the trial court. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 125 Wn.2d 1002 (1995). No single factor is decisive; rather, reliability is based on an overall evaluation of the factors. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). If the factors are substantially met, the statement is sufficiently reliable. State v. Borland, 57 Wn. App. 7, 20, 786 P.2d 810 (1990).

In the present case, the majority of the Ryan factors support admission:

1. Motive to lie: The trial court found that there was no apparent motive to lie. RP 192. The appellant claims that such a motive existed because of a purported dislike for him on the part of the declarant's mother. Brief of Appellant at 26. The only evidence of this dislike is the appellant's own statement. The court was not required to believe him. In any event, any animus on the part of the mother would not establish the *declarant's* motive to lie.

2. The declarant's character: The declarant's mother testified that she generally told the truth. The only exception was "kid problems," like claiming that she had cleaned her room when she hadn't. RP 52-53. It would be rare to find a child who *always* told the truth. The record supports the trial court's finding that there was nothing in the declarant's character that would lead to misperception or misstatement. RP 193.

3. Whether more than one person heard the statement: The victim's initial statement was only heard by her mother. RP 42-43. Shortly afterwards, she repeated similar statements to her mother and father. RP 44-45, 68-69. She also made similar statements to police. RP 101-02; ex. 4. Consistent statements by a child indicate

reliability. State v. Robinson, 44 Wn. App. 611, 620, 722 P.2d 1379 (1986); State v. Frey, 43 Wn. App. 605, 610-11, 718 P.2d 846 (1986). Although there were some inconsistencies in her trial testimony, that was over a year later, when her recollection was probably poorer.

4. Spontaneity of the statements: The initial disclosure was entirely spontaneous. RP 42. The statements shortly afterwards were given in response to general questions. RP 44. Statements to police were made in response to non-suggestive questioning. RP 101-02; ex. 4. The existence of questioning does not defeat the "spontaneity" of a statement. Information volunteered by a child in response to non-suggestive questions is "spontaneous." State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

5. The timing of the declaration and the relationship between the declarant and the witness: The initial disclosure was made to the declarant's mother shortly after the abuse. RP 42. Other statements were made shortly afterwards. RP 44. Statements to police were made two and four days later. RP 101-02.

The defendant claims that a person's statement to her mother might be untrustworthy because a mother "might be predisposed to believe that the defendant had committed indecent

liberties.” Brief of Appellant at 25-26, citing Ryan, 103 Wn.2d at 176. In Ryan, this predisposition existed because the mother had been told of the possibility of abuse *before* she questioned the declarant. Here, there is no evidence of any pre-existing suspicion of abuse.

6. Whether the statements contain any express assertion about past facts: They do, but this is almost always true of child hearsay.

7. Whether cross-examination could show the declarant's lack of knowledge: Since the declarant was cross-examined, this factor is irrelevant. There is also no likelihood that cross-examination could show that the victim did not *know* whether he was abused.

8. Whether the possibility of the declarant's faulty recollection is remote: Given the short time between the abuse and the disclosure, there is no likelihood that the disclosure reflected faulty recollection. The reliability of the disclosure is not affected by any problems with the victim's memory at the time of trial a year later.

9. Whether there is no reason to suppose that the declarant misrepresented defendant's involvement: In light of the factors

discussed above, there is no reason to believe that the victim's statements were anything other than the truth.

The trial court carefully considered all of these factors. RP 192-200. Most of them support admissibility of the statements. Admitting the statements was therefore not an abuse of discretion.

**2. Even If The Victim Is Considered Incompetent To Testify, That Does Not Render Cross-Examination Meaningless, So As To Make Her Statements Inadmissible Under The Confrontation Clause.**

The appellant also challenges the constitutional admissibility of the victim's statements. This challenge is predicated on the victim's incompetence to testify. Brief of Appellant at 20-24. As discussed above, she was in fact competent.

If, however, this court considered her incompetent, allowing her to testify would be reversible error. Accordingly, it would not be necessary for the court to consider other possible grounds for reversal. On remand, the admissibility of her hearsay statements would have to be determined anew, based on her competency and any corroboration that might exist at the time.

In any event, the appellant's argument rests on a false premise: that cross-examination of the victim was not meaningful. He claims that she was incompetent because she lacked an

accurate memory. Brief of Appellant at 17-19. A witness's lack of memory does not render cross-examination meaningless. The witness can still be cross-examined on such matters as bias. Indeed, simply demonstrating the witness's poor memory is a prime objective of cross-examination. United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). In the present case, cross-examination was highly effective in eliciting contradictions, demonstrating lack of memory, and suggesting that the witness had been coached. RP 91-98. Much of the appellant's argument on appeal is based on this cross-examination. Brief of Appellant at 13-16, 18-19. In no sense was the cross-examination less than "meaningful." The admission of the victim's statements did not violate constitutional requirements.

**C. A STUDENT IS NOT IN "CUSTODY" WHEN HE IS QUESTIONED AT SCHOOL AFTER BEING EXPRESSLY TOLD THAT HE IS FREE TO LEAVE.**

The appellant claims that his statements to police should have been suppressed under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda requirements are only applicable when there has been custodial interrogation by a state agent. The test for custody is objective: "whether a reasonable person in the individual's position would believe he or

she was in police custody to a degree associated with formal arrest.” State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). “Whether the suspect is free to leave is not the question.” College Place v. Staudenmaier, 110 Wn. App. 841, 43 P.3d 43, review denied, 147 Wn.2d 1024 (2002). The trial court’s determination of “custody” is reviewed de novo. Lorenz, 152 Wn.2d at 36. In this context, “de novo review” means applying the legal standard to the facts found by the trial court. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025 (2003).

The appellant relies on State v. D.R., 84 Wn. App. 832, 930 P.2d 350, review denied, 132 Wn.2d 1015 (1997). There, this court held that a student was subjected to “custodial interrogation” when he was questioned at school in the assistant principal’s office by a police officer. The most critical factor supporting this conclusion was that the student was not told that he was free to leave. Id. at 838.

D.R. examined two Oregon cases: State ex rel. Juvenile Dep’t v. Killitz, 59 Or. App. 720, 651 P.2d 1382 (1982), and State ex rel. Juvenile Dep’t v. Loreda, 125 Or. App. 390, 865 P.2d 1312 (1993). Both cases involved interrogations of students by police officers in principals’ offices. In Killitz, the officer did nothing to

“dispel the clear impression communicated to defendant that he was not free to leave.” The court therefore concluded that the student was in “custody.” D.R., 84 Wn. App. at 837, quoting Killitz, 651 P.2d at 1384. In Loredo, in contrast, the student was told that he was not under arrest and could leave if he wanted to. The court therefore held that the student was not in custody and that Miranda warnings were not required. D.R., 84 Wn. App. at 837, citing Loredo, 865 P.3d at 1313-14. The D.R. court concluded that the “most significant difference” between Killitz and Laredo was whether the suspect was told that he was free to leave. Because the juvenile in D.R. did not receive this advice, the court concluded that he was in “custody” and Miranda warnings were required. D.R., 84 Wn. App. at 838.

In the present case, there was a conflict in the testimony on this point. The appellant testified that the officer did not tell him that he was free to leave. RP 172. The officer testified to the contrary: “I made it very clear to him that he wasn’t under arrest, and that I had no intentions of arresting him or taking him from the school, and that he could go back to class at any time.” RP 150. The trial court credited the officer’s testimony:

I think to the question that [M.H.] may have felt in going there that he had to talk to somebody, I think the officer made it clear enough by letting him know that he wasn't under arrest, wouldn't be arrested, and is free to go back to class at any time. Though I recognize that's at variance with [M.H.'s] testimony, I accept that testimony, and I think that purports with any requirements that the detective had by way of information or advice or fights to dispel any coercion from the setting for the interrogation.

RP 179. Even when constitutional issues are involved, the trial court's credibility determinations will not be overturned on appeal. State v. Swan, 114 Wn.2d 613, 666, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1991). In light of the trial court's determination that the appellant was told he was free to leave, the court correctly determined that he was not in custody.

**D. REMARKS MADE BY A TRIAL JUDGE IN HIS ORAL OPINION DO NOT INVALIDATE THE CONVICTION UNLESS THEY CLEARLY DEMONSTRATE MISUNDERSTANDING OF THE LAW.**

The appellant claims that the finding of guilt is invalidated by remarks made by the trial judge. The cases he cites on this point deal solely with jury arguments made by prosecutors. He cites no authority holding that judicial decisions are governed by the same standards. Cases from other jurisdictions hold that the standards are *not* the same. Judges are presumed to know the law; jurors are not. Consequently, judges need not express themselves at a

bench trial with the same precision that is required of counsel during arguments to a jury. United States v. Van Fossan, 899 F.2d 636, 638 (7<sup>th</sup> Cir. 1990); see People v. Howery, 178 Ill.2d 1, 34-35, 687 N.E.2d 836, cert. denied, 525 U.S. 828 (1997); United States v. Brobst, 558 F.3d 982, 998-1000 (9th Cir. 2009).

Van Fossan provides a striking example of this distinction. The defendant was charged with poisoning migratory birds. He was tried at a bench trial. Two neighbors testified that they had collected poisoned grain from his lot. The defendant denied spreading poisoned grain. In finding the defendant guilty, the magistrate remarked that to acquit the defendant, he would have to disbelieve the neighbors. Van Fossan, 899 F.2d at 638. If such a remark were made by a prosecutor during a jury trial, it would be clearly improper. United States v. Vargas, 583 F.2d 380, 387 (7<sup>th</sup> Cir. 1978); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Nonetheless, when the remark was made by a judge in his oral ruling, it did not establish error:

Although it is technically possible for the tier of fact to believe the neighbors and disbelieve [the defendant], yet still find the evidence insufficient to show guilt beyond a reasonable doubt – maybe someone in addition to [the defendant] spread poisoned grain on

his lot, and this other grain killed the [birds] – this possibility is too remote to worry about. Magistrates know fundamental principles such as the “reasonable doubt” rule, and appellate courts ought not infer from ambiguous expressions that they have contravened the basic norms of the legal system.

Van Fossan, 899 F.2d at 638.

Rather than rely on inapplicable cases dealing with jury arguments, this court should adopt a standard specifically applicable to judicial rulings during bench trials. The Illinois Supreme Court set out an appropriate standard in Howery:

The trial court is presumed to know the law and apply it properly. However, when the record contains strong affirmative evidence to the contrary, that presumption is rebutted.

Howery, 178 Ill. 2d 1 at 32.

Applying this standard in the present case, the record does not contain strong affirmative evidence that the trial judge shifted the burden of proof. In his oral opinion, the judge made the following remarks:

I think that [the victim’s] statements, if I look no further, were extremely credible and corroborated on every occasion that [she] was questioned, including here at trial.

Oddly, in [M.H.’s] statement to police, he indicated that he was never in any closet. If these children were playing and nothing happened, why deny that it occurred in a closet? It would be a benign disclosure to acknowledge that they were playing doctor in a

closet. And so it seems that he's taken a step that impairs his credibility by denying something about which he could have admitted had it occurred without in any way incriminating himself.

I thought it more significant that in his statement he indicated that he and [the victim] were playing doctor with [three other children]. Three witnesses who could have corroborated him, who could have been called to testify. And I think that that statement is significant, because it not only is clearly at variance with all the other evidence in the case that I've heard and that's been presented, but if that had been corroborated, the circumstance under which five children playing doctor together would certainly make the likelihood of sexual misconduct far less likely in my view than if it is simply he and [the victim] playing together in a closet.

And I take note of that, because it is a statement that's not corroborated, and could have been, had he been telling the truth to the police officer.

RP 222-23.

The trial court started by determining that the victim's testimony and statements were credible. It then determined that the appellant's exculpatory statement was not credible. Having reached these conclusions, the court speculated about possible evidence that might have rendered the exculpatory statement. Of course, it is almost always true that a defendant's exculpatory statements are more credible if supported by other evidence. There are many cases in which the State's evidence by itself would establish proof beyond a reasonable doubt, but defense evidence

refutes the State's case and creates a reasonable doubt. When the court remarked on this possibility, it did not "shift the burden of proof."

Even in a prosecutor's jury argument, it is sometimes permissible to remark on the defendant's failure to produce witnesses. State v. Montgomery, 163 Wn.2d 577, 597-98 ¶¶39-40, 183 P.3d 267 (2008). The present case, however, does not involve a jury argument. The trial judge's remarks do not provide strong affirmative evidence that the judge mis-applied the burden of proof.

**E. THE TEST FOR SUFFICIENCY OF THE EVIDENCE CONSIDERS ALL OF THE EVIDENCE, EVEN IF SOME OF THAT EVIDENCE IS LATER HELD INADMISSIBLE.**

Finally, the defendant argues that *if* the victim was incompetent to testify and *if* her statements were inadmissible, the evidence was sufficient to support a conviction. Since there were no other witnesses to the abuse, the State agrees that the evidence would be insufficient without any of the victim's testimony or statements. This is not, however, the proper test for sufficiency of the evidence. In determining whether the evidence was sufficient, the court considers all the evidence, including any that was erroneously admitted. State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1983); Lockhart v. Nelson, 488 U.S. 33, 109 S. Ct. 285,

102 L. Ed. 2d 265 (1988). In the present case, the evidence as a whole supports the conviction.

**IV. CONCLUSION**

The adjudication and disposition should be affirmed.

Respectfully submitted on March 28, 2011.

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