31314-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

REUBEN D. DWAZI MULAMBA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF KITTITAS COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in entering Conclusion 2: "There is no evidence presented that the children are incompetent to testify." (CP 583)
2. The court erred in entering Conclusion 3: "The recordings make it clear that the children understand both what it means to tell the truth and why it is important to tell the truth." (CP 583)
3. The court erred in entering Conclusion 5: "The childrens' answers were spontaneous in response to questions asked by their interviewers." (CP 583)
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7. The court erred in entering Conclusion 11: "The social worker and/or detective can only testify as to what statements each child made as to physical acts of abuse incurred by the child who made the statement."

8. The court abused its discretion in finding evidence admissible under the Child Hearsay Statute, RCW 9A.44.120.

9. The court abused its discretion in finding J.R. competent to testify.

10. The social worker's opinion testimony as to J.R.'s veracity was manifest constitutional error.

11. The court erred in imposing an exceptional sentence based on the verdict finding S.E. particularly vulnerable.

B. ISSUES

1. During a forensic interview, after promising to tell the truth, a child tells numerous demonstrable lies, having been instructed to do so by a parent. Does the child have an apparent motive to lie?

2. During a forensic interview, the interview summarizes some of the child's statements that the interviewer believes

to be true, and then assures the child that those statements are the truth. Are the child's subsequent statements spontaneous?

3. During a forensic interview, the child responds to numerous questions about how the child came to be injured by saying "I don't know" or "I don't remember." Has the child demonstrated an ability to recall and describe what happened?

4. When, during a forensic interview, a child has promised to tell the truth and then told numerous demonstrable lies and admitted being instructed to do so by a parent, the interviewer has instructed the child as to which of the child's statements are true, and the child is unable or unwilling to describe the acts that caused various visible injuries, does the court abuse its discretion in finding the child's statements to the interviewer are admissible under the Child Hearsay Statute?

5. A forensic interviewer testifies about a child's statements describing various objects, generalizations about recent abuse that occurred over a period of about a week, abuse of a child other than the declarant, and verbal threats. Does

the court abuse its discretion in failing to sustain defense counsel's continuing objection to such hearsay testimony?

6. After promising to tell the truth, a 4-year-old child makes deceptive statements and tells an interviewer numerous demonstrable lies, having been told to do so by her mother. Thereafter, the child makes numerous factual assertions that cannot be independently verified. Has the child demonstrated an understanding of the obligation to tell the truth?

7. A 4-year-old child is unable to tell the interviewer how she had sustained injuries she received within the preceding two weeks, including severe burns and a bald patch apparently caused by having her hair forcibly pulled out. She asserts that she has been beaten with a belt or wire, but is unable to relate any specific incident in which this occurred. Has the child demonstrated the mental capacity to receive an accurate impression, and to retain an independent recollection, of the occurrences concerning which she is to testify?

8. Given evidence that a 4-year-old child has been instructed to make, or refrain from making, various statements, by at

least two different adults and is unable to recall how she sustained specific recent severe injuries, does the court abuse its discretion in finding the child competent to testify?

9. A social worker testifying about her interview of a child abuse victim relates a statement made by the child about a recent event unrelated to the abuse, then tells the jury that she knows the event the child describes actually happened. Does this testimony constitute an almost explicit opinion on the victim's veracity, thereby violating the defendant's right to a jury trial?

10. Is an 8-year-old boy who attends school and is able to dress and bathe himself and prepare simple meals and has no reported physical or mental impairment a particularly vulnerable victim of the crime of assaulting a child?

C. STATEMENT OF THE CASE

1. Events Following The Commission Of The Crime.

Aspen is a crisis center that provides services relating to domestic violence in Kittitas County. (RP 652) On the afternoon of January 31, 2012, Ashley Eli brought her children, J.R., age 4, and S.E., age 8, to

Aspen. (RP 654) Ms. Eli told Aspen supervisor Deborah Coppin that she and the children needed housing "because of what had happened with the children." (RP 660) Ms. Coppen had received an email from another member of the Aspen staff indicating Ms. Eli had reported that her "boyfriend had been beating the children." (RP 654-65) Based on her own observation of the children and her experience, Ms. Coppen decided she should contact the police. (RP 663)

When the police arrived, Ms. Coppen explained the situation and Detective Weed determined the family should be taken to the police station. (RP 667) At the station, Detective Weed began interviewing Ms. Eli. (RP 668-69) Ms. Eli told the detective that her ex-boyfriend spanked the children with a belt. (RP 717) She refused to provide any information about the boyfriend. (RP 690) When Ms. Eli proved uncooperative, Detective Weed attempted to interview S.E.. (RP 690) S.E. repeatedly told Detective Weed: "We are hurting and I don't know why we are hurting." (RP 691-92)

Meanwhile, Ms. Coppen had been staying with J.R. in the waiting room. (RP 670) J.R. appeared to be experiencing some pain. (RP 669) After Detective Weed took S.E. to be interviewed, J.R. began crying and saying her throat hurt, her stomach hurt, and she wanted to lie down.

(RP 670) Ms. Coppen spoke to Sergeant Brett Koss and told him the children needed to go to the hospital immediately. (RP 671)

Ms. Eli, Ms. Coppen, S.E., J.R. and the police officers went to the Kittitas Valley Community Hospital emergency room. (RP 671-72) While they were in the car, Ms. Ramsey appeared angry and asked the children "What did they ask you?" Ms. Coppen intervened and said "nobody talked to J.R.," to which Ms. Eli responded: "If my kids were hurt I would have taken them to the hospital." (RP 672)

Once inside the emergency room, Ms. Eli told the nurse they were there "for skin abrasions." (RP 673) When the nurse asked what she meant, she told him: "Well, why do you think we are here. They think my kids are being abused." (RP 673)

As the nurse began to remove J.R.'s bathrobe, Ms. Coppen saw that the left side of her body "was completely bruised." (RP 674) Then, when the nurse pulled up J.R.'s nightgown, Ms. Coppen saw that her thighs were "completely black." (RP 675) They appeared to have been burned. (RP 675-76)

The nurse, John Yoder, saw the bruises and what he described as "stripes on her back" as he was removing J.R.'s clothing. (RP 544) He smelled an unusual smell, like "dead flesh or something infected" and when he pulled her nightgown up he saw severe burns on her legs.

(RP 544) He immediately left the room and went to get Dr. Frick. (RP 546)

On entering the room Dr. Frick saw that J.R. was pale and appeared despondent. (RP 279-80) He felt she was in "serious to critical" condition. (RP 279) He ordered a number of tests, and the results showed, among other things, that J.R.'s white count was elevated, her red cell count, creatin and hemoglobin were quite low. (RP 546) Once J.R. was fully disrobed, it became evident that she had multiple injuries on her back and second or third degree burns on her thighs and buttock. (RP 282, 547) The burns appeared to be at least three days to several days old. (RP 284, 385-86)) According to Dr. Frick the burns would leave permanent "very ugly" scars. (RP 384) Dr. Frick noted a patch on J.R.'s scalp where a large part of her hair had been torn out. (RP 380-81)

That evening J.R. was seen by Dr. Kenneth Feldman at Harborview Hospital in Seattle. (RP 369) Based on her lab results, Dr. Feldman concluded that she had a urinary tract infection, muscle and blood injury, and her kidneys were failing. (RP 370-71) In his opinion, the severity of her kidney failure, if left untreated, would eventually have resulted in death. (RP 371)

S.E. was initially seen at the emergency room in Ellensburg, where nurse Eric Davis began examining S.E. (RP 532) He promptly realized

S.E. was in pain. (RP 534-35) As he removed S.E.'s clothing he saw numerous bright red marks covering his body from his shoulders to his ankles and wrists. (RP 536) S.E. told Nurse Davis he had been whipped and pinched with pliers. (RP 537) The nurse observed bruising on S.E.'s left arm. (RP 538)

S.E. was transported to Harborview, where he too was seen by Dr. Feldman. (RP 538) In Dr. Feldman's opinion, S.E.'s injuries were inflicted over a short period of time that may have stretched over several days. (RP 387-88) According to S.E., his injuries had occurred during the preceding week. (RP 346) There is no evidence the injuries were inflicted at an earlier date, although Dr. Frick could not exclude the possibility. (RP 358, 362)

After examining S.E. and obtaining the results of his laboratory tests, Dr. Feldman concluded that he had sustained very severe injuries to his muscle and blood cells. (RP 349, 356) Some of the injuries showed that he had been struck by something with high velocity and force. (RP 353, 355) The patterns evidence multiple blows rather than a blow from a single blunt object. (RP 357) S.E.'s answers to questions were "quite cogent." (RP 350) Dr. Feldman did not consider the injury on S.E.'s right shoulder a burn injury. (RP 366)

While the children were being seen at the Kittitas Hospital, Detective Weed interviewed Ms. Eli and placed her under arrest for criminal mistreatment. (RP 695-96) She told him she first saw J.R.'s burns on the previous Friday, January 27th. (RP 719) She described bathing J.R., cleaning the wounds and putting Neosporin on them. (RP 719) She denied hitting the children. (RP 720)

Following her arrest, Detective Weed and Sergeant Koss interviewed Ms. Eli several times. (RP 697) They employed a "Reid technique" which involved suggesting that Ms. Eli may have just hit the children so Mr. Mulamba "wouldn't do it as hard." (RP 723) Detective Weed told Ms. Eli that S.E. had reported that his mother hit him with a whip and "He said you didn't spank nearly as hard." (RP 724) Ms. Eli admitted that she had spanked each of the children "to try to minimize how hard they were getting hit." (RP 697. 724) She told the officers she had used a "rainbow belt" and a folded television cable. (RP 724) She admitted gagging her children. (RP 697) She acknowledged she hit S.E. with a metal track, purportedly to prevent Mr. Mulamba from doing so. (RP 722)

Marti Miller, the supervisor of Child Protective Services for the Division of Family Services, interviewed S.E. and J.R. on February 2. (RP 577) Towards the end of the interview, S.E. told Ms. Miller that

before they went to her office his mother had instructed him and his sister not to disclose Mr. Mulamba's name. (CP 697-98) Similarly, J.R. told Ms. Miller that her mother had told her not to talk about her injuries, to say she had only been spanked on the bottom with a hand, and not to say who did it. (RP 591-92, 613; CP 669) Both children, however, did tell Ms. Miller that Mr. Mulamba had beaten them. (RP 481-82)

The State charged Mr. Mulamba with assault of a child in the first degree and first degree criminal mistreatment of J.R., and assault of a child in the second degree and second degree criminal mistreatment of S.E., and alleged each count was aggravated by knowledge of the victim's vulnerability. (CP 304-06)

2. Trial Court Proceedings.

Defense counsel challenged the children's competency and the trial court held a pre-trial hearing to determine both their competency and the admissibility of their statements under the child hearsay statute, RCW 9A.44.120. (CP 589-94, 626-27) The trial court reviewed recordings or transcripts of various interviews of both children. (CP 591-92) Following that hearing, the court found that neither child was incompetent to testify, found that they were "able to recall and describe what happened" and concluded the social worker or the detective

could only testify "as to what statements each child made to physical acts of abuse incurred by the child who made the statement" and neither could testify as to statements either child made about physical abuse the other child may have suffered. (CP 582-84)

The charges against Mr. Mulamba were tried to a jury. (RP 98) Ms. Eli told the jury she had moved to Moses Lake from Montana to live with her mother. (RP 117-20) She met Mr. Mulamba in a bar during the summer of 2011. (RP 121) They spent the evening together, and Mr. Mulamba agreed to give her a ride home provided she paid for gas. (RP 123)

Mr. Mulamba's mother operated an adult care facility called Golden Age in Moses Lake. (RP 898, 900) Mr. Mulamba was going to school in Ellensburg, but on the weekends he would return to Moses Lake to help out at the Golden Age. (RP 127, 938, 940) During this time Ms. Eli was working at a nursing home called the Blue Goose. (RP 127) On the weekends she and her children frequently came to "hang out" with Mr. Mulamba and his family. (RP 129, 939)

In November Mr. Mulamba found his own apartment in Ellensburg, and Ms. Eli and her daughter began visiting him there. (RP 126, 950) During November and December she began leaving things like her daughter's toys at Mr. Mulamba's apartment. (RP 950)

After Christmas, Ms. Eli lost her job at the Blue Goose. (RP 130) She wasn't getting along with her mother. (RP 121, 951) Mr. Mulamba agreed to let her and her children move into his apartment in Ellensburg. (RP 130, 952) Ms. Eli testified that in exchange she had agreed to pay him half the rent and power bill. (RP 130-31)

By January 9, Ms. Eli had not yet found a job in Ellensburg, so she had not paid her share of the rent. (RP 133) She and Mr. Mulamba began arguing. (RP 133) According to Ms. Eli, Mr. Mulamba complained that in addition to her failing to pay her share, her children were too loud. (RP 135-36) Mr. Mulamba was unhappy because J.R. was not wearing training pants or using the toilet to urinate. (Mul Amba RP 3-4) On January 13 Mr. Mulamba asked Ms. Eli to move out. (RP 312, 316, Mul Amba RP 5)

Ms. Eli testified that during the week of January 16 she and Mr. Mulamba continued to argue about the children's discipline. (RP 145-46) She admitted that during this time she spanked them, but denied ever using a cable. (RP 146-47) She said that by this time Mr. Mulamba was demanding that she get her taxes done and get her refund so she could afford to move out. (Mul Amba RP 11-12) He recalled that during that week he felt ill, went to Moses Lake to see a doctor, and spent most of the rest of the time at school avoiding Ms. Eli and her children. (Mul Amba

RP 13, 15) According to Mr. Mulamba, he, Ms. Eli and her children all spent the weekend of January 20 in Moses Lake. (Mul Amba RP 19). On Saturday morning, Ms. Eli discovered that J.R. had wet the bed. (Mul Amba RP 19-20) Mr. Mulamba became very angry and told Ms. Eli to take her children home. (Mul Amba RP 20-21)

Ms. Eli told the jury the first time she was aware of Mr. Mulamba physically punishing the children was January 21, although she suspected he might have done so earlier. (RP 148) She recalled that she first noticed some bruising on J.R. during the week of January 23. (RP 151)

Ms. Eli enrolled S.E. in school in Ellensburg on Monday, January 23. (RP 136)

She testified that during that week Mr. Mulamba began beating the children with a belt, to which she did not object because she recalled her siblings had been punished that way. (RP 152-53) She said that after a while he used an electric cord or a coaxial cable. (RP 154) She told the jury that she saw Mr. Mulamba spanking S.E. with a piece of wood and a piece of metal. (RP 157) Ms. Eli testified that during this time she repeatedly tried to leave but Mr. Mulamba would prevent her from leaving by taking her keys and wallet. (RP 162)

Mr. Mulamba remembers that on Tuesday, January 24, J.R. urinated on the floor and Mr. Mulamba got mad at Ms. Eli. (Mul Amba

RP 31) Ms. Eli punished her by making her sit against the wall and hitting her on the hands with a wire. (Mul Amba RP 32) Mr. Mulamba didn't interfere because he wasn't J.R.'s parent. (Mul Amba RP 32) He told Ms. Eli she needed to get her tax refund and left to spend the evening at the library. (Mul Amba RP 33) When he returned home, he discovered that Ms. Eli had shaved her head. (Mul Amba RP 33)

The next evening S.E. spilled a drink on the couch. (Mul Amba RP 35)

Ms. Eli told Mr. Mulamba to spank him and Mr. Mulamba spanked him with the cord of a phone charger. (Mul Amba RP 35-37) The next day he spanked J.R. on her bottom with a belt after she urinated on the carpet. (Mul Amba RP 41)

Ms. Eli recalled that on Thursday, January 26, Mr. Mulamba threatened to burn J.R. with a clothes iron. (RP 191) Ms. Eli testified that she and her children and Mr. Mulamba drove to Moses Lake and dropped Mr. Mulamba off at work on the evening of Friday, January 27. (RP 177-78) On Saturday she and the children drove back to Ellensburg to pick up papers, and then to Yakima to file her taxes. (RP 178-79) That evening she picked up her tax refund check, ran some errands and drove to Moses Lake where she paid Mr. Mulamba $1600 or $1700 just after midnight on Sunday morning. (RP 179-82) Then she and the children

returned to Ellensburg for a few hours, drove back to Moses Lake to pick up Mr. Mulamba, and returned to Ellensburg on Sunday afternoon. (RP 182-85)

Ms. Eli told the jury she got pizza for dinner that night, but J.R. threw up and Mr. Mulamba got angry and said she did it on purpose. (RP 184-85) According to Ms. Eli, she made J.R. "wall sit" and when J.R. couldn't "hold the position", Mr. Mulamba beat her with the coaxial cable. (RP 185-86)

Ms. Eli testified that after that she gave J.R. a bath and that was when she first discovered the extent of J.R.'s injuries. (RP 110, 163-64, 188, 229) On seeing the extent of the wounds she asked Mr. Mulamba to finish bathing J.R. (RP 164-64) After the bath she poured hydrogen peroxide on the wounds and left the room while Mr. Mulamba wiped them. (RP 165-66)

Mr. Mulamba recalled that J.R. seemed to be in pain that evening, and after dinner Ms. Eli asked him to get some hydrogen peroxide, which he did. (Mul Amba RP 50-52) Then he went to the library and stayed there until almost midnight. (Mul Amba RP 53-54) When he got home he told Ms. Eli to "pack her things" and "get out." (Mul Amba RP 54-55)

According to Ms. Eli, Mr. Mulamba again threatened to discipline J.R. later that evening so she took the children and fled. (RP 196) She

and the children spent the next two nights in a motel. (RP 197-203) She finally took the children to Aspen on the morning of January 31. (RP 203) She told the jury she had not taken her children to the hospital sooner because knew she would be blamed. (RP 109-10)

She testified that on one occasion Mr. Mulamba was whipping S.E. so she tried to gag him to get him to stop crying. (RP 115) On another occasion, Ms. Eli was making J.R. "do a wall sit" and when J.R. fell over, Mr. Mulamba started beating her. (RP 116) Ms. Eli testified that she gagged J.R. "to get her to stop crying" and removed the gag when J.R. vomited. (RP 117)

Ms. Eli testified that when she told a police officer that she used a belt and a TV cable on her children she was lying about that. (RP 225-26) She claimed that she did not see J.R.'s injuries until January 29 because prior to that day, J.R. had been bathing herself. (RP 166) She wrote a letter indicating she knew about the burns at least as early as the 28th because the wounds had opened and there was blood in her underwear and asked Mr. Mulamba to get medical supplies. (RP 229) She eventually pleaded guilty to two counts of criminal mistreatment and received a ten-year prison sentence. (RP 106, 112)

J.R. testified, identifying her foster mother as her only mother. (RP 472) She identified Mr. Mulamba as the "guy who hurt me" but she

didn't remember how he hurt her. (RP 477) When the prosecutor drew her attention to a mark on her leg she said it was from his spanking her on her leg. (RP 478) She did not remember how many times he spanked her. (RP 478) She did not remember who lived with her when he spanked her. (RP 478) She did remember that he hit her on the bottom and it hurt. (RP 479) She did not remember his doing anything else to her. (RP 479) She did not remember why she went to the hospital, but when asked if they helped her she responded, "yes." (RP 480)

When defense counsel suggested that her mother's name was Ashley, J.R. said "I think so" but she did not remember if her mother ever hit her or tied a bandanna around her mouth or whipped her, or if her mother or Mr. Mulamba ever burned her. (RP 481-82)

Ms. Miller testified that when she interviewed J.R., J.R. said she got the "owie" on her bottom from scratching it, and got owies on her legs from getting spankings from "dad" with her mother's rainbow belt when she was bad. (RP 588-90) J.R. told Ms. Miller she didn't know how she got owies on her back but she remembered her mother slapped her on the mouth. (RP 591) J.R. did say that her mother had told her she was not supposed to talk about her injuries or to say who did it. (RP 591) Ms. Miller went on to relate J.R.'s assertions that "dad" had also spanked S.E. on the leg with a belt and their mother had slapped S.E. (RP 592-93)

Asked whether "dad" had used anything to hit her, she said he used a wire from her bedroom. (RP 593) After refreshing her memory from a transcript of her interview with J.R., Ms. Miller told the jury J.R. had said "and then S.E. got a spanking with it because he wasn't listening to what Dennis said." (RP 593-94)

S.E. told the jury that he and his sister are now living in Wenatchee with their foster parents Charman and Eric. (RP 424-26) He testified that Mr. Mulamba hit him and his sister with a belt and a wire. (RP 428, 450-52) He could not remember any specific times Mr. Mulamba hit his sister. (RP 453) He said that after he moved to Ellenburg in January he and his sister spent most of their time in the bedroom because they couldn't go out in the living room. (RP 431) He told the jury Mr. Mulamba began hitting him on the back and the legs with a belt a couple of weeks after they moved to Ellensburg. (RP 432-33) He said Mr. Mulamba once pinched his chest with pliers. (RP 435) Although he had seen what he later learned were burns on J.R.'s legs, he never saw Mr. Mulamba burn her. (RP 439) He claimed Mr. Mulamba did threaten to burn him, and made him choose whether to be burned or to go outside. (RP 440) He chose to go outside. (RP 441) He described an incident in which Mr. Mulamba threatened to burn him with a lighter and put salt on his leg. (RP 446) S.E. also recalled an incident in which Mr. Mulamba

held an iron so close to his body that he could feel the heat, but he testified that Mr. Mulamba never burned him. (RP 447-48)

S.E. testified that his mother hit him on the back, but asked whether she ever hit his face he said he could not remember. (RP 449) Asked if she ever put an iron close to him, he said he could not remember. (RP 449) He denied that she hit him with a belt or wire. (RP 449)

The jury found him guilty of first degree assault and first degree criminal mistreatment of J.R., second degree assault and misdemeanor criminal mistreatment of S.E. (CP 511) With respect to the first three charges, the jury also found that he knew or should have known the victims were particularly vulnerable. The court imposed consecutive sentences above the standard range for each of the felony offenses, for a total sentence of 40 years. (CP 514)

D. ARGUMENT

1. THE SOCIAL WORKER'S HEARSAY TESTIMONY WAS IMPROPERLY ADMITTED INTO EVIDENCE.

a. The Court Erred In Determining The Social Worker's Statements Were Admissible Under Child Hearsay Statute.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted." ER 801. The children's statements to Detective Weed and Ms. Miller during their interviews, to the extent they were offered to prove the truth asserted, were hearsay.

Hearsay is generally inadmissible. ER 802. The legislature has fashioned an exception to the hearsay rule admitting children's statements under certain circumstances:

> A statement made by a child when under the age of ten . . . describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, . . . 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 . . .

RCW 9A.44.120.

The trial court's decision to admit child hearsay statements under this statute is reviewed for abuse of discretion. *State v. Kennealy*, 151 Wn. App. 861, 879-80, 214 P.3d 200 (2009). "A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)." *Id.*

The threshold determination of reliability requires consideration of several 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) the spontaneity of the statements;
> (5) the timing of the declaration and the relationship between the declarant and the witness;
> (6) whether the statement contained express assertions of past fact;
> (7) whether the declarant's lack of knowledge could be established through cross-examination;
> (8) the remoteness of the possibility of the declarant's recollection being faulty; and
> (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

State v. Kennealy, 151 Wn. App. 861, 879-80, 214 P.3d 200 (2009) *citing State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984). "The underlying issue in any RCW 9A.44.120 determination is whether the time, content, and circumstances of the statement provide sufficient indicia of reliability." *State v. Carlson*, 61 Wn. App. 865, 872, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993)

The court reviewed transcripts of statements J.R. and S.E. made to Detective Weed and Ms. Miller, heard argument of counsel, and entered written findings of facts and conclusions of law. (CP 582-84) The findings related to the court's reliability determination are listed under the "Conclusions of Law" heading:

> 3. The recordings make it clear that the children understand both what it means to tell the truth and why it is important to tell the truth.
> 4. They understand simple questions and intelligently respond corresponding with their ages.
> 5. The childrens' answers were spontaneous in response to questions asked by their interviewers.
> 6. The childrens' responses are relatively consistent.
> 7. The children demonstrate a good sense of timing and being able to recall and describe what happened.
> 8. When the defendant's attorney questioned the children, out of court, the children were still able to recall what physical acts of abuse they say the defendant inflicted upon them.
> 9. Any omissions, by the children, are not the result of faulty recollection as opposed to the children just not wanting to talk about what they do not want to talk about.

(CP 583) "A finding of fact incorrectly denominated as a conclusion of law is reviewed as a finding, for substantial evidence." *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352, 1357 (1995).

The court's Conclusion No. 5, that "The childrens' answers were spontaneous in response to questions asked by their interviewers" addresses the fourth *Ryan* factor. (CP 583) Black's Law Dictionary defines a spontaneous declaration as "[a] statement that is made without time to reflect or fabricate and is related to the circumstances of the perceived occurrence." (9th ed. 2009). This court has stated that "[f]or 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." *State v. Carlson*,

61 Wn. App. at 872. Most of the children's statements were spontaneous in the sense that the interviewers' questions generally did not suggest an answer. The statements were made, however, in the setting of a forensic interview in response to questioning expressly directed to the particular subject matter of how they had been injured and by whom. Thus, they were not spontaneous in the usual sense of the word.

None of the remaining findings expressly addresses any of the *Ryan* factors.

The court found the children understood the concept of truth, and its importance, but this does not address the first *Ryan* factor: whether the children had a motive to lie. The record suggests both children had a motive to lie. They made statements indicating that their mother had told to them deny or minimize the extent of their injuries and to conceal the identity of the perpetrator. (CP 666-68, 685-86, 697) It appeared that they had been told to conceal Mr. Mulamba's identity, and they apparently complied with those instructions initially, but even after acknowledging what they had been told to say or not say, continued to provide inconsistent answers. J.R. stated at one point that her mother had slapped her, then retracted her statement and asked the interviewer not to tell her mother what she had said. (CP 672) Absent reliable evidence as to what

instructions Ms. Eli gave the children, it is impossible to determine which of their statements was the product of the strong motive to lie.

Findings 7 and 9 relate to the eighth factor, namely the possibility that the children's recollection is faulty. The court found the children were able to recall what happened and any omissions were the product of the children's decision not to discuss certain matters rather than faulty recollection. (CP 583) The record does not support these findings. Apart from evidence that their mother had expressly told them to omit or misrepresent certain information, there is no evidence the children made conscious decisions not to talk about certain matters such as how or by whom J.R. was burned or who tore her hair out.

Dr. Frick explained that when children are experiencing severe pain they "can think outside their body while the, quote, unquote, 'discipline' is being administered." (RP 380) He testified that as a result of this disassociation they might not be aware of what was happening. (RP 380) Thus, given the severity of the injuries inflicted on these children, it is possible that far from choosing not to discuss certain matters these children were unaware of what had happen as a result of disassociating. There is no way to determine whether or when this may have occurred.

The court found: "The childrens' answers were spontaneous in response to questions asked by their interviewers." (CP 583) "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." *State v. Carlson*, 61 Wn. App. at 872. The statements sought to be admitted at trial were made in response to questions, so they were not literally spontaneous. They were, however spontaneous in the sense that the interviewers' questions generally did not suggest an answer.

The court made no findings respecting the second, fourth or fifth *Ryan* factors, namely the general character of the children, the number of persons to whom the children made statements, the relationship between Ms. Miller or Detective Weed and the children. The court found the children's responses to questions were "relatively consistent." The record shows that once J.R. had been assured that her statements that she "got spanked on the butt with a belt and then sometimes with a hand. But mom - mama didn't want [her] to talk about that" were the truth, she consistently repeated those assertions. The record includes numerous inconsistent statements which reflect, at least in part, the fact that the children may have been told not to disclose certain information. The extent of those instructions is unclear, however, and the only basis for

discerning which statements are reliable appears to be the interviewers' and court's assumption that the statements implicating Mr. Mulamba were more reliable than statements or omissions relating to Ms. Eli's participation or lack thereof.

The record does not support the court's findings, and the findings are insufficient to establish that "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1). The court erred in concluding that the social worker could be permitted to testify about the children's statements as to the physical acts of abuse they incurred.

b. The Social Worker Testified To Hearsay Statements That Are Not Admissible Under The Child Hearsay Statute.

i. Statements That Do Not Describe An Act Of Physical Abuse.

Only statements "describing any act of physical abuse of the child by another that results in substantial bodily harm" are admissible under the child hearsay statute. RCW 9A.44.120.

The statute has been construed as requiring that, to be admissible, each statement must describe a specific act of abuse. *See State v. Jones*, 112 Wn.2d 488, 496, 772 P.2d 496 (1989). *Jones* involved the admissibility of a child's statements when corroborative evidence was

required because the child was not available to testify. In that case the child made three statements, each describing a distinct act of sexual abuse. The court held that each act must be separately corroborated: "The hearsay statements offered in this case allege basically three acts of abuse, each of which must be separately corroborated under the statute." *Jones*, 112 Wn.2d at 488; *see State v. C.J.*, 148 Wn.2d 672, 687, 63 P.3d 765 (2003).

Defense counsel expressly objected to the admission of statements that did not describe a specific act. (RP 574-76; CP 288, 298) The children in the present case both testified, and thus their statements did not require corroboration. Never the less, far from describing specific acts of abuse their statements describing events in general, non-specific terms that could not be subject to corroboration, should not have been admitted.

Nevertheless, Ms. Miller related S.E.'s statement about the general time frame during which various acts of physical abuse allegedly occurred:

> Q. (By Mr. Herion) S.E. indicate when they moved to Ellensburg?
> A. Yes.
> Q. When?
> A. He was real clear that was January Fourth.
> Q. In regarding the physical act of abuse on S.E. did he indicate in that time line beginning January Fourth when he was physically being beaten and when he wasn't?

A. S.E. has indicated he was real clear his memory was his mom told him they moved there January Fourth. That stuck in his mind. And he believes two week nothing happened and after that he remembers getting beat.
Q. Okay. So those were his words first two weeks physical act of abuse weren't happening according to S.E.?
A. Well, I don't think he used the words physical acts but he said, "My sister and I for the first two weeks we were there we didn't get beat but after that we started getting beat."

(RP 605-06)

Ms. Miller testified to S.E.'s statements about the number of times he had "been beaten":

Q. Do you remember asking him about how many times he had been beaten by the defendant?
A. I asked him that in an I couple different time frames throughout the interview so --

. . .

Q. Did you ask S.E. how many times the defendant hit him with something?
A. Yes. My question to S.E. was, "So how many times do you think?" In reference to he had just talked about being hit. And he said, "I would have to say more than ten times."
Q. More than ten times?
A. Yes.
Q. And you indicated there was another part of the interview as well?
A. Yeah, later I asked him -- make sure I get my question accurate. Okay. So I would ask him, "How many different times do you think he has hit you guys?" And I would specify "S.E., how many times

for you?" And he said, "I think about more than 19 times."

(RP 607-08)

Ms. Miller related statements J.R. made about being instructed to conceal Mr. Mulamba's identity, clearly offered for the truth of the matter asserted and having no relationship to any specific act of abuse:

Q. Did she indicate whether she had any discussions with her mother about her injuries on her body?
A. Yeah, she wasn't suppose to talk about it.
Q. About what?
A. She wasn't suppose to say who did it. And she was only suppose to say that they got spanked on the butt with a hand.

(RP 591-92)

In fact, in talking turning your attention to J.R.'s interview you in fact had a discussion with her about what mom was telling her to say or not to say, didn't you?

A. I did.
Q. What did J.R. say?
A. She said when she first told us about dad she didn't want her mom to know that she told us that. When she went on to talk about specific things that Dennis did she caught herself a couple times and said, "don't tell my mom I told you that." And then when she finally said his name Dennis she got quite a look of surprise on her face when I repeated the words back to her and then went -- I think she realized at that point she actually told me his name

and again wanted to make sure that I didn't tell her mom that she told us who he was.

(RP 625-26)

Ms. Miller repeated the children's statements about their mother tending to show their mother did not participate in the beatings:

Q. So during this discussion did you not ask J.R. questions about mom?
A. I did ask her questions about mom and where mom was what mom did or didn't do. What was her part in it?
Q. You in fact asked similar questions of S.E., didn't you?
A. Yes, also.
Q. Did you ask S.E. where his mom was at when this was happening?
A. I did.
Q. What did he say?
A. She some thing, would be there. She was in a different room, she would turn her head away. So there was indication that she was certainly present at some of the – his words -- "beating" and other times she might have been in a different room in the apartment or some times she was in the car so he gave some specifications on that.

. . .

Q. Direct your attention to page 11, quarter of the way down. Do you not ask what is she doing? What's going on?
A. Yeah. "What's mom kind of doing when all this stuff is happening?" And he answered, "She's not doing anything." "She's just letting her boyfriend hit me."

(RP 625-26) None of these statements related to any specific act of abuse. The exception created by RCW 9A.44.120 did not apply to such

statements and their admission into evidence was an abuse of the court's discretion.

ii. Statements About A Different Child.

A child's statements about acts of abuse of a different child are not admissible under the Child Hearsay Statute exception to the hearsay rule. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 365-66, 225 P.3d 396, 403 (2010). "[T]he statutory language regarding 'the child' only applies to the abused child." *State v. Alvarez-Abrego*, 154 Wn. App. at 365-66. Following the hearing on the admissibility of the children's statements to Ms. Miller the court concluded: "The social worker and/or detective can only testify as to what statements each child made as to physical acts of abuse incurred by the child who made the statement." (CP 583)

Nevertheless, over defense counsel's continuing objection to such statements the prosecutor elicited the following testimony relating statements attributed to J.R.:

Q. (By Mr. Herion) "What did she say?"
A. She said he got some "owies" by getting spankings too.
Q. That's how she described it? Spankings?
A. He got spankings on his butt and on the leg, too?
Q. Spankings. Did you ask J.R. who spanked S.E.?
A. I did. I asked her who spanked him on the leg with the belt and she said, "Same person, our dad."
Q. Were those her words "same person our dad"?
A. Correct.

Q. Did you ask J.R. if her mother or their mother hit S.E.?
A. I said, "Who slapped him with the hand?" And she said, "um, mom." And I clarified "mom did?" And she said, "yeah." . . .

(RP 592-93)

Q. What did she say?
A. . . . "Well one day um he didn't find..." inaudible. "...in that room and then..." inaudible. "...told me to keep..." inaudible "...and then I did and..." inaudible "...from the blanket and then S.E. got a spanking with it because he wasn't listening to what Dennis said."
Q. Dennis said?
A. Correct.
Q. Who utilized those words?
A. J.R..
Q. With J.R. saying "Dennis said" what did you ask?
A. I asked, "He wasn't listening to what Dennis said?" So again repeating words that she's given me.

(RP 593-94)

iii. Statements Describing Threats.

The statutory language limits the scope of the child hearsay statutory exception to statements "describing any act of physical abuse of the child by another that results in substantial bodily harm." RCW 9A.44.120. The court expressly concluded the only hearsay statements admissible under the exception were "statements each child made as to physical acts of abuse incurred by the child who made the statement." A verbal threat is not an act of physical abuse, and without more does not

result in substantial bodily harm. Nevertheless, despite the court's ruling and defense counsel's continuing objection, the prosecutor elicited the following testimony regarding S.E.'s statements:

> . . . "He threatened to burn me with an iron. "
> Q. Does that happened?
> A. Pardon?
> Q. Did he indicate whether that in fact happened if he was burned with an iron?
> A. At this moment he did indicate it happened.
> Q. Then what did he say?
> A. "He threatened to burn me with an iron or make me stand outside until it was morning." "He told me to choose and I didn't want to choose so he said he is choosing and I guess he chose to burn me with a iron."
> Q. Did he indicate where on his body?
> A. He said he was going to do it right up here and I --
> Q. "Here" in court you're?
> A. In the shoulder area.
> Q. You took your right hand, put it up to your left shoulder?
> A. I think it was his left shoulder. I could be wrong but kind of in the shoulder area.
> Q. During the course of the interview S.E. took his hand and motioned?
> A. Kind of motioned, right.
> Q. And did he offer an explanation?
> A. He did. He went on to say that they were they ended up going to the library. When they came back that's when he got the iron. He and my reference is to Dennis he didn't turn it on he just used the wire and he beat S.E.'s back with it.

(RP 600-01) S.E. said, "I finally got up." "I ran to the car." "My shoes were off and my mom just got my shoes and then we left, but the next day, which was Sunday, Dennis said I am going to get beat you to death."

Q. Beat to death?
A. Beat to death.
Q. He said that to you?
A. That was my words to S.E. and S.E. said, yeah.
Q. Did you clarify he was? If he, S.E., had been beaten?
A. Yeah, I asked him.
Q. What did he say?
A. Said something about to get beat but I wasn't beat all day. I asked what he meant by that. He said he was going to beat –

(RP 604-05) (the court sustained an objection to the remainder of this response)

The social worker's testimony consisted, in large part, of reporting each child's description of assaults on the other child, threats, actions that did not result in substantial bodily harm, and general non-specific descriptions of various objects and activities that did not constitute acts of physical abuse. None of this hearsay testimony was admissible under RCW 9A.44.120 or any other exception to the hearsay rule. The effect of the testimony was, however, to depict Mr. Mulamba as the primary, or even sole, cause of all of their injuries. Permitting Ms. Miller to testify to these inadmissible hearsay statements deprived Mr. Mulamba of his right to a fair trial.

2. THE CONVICTION IS BASED ON INCOMPETENT EVIDENCE.

"Due process protects a criminal defendant against a conviction based upon incompetent evidence." *State v. Brousseau*, 172 Wn.2d 331, 335, 259 P.3d 209 (2011)

All witnesses, including children, are presumed competent to testify. *State v. S.J.W.*, 170 Wn.2d 92, 102, 239 P.3d 568 (2010). In order to rebut that presumption, a party must present evidence that the child is "incapable of receiving just impressions of the facts, or incapable of relating facts truly . . . ." *Id*.

Ordinarily, "[t]he determination of competency rests primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence," and the court's finding of competency is reviewed for abuse of discretion. *State v. Brousseau*, 172 Wn.2d at 340; *State v. C.J.*, 148 Wn.2d at 682. Here, however, the trial court based its determination on a review of the transcripts and recordings of several interviews of the children. Those recordings are available to this court. Accordingly, this court may make an independent review of the competency evidence and the trial court's findings. *See State v. Avila*, 78 Wn. App. 731, 735, 899 P.2d 11 (1995);

In re Marriage of Hunter, 52 Wn. App. 265, 268, 758 P.2d 1019 (1988), *review denied*, 112 Wn.2d 1006 (1989).

In determining the competency of a witness, the courts continue to apply the *Allen* factors:

> 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;
> (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 Wn.2d 690, 692, 424 P.2d 1021 (1967); *see State v. C.J.*, 148 Wn.2d at 682.

With respect to whether J.R. had "an understanding of the obligation to speak the truth," the court found: "The recordings make it clear that the children understand both what it means to tell the truth and why it is important to tell the truth." (CP 583)

In her first interview with Ms. Miller J.R. demonstrated her ability to tell truth from lies and promised to tell the truth. (CP 664) But moments later she denied living with anyone other than her mother and

brother. (CP 666) When Ms. Miller said S.E. had already told her there was someone else, J.R. admitted this was so but said she did not know who he was. (CP 666-67) She then repeated that this person did not live with them. (CP 667) She told Ms. Miller her injuries were self-inflicted, and only gradually acknowledged that she had been spanked. (CP 667-68) She identified the person who spanked her as "dad" although she had earlier asserted that "dad" did not live with them. (CP 666-68) Eventually, J.R. said the person who lived with them was named Dennis, and immediately asked Ms. Miller not to tell anyone she had said this. (CP 673)

In short, J.R. demonstrated that she knew what a lie was, and proceeded to tell a string of lies for several minutes, apparently because she had been told to lie by her family. This is overwhelming evidence that J.R. did not have a genuine understanding of her obligation to tell the truth to Ms. Miller or the court, and her loyalty to them was greater than any obligation to speak the truth.

The court made no express finding respecting whether J.R. had the mental capacity to receive an accurate impression of recent events. And the record provides little basis for making such an assessment. Her responses to most questions appeared vague, evasive, or non-responsive.

As to whether J.R. had "a memory sufficient to retain an independent recollection of the occurrence" the court found: "The children . . . being able to recall and describe what happened." (CP 583) The court further found: "Any omissions, by the children, are not the result of faulty recollection as opposed to the children just not wanting to talk about what they do not want to talk about," and "When the defendant's attorney questioned the children, out of court, the children were still able to recall what physical acts of abuse they say the defendant inflicted upon them." (CP 583)

In the course of her interview with Ms. Miller, J.R. repeatedly responded to questions about the cause or circumstances of her injuries with "I don't know" or "I don't remember". (CP 666-77) Near the end of the interview J.R. disclosed that her mother had slapped her hand, then said she did not remember on what part of her body she had been slapped and then told Ms. Miller "Don't tell her I said that." (CP 672) Apparently even at this point J.R. was trying to shape her responses to conform to instructions her mother had given her.

J.R. eventually told Ms. Miller that she had been spanked by "dad" with a belt on her legs and buttocks, and slapped on the mouth by her mom. (CP 668-69) At that point the following exchange occurred:

MILLER: Okay. So, I just wanna be sure I heard you right J.R., okay?
RAMSEY: Okay.
MILLER: So, dad did some spankings with the belt on your butt and your legs. And ...
RAMSEY: No spank me with his hand on arm and butt but I - but don't tell my mom that I told you that cause she told me to tell you guys only that I - we got a spank with the belt.
MILLER: Okay. You know what? You - you did a good job cause we promised to tell the truth today, remember and the truth is that you got spanked on the butt with a belt and then sometimes with a hand. But mom - mama didn't want you to talk about that?
RAMSEY: No.

(CP 670-71) (emphasis added). Fairly read, this exchange suggests that while J.R. continued to be less than forthcoming about what had happened to her, Ms. Miller took it upon herself to instruct J.R. as to which of her statements were true.

Months later, when the prosecutor and defense counsel interviewed J.R., the only thing she could remember was that Dennis had lived with them and had spanked her "really hard" with a belt or his hand. (CP 743, 746, 748)

The record does not support the court's finding that the children had merely omitted certain incidents because they did not want to talk about them. Whatever memory of the circumstances of her injuries J.R. may have initially retained obviously became distorted by her mother's

instructions and Ms. Miller's selective reinforcement of J.R.'s varying and inconsistent assertion. On this record, it is impossible to determine whether J.R. had an independent recollection of the events she described.

With respect to J.R.'s ability to express in words her memory of what happened, the court found she was "able to recall and describe what happened." (CP 583). The record shows that J.R. was fairly articulate and, to the extent she had any accurate memory of what happened, she was able to relate her memories. There is little evidence, however, that she was able to recall anything that happened beyond the generalized statements about being spanked with a belt.

The court made no findings respecting J.R.'s ability to understand simple questions. The record demonstrates that she was able to respond appropriately to such questions.

The court made no express finding that J.R. was competent. The court's findings, even if supported by the record, are insufficient to support such a conclusion. Admitting J.R.'s testimony into evidence violated due process and resulted in a conviction based on incompetent evidence. Further, under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), since incompetence rendered J.R. unavailable to testify, any of her testimonial hearsay statements would have been inadmissible. *State v. Hopkins*, 137 Wn. App. 441, 447,

154 P.3d 250 (2007). A child's statements to a CPS social worker in the course of a forensic interview are testimonial. *State v. Beadle*, 173 Wn.2d 97, 110, 265 P.3d 863 (2011). The court's erroneous competency ruling resulted in violation of Mr. Mulamba's rights under both due process and the confrontation clause, since none of her statements would have been otherwise admissible.

3. THE SOCIAL WORKER'S OPINION AS TO J.R.'S VERACITY VIOLATED THE RIGHT TO A JURY TRIAL.

The Sixth Amendment to the United States Constitution and Article I, § 21 of the Washington Constitution guarantee the right to a jury trial. *State v. Elmore*, 154 Wn. App. 885, 897, 228 P.3d 760 (2010). The right to a jury trial includes the right to have the jury make an independent determination of the facts. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Accordingly, opinion testimony on the veracity of the victim generally violates the right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); *Demery*, 144 Wn.2d at 759.

Generally, no witness may offer an opinion regarding the veracity of a witness. *State v. Kirkman*, 159 Wn.2d at 927; *State v. Rafay*, 168 Wn. App. 734, 805, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023 (2013). Such testimony is irrelevant and unfairly prejudicial to the

defendant because it invades the defendant's right to a jury trial and the jury's exclusive fact-finding province. *Kirkman*, 159 Wn.2d at 927; *Rafay*, 168 Wn. App. at 805; *Demery*, 144 Wn.2d at 759 (plurality opinion); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

"An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility." 5A K. Tegland, Wash. Prac., Evidence, § 292 n. 4 at 39 (2d ed. 1982), *United States v. Samara*, 643 F.2d 701, 705 (10th Cir.1981), *cert. denied*, 454 U.S. 829, 102 S. Ct. 122, 70 L. Ed. 2d 104 (1981).

A claim of improper opinion testimony may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926-27. "Manifest error" requires a showing of actual prejudice to the defendant's constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27. Such prejudice is shown with regard to opinion testimony when the statement was an "'explicit or almost explicit'" opinion on the victim's veracity. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (*quoting Kirkman*, 159 Wn.2d at 936).

To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, "'(1) "the type of witness involved," (2) "the specific nature of the

testimony," (3) "the nature of the charges," (4) "the type of defense," and (5) "the other evidence before the trier of fact."'" *Id*. at 928 (*quoting Demery*, 144 Wn.2d at 759 (*quoting City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). *State v. King*, 167 Wn.2d at 332-33.

Ms. Miller testified as an expert witness with impressive experience and credentials. (RP 577-580) She began by providing a detailed description of the procedure she followed in attempting to ascertain whether J.R. was able to discern the difference between truth and lies. (RP 585-86) She then started to testify about the "substantive portion" of the interview:

> A. I wanted to know what happened to her. I explained, what happened to you? She said she puked, which I knew to be true. Mom after we went into the room she threw up all over herself and on the bed.
> Q. So she in fact -- J.R. in fact described for you an actual thing? What had just happened?
> A. Had happened I don't know probably a half hour by the time maybe a little longer or so from the prior time we essentially arrived to the time-wise speaking with her and doing the interview.

(RP 587)

This testimony constituted, in effect, an almost explicit comment on J.R.'s veracity. Apart from Ms. Miller's own testimony, there is no evidence that J.R.'s statement was true. Ms. Miller's testimony relied on a

fact not in evidence in order to demonstrate for the jury that the child was telling the truth.

Any error that infringes on a constitutional right is presumed prejudicial. And the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The error is harmless if there is overwhelming untainted evidence that the jury would have reached the same result without the erroneous introduction of evidence. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). *State v. Dunn*, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005)

This is a case in which the children's statements clearly conflict with much the defendant's testimony as to the essential elements of the charges. The children alleged that Mr. Mulamba inflicted nearly all their injuries and assaulted them repeatedly. Mr. Mulamba testified that he struck the children on only a couple of occasions and did not believe he had inflicted any injuries. The only other evidence asserting that Mr. Mulamba was responsible for the children's injuries was that of Ms. Eli. She was, in fact, the only other person who could have inflicted the injuries. The central task for the jury in this case was to weigh the credibility of the witnesses; the children's veracity was a pivotal issue.

Mr. Mulamba's conviction rests on the credibility of the children. The expert opinion as to J.R.'s veracity was highly prejudicial and requires reversal.

4. THE EVIDENCE IS INSUFFICIENT TO SUPPORT FINDING S.E. WAS PARTICULARLY VULNERABLE.

The trial court may impose an exceptional sentence based on a jury's finding that the defendant "knew or should have known that the victim . . . was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). To prove a victim's vulnerability as such an aggravating factor, the State must show: (1) that the defendant knew or should have known (2) of the victim's particular vulnerability; and (3) that the vulnerability was a substantial factor in accomplishing the crime. *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006). To be a substantial factor, the victim's disability must have rendered the victim "'more vulnerable to the particular offense than a nondisabled victim would have been.'" *State v. Mitchell*, 149 Wn. App. 716, 724, 205 P.3d 920 (2009) (*quoting State v. Jackmon*, 55 Wn. App. 562, 567, 778 P.2d 1079 (1989)), *aff'd*, 169 Wn.2d 437, 237 P.3d 282 (2010).

Generally, the victim's age does not justify an exceptional sentence when age constitutes an element of the crime and, thus, has already been

factored into the sentencing guidelines. *State v. Garibay*, 67 Wn. App. 773, 778, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996). When age is an element of the crime, the victim's age "may also be used as [a] justification for departure from the standard sentencing range if the extreme youth of the victim in fact distinguishes the victim significantly from other victims of the same crime." *Garibay*, 61 Wn. App. at 779. For example, the Washington Supreme Court upheld an indecent liberties victim-vulnerability aggravating factor where the statute contemplated a wide range of victims (0–14 years old) and the victim was a 5-1/2-year-old boy at a local swimming pool, who trusted the defendant enough to go to the bathroom with him because it was reasonable to conclude that the child's young age rendered him particularly vulnerable and incapable of resistance. *State v. Fisher*, 108 Wn.2d 419, 421, 424-25, 739 P.2d 683 (1987).

In *State v. Woody*, this court held that a seven-year-old school-aged victim of indecent liberties was not particularly vulnerable because "grade-school age children are regarded as having achieved a level of reason that sets them apart from younger children." *State v. Woody*, 48 Wn. App. 772, 777, 742 P.2d 133 (1987), *review denied*, 110 Wn.2d 1006 (1988). Generally, victim vulnerability is an appropriate aggravating

factor where the child is younger than school age. *See Fisher,* 108 Wn.2d at 425 (vulnerable indecent liberties victim was 5 years old); *State v. Armstrong*, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986) (victim was 10 months old); *State v. Jennings*, 106 Wn. App. 532, 545, 24 P.3d 430 (2001) (victim was 13 days old) *State v. Tunell*, 51 Wn. App. 274, 283, 753 P.2d 543 (1988) (victim was 3 years old); *State v. Wood*, 42 Wn. App. 78, 709 P.2d 1209 (1985) (victim was 4 years old)

At the time of the alleged offenses, S.E. was in the third grade, attending school at Mount Stewart Elementary School. (RP 631) As his mother testified, he was especially capable and competent:

> A. No, both my children dressed themselves and bath themselves. I taught them to be that way because I had to work all the time and I couldn't relie on anybody else to care for my children so I wanted to make sure they were capable themselves.
> Q. Okay?
> A. Of basic necessities. I taught my son how to make simple meals for himself and his sister.
> Q. And would your son care for his sister?
> A. All the time. They were -- I wanted them to be real close. I wasn't like that with my brother and sisters.

(RP 156)

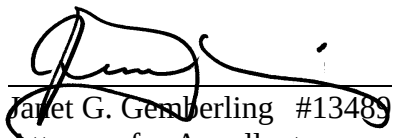
The instructions required the jury to find that S.E. was not merely vulnerable, but particularly vulnerable. The record fails to provide any support for the jury's finding. The sentence enhancement for the second degree assault conviction should be reversed.

E. CONCLUSION

The State relied on inadmissible testimony to prove its case, disregarding the court's rulings on the admissibility of hearsay statements, violating the defendant's right to due process and a trial by jury. The conviction should be reversed. Alternatively, the evidence is insufficient to prove beyond a reasonable doubt that S.E. was vulnerable; the exceptional sentence for second degree assault of a child should be reversed.

Dated this 14th day of May, 2014.

JANET GEMBERLING, P.S.



Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31314-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
REUBEN D. DWAZI MULAMBA,	)	
	)	
Appellant.	)	

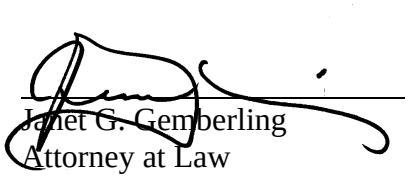
I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Chris Herion
Chris.Herion@co.kittitas.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on May 14, 2014, I mailed a copy of the Appellant's Brief in this matter to:

Reuben D. Dwazi Mulamba
#362543
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed at Spokane, Washington on May 14, 2014.



Janet G. Gemberling
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