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62162-9

NO. 62162-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN C. KOELLER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie I. Churchill, Judge  
Superior Court Cause No. 07-1-00179-5

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 STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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**I. STATEMENT OF THE ISSUES**

- A. Whether *Crawford v. Washington* rendered RCW 9A.44.150, permitting children to testify at trial by closed circuit television, unconstitutional?**
- B. Whether the trial court properly allowed the child who was raped by the defendant to testify by closed circuit television pursuant to RCW 9A.44.150?**
- C. Whether the court properly found the child victim competent to testify?**
- D. Whether the trial court abused its discretion in permitting testimony regarding the victim's psychiatric diagnosis?**
- E. Whether the trial court properly admitted testimony of DKK under ER 404(b)?**
- F. Whether the trial court properly ruled that the prosecutor should not be called as a defense witness?**

**II. STATEMENT OF THE CASE**

On May 16, 2008, Bryon Koeller was found guilty by a jury of Rape of a Child in the First Degree, after a second trial.

05/15/08 RP 370<sup>1</sup>. The first trial ended in a mistrial. 03/21/08 RP 25.

Pretrial hearings were held on March 5 and 6, 2008. The state requested a child competency hearing regarding the minor victim, VCM. The state also brought a motion to permit child hearsay statements made by VCM to his grandmother and his mother. Lastly, the state asked the court to admit certain prior bad acts under ER 404(b), specifically that Appellant required his daughter by Kyla Williams, DKK, when she was four years old, to perform oral sex on him in the bathroom. 3/05/08 RP at 7-8. Patricia Wood, VCM's maternal grandmother, Elizabeth Williams, VCM's mother, Karen Miller, DKK's therapist, Kyla Williams, DKK's mother, VCM and DKK testified at the preliminary hearings.

The trial court ruled that VCM would be permitted to testify via closed-circuit television at the March 5 pre-trial hearing, pursuant to RCW 9A.44.150. 03/05/08 RP 143. The state called VCM on the afternoon of March 5, 2008. 03/05/08 RP 154. VCM testified from an interview room adjacent to the court room. The

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<sup>1</sup> Transcripts were provided in volumes by date. For clarity, the volumes will be referred to by date, to conform with Appellant's nomenclature.

prosecutor and the defense attorney were physically in the interview room with VCM. A video camera focused only on VCM was directly connected via a one-way closed circuit to a video projector in the courtroom. The projector projected a live video image of VCM on a large screen in the courtroom. The image was visible to the court, the defendant and any members of the public in the gallery. A telephone connection from a cellular phone, with speakerphone, in the interview room to a landline speakerphone in the courtroom provided a continuous two-way audio connection. Another cell phone, with an ear piece, was used by the defense attorney to connect to a standard telephone at counsel table for the defendant. Thus, the defendant could communicate with his attorney without others hearing them, in nearly the same way as if counsel was sitting with defendant at counsel table. The defendant-attorney phone connection and the interview room-courtroom connection were constant throughout the testimony.

Defense counsel complained of difficulties hearing through the cell phone, and VCM was excused from testifying until the next day. 03/05/08 RP 155-63.

The state recalled VCM on the second day of the hearing. The record does not accurately reflect the system used, and the

state has not been successful in obtaining permission to supplement the record. There are several witnesses, including court staff and technicians, who could provide the Court with a detailed description of the system used, if the matter were remanded for a reference hearing. Defense counsel did not renew his objection to the quality of the audio connection to the defendant on the private phone line. There was no mention by defense counsel that he could not hear his client or that his client could not communicate with him over the phone. There is nothing in the record to indicate that the telephone connection was not constant between the defendant and his attorney. Additionally, co-counsel, Darrin Hall, was seated next to the defendant during VCM's testimony.

At trial, VCM again testified via closed-circuit television. The system used was a one-way live video feed from an interview room to a projector in the courtroom projecting onto a large screen in the courtroom visible to the defendant, the judge and to the jury. The trial courtroom is equipped with a sound amplification system and microphones throughout the courtroom. All spoken words are amplified and broadcast via ceiling-mounted speakers. Continuous two-way audio communication between the interview room and

the courtroom was provided by augmenting the courtroom sound system with an additional microphone and speaker in the interview room. The camera was placed such that the witness was centered in the video frame. Defense counsel and the prosecutor sat across the table from the witness. A standard telephone extension with a headphone was used by defense counsel and was connected to a standard telephone extension at counsel table for defendant. The defendant-counsel private telephone connection was constant during the testimony.

### **III. ARGUMENT**

#### **A. RCW 9A.44.150 does not violate the confrontation clause of the United States Constitution.**

A reviewing court presumes the statute is constitutional. *State v. Stevenson*, 128 Wn.App. 179, 189, 114 P.3d 699 (2005). The party challenging the constitutionality of the statute bears the burden to prove the statute is unconstitutional beyond a reasonable doubt. *State v. Ramos*, 149 Wn.App. 266, 270, 202 P.3d 383 (2009).

Appellant has not carried this heavy burden to show that RCW 9A.44.150 is unconstitutional.

Washington permits testimony of witnesses under the age of 10 by closed circuit television in certain limited circumstances. RCW 9A.44.150 provides:

(1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of ten may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

(a) The testimony will:

(i) Describe an act or attempted act of sexual contact performed with or on the child witness by another person or with or on a child other than the child witness by another person;

(ii) Describe an act or attempted act of physical abuse against the child witness by another person or against a child other than the child witness by another person; or

(iii) Describe a violent offense as defined by RCW 9.94A.030 committed against a person known by or familiar to the child witness or by a person known by or familiar to the child witness;

(b) The testimony is taken during the criminal proceeding;

(c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child witness to testify in the presence of the defendant

will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;

(d) As provided in subsection (1)(a) and (b) of this section, the court may allow a child witness to testify in the presence of the defendant but outside the presence of the jury, via closed-circuit television, if the court finds, upon motion and hearing outside the presence of the jury, that the child will suffer serious emotional distress that will prevent the child from reasonably communicating at the trial in front of the jury, or, that although the child may be able to reasonably communicate at trial in front of the jury, the child will suffer serious emotional or mental distress from testifying in front of the jury. If the child is able to communicate in front of the defendant but not the jury the defendant will remain in the room with the child while the jury is excluded from the room;

(e) The court finds that the prosecutor has made all reasonable efforts to prepare the child witness for testifying, including informing the child or the child's parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion;

(f) The court balances the strength of the state's case without the testimony of the child witness against the defendant's constitutional rights and the degree of infringement of the closed-circuit television procedure on those rights;

(g) The court finds that no less restrictive method of obtaining the testimony exists that can adequately protect the child witness from the serious emotional or mental distress;

(h) When the court allows the child witness to testify outside the presence of the defendant, the defendant can communicate constantly with the defense attorney by electronic transmission and be granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney;

(i) The court can communicate with the attorneys by an audio system so that the court can rule on objections and otherwise control the proceedings;

(j) All parties in the room with the child witness are on camera and can be viewed by all other parties. If viewing all participants is not possible, the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child;

(k) The court finds that the television equipment is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment; and

(l) The court imposes reasonable guidelines upon the parties for conducting the filming to avoid trauma to the child witness or abuse of the procedure for tactical advantage.

The prosecutor, defense attorney, and a neutral and trained victim's advocate, if any, shall always be in the room where the child witness is testifying. The court in the court's discretion depending on the circumstances and whether the jury or defendant or both are excluded from the room where the child is testifying, may remain or may not remain in the room with the child.

(2) During the hearing conducted under subsection (1) of this section to determine whether the child witness may testify outside the presence of the defendant and/or the jury, the court may conduct the observation and examination of the child outside the presence of the defendant if:

(a) The prosecutor alleges and the court concurs that the child witness will be unable to testify in front of the defendant or will suffer severe emotional or mental distress if forced to testify in front of the defendant;

(b) The defendant can observe and hear the child witness by closed-circuit television;

(c) The defendant can communicate constantly with the defense attorney during the examination of the child witness by electronic transmission and be granted reasonable court recesses during the child's examination for person-to-person consultation with the defense attorney; and

(d) The court finds the closed-circuit television is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment. Whenever possible, all the parties in the room with the child witness shall be on camera so that the viewers can see all the parties. If viewing all participants is not possible, then the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child.

(3) The court shall make particularized findings on the record articulating the factors upon which the court based its decision to allow the child witness to testify via closed-circuit television pursuant to this section. The factors the court may consider include, but are not limited to, a consideration of the child's age, physical health, emotional stability, expressions by the child of fear of testifying in open court or in front of the defendant, the relationship of the defendant to the child, and the court's observations of the child's inability to reasonably communicate in front of the defendant or in open court. The court's findings shall identify the impact the factors have upon the child's ability to testify in front of the jury or the defendant or both and the specific nature of the emotional or mental trauma the child would suffer. The court shall determine whether the source of the trauma is the presence of the defendant, the

jury, or both, and shall limit the use of the closed-circuit television accordingly.

(4) This section does not apply if the defendant is an attorney pro se unless the defendant has a court-appointed attorney assisting the defendant in the defense.

(5) This section may not preclude the presence of both the child witness and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(6) The Washington supreme court may adopt rules of procedure regarding closed-circuit television procedures.

(7) All recorded tapes of testimony produced by closed-circuit television equipment shall be subject to any protective order of the court for the purpose of protecting the privacy of the child witness.

(8) Nothing in this section creates a right of the child witness to a closed-circuit television procedure in lieu of testifying in open court.

(9) The state shall bear the costs of the closed-circuit television procedure.

(10) A child witness may or may not be a victim in the proceeding.

(11) Nothing in this section precludes the court, under other circumstances arising under subsection (1)(a) of this section, from allowing a child to testify outside the presence of the defendant and the jury so long as the testimony is presented in accordance with the standards and procedures required in this section.

The statute has been found not to violate the Sixth Amendment or Washington Constitution art.1, sec. 22, in *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998).

As well, the United States Supreme Court has upheld a Maryland statute which was similar to our RCW 9A.44.150. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)<sup>2</sup>

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<sup>2</sup> Maryland Cts. & Jud.Proc.Code Ann. § 9-102 (1989) provided:

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

(i) the testimony is taken during the proceeding; and  
(ii) The judge determines that the testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child;

(3) The operators of the closed circuit television shall make every effort to be unobtrusive;

B)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television;

(i) The prosecuting attorney;  
(ii) The attorney for the defendant;  
(iii) The operators of the closed circuit television equipment; and  
(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method

Appellant argues that *Crawford* overruled *Craig*. In *Craig*, the United States Supreme Court upheld a statute similar to RCW 9A.44.150, specifically deciding that under proper circumstances and after adequate findings, closed-circuit television testimony of a child witness did not violate a defendant's confrontation right. *Crawford* addressed a different issue, whether hearsay statements of an unavailable witness violated the confrontation clause. Here, the defendant was provided complete, unfettered opportunities to confront and cross-examine VCM, which, according to *Crawford* is the heart of the confrontation clause.

It must be remembered that:

“The [Confrontation] clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.”

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- (c) the provisions of this section do not apply if the defendant is an attorney pro se.
  - (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

*Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177, citations omitted.

The rationale and spirit of *Crawford* existed within *Craig* long before *Crawford* was decided.

Assertions such as “the Framers could not have contemplated closed-circuit television” are not helpful to the discussion of how technology can assist confrontation and the truth-seeking process.

How, and under what circumstances, does technology such as closed-circuit television aid in the truth seeking process and further the goal of the confrontation clause to ensure reliability of evidence?

The state submits that the answer to those questions lie soundly within *Craig*, which has been unaffected by, and is harmonious with, *Crawford*, in light of the realities of the world in this century. Appellant argues that “the *Crawford* court held that the Sixth Amendment was subject only to those exceptions established at the time of its ratification in 1791.” Brief of Appellant at 17. This is incorrect. What the *Crawford* court said, at page 54, was:

The text of the Sixth amendment does not suggest any open-ended exceptions from the confrontation

requirement to be developed by the courts. Rather, the ‘right . . . to be confronted with the witnesses against him,’ Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.” . . . [T]he common law in 1791 conditioned admissibility of an absent witness’s examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.

The state respectfully submits that “confrontation” means the ability to see, hear and vigorously cross-examine the witness, and have the jury see, hear and witness the vigorous cross-examination.

The state’s position finds support in *Mattox v. U.S.*, 156 U.S. 237, 343-243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895) (emphasis added):

The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand *face to face with the jury* in order that they may look at him, and judge by his demeanor and his testimony whether he is worthy of belief.

*Craig*, and RCW 9A.44.150, promote confrontation because they promote actual testimony by the accuser, who would otherwise be unable to testify, in such a way that a defendant – and the jury -- can view the witness and the witness can be effectively cross-examined. Under the *Mattox* court’s rationale, a defendant’s right to confrontation includes the opportunity for the *jury* to be presented with the witness so that the *jury* can judge the demeanor of the witness, and not necessarily that he have a face-to-face meeting with his child accuser.

Other jurisdictions have adopted this view of “confrontation.”

The Kansas Supreme Court has had opportunity to rule on the issue whether *Crawford* rendered unconstitutional the Kansas equivalent of RCW 9A.44.150, in *State v. Blanchette*, 35 Kan.App.2d 686, 134 P.3d 19 (2006). In that case, the court ruled that the holding in *Crawford* was limited to testimonial hearsay where the defendant had not been afforded an opportunity to cross examine. The court specifically held:

In line with post *Crawford* decisions from other courts, we reject *Blanchette*’s argument that K.S.A. 22-3434 is unconstitutional based on *Crawford*. Closed-circuit television testimony differs from testimonial hearsay because the witness is available

and subject to cross-examination. In this case, J.I. was a full participant in Blanchette's trial and was subject to cross-examination in full view of Blanchette and the jury. The constitutionality of K.S.A. 22-3434 does not rest upon the Roberts "reliability" test which was rejected by the court in *Crawford*. *Craig* [is] still good law and control[s] the determination that K.S.A. 22-3434 does not violate the Confrontation Clause of the Sixth Amendment.

The Utah Supreme Court likewise upheld its closed-circuit television testimony statute in *State v. Henriod*, 131 P.3d 232 (2006). In that case the court held that the district court had abused its discretion when it determined that closed-circuit television testimony would violate the Confrontation Clause. Noting that the *Crawford* court saw the Confrontation Clause as a protection against ex parte examinations against the accused, it held that *Crawford* neither explicitly nor implicitly overruled *Craig*. *Henriod* at 237. The court explained:

Testimonial hearsay is significantly different from a child's testimony that is given under oath during trial and simply is transmitted into the courtroom by electronic means. Given the prior debate in *Coy* and *Craig*, it seems unlikely that the Court inadvertently omitted or overlooked this distinction. We are persuaded that either the Court did not believe *Craig* was implicated by the *Crawford* facts and analysis, or it intentionally left the question open. We find support for this interpretation in the concurring vote by Justice O'Connor, who staunchly supported the allowance of non-face-to-

face testimony where necessary to protect a child in both the *Coy* and *Craig* majority opinion.

Id., referencing *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988).

The Missouri Court of Appeals visited this same issue in *State v. Griffin*, 202 S.W.3d 670 (2006). In that case, the court held that excluding the defendant from a videotaped deposition of complainant did not violate the Confrontation Clause. The court's rationale was as follows:

Mr. Griffin had an opportunity to cross-examine L.G. through a procedure that the Missouri Supreme Court has held is constitutionally permissible because it is not significantly different from the procedure approved by the United States Supreme Court in *Craig*. Further, because the trial court found that L.G. was an unavailable witness and Mr. Griffin had a sufficient opportunity to cross-examine her prior to trial, the requirements of *Crawford* were met, and Mr. Griffin has failed to show a violation of his rights under the Confrontation Clause.

Id. At 681.

The state asks that this court follow the rationales of the states of Kansas, Utah and Missouri, and rule, rightly, that *Crawford* does not in any way overrule *Craig*.

**B. The trial court did not err in permitting VCM to testify via closed-circuit television pursuant to RCW 9A.44.150**

1. *The court properly found that VCM would suffer serious emotional or mental distress that would have prevented the child from reasonably communicating at the trial if he had to testify in the courtroom with the defendant.*

The trial court must find whether there is substantial evidence that the child witness would suffer serious emotional or mental distress that would prevent the child from reasonably communicating at the trial. RCW 9A.44.150(1)(c). “Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.” *Foster*, 135 Wn.2d 441, 471, citations omitted. Additionally, the trial court must find that the serious emotional distress of the child is the result of the defendant’s presence. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). There is sufficient evidence in the record to support the trial court’s finding such that it should not be disturbed on appeal

The court’s findings on the issue include that the family does not use Appellant’s name with VCM, that when the name

does come up, VCM gets very nervous, dances side to side, and won't make eye contact, and that it took a year for VCM to talk to his mother about the abuse. 03/05/08 RP 143-44. As well, there was substantial evidence of nightmares and anxiety associated with the defendant.

“[A] face-to-face here, especially in front of the Defendant, is going to make [testifying] even more difficult” is sufficient to connect VCM's substantial emotional distress to facing Mr. Koeller, thus rendering VCM unavailable to testify. This satisfies *Craig's* requirement that “it is the presence of the defendant that causes the trauma.” *Craig*, 496 U.S. at 856.

2. *The court properly found that the equipment used during the pretrial hearings and the trial permitted constant communication between Appellant and his attorney.*

Defendant objected to the use of closed circuit TV at the pre-trial hearing because of a connection problem with the private phone link to his counsel. He did not renew that objection the second day of the pretrial hearing after the problem was corrected. At the second trial, with Mr. Hall as counsel, the defendant did not renew any of the previous objections to the closed-circuit

television testimony equipment or system, merely its use at all.

05/13/08 RP 19.

Since the defendant did not object, he has not preserved the error. The law surrounding preservation of error for appeal is succinctly put in *State v. Kirkman*, 159 Wn.2d 918 (2007) (citations omitted):

RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of "manifest" constitutional magnitude. This court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.' Exceptions to RAP 2.5(a) must be construed narrowly.

Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction). Failure to object deprives the trial court of this opportunity to prevent or cure the error. The decision not to object is often tactical. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences.

"Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. 'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.' [E]xceptions to RAP 2.5(a) are to be construed narrowly. If the trial record is insufficient to

determine the merits of the constitutional claim, the error is not manifest and review is not warranted.

Moreover, the State was not afforded an opportunity to make a complete record of the technical set up. This court should not review an error that was not preserved, and that neither the State nor the court had an opportunity to correct prior to trial.

The record does not adequately describe the equipment actually used during VCM's testimony via closed circuit television at the pretrial hearings.<sup>3</sup> There were technical problems with the system used on March 5, 2008. VCM was recalled for testimony on March 6, 2008. The equipment was checked and found to be operational. 03/06/08 RP 176, 179 Defense counsel did not renew the objection of the day before to the telephone set-up. Co-counsel, Darrin Hall, sat next to the defendant during the proceedings during this second day of pretrial hearings. 03/06/08 RP 178. Defendant was able to communicate directly with counsel via telephone connection and to co-counsel in writing or by speaking directly to him. In fact, counsel *declined to use* the telephone system provided to give his client constant

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<sup>3</sup> The state has asked three times to supplement this record, twice to this court and once to the trial court, and has been unsuccessful in being able to provide this court with the facts as they actually occurred in the courtroom at the pretrial testimony of VCM.

communication with him. 2 RP 179. The private line was, however, connected and immediately available, throughout the proceeding.

**C. The trial court did not err in finding VCM competent**

RCW 5.60.050 governs this issue and reads:

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

“A trial court can find a child competent if the child understands an obligation to testify truthfully and possesses (1) the mental capacity accurately to perceive events at the time of occurrence, (2) sufficient memory to retain the events in question, (3) the ability to express orally his memory of the event, and (4) the capacity to understand and to answer simple questions about the event.” *State v. Hopkins*, 137 Wn.App. 441, 449, 154 P.3d 250 (2007), citing *State v. C.J.*, 148 Wn.2d 672, 682, 63 p.3d 765 (2003).

Washington courts have found no abuse of discretion when trial judges found children close in age to VCM [the four-year-old witness in the case] competent to testify. *See, e.g., State v Carlson*, 61 Wn.App. 865, 874, 812 P.2d 536 (1991), review denied, 120 Wn.2d 1022, 844 P.2d 1017 (1993) (finding no abuse of discretion when trial court found three-and-one-half year old sexual abuse victim competent to testify); *State v. Borland*, 57 Wn.App. 7, 11, 786 P.2d 810, review denied, 114 Wn.2d 1026, 793 P.2d 974 (1990) (no abuse of discretion in finding four year old competent to testify). *Id.* at 451.

To determine if a child is competent, the trial court should evaluate the child for whether the child has: (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 that which they are to testify about, 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 their memory of the occurrence; and (5) the capacity to understand simple questions about it. *See State v. Bailey*, 52 Wn.App. 42, 47, 757 P.2d 541 (1988) citing *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

The determination of these factors rests primarily with the trial judge who views the witness, notices his manner, and considers his capacity and intelligence. See *id.*

What is particularly important is the second factor -- that a child's ability to "receive just impressions at the time of the abuse may be demonstrated by the child's ability to recall events or circumstances occurring before the abuse or during the time period of the abuse." *Id.* at 619.

In *State v. Hunsaker*, 39 Wn.App. 489, 693 P.2d 714 (1985), the Court found a three-and-one-half year old child competent because she demonstrated she was intelligent beyond her tender years. Specifically the child was able to state her age, her birthday, address, say she was in preschool and sing a song she learned in school. See *id.* Courts have also found that if a child can recollect details about other events occurring at, before, or near in time to the abuse, a child can satisfy the second factor. See *State v. Pham*, 75 Wn.App. 626, 630, 879 P.2d 321 (1994).

Defendant relies upon *In re Dependency of AEP*, 135 Wn.2d 208, 956 P.2d 297 (1998) for the proposition that the trial court should not have found VCM competent to testify. In that case, there was no evidence of when the abuse occurred such that

the court could not find that the child had a mental capacity at the time of the occurrence to receive accurate impressions of it. Neither was there anything in the record which would narrow the time frame for the event. *Id.* at 225.

In this case, there is evidence narrowing the time frame. Defendant is incorrect when he says that there is no information of VCM's ability to recall events at age one or two. Pat Wood specifically testified as to VCM's ability to remember his second birthday. Wood testified that VCM remembered bowling and a bouncing house and a bowling pin with his name on it. 03/5/07 RP 14-15. Elizabeth Williams also testified that his second birthday was the earliest birthday he could remember. 03/5/07 RP 45.

The record reflects that VCM's behavior had changed from about a year before the pretrial hearings, around January 2007. 03/05/07 RP 46. He showed separation anxiety; he touched his mother's breasts inappropriately; he showed sexually inappropriate behaviors in the bathtub, which may fairly be described as precocious knowledge. 03/05/08 RP 48-49. It is clear from the record that he did not have such knowledge prior to this change in his behavior.

The *AEP* court's concern was that there was *nothing* in the record "that helps narrow the time window of when the event occurred." *Id.* at 225. In our case, we do have information in the record that helps "narrow the time window." VCM was able to relate accurate information as early as his second birthday. He showed no precocious knowledge of sexual activity until about a year before the pretrial proceedings. The record in our case is unlike that in *AEP*. In this case, the "time window" can be sufficiently narrowed to exclude any time before his exhibitions of precocious knowledge, which would make the time frame when VCM was four. The trial court specifically found that the abuse occurred when VCM was four years old. 03/11/09 RP 3. As well, it is clear from the record that he was able to receive "just impressions of the facts, respecting which [he was] examined" at ages three and four. RCW 5.60.050(2).

**D. The trial court did not err in admitting evidence that VCM suffered from post-traumatic stress disorder**

Defendant argues that the trial court erred in permitting evidence of a diagnosis of post-traumatic stress disorder for VCM., relying on *State v. Jones*, 71 Wn.App.798, 863 P.2d 85 (1993) and *State v. Florczak*, 76 Wn.App. 55, 882 P.2d 199 (1994), for the

proposition that this testimony is somehow “generalized profile testimony regarding the common behaviors of sexually abused children.” Brief of Appellant at 27.

Briefly, to refute Defendant’s arguments in this regard, there was no testimony at trial by Ms. Satsuma, VCM’s counselor, about “generalized profile testimony regarding the common behaviors of sexually abused children.” Brief of Appellant at 27.

There was no testimony by Ms. Satsuma concerning “child sexual abuse accommodation syndrome.”

There was *no* testimony by Ms. Satsuma that “a diagnosis of post traumatic stress syndrome is ‘consistent with a child who has suffered sexual abuse.’”

Ms. Satsuma *never* testified that “the only source of trauma that could have possibly caused VCM’s PTSD was sexual abuse.”

**E. The trial court did not err in admitting DKK’s testimony.**

Evidence Rule 404(b) prohibits use of other crimes, wrongs or acts “to prove the character of a person in order to show action in conformity therewith.” Such acts may, however, be admissible to show, among other things, common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 854-55, 889 P.2d 487 (1995).

A trial court's decision to admit such evidence will be reviewed for abuse of discretion. *State v. Griswold*, 98 Wn.App. 817, 823, 991 P.2d 657 (2000).

To admit evidence under ER 404(b), the trial court must find, by a preponderance of the evidence, that the act actually occurred; that the evidence is admitted for the purpose of establishing a common scheme or plan; that the evidence is relevant to prove an element of the crime charged; and, that the evidence is more probative than prejudicial. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The burden of proof is on the party offering the prior misconduct to prove to the court by a preponderance of the evidence that the act occurred. *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993).

The trial court specifically found that DKK's testimony was relevant and that, by a preponderance of the evidence, the acts actually occurred. Where identity is not an issue, and the only issue at trial is whether the crime occurred, prior bad acts of the defendant are relevant when they are of such character that, while not identical to the crime charged, they do tend to prove a scheme or plan, and uniqueness is not required. *DeVincentis* at 21. In this

case, the trial court specifically found that both DKK and VCM were “four years old when the alleged abuse occurred; the Defendant was in a position of trust with both children; both children said that the Defendant had them suck his penis; . . . that the defendant “peed;” and that the incidents happened in the bathroom with the door closed.” RP 3/11/2008 at 19. The two incidents are “naturally explained as individual manifestations of a general plan.” *DeVincentis* at 21.

The trial court also found that the probative value of the offered evidence outweighed the prejudice of such evidence to the defendant. In this case, as in the *DeVincentis* case, the relevant factors used in balancing include

The age of the victim, the need for the evidence, the secrecy surrounding sex abuse offenses, ‘the vulnerability of the victims, the absence of physical proof of the crime, degree of public opprobrium associated with the accusation, . . . and the general lack of confidence in the ability of a jury to assess the credibility of child witnesses.’

*Id.* at 23.

As well, this evidence was the main evidence of corroboration for the child’s statements, as it was in *DeVincentis*, and “no less inflammatory documentation or corroboration that the

crime occurred [is] available.” *Id.* Indeed, this is a he said-he said situation, as is almost always the case with child sexual abuse.

**F. There was no denial of right to present a defense by not permitting defense to call the prosecutor as a witness.**

Defense subpoenaed the prosecutor during the course of the trial to testify that VCM had changed his testimony from the first trial to the second. The prosecutor had contact with VCM the day before trial, unexpectedly<sup>4</sup>, at which time VCM told the prosecutor, “Mr. Bryon put his pee-pee in my mouth. And he did something with my butt, but I don’t remember.” 05/13/08 RP at 13 - 15. At the first trial, VCM said he did not remember what happened with defendant in the bathroom, and did not remember what the bad things were. 03/19/09 RP

The court ruled that defense would not be permitted to call the prosecutor, noting that “there were other people besides Ms. Kenimond in the room.”

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<sup>4</sup> Appellant is mistaken when he attributes certain statements to the prosecutor. The prosecutor did not admit that she “met with VM ‘to develop a rapport with him, to develop some ability to talk to him in a kid friendly manner, something a five-year-old will understand.” Brief of Appellant at 11, citing 5/13/08 RP 13. Those comments were made by defense counsel.

Any of those other people could have been called. Defense did not need the prosecutor, who, if a witness, would be unable to represent the state in the trial that was beginning at the time the subpoena was served on the prosecutor.

#### **IV. CONCLUSION**

For all the reasons stated above, the State respectfully requests that Appellant's request for reversal be denied. In the event that the Court believes it is unable to decide the closed-circuit television issues based on the record before the Court, the State requests that the matter be remanded for a reference hearing to fully establish the record of the closed circuit audio/video system.

Respectfully submitted this 5<sup>th</sup> day of November, 2009.

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By: 

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