COA No. 31314-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

REUBEN MULAMBA, Appellant.

RESPONDENT'S BRIEF

Kittitas County Prosecutor's Office
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Ellensburg, Washington 98926
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STATEMENT OF THE CASE

On November 9, 2012, a Kittitas County jury found the Appellant guilty of Assault of a Child in the First Degree, Assault of a Child in the Second Degree, Criminal Mistreatment in the First Degree, and Criminal Mistreatment in the Third Degree. The jury also made the special findings for the first three crimes that, during the commission of the crimes, the Appellant should have known that the victims of the current offenses were particularly vulnerable or incapable of resistance when he beat, whipped, twisted skin, and burned a 4-year-old girl and her 8-year-old brother over the course of one cold week, in January 2012, with an electrical cord, a wood plank, a coax cable, a belt, pliers, a lighter, and an iron, leaving the girl nearly dead, with an indelible impression of an iron on her left upper thigh. CP 478-484.

EVENTS PRECEDING APPELLANT'S ARREST

On January 31, 2012, at about 1335 hours, Ellensburg Police responded to ASPEN Crime Victim Services for a reported assault of a child. Upon arrival, police learned that Ashly Eli, 23, came to ASPEN with her two children: SE, 8, and JR, 4, seeking shelter. CP 652-679.

Ms. Eli reported that she had spent the last two nights in a local motel after leaving her abusive boyfriend, later to be identified as the Appellant, Reuben Mulamba, 27. At that time, Ms. Eli would not provide

the Appellant's name. She would only refer to the Appellant as her "ex-boyfriend." According to Ms. Eli, in August 2011, she moved from Montana to Moses Lake, where she met the Appellant. On January 4, 2012, the four of them moved to Ellensburg where the Appellant went to school at Central Washington University. Ms. Eli reported that her "ex-boyfriend" began spanking her two children, within the last two weeks, as discipline, at their apartment. She said this occurred when the children would ignore them or tell a lie or, in the case of JR, when she wet her bed. Otherwise, Ms. Eli did not provide any details about whether her children had been seriously injured. Therefore, police brought the children to the police department for interviews. RP 101-275.

At 1513 Detective Tim Weed took an audio video recorded statement from SE. Detective Weed established why he was interviewing SE. He asked SE if he would tell the truth. SE responded affirmatively. Detective Weed then asked SE if he understood the difference between the truth and a lie. To that end, he provided SE a scenario to determine if he knew the difference. SE answered correctly. Detective Weed also advised SE that he could tell him if he did not understand a question asked and correct the Detective if any information was incorrect. RP 49-71.

Detective Weed began the substantive portion of his interview asking SE if knew why he was at the police station. SE said he did not

know. Detective Weed then told SE that he "heard something might have happened." SE told Detective Weed that he could not "remember what happened." But SE corroborated that his Mom decided to leave her "boyfriend's house," explaining: "I was sleeping during it. My Mom just got me and my sister up and we left." RP 49-71.

When the child would not divulge details, Detective Weed told SE that he "heard that somebody was worried" about both SE and his sister, prompting the following exchange:

> **SE** I think they're worried because um, me and my sister, um are hurting a lot.
>
> **DETECTIVE:** Tell me about that?
>
> **SE** Um, we're hurting, but um, I um, don't remember why um, we are hurting, but we're um hurting a lot.
>
> **DETECTIVE:** Tell me about it, where does it hurt?
>
> **SE** Um, on me, it hurts on my legs and my back and my sister it's her um, it hurts her um bottom and then her knees.
>
> **DETECTIVE:** Okay, and tell me why?
>
> **SE** I don't, um, remember why, but I know they just hurt bad.
>
> **DETECTIVE:** What made them hurt?
>
> **SE** Um, I don't remember. I really don't remember what made us um, hurt at all. But I know we just hurt really bad. I don't know we hurt. I don't even know why um, me and (sister) are hurting this bad. Usually, we don't hurt this bad. If we hurt this bad, then usually after two days it's gone, but nope, not with me and my sister yet, we um, still hurt, and I don't know why.

Detective Weed followed up, asking SE why his legs hurt. Again, SE would not explain but admitted: "I have trouble walking." In the interim, Ms. Coppin waited in the lobby with JR who began crying, stating that her belly and throat hurt. JR then asked Ms. Coppin if she could lay down on the floor. Ms. Coppin reported that JR appeared to be "limping." RP 49-71, 422-467. CP 95-276.

Detective Sergeant Brett Koss then came into the interview room and told Detective Weed that JR was ill and having difficulty walking. Detective Weed abruptly terminated his interview to take the children to Kittitas Valley Community Hospital (KVCH) to be examined. RP 739-763.

Once at KVCH, both children were disrobed at which time police and medical staff observed a whole host of injuries on the childrens' bodies consistent with being repeatedly beaten and burned. In addition, JR had burns on the front of her legs, with one obvious impression in the shape of an iron. RP 652-679, 577-630

Medical staff immediately went to work. ER Physician Dr. David Frick reported that JR had bruises, burns, and abrasions covering every part of the child's body except her face. He reported that JR suffered from acute kidney failure and extensive blood loss, having lost up to two-thirds of her blood supply. Dr. Frick stabilized the child to prevent her from

going into respiratory distress or cardiac arrest before being airlifted to Harborview. RP 277-310.

Dr. Frick also stabilized SE for similar but less serious injuries. However, SE was still assessed as having suffered from significant blood loss, malnutrition, kidney failure, and anemia requiring him to be transported to Harborview by ambulance. In order to assess and treat SE's injuries, Dr. Frick asked SE what happened. SE told him that that he had been "abused" by his "mother's boyfriend . . . *for a week.*" Dr. Frick asked how. SE told Dr. Frick that the Appellant had hit him with a belt and wire and sometimes asked him to run outside in the cold and snow. RP 277-310.

After Dr. Frick left the room, SE told RN and Director of Emergency Services Erik Davis that the Appellant had pinched him with "pliers" in his upper chest area. Ms. Coppin, who also was in the room, reported that SE looked at her and stated: "The marks on my chest are from his fingers and from pliers and – but you don't have to tell the doctor that cause it's not a big deal." SE later reported to Ms. Coppin that his "Mom's boyfriend" would make him run laps around the apartment complex, at night, where they lived. Ms. Coppin said SE eventually disclosed that the name of his "Mom's boyfriend" was "Dennis," the Appellant. RP 277-310, 652-679, 530-539.

Ms. Coppin said SE began to disclose more physical abuse while being prepared for transport to Harborview. He described how the Appellant hit him with a "cord." SE then told her about one night when the Appellant presented SE with a "choice." He said the Appellant turned on an iron, held it up to his face, and told him to choose between being burned on his chest, with or without a shirt on, explaining that if the Appellant burned SE with his shirt on, the material would melt to his skin as opposed to just having his skin burned. SE told Ms. Coppin that he also saw the Appellant beat his sister with a cord or belt. He said he saw the injuries to JR's thighs but did not see the injuries to her buttocks. RP 652-679. CP 95-276.

After seeing the extent of injuries to both children, Detective Weed obtained a recorded statement from Ms. Eli. Ms. Eli said the Appellant would spank the children with a belt. Ms. Eli said the Appellant spanked the children between 5-20 times each time they would get in trouble. Ms. Eli told police that when the bruises got too bad on their bottoms the Appellant began spanking them on their backs, legs and stomachs. RP 49-71, 101-275.

Ms. Eli said on Friday, January 27, JR had picked the scabs on her buttocks and legs until they were open sores. Ms. Eli said JR's injuries began to smell on Saturday night, January 28. Ms. Eli said she never

looked at SE's injuries. Ms. Eli said on Sunday, January 29, the children were cleaning their room and the Appellant noticed it smelled like urine because JR had wet her bed and soiled her clothing. Ms. Eli said the Appellant was going to spank JR, when Ms. Eli told him to stop. The Appellant reportedly told Ms. Eli that if she did not like him disciplining her children, she needed to move out. Ms. Eli said she took the children and left. RP 101-275

Police obtained a second recorded statement from Ms. Eli who, post Miranda, admitted that the Appellant would spank her children with either an electrical cord, a wood plank, or a coax cable. Ms. Eli said she did not see the Appellant pinch SE with pliers, but heard him threaten to pinch him with pliers when they were in the car one day. Ms. Eli also said the Appellant had pliers when he made the threat. Ms. Eli, a certified nurse's assistant, said she recognized the seriousness of JR's injuries Sunday night, January 29. She said that she did not bring the children to the hospital Sunday night, and, never intended to bring the children to the hospital to avoid law enforcement and CPS involvement. Police arrested Ms. Eli for criminal mistreatment. RP 101-275.

Police contacted the Appellant, later in the day, at his Ellensburg apartment. The Appellant invited the police into the residence. Detective Sergeant Koss explained to the Appellant that he did not have to let the

police into his residence and could tell us to leave at any time. The Appellant agreed to provide a recorded statement. Post Miranda, the Appellant admitted to spanking both children with his hands, a belt, and a wire. The Appellant said that he always spanked the children on the buttocks except when they would fall or move to avoid being spanked. Then he would spank them on their backs. The Appellant admitted to pinching the children with his fingers. He admitted to being frustrated with the children because they "whin(ed)," were "loud," and "pee(d) everywhere." CP 95-276. RP 922-1004.

Two days later, on February 2, 2012, Child Protective Services (CPS) Community Social Worker (CSW) Marti Miller and Detective Weed interviewed both children at Harborview Medical Center. First they interviewed SE.

Similar to Detective Weed's first interview, CSW Miller clearly established that SE understood the difference between the truth and a lie and could understand simple questions and correct misinformation. This time, without prompt, SE disclosed how he incurred his injuries:

> **"My Mom's boyfriend was there – um if we didn't listen we got a belt or the wire and um – the night when my Mom decided to move he threatened to burn me with an iron . . . he threatened to burn me with an iron or he would make me go stand outside until it was morning. I didn't want to choose so he said he choosing and I guess he chose to burn me with an iron."**
>
> **"I got hit with wire from the iron in the kitchen . . . a belt once and then he was using the wire on me."**

"It hit me on the leg, on the back – on my bottom – on m hand and my arm."

"I only got hit with the wire on my back when it was night."

When CSW Miller asked: "Anything else that has been used on you?" SE replied: "Just a pair of pliers. . . . he started pinching me." SE described how near the last day they stayed with the Appellant, "he said the next day which was Sunday I was um- gonna get beat to death. He said I was gonna be beat until um – I had burns like JR." CP 95-276.

He said he observed the Appellant hit his sister "with a wire on her leg and on her bottom. She gets hit there all the time with the wire." He saw the Appellant "use a belt . . . pinch my sister on her bruise and then he took a pair of pliers and pinched my sister on her bruise. He did the same thing with me. He would grab my bruise right here." CP 95-276. RP 422-467.

SE said that the Appellant did not like it when his sister "pee(d) during the night," prompting further beatings. He said the Appellant would order both him and his sister to stand against a wall, as if they were sitting in imaginary chairs, and hold their positions. He said if they did not hold their positions, they would get beat. He said the beatings progressed from being slapped with an open hand to "a belt but then he changed it to a wire." CP 95-276. RP 422-467.

SE said he got burned with a lighter after the Appellant pored salt

on his wounds and SE told the Appellant that he did not feel anything. SE told the social worker that his mother did not want him to disclose the name of his "Dad" who inflicted the abuse. But SE eventually identified "Dad" as "D-e-n-i-s." SE told the social worker and Detective Weed that they moved to Ellensburg on January 4, 2012. He explained that "the first two weeks we were there we didn't' get beat but after that we started getting beat." He said the last time he got beat was "the day when my Mom decided to leave." CP 95-276. RP 49-71, 577-630, 422-467.

At 1830 hours, Detective Weed and CSW Miller interviewed JR in her hospital bed. The social worker established that JR understood the role of a police officer: "Yeah. People who take bad people to jail." The social worker went to great lengths to establish that JR understood the difference between a truth and a lie. CSW Miller used scenarios to test JR's ability to understand simple questions and correct misinformation. Like SE, JR did not readily respond to open-ended questions about why she was being questioned. JR answered the questions asked. CP 95-276. RP 49-71, 577-630, 469-480.

For example, when CSW Miller asked JR what might have happened to her, JR responded: "I just puked." When CSW Miller asked JR "I heard that something might have happened to you and your brother?" JR responded: "Well, I don't know what happened to my

brother." CP 95-276. RP 49-71, 577-630, 469-480.

However, JR responded once Social worker began asking matter of fact questions about the obvious injuries on the child's body. JR told Social worker that she incurred the injuries on her body when she would get "spankings." JR maintained, through the course of her interview, that all of her injuries were caused by "spankings" that included the use of a "belt" and a "wire.' JR told Social worker that "Dad" gave her the spankings, later letting it slip that "Dad" was the Appellant "Dennis." JR told Social worker "I supposed to say Dad . . . 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. She also told us not to tell you guys Dad's real name and just tell you guys that his name is 'Dad.'" CP 95-276. RP 49-71, 577-630, 469-480.

JR said the Appellant "sometimes (made) me go stand outside." She explained her burns as being the consequence of repeated "spankings" that manifested because "it was either my Mom or Dad, he told me that I got those because I'm – I scratch em. It was either one of them who told me." CP 95-276.

On September 21, 2012, the Appellant's attorney, Ulvar Klein separately interviewed both children at the Ellensburg CPS office. The interviews were audio recorded. CP 95-276, 281-299.

Again, the children provided similar accounts of the physical abuse they suffered at the hands of the Appellant. Both children corroborated that the majority of the physical abuse occurred in Ellensburg in January 2012. Both children told defense counsel that their mother told them not to talk about their injuries or disclose the Appellant's name. SE elaborated, telling defense counsel that the Appellant would ask them if they had showed his injuries to anyone, and, he said, his Mom would remind them not to talk about it or show their injuries to anyone. He said his Mom said: "Don't tell them his name and that he hit us." CP 281-299.

SE told defense counsel how the beatings graduated from a hand to a belt to a "wire" which the Appellant "made us find." SE told defense counsel: "He would hit us if we spoke up." CP 95-276, 281-299.

In describing his sister's injuries to defense counsel, SE reported that it was "worse on JR." He said his sister was "getting whipped over and over." SE said that he did not get a good look at his sister's legs, but he said the Appellant told him: "SE your legs aren't as bad as JR's." He recalled how the Appellant used "pliers . . . (and) pinched her where her skin was healing.' CP 95-276, 281-299.

SE said with the exception of one-time, his Mom did not hit him. He said his Mom was present in the residence or "somewhere else" during many of the beatings and would "try to get him to stop." When asked

how, SE stated that his Mom would tell the Appellant to "stop." SE explained how the Appellant ordered him and his sister to sit with their backs against the wall in a simulated "wall-chair." But when the children could not hold the position, he would beat them. CP 95-276, 281-299.

JR, in responding to questions, from defense counsel, about how she incurred her injuries, JR stated: "The guy who hurted me. He spanked me . . . He hit me almost everywhere on my body." JR told defense counsel that his client hit her with his "belt or hand." When asked by defense counsel whether she liked living with the Appellant, she responded: "I didn't like how he hit me because it was really hard." CP 95-276, 281-299.

Neither child would admit they had been burned, even after being pressed by both defense counsel and the undersigned. However, SE explained how the Appellant threatened to "burn" him with an "iron" or put him outside in the cold in his "shorts and short sleeve shirt" in addition to the time that he threatened to burn him with an iron with his "shirt on or shirt off." He recounted how the Appellant "pored salt" on his wounds and when he did not show pain, the Appellant took a "lighter" and placed the flame close to SE's leg until he was in pain. CP 95-276, 281-299.

Both children explained they suffered their injuries as the consequence of repeated beatings. However, SE recounted of "eating

dinner one night" in the living room from where "all I heard was JR crying." SE said he did not see what happened. SE also recalled waking-up "one night" to the sound of his sister "crying and screaming" out in the living room. SE said that he did not dare go into the living room to look because: "I did not want to see." SE also told defense counsel that he saw the Appellant putting ointment on his sister's thighs which "looked like they were burned." CP 95-276, 281-299.

When asked by the State of Washington, what it meant to tell the truth, JR responded: "It means like telling that actual thing that is the right thing." When asked what it meant to tell a lie, JR said: "It means we are not telling the truth." CP 95-276, 281-299.

CHARGING & PRE-TRIAL MOTIONS

The State of Washington charged the Appellant with two counts of Assault of a Child in the First Degree – Domestic Violence and two counts of Criminal Mistreatment in the Second Degree – Domestic Violence. The State of Washington also filed an aggravating circumstance, for each count, alleging that the Appellant knew or should have known that the victims of the current offenses were particularly vulnerable or incapable of resistance. CP 304-306.

On October 18, 2012, the State of Washington filed a Motion & Memorandum to Admit Child Hearsay Describing Acts of Physical Abuse

and both provided the trial court the Ellensburg Police Department and Child Protective Service's audio-video recordings and transcripts of their interviews of the children and the interviews of all those involved. The State of Washington also attached transcripts of defense counsel's interviews of both children. CP 95-276.

Appellant also filed "Appellant's Child Hearsay Memorandum." CP 281-299.

On October 19, 2012, first of two days of hearings were held on the State of Washington's written motion. The children did not testify at the hearings. CP 582-584, 589-594, 595-824.

The trial court reviewed legal memorandums filed by both parties, and transcripts and audio-video recordings of the social worker and Detective's interviews of the children and defense counsel's interviews prior to the hearing. Based upon its review, the trial court determined that it was not necessary for the State of Washington to call the children to testify to argue its motion, particularly since defense counsel already had an opportunity to question the children prior to the hearing. CP 582-584, 589-594, 595-824.

Following oral argument, the trial court issued its findings encapsulated in written findings of fact and conclusions of law addressing both the competency of the children and the reliability of the children's

statements per law and case law. The trial court noted that the children provided separate statements to a social worker and police detective at Harborview Hospital. The interviews were audio-video recorded. The trial court reviewed the recordings and transcripts of the same in their entirety and incorporated them by reference. CP 582-584, 589-594, 595-824.

On October 26, 2012 on the record and ultimately in writing, the trial court concluded that all witnesses are presumed competent, in the absence of evidence of incompetence. The trial court found that the children were competent. CP 582-584, 589-594, 595-824.

The trial court found that the audio video recordings demonstrated that the children understood both what it meant to tell the truth and why it was important to tell the truth. The trial court found that the children understood simple questions and intelligently responded corresponding with their ages. CP 582-584, 589-594, 595-824.

The childrens' answers were spontaneous in response to questions asked by their interviewers. The trial court found that the childrens' responses were relatively consistent, and they demonstrated a good sense of timing and being able to recall and describe what happened. For example, the trial court noted that the children could differentiate between a slap and a hit. CP 582-584, 589-594, 595-824.

The trial court noted that when the Appellant's attorney questioned the children, out of court, the children were still able to recall what physical acts of abuse they say the Appellant inflicted upon them. Cross-examination of the children did not showcase a lack of knowledge. CP 582-584, 589-594, 595-824.

The trial court held that any omissions, by the children, were not the result of faulty recollection or lying as opposed to the children just not wanting to talk about what they do not want to talk about. The trial court noted that the fact that the children were reluctant to name the Appellant as their abuser went to their credibility rather than their lack of credibility. CP 582-584, 589-594, 595-824.

However, the trial court ruled that the social worker could not testify as to statements one child made about any acts of physical abuse the other child may have suffered. The social worker could only testify as to what statements each child made as to physical acts of abuse incurred by the child who made the statement. CP 582-584, 589-594, 595-824.

The trial court found that all of the statements made by the children were "testimonial," under Crawford. Therefore, the trial court strictly conditioned its findings upon the children testifying at trial before the social worker testified. CP 582-584, 589-594, 595-824.

The case proceeded to trial.

At trial, among the many witnesses who testified, both children and the social worker testified.

4-year-old JR testified as to her name and age, describing his recent birthday party to include who came and the gifts he received. She went on to testify about the injuries she incurred as a result of the Appellant "spanking" her. She identified the Appellant, in court, as her abuser. JR could not otherwise describe with particularity how she incurred the obvious iron burn on her leg or the assortment of other injuries to her body. RP 469-480.

8-year-old SE provided more detailed testimony of being beaten, whipped, burned with a lighter, and having his skin twisted by the Appellant with a pair of pliers. He testified to seeing his sister being mercilessly whipped and crying aloud sometime while he stayed in his room. RP 422-467.

Following the childrens' testimony, the social worker testified consistent with what the children reported to her at Harborview. RP 577-630.

After the State of Washington rested, the Appellant testified offering begrudging admissions that he had disciplined the children, when faced with those admissions he provided to law enforcement. RP 922-1004.

The jury found the appellant guilty. CP 511.

The trial court sentenced the appellant to 40 years in prison. CP 514.

This appeal followed.

ARGUMENT

1. **THE TRIAL COURT PROPERLY ADMITTED THE SOCIAL WORKER'S CHILD HEARSAY TESTIMONY AFTER CONDUCTING A RCW 9A.44 HEARING, OVER TWO DAYS, AT WHICH THE TRIAL COURT REVIEWED WRITTEN BRIEFS FROM BOTH THE STATE AND APPELLANT, TRANSCRIPTS AND AUDIO-VIDEO RECORDINGS OF STATEMENTS MADE BY THE 4-YEAR OLD AND 8-YEAR-OLD CHILD VICTIMS TO THE SOCIAL WORKER, A POLICE DETECTIVE AND APPELLANT'S COUNSEL, AND HEARD ORAL ARGUMENTS FROM BOTH SIDES BEFORE APPLYING THE "RYAN" FACTORS AND ENTERING WRITTEN FINDINGS.**

RCW 9A.44.120, through ER 807, provides that:

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,.... not otherwise admissible by statute or court rule, is admissible in evidence in.... the courts of the state of Washington if:

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

(2) The child either:

(a) testifies at the proceedings; OR

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

In applying this statute and evidence rule, the court must undertake a three-step legal analysis, addressing three questions: **(1)** Is the child competent to testify? **(2)** Is the statement the child made *testimonial*? **(3)** Do the time, content, and circumstances of the statement provide a *sufficient indicia of reliability?*

COMPETENCY

The first step, in this legal analysis, is to determine whether the child is competent to testify, *if* the child's competency is at issue. However, since the Appellant is only raising this issue with regard to one of the two children (JR), this will be addressed below in the State of Washington's response to the Appellant's second issue.

TESTIMONIAL

The Sixth Amendment to the United States constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Article I, Section 22 of the Washington State Constitution provides that "(i)n all criminal prosecutions, the accused shall have the right to . . . meet the witnesses against him face to face."

In the landmark Supreme Court case Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354 (2004), the United State Supreme Court held that if an out-of-court statement is "testimonial," the state can only introduce

the statement *provided* that the accused has had an opportunity to cross-examine the out-of-court declarant.

If the court decides that a child's statement *is testimonial*, then the State of Washington cannot introduce the child's out of court statements, through the testimony of other witnesses, unless the Appellant has an opportunity to cross-examine the child. If the statement is *not testimonial*, then a traditional hearsay analysis applies under ER 807 and RCW 9A.44.120 to include the state invoking traditional hearsay exceptions to introduce such statements. Otherwise, if the child is unavailable as a witness at trial, and the Appellant had no prior opportunity to cross-examine the child under oath, then all of the child's out-of-court statements are inadmissible. SEE Karl Tegland's Courtroom Handbook on Washington Evidence, Author's Comments pgs. 416-422, 455-468 (2013-2014 Edition).

In this case, the State of Washington moved to introduce statements the children made to EPD Detective Tim Weed, CPS Supervisor Marti Miller, ASPEN Crime Victim Manager Katie Coppin, and hospital personnel.

The State of Washington conceded that the majority of the statements the children made to Detective Tim Weed, CPS Supervisor Marti Miller, and ASPEN Crime Victim Manager Katie Coppin, at KVCH and Harborview, were testimonial. The trial court agreed, finding that there would be no Confrontation Clause/Crawford issue provided that the children testified first.

The only remaining question was whether the time, content, and circumstances of the childrens' statements to these witnesses provide a sufficient indicia of reliability under RCW 9A.44.

SUFFICIENT INDICIA OF RELIABILITY

Once a court has decided whether the child is competent to testify and has addressed the issue of whether the statement is *testimonial,* requiring the children to testify, the remaining issue for the court to decide is whether the time, content, and circumstances of the statements provide a sufficient *indicia of reliability*. SEE ER 807 and RCW 9A.44.120.

The reliability test is set forth in State v. Ryan, 103 Wash. App. 165, 691 P.2d 197 (1984). The Ryan court listed nine factors a trial court must apply when determining whether the time, content and circumstances surrounding an out of court declaration provide sufficient indicia of reliability:

> These factors are (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 of 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 Appellant's involvement.

The final three factors listed in Ryan have been determined by the Court of Appeals to be of little use when addressing reliability of child hearsay statements. See, e.g., State v. Borland, 57 Wash App. 7, 20, 786 P2d 810 (1990); State v. Strange 53 Wash App. 638, 645, 769 P.2d 873 (1989). In State v. Strange, 53 Wash. App. 638, 769 P.2d 873 (1989), the court observed that the sixth factor is "unimportant" in the context of the child hearsay reliability analysis.

Statements made to law enforcement officers or designated child interviewers in response to questions may be admissible under the child hearsay statute. State v. Young, 62 Wash App. 895, 901 (1991). In Young, the Court of Appeals rejected the appellant's claim that the child's statements to law enforcement officers and social workers should not be admitted as they were not spontaneous, and because the professional interviewers were aware of the abuse when they questioned the child. The Court noted that "Washington law ... recognizes that a child's answers are spontaneous so long as the questions are not leading or suggestive." Young, at 901. Further, the court held that the professional interviewers enhanced the reliability of the child's statements, rather than diminished it. Id. at 901. The court noted that:

> Professionals are, by definition, trained to be objective in assessing whether a child's complaint merits further investigation, and unlike parents, their perceptions are not impaired by personal attachment to the child.

Young, at 910.

Not all of the Ryan factors need be met in order for the court to find a statement reliable. State v. Swan 114 Wash App. 613, 652, 790 P.2d 610 (1990). The test is whether the Ryan factors are "substantially met." Id. The trial court is vested with considerable discretion in making reliability determinations and will not be reversed absent a showing of manifest abuse of discretion. Jones, 112 Wn. 2d at 499.

In this case, the court reviewed legal memorandums filed by both parties, and transcripts and audio-video recordings of the social worker and detective's interviews of the children and defense counsel's interviews prior to the hearing. The trial court heard oral arguments.

The trial court found that the facts and circumstances of JR and SE's disclosures of physical abuse indicated no apparent motive to lie. Their obvious physical injuries alone distinguish this case from those involving allegations of physical or sexual abuse where there is absolutely no corroborating physical evidence, and the case hinges exclusively on the word of the accuser.

Both JR and SE suffered grotesque, disfiguring, life threatening injuries for which there had to be a physical explanation. The children had

absolutely no motive to fabricate how they incurred their injuries. They simply described what happened to them.

The record reflects that the children told multiple persons in positions of authority, principally in hospital settings, further lending credibility to their statements because the time, content, and circumstances of their statements leave it less likely that the statements were the byproduct of coercion or undue influence.

The children clearly understood that the police, social workers, and medical personnel were there to help them if not rescue them from their nightmare. Both SE and JR expressed real concerns about their mother knowing they had made disclosures which only lent further credibility to their statements. The children offered plausible explanations for their injuries consistent with lay observation and the medical testimony that the children were repeatedly beat, whipped, and burned.

Last, the Appellant admitted that he disciplined the children to include spanking them with his hands and using a belt and "at different times . . . (a) wire." The Appellant denied he pinched the children with pliers but admitted that he pinched them with his fingers. He admitted that he was frustrated with the children because they "whin(ed)," were "loud," and "pee(d) everywhere." Even if the Appellant's admissions did not arise to the level of discipline that would be necessary to inflict the injuries the

children, in fact, suffered, what admissions the Appellant made corroborated what SE and JR disclosed to include the Appellant's attorney.

Taking SE and JR's statements in their entirety, the tight timeline lends a strong indicia of reliability to the statements they made to authority figures. The trial court had no reason to doubt the credibility of the childrens' statements describing the physical abuse the Appellant cruelly inflicted upon them. The trial court encapsulated its findings in writing.

Appellant questions how the witnesses could testify to the childrens' statements that they had been beaten, hit, and burned in general when "none of these statement related to any specific act of abuse." SEE Appellant's Brief.

Appellant misconstrues the statute which permits statements "describing any act of physical abuse of the child by another that results in substantial bodily harm." The law does not specify that each act must results in substantial bodily harm.

4-year-old JR's left leg showed the indelible imprint of an iron on the witness stand. Yet, she never described the injury to the CPS social worker or the jury as being a consequence of anything more than a "spankings." That was how JR described the entirety of her injuries that nearly took her life: "spankings." Further, there is no law or case law that

requires that a child's description of any act of physical abuse accurately describe what happened provided it results in substantial bodily harm.

Clearly, JR's use of the adjective "spankings" was her 4-year-old way of describing physical abuse that resulted in substantial bodily harm when the Appellant took a hot iron and seared her leg, leaving the indelible image of an iron on the child for the rest of her life.

It defies reason and logic that it was the intent of the legislature to bar the admissibility of a child's statements to others because the child's general or even incorrect description of what actually happened to her does not match the statutory definition. In State v. Clark,139 Wn.2d 152, 985 P.2d 377 (1999), quoted by Karl Tegland at 420, the Washington Supreme Court ruled that "(a) statement is not necessarily rendered unreliable by the fact that the child later recants the statement or makes other statements that are inconsistent with it."

The State of Washington concedes that the social worker testified as to statements JR made about the abuse she reported her brother SE suffered at the hands of the Appellant. However, the testimony is very limited, particularly when reviewed in context with the totality of evidence the jury received to include testimony from both children and the multiple persons to who interacted with the children in their medical capacities. Therefore, any error is harmless.

Last, Appellant argues that the social worker improperly testified as to "threats" SE told her the Appellant made to include threatening to "burn" him and "beat" him to death because they do not constitute an "act of physical abuse of the child by another that results in substantial bodily harm," under RCW 9A.44.120. Yet, this testimony was offered within the context of what did happen. The Appellant beat, whipped, and burned SE.

The fact that the Appellant made threats to cause specific acts of violence only goes to show that the Appellant's threats were not hollow. In fact, the only "threat" the Appellant did not carry out was his threat to beat SE to "death." SE lives.

Last, any error would be harmless because SE testified to the same prior to the social worker's testimony, just as the trial court mandated in its ruling.

2. FOUR-YEAR-OLD JR PROVIDED COMPETENT AGE APPROPRIATE TESTIMONY AT TRIAL OF HOW THE APPELLANT'S REPEATED "SPANKINGS" CAUSED HER INJURIES FOLLOWING A COMPETENCY HEARING AT WHICH THE TRIAL COURT REVIEWED WRITTEN BRIEFS FROM BOTH THE STATE AND APPELLANT, TRANSCRIPTS AND AUDIO-VIDEO RECORDINGS OF STATEMENTS MADE BY THE 4-YEAR OLD AND 8-YEAR-OLD CHILD VICTIMS TO THE SOCIAL WORKER, A POLICE DETECTIVE, AND APPELLANT'S COUNSEL, AND HEARD ORAL ARGUMENTS FROM BOTH SIDES BEFORE APPLYING THE "ALLEN" FACTORS AND ENTERING WRITTEN FINDINGS.

The court has no obligation to determine a child's competency unless the child's competency is challenged. State v. CMB, 130 Wash.App. 841 (Div I 2005). The burden is on the challenger to demonstrate that the child in question is incompetent to testify. State v. S.J.W. , 170 Wn.2d 92 (2010).

If a child's competency is challenged, the child's competency will determine whether the child is available or unavailable as a witness per RCW 9A.44.120. In determining competency, the court must apply the following legal analysis:

ER 601 provides that *every person is competent to be a witness except as otherwise provided by statute or court rule.*

CrR 6.12 provides, in part:

> (c) The following persons are incompetent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or do not have the capacity of relating them truly.

A trial court has *broad discretion* in determining the competency of a child, and an appellate court will not disturb a trial court's finding of

competency absent a manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 424 P. 2d 1021 (1967); State v. Wyse, 71 Wn.2d 434 (1967)

"The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

At a competency hearing, "a trial court has considerable latitude in choosing the procedure for determining competency, and may proceed ***by any means*** which permits the parties to be heard and allows the court to make a well-informed judgment." State v. Maule, 112 Wn.App. 887, 888-89, 51 P.3d 811 (2002) (emphasis added). The Maule court upheld the trial court's decision to refuse defense counsel's cross examination of the witness because the questions were not related to the child's competency. Id. at 895.

The court in Wyse and Allen spelled out just what factors the trial court should consider in determining a child's competency:

> (a) [(1)Whether the child has] 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 about 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 asked about it.

Children as young as three and one half years old have been found competent to testify. Hunsaker, supra. In fact, many children below the age of eight have also been found competent to testify in Washington courts. See State v. Ridley, 61 Wn. 2d 457, 378 P.2d 700 (1963) (five year old); State v. Allen, supra, (six year old); State v. Tate, 74 Wn. 2d 261, 444 P.2d 150 (1968) (seven year old); State v. Sims, 4 Wn. App. 188, 480 P.2d 228 (1976) (five and seven year olds); State v. Johnson, 96 Wn.2d 926, 639 P2d 1332 (1982) (five year old); State v. Woodward, 32 Wn. App. 204, 646 P.2d 135 (1982) (five and one-half year old).

In this case, the Appellant challenged the competency of both children arguing that they were "dishonest" because they would not readily disclose the name of their mother's boyfriend and state, contrary to the medical evidence, that their injuries were the result of being spanked and picking their scabs. CP 281-289.

As the State of Washington argued, the fact the children, particularly JR, did not admit to being burned or provide other explanations is not evidence of dishonesty as it was evidence of their youth, innocence, and inability to comprehend the horror the Appellant visited upon them while their mother stood-by and did nothing. The children provided explanations

for the vast majority of the injuries the Appellant inflicted on their little bodies. These explanations proved to be consistent to what the experts testified and what was patently obvious to the lay observer. SE and JR were repeatedly whipped and beaten in addition to being burned. CP 95-276.

In addition, it was not as if the children made no reference to being burned. SE described how the Appellant threatened to burn him with an iron, giving him the choice of being burned directly on his skin or over his shirt, unless he wanted to go outside in the cold. SE described how the Appellant placed the flame of a lighter to his skin after poring salt in his wounds. He also described to defense counsel how he observed the Appellant putting ointment on his sister's thighs which appeared to him to be "burned."

While the children did not readily disclose the Appellant's name, it is patently clear their mother told them not to disclose the Appellant's name nor discuss or show their injuries to anybody. Therefore, it is more likely that the children were merely doing what their mother told them to do until they felt comfortable enough to disclose to authority figures with whom the children developed a bond of trust and confidence.

Through the course of several interviews, to include those requested and conducted by defense counsel, the children clearly demonstrate their obligation to speak the truth. The children are candid and have maintained

consistent accounts.

Each child demonstrated independent recollection of what happened. JR, at one point, told the social worker that she does not know what happened to her brother, but she knew what happened to her. The children clearly have the capacity to explain what happened and respond to questions about what happened. Appellant attorney's own interviews established the same.

In reaching its findings, the trial court reviewed the audio video recordings of the social worker and detective's interviews

The trial court found that both children understood what it meant to tell the truth, possessed the memory to recall details, and had the capacity to answer questions about the incident.

Most importantly, at trial, JR was able to demonstrate that she understood her obligation to speak the truth and answer simple questions about the events, prompted by a simple series of questions:

Q: Do you know Dennis?
JR: Yes
Q: Who is Dennis?
JR: The guy who hurt me.
Q: JR, how did he hurt you? Tell me how did he hurt you?
JR: I don't really remember.
Q: Okay. JR, when you walked in the courtroom I saw something on your leg. What is that on your leg?
JR: A mark.
Q: A mark of what?
JR: From his spanking me.

Q: Who spanked you?
JR: Dennis.
Q: Where did he spank you?
JR: On my leg

JR went on to describe other place on her body where Dennis "spanked" her.

Prior to the children testifying, the trial court advised that if it had any "issues" regarding the testimony of either child, it would raise the issue with the State of Washington. RP 421. The trial court never raised an issue based upon the testimony provided.

Taking LH's testimony in its entirety, the trial court reasonably exercised its discretion in finding JR competent to testify.

3. THE SOCIAL WORKER DID NOT OFFER AN OPINION AS TO 4-YEAR-OLD JR'S VERACITY, IN VIOLATION OF THE APPELLANT'S RIGHT TO A JURY TRIAL, WHEN SHE TESTIFIED THAT SHE KNEW JR HAD "PUKED" IN HER HOSPITAL ROOM BECAUSE THE SOCIAL WORKER'S TESTIMONY WAS RESPONSIVE TO AN EVENT WHICH HAD JUST OCCURRED IN JR'S HOSPITAL ROOM BUT WHICH HAD NOTHING TO DO WITH THE TRUTH OF THE MATTER ASSERTED AND JR TESTIFIED AT TRIAL, PERMITTING THE JURY THE OPPORTUNITY TO INDEPENDENTLY EVALUATE THE CHILD WITNESSE'S VERACITY.

The law is not in dispute. The facts in evidence are in dispute.

In this case, the social worker testified that she began her interview by explaining to the child the "ground rules" in an effort to determine if the child could understand questions being asked, answer questions asked, and understand the importance of telling the truth about real events. The prosecutor then asked the social worker if she "transition(ed) to the substantive portion" of her interview, at which time, the social testified that she asked the child "(W)hy she was at the hospital? What happened?" in an effort to find out from the child how she incurred the injuries she did.

Instead, the social worker testified that the child told her that she had just been "washed" because she had "puked." That prompted the social worker to testify that she knew that to be "true" because 30 minutes prior to the social worker and detective's arrival, the child had puked.

Clearly, the social worker was only commenting on an actual event completely disconnected from the case at bar. This does not arise to manifest error which resulted in actual prejudice to the Appellant's constitutional rights at trial. In fact, the social worker clarified that because the child was not responsive to her initial open-ended question to learn about her injuries, the heart of the case, the social worker had to ask her question a different way: "Eventually I said that I heard something might have happened to you and your brother."

Ultimately, the social worker testified that she was able to elicit answers from JR that were responsive to her questions to learn about how the child incurred the life threatening injuries she did. But the social worker never testified as to the child's veracity regarding answers the child provided about her injuries which would constitute manifest error.

Arguably, even if this court found that the social worker offered impermissible opinion testimony about the child's veracity, the jury had plenty of other evidence to consider to include the testimony of JR – offering the jury the best and most independent opportunity to assess the child's veracity and determine the truth of the matter asserted.

Therefore, the Appellant fails to make a reasonable argument that the social worker's testimony constituted impermissible opinion testimony based upon the specific nature of the testimony and the other evidence before the trier of fact.

4. THE EVIDENCE, AT TRIAL, SUBSTANTIALLY SUPPORTED THE JURY'S FINDING THAT 8-YEAR-OLD SE WAS PARTICULARLY VULNERABLE WHEN HIS MOTHER TESTIFIED HOW SHE ALLOWED THE APPELLANT TO "DISCIPLINE" HER CHILDREN BECAUSE HE WAS UPSET THAT SHE WOULD NOT, AND SE TESTIFIED HOW HE WAS BEATEN AND BURNED BY THE APPELLANT AND WOULD HIDE IN HIS ROOM TO AVOID KNOWING WHAT WAS HAPPENING TO HIS SISTER.

The law is not in dispute. The question is whether the jury (the trier of fact) had sufficient evidence to find that the Appellant should have known, during the commission of his assault, that SE was particularly vulnerable or incapable of resistance when he beat, whipped, twisted his skin, and burned him over the course of a week with an electrical cord, a wood plank, a coax cable, a belt, a pair of pliers, and a lighter.

First, it is noteworthy that the Appellant only questions whether the evidence was sufficient to support the jury's findings that SE was "particularly vulnerable" when the law provides that the jury can also make the finding based upon a determination that the victim was "was particularly vulnerable ***or*** incapable of resistance."

Regardless, at trial, the jury heard testimony from SE.

SE testified that, during the time he lived with the Appellant, he was principally confined to his bedroom. RP 431. He testified that the Appellant hit him with a belt and wire, pinched him with pliers,

He testified that the Appellant would hit him "because usually either me and my sister didn't answer quick enough or like we might have said something we didn't mean to say. . . (h)e normally hit us if we didn't answer in the right amount of time." RP 437.

He testified that the Appellant threatened to burn him to include plugging in the iron and warming it up. RP 439-440. He testified that the

Appellant threatened to burn him like he had burned his sister. RP 456. He testified that the Appellant asked him to choose between getting burned with an iron or staying outside, in the cold, until the morning. RP 440.

SE testified that, on one occasion, he chose to go outside without a jacket. RP 440-441. He testified that on another occasion the Appellant held a hot iron up to his chest to feel the heat. RP 447-448.

SE recounted how, one night, he woke to hear his sister JR crying loudly out in the living room. However, SE testified that he dared not look out his room to see or intervene. RP 453-455.

He never testified that his mother, who was around him more than the appellant, ever attempted to intervene. He testified that his mother told him not to tell anybody the Appellant's name. RP 442.

SE testified that they remained at the Appellant's residence until their mother finally left the residence, concluding: "me and her were hurting really bad and when we were at the hotel like it was hard to get up out of bed." RP 467.

SE's mother, AE, testified that she moved in with the Appellant because she had no place to live. Very quickly, the Appellant began getting upset with her because she would not "discipline" her children. RP 116. Arguments ensued with the Appellant berating her for failing to

"discipline" her children. RP 128. The focal point of the arguments always came down to her failure to "discipline."

AE testified that her predicament grew because she had no money for rent and no place to go. RP 132-133, 135. Then after one "big fight," AE began allowing the Appellant to "discipline" her children first with a belt then a co-axle television cable, wood, and metal. RP 140, 152 – 158.

During many of the times the Appellant was "disciplining" her children, AE testified that she would leave, go into another room, or "sleep." RP 160.

Clearly, the evidence presented was that AE abandoned her children and relinquished all authority to the Appellant who, over the course of a week, systematically beat, whipped, twisted the skin, and burned JR and SE over the course of a week with an electrical cord, a wood plank, a coax cable, a belt, pliers, a lighter, and an iron.

The totality of the testimony supports that SE was submissive because the consequences of not submitting included severe beatings and burning, and he knew his Mom would do nothing about it. It simply is not reasonable to argue that SE was anything but particularly vulnerable or incapable of resistance. The physical abuse he suffered was akin to torture, and his Mom did not put an end to it until it was nearly too late.

The trial court record amply supports the jury's findings. Therefore, the sentence enhancement should be affirmed.

CONCLUSION

Based upon the foregoing legal analysis, court papers filed, and application of the facts in evidence at appellant's jury trial, the State of Washington respectfully requests that this court affirm the trial court's findings that 8-year-old SE and 4-year-old JR statements to the social worker were admissible and JR was competent. The State of Washington respectfully requests that this court find that Appellant's right to a jury trial was not violated, and the jury had sufficient evidence to find that SE was particularly vulnerable or incapable of resistance when the Appellant beat and whipped him with a belt, wood plank, and co-axle cable, twisted his skin with pliers, burned him with a lighter, and threatened to burn him with an iron has he did to his 4-year-old sister, leaving an iron imprint on her leg for the rest of her life.

Dated this 8th day of August 2014.

Respectfully submitted,

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