

NO. 63652-9-1

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

STATE OF WASHINGTON
Respondent,

v.

WILLIAM J. CARLSON,
Appellant.

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

William Carlson claims that the trial court erred in admission of child hearsay statements after conviction on a bench trial for two counts of Child Molestation in the First Degree. He contends the trial court abused its discretion in finding the child was competent and in admission of the child hearsay statements.

The record shows that the trial court did not abuse its discretion in determining that the child was competent and that the statements were reliable under RCW 9A.44.120. Even if the trial court improperly found the child to be competent, there was sufficient corroboration to admit the statements under 9A.44.120(2)(b). The trial court also did not err in finding that the statements to family members were non-testimonial.

Finally, should this Court determine that the admission of statements was improper, reversal on one count is not merited because the trial court specifically found an act of molestation as observed by and testified to by the victim's aunt.

II. ISSUES

Where the child understood the difference between the truth and a lie and the child had the ability to recall the time frame and

some facts of the molestation, did the trial court abuse its discretion in determining the child victim competent?

Where the child victim's statements to family members were made spontaneously, repeatedly, and without motive to lie, did the trial court err in determining the child hearsay statements were reliable?

If the trial court erred in finding the victim competent, where there was an act of molestation observed by the victim's sister, was there corroboration sufficient to admit the child hearsay statements?

Were the statements to family members non-testimonial?

Where the trial court specifically found that one of the counts of molestation was not based upon the child hearsay statements, if this Court determines that the child hearsay was improperly admitted, should that count be reversed?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On September 10, 2008, William Carlson was charged with Child Molestation in the First Degree alleged to have occurred on or between June 1, 2008, and July 31, 2008. CP 1. The charge was

based upon a report by a six-year-old nephew of Carlson, that Carlson had been grabbing him and pulling on his penis. CP 4.

On April 29, 2009, the State amended in the Information to allege two counts of Child Molestation in the First Degree alleged to have occurred between September 1, 2007, and July 31, 2008, in separate and distinct acts. CP 24-5. The Information also included exceptional sentence allegations of particular vulnerability of the victim and a pattern of ongoing abuse. CP 25.

On May 4, 2009, Carlson waived his right to a jury trial and proceeded to a bench trial. CP 31, 5/4/09 RP 3-5.¹

On May 8, 2009, the trial court found Carlson guilty of two counts of Child Molestation in the First Degree. 5/8/09 RP 749-50.

On May 28, 2009, Carlson was sentenced to a determinate plus sentence with a minimum sentence of 130 months. CP 40, 5/28/09 RP 13.

On June 2, 2009, a notice of appeal was timely filed. CP 62.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The reports of proceedings in this case are as follows:

4/22/09 RP	Hearing regarding child hearsay – Day 1
4/30/09 RP	Hearing regarding child hearsay – Day 2
5/4/09 RP	Child competency hearing
5/5/09 RP	Trial Day 1: opening, testimony
5/6/09 RP	Trial Day 2: testimony
5/7/09 RP	Trial Day 3: testimony
5/8/09 RP	Trial Day 4: testimony, closing, judge's ruling

On July 1, 2009, the trial court entered written Findings of Fact and Conclusions of Law. CP 63-80.

2. Statement of Substantive Facts From Trial

The State presents the following summary of the trial testimony and trial court decision.² The State presents separate summaries of the child hearsay hearing and child competency hearing testimony in the pertinent argument sections below.

i. Testimony at trial

C.C.³ testified first for the state. 5/5/09 RP 86-114. C.C. first named his mother and grandmother. 5/5/09 RP 86-7. He testified his grandmother lived in Rockport. 5/5/09 RP 87. He also named his teacher that year in first grade and the previous year in kindergarten. 5/5/09 RP 87. C.C. agreed to tell the truth as he had testified to the previous day. 5/5/09 RP 87-8. C.C. testified that Willy⁴ had touched his privates when they were in the bedroom in Rockport. 5/5/09 RP 88. He identified that his teacher at the time that Willy touched his privates was his kindergarten teacher, Ms. Bromley. 5/5/09 RP 89.

5/28/09 RP Sentencing.

² The Appellant's Statement of Fact mixes facts from the child hearsay, child competency and trial. Brief of Appellant at pages 3-10.

³ The State will refer to C.C. and M.C. by initials because they are minors.

⁴ The State will refer to the defendant as Willy or William to match the testimony at trial. Other family members with the last name Carlson will be referred

When the prosecutor pointed to areas of her body, C.C. identified the genital area as the area he identified as the private area. 5/5/09 RP 91. C.C. said he was touched more than one time and that his pants and underwear were off. 5/5/09 RP 92. He testified that he was touched fifty times. 5/5/09 RP 92. C.C. testified that he told Dorothy that Willy had touched him. 5/5/09 RP 95.

C.C. was cross-examined. 5/5/09 RP 96-113. During cross-examination, C.C.'s focus on the question began to wane and defense counsel asked questions unrelated to the case. 5/5/09 RP 98-9. During cross-examination, C.C. said he had told the prosecutor and the interview specialist that Willy had touched him. 5/5/09 RP 98. C.C. testified that being touched was bad. 5/5/09 RP 109.

Jennifer Carlson, C.C.'s mother testified. 5/5/09 RP 114-199, 5/6/09 RP 230-234. Willy, the defendant, is Jennifer's younger brother. 5/5/09 RP 114-5. Jennifer testified Dorothy Buckley was a family friend. 5/5/09 RP 114. Jennifer testified that C.C. was in first grade and had been in kindergarten the previous year with Ms. Bromley. 5/5/09 RP 116. Jennifer testified that the previous year, C.C. had lived in Rockport and gone to school in Concrete in September to November of 2007. 5/5/09 RP 117. At the time, Willy

to by their first name. Family members or other witnesses with other last names will

lived there. 5/5/09 RP 117. He then went to school in Anacortes and lived with Dorothy Buckley and Jennifer's father, Andy Carlson from November of 2007 to the spring of 2008. 5/5/09 RP 117-8. In the spring of 2008, C.C. lived with Jennifer's sister, Fawn Fields, and went to school in Sedro Woolley. 5/5/09 RP 118. While living with Fields, C.C. visited Rockport on occasion. 5/5/09 RP 119.

Jennifer testified that one of the times she was in Rockport, her daughter M.C. brought C.C. out into the field they were in and C.C. told Jennifer that Willy had pulled his pants down. 5/5/09 RP 120. A few weeks later outside a courtroom waiting to get a restraining order, C.C. told Jennifer that Willy had touched his privates. 5/5/09 RP 122-3. C.C. told Jennifer that it had happened a lot. 5/5/09 RP 124. Jennifer had never asked C.C. to talk to her about what had happened. 5/5/09 RP 124. Jennifer only asked C.C. a few questions when C.C. brought it up, but didn't push C.C. for an answer to any questions. 5/5/09 RP 124.

On cross examination, Jennifer related that C.C. had told her about an incident of touching the day before while waiting for a court hearing. 5/5/09 RP 126. Jennifer testified that C.C. had said he was touched the day they went to Sauk Mountain. 5/5/09 RP 126.

be referred to by that last name.

Jennifer recalled that day occurred in September of 2007. 5/5/09 RP 129.

Dorothy Buckley testified. 5/6/09 RP 279-380. Buckley became friends with the Carlson family after her son and Willy were in preschool together. 5/6/09 RP 280. Buckley babysat C.C. quite a bit. 5/6/09 RP 280. Buckley felt close to C.C. and C.C. called her Nanna. 5/6/09 RP 281. In the summer of 2008, C.C. visited Buckley. 5/6/09 RP 283-4. On one of the visits, C.C. told Buckley something that disturbed her. 5/6/09 RP 284. Buckley saw her dog rocking back and forth on the floor scratching her back. 5/6/09 RP 284-5. C.C. saw it and called it the Oh Willy dance. 5/6/09 RP 285. Buckley asked C.C. why he said that and C.C. said because that's what Willy did when he put him on his lap and touched him. 5/6/09 RP 285, 311. C.C. described that Willy put his hands in C.C.'s pants and touched his pee pee. 5/6/09 RP 295. Buckley read from her written statement that "Willy had been pulling down his pants and his underwear and touching him, and Cody - - and sometimes he puts him on his lap and does the Oh, Willy dance." 5/6/09 RP 288-9. Buckley testified that C.C. had said it had happened lots. 5/6/09 RP 311. Buckley tried to clarify how many times lots is and C.C. said, maybe three. 5/6/09 RP 311. C.C. told Buckley it happened in

Willy's trailer in Rockport. 5/6/09 RP 313. C.C. told Buckley that he had already told his mother, grandmother Anita, sister M.C. and aunt Fawn. 5/6/09 RP 290. C.C. also related the same information to Andy Carlson. 5/6/09 RP 291. Buckley testified that when she had C.C. over night and told him he was going to Rockport he would get mad, or he would throw up. 5/6/09 RP 293. Buckley did report what C.C. had told her to CPS. 5/6/09 RP 294.

Fawn Fields testified. 5/6/09 RP 381-92. C.C. is Fields' nephew. 5/6/09 RP 382. Fields recalled an incident when C.C. was staying with her when C.C. came up to her and asked her why Willy touched him in the privates. 5/6/09 RP 383. C.C. had stayed with her between September of 2007 and June of 2008. 5/6/09 RP 382. Fields told C.C. that if it ever happened again, he should tell an adult so it could be taken care of right then and there. 5/6/09 RP 383.

Anita Carlson, Willy's mother and C.C.'s grandmother testified. 5/7/09 RP 433-483. Anita was aware of Willy's prior sex offense. 5/7/09 RP 435, 438-9. When Anita's granddaughter, M.C. came and told her that Willy had touched C.C., she responded by sending the kids to live with others and keeping Willy in her house. 5/7/09 RP 442-3. Anita found a marijuana pipe, pictures of naked people having sex and small boys underwear in Willy's car. 5/7/09 RP 474-5. This

concerned Anita, so she took the items to law enforcement. 5/7/09 RP 474-5.

M.C., Willy's sister, and C.C.'s aunt testified. 5/7/09 RP 484-525. M.C. had just turned thirteen years old before trial. 5/7/09 RP 485. M.C. testified there were two incidents between Willy and C.C. that she observed. 5/7/09 RP 488. In the first, C.C. had been on a lift chair and began to fall off and Willy put hand on the outside of C.C.'s private area for more than minute to hold him in the chair. 5/7/09 RP 488-9. In the second incident, M.C. saw Willy put his hand down the front of C.C.'s pants. 5/7/09 RP 490. C.C. also told M.C. that Willy had touched him and it didn't feel right. 5/7/09 RP 491. M.C. also testified that she heard C.C. tell two other children that he was going to touch them in the privates because that is what Willy did to him. 5/7/09 RP 493-4

Matthew Clark testified. 5/6/09 RP 237-287. Clark was in the Skagit County jail when he met William Carlson. 5/6/09 RP 242. Clark was in the same cell with William. 5/6/09 RP 242. It was just the two of them in the cell. 5/6/09 RP 242. Over time, William started talking to Clark and eventually told Clark that he had touched a six-year-old boy inappropriately and had tried to stick his penis in him. 5/6/09 RP 242-3. William told Clark that he thought he would get

away with it. 5/6/09 RP 243. Clark was upset by the disclosure and talked to his ex-fiancé about it before deciding to tell his lawyer to report the incident. 5/6/09 RP 244.

Detective Ben Hagglund was called by the State. 5/7/09 RP 526-44. Hagglund testified that jail records showed Clark was housed with Carlson. 5/7/09 RP 528. Hagglund also reviewed some of Clark's jail phone calls and confirmed he did have jail phone calls regarding information that Clark had about William. 5/7/09 RP 530.

Defense called the defendant's father, Andy Carlson. 5/6/09 RP 393-414. Andy recalled an occasion in the summer of 2008 when Dorothy and C.C. talked to him about Willy. 5/6/09 RP 394. Andy recalled that C.C. had said that Willy put him on his lap doing the old Willy thing dance. 5/6/09 RP 395-6. Andy recalled telling a detective that C.C. said that Willy grabbed his privates. 5/6/09 RP 410. Andy believed C.C. said it occurred about a month before. 5/6/09 RP 396. Andy said the statement that C.C. made may have occurred when Andy was in Anacortes with Dorothy doing a paper route. 5/6/09 RP 410.

Defense called Mike Fields. 5/7/09 RP 546. Fields is Fawn Field's husband and C.C. stayed at their residence. 5/7/09 RP 546-7.

He did not recall C.C. telling him he was touched inappropriately.
5/7/09 RP 550.

Defense called Nichol Flacco, a child interview specialist, who had interviewed C.C.. 5/7/09 RP 553-4. Flacco had a little trouble understanding C.C. because of his speech difficulties. 5/7/09 RP 564-5. Flacco asked C.C. questions which were tasks to see if he could tell the difference between a truth and a lie. 5/7/09 RP 571. He was always correct on identifying the items in the tasks and understanding the difference between the truth and a lie. 5/7/09 RP 575-6, 617. When Flacco asked what happened to C.C., he said he was beat up by Willy and Mike. 5/7/09 RP 577. Toward the beginning of the interview, C.C. blurted out about Willy touching him "right there" and pointed to his genital area. 5/7/09 RP 585. When Flacco asked how the touching felt, C.C. said it hurts. 5/7/09 RP 591. C.C. told Flacco it happened fifteen times, then later 18 times. 5/7/09 RP 592, 610. During the interview when C.C. described how it felt, he described it like a turtle biting and that it hurt so bad. 5/7/09 RP 593-4. C.C. told Flacco that John who was a worker at the property had taken his shirt and pants off and was wearing no underwear. 5/7/09 RP 607-8.

On cross-examination by the prosecutor, Flacco testified that C.C. had said that Willy had pulled C.C.'s pants and underwear down when he touched him. 5/7/09 RP 623. Flacco also described that C.C. had said Willy had lifted him up, pulled C.C.'s pants and underwear down and touched him in the genital area. 5/7/09 RP 629.

Defense recalled Detective Hagglund. 5/7/09 RP 641-733. Hagglund was not able to contact John Coombs to see if he had any information about what C.C. had said in the interview with Flacco. 5/7/09 RP 644. Hagglund tried to interview witness to determine where C.C. was staying at different times, but found it difficult to determine. 5/7/09 RP 652.

ii. Bench trial decision

The trial court's oral decision was entered on May 8, 2009. 5/8/08 RP 743-750. The trial court noted that it could not believe that there was a conspiracy amongst those in contact with C.C. to get him to report instances of touching. 5/8/08 RP 748. The trial court noted the initial report was by a person who had as much emotion for Willy as C.C.. 5/8/08 RP 745. The trial court could not find any motivation by any of the witnesses to embellish, coach or make matters worse. 5/8/08 RP 745. The trial court found that C.C. was consistent through

the whole process that William touched him in his private area. 5/8/08 RP 746. The trial court did not believe that a boy at his age and level could go through so many contacts and remain consistent on only that point. 5/8/08 RP 746. The trial court found William was in a position to have contact alone with C.C. 5/8/08 RP 746-7.

The trial court did not find the lift-chair incident was an act of child molestation. 5/8/08 RP 747. However, the trial court did find that the incident observed by M.C. where William placed his hands down the front of C.C.'s pants while they sat together in the living room in Rockport was an act of child molestation. 5/8/08 RP 747-8, 750. The trial court also found that William Carlson had sexual contact on numerous other occasions between September of 2007 and August 2008, based upon the description of the touching by C.C. based upon the movements described and the location of the hands and touching. 5/8/08 RP 749-50.

The written decision was entered on July 1, 2009. CP 63-80. That decision found three separate acts of child molestation despite two counts being alleged: (1) the touching observed under the clothes by M.C., (2) the touching described by C.C. to Nicol Flacco occurring in the bedroom where William pulled down C.C.'s pants and (3) the touching described to Dorothy Buckley in the defendant's trailer in

Rockport. CP 63-4. The trial court also found that C.C. made other disclosures to his mother, Dorothy Buckley, Andy Carlson, M.C., and Fawn Fields (Carlson). CP 64-5. The trial court specifically found that it was not believable that C.C. would have the ability to make up the allegations and remain consistent throughout the disclosures. CP 66. The trial court also found that C.C. was accurately able to provide detail such as which adults resided at relevant addresses and that he never accused any other adults in his life of sexually touching him. CP 66.

IV. ARGUMENT

1. The trial court did not abuse its discretion in determining that C.C. was competent to testify at trial.

i. Legal standards regarding competency.

Washington court rules provide that those who are of unsound mind, or intoxicated at the time of their production for examination; and children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly are incompetent to testify. CrR 6.12(c). Case law has developed five factors for a trial court to evaluate competency of child witnesses.

Five factors must be found before a child can be declared competent:

The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Appellate courts give great deference to a trial court's determination of a child's competency or lack thereof-the trial judge's findings "will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion." State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (*quoting Allen*, 70 Wn.2d at 692, 424 P.2d 1021).

Matter of Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In order to facilitate appellate review, the better practice is for the trial court to state its analysis of the Allen factors on the record. Here, the record is sufficient for us to conduct an independent review, and we will therefore address each factor individually.

State v. Avila, 78 Wn. App. 731, 735-736, 899 P.2d 11 (1995).

ii. Testimony at Competency Hearing.

C.C. testified at the competency hearing on the first day of the bench trial. 5/4/09 RP 13-33. C.C. stated his name and was aware of the judge and his responsibility to tell the truth. 5/4/09 RP 14-5. At the time of trial, C.C. was six years old, was in first grade and knew his teacher was Ms. Reals. 5/4/09 RP 16. C.C. testified as to his birthday in just over a week and he would be turning seven. 5/4/09 RP 17. C.C. named various family members. 5/4/09 RP 18-9. C.C. was able to distinguish truth from a lie. 5/4/09 RP 16, 17-8. C.C. testified that if he told a lie at home he would be in big trouble. 5/4/09 RP 18. During the child competency hearing, C.C. testified he was touched by Willy at a house at Rockport "like a hundred times." 5/4/09 RP 21. He testified it occurred in the bedroom at the house and that his teacher in kindergarten at the time was Ms. Bromley. 5/4/09 RP 21. C.C. was able to testify that he had told his grandmother and his sister that Willy had touched him. 5/4/09 RP 21.

On cross examination, C.C. again said he had told his grandmother, mother, and aunt as well as his sister of the touching. 5/4/09 RP 26, 28. C.C. also testified that he had lived at "Rockport, Fawn's, my mom's, Eastern Washington, Dorothy's" in the prior year. 5/4/09 RP 27. He also testified to going to four schools. 5/4/09 RP 27. C.C. testified that he knew it was okay to make a mistake but not

to lie. 5/4/09 RP 33-4. C.C. was asked by defense counsel if it was okay to make a mistake and he said it was. 5/4/09 RP 33. He also again said it was not okay to lie. 5/4/09 RP 33-4. He also said there was a difference between the two. 5/4/09 RP 34. Defense counsel also cross-examined C.C. about a statement he had made during an interview a few days before. 5/4/09 RP 35. Although he at first did not recall making the statement, when he was asked further, he did recall making the statement. 5/4/09 RP 35-6.

The parties argued regarding competency. 5/4/09 RP 37-40. The trial court first noted that C.C.'s attention started to wane over time during the course of the testimony. 5/4/09 RP 40-1. But the trial court found that C.C. had the ability to know the truth from a lie, was able to relate his teacher, his age and his family. 5/4/09 RP 41. The trial court found C.C. was "quite clear on the fact that Willy did a bad thing," where it had taken place, that no one else was there, what grade he was in at the time and as to who he told of the incident. 5/4/09 RP 41. The trial court held "And I would find based simply observing him, watching him, and listening to him that Cody is competent in terms of the very basic requirements." 5/4/09 RP 42.

iii. The trial court did not abuse its discretion in determining that C.C. was competent to testify.

Carlson contends that the trial court abused its discretion in determining that C.C. was competent to testify because of some of his testimony at trial. However, discrepancies in testimony and the responses by C.C. to questions did not render him incompetent.

Likewise, a child who has a “long-standing, often-observed inability to distinguish what was true from what was not” may also be found incompetent to testify. State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), *overruled on other grounds by State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). But inconsistencies in a child’s testimony go to weight and credibility, not to competency. State v. Carlson, 61 Wn. App. 865, 874, 812 P.2d 536 (1991).

Because the trial court is in the best position to observe a potential witness, competency determinations are within the trial court’s sound discretion, and we review a trial court’s competency determination for a manifest abuse of discretion. Allen, 70 Wn.2d at 692, 424 P.2d 1021. We place particular reliance on the trial court’s judgment in assessing a child witness’s competency. See State v. Borland, 57 Wn. App. 7, 10-11, 786 P.2d 810 (1990) (child found competent even though child had difficulty responding to some questions and made some inconsistent statements because “there is probably no area of law where it is more necessary to place great reliance on the trial court’s judgment than in assessing the competency of a child witness.”), *overruled on other grounds, State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997).

State v. Kennealy, 151 Wn. App. 861, 878, 214 P.3d 200, 208 (2009) rev. denied, 168 Wn. 2d 1012 (2010).

In the present case, C.C. was in first grade and almost seven at the time of trial. 5/4/09 RP 16-7. He was able to identify the truth from a lie. 5/4/09 RP 16-18. Thus he demonstrated an understanding of the obligation to speak the truth. 5/4/09 RP 33-4. He had a recollection of the four schools he had been at and the four places he lived in the past year. 5/4/09 RP 27. He was able to identify the time frame when the touching occurred based upon who his kindergarten teacher was at the time. 5/4/09 RP 21. Thus he had the mental capacity at the time of the incident to receive an accurate impression. He related some of the details of the touching at the competency hearing and where it occurred. 5/4/09 RP 21. He was also able to recall who he had told about the touching. 5/4/09 RP 21, 26, 28. Thus he showed a memory sufficient to retain some independent recollection of the event. Even though he had a significant speech impediment that could have caused some problems with the content of the transcript, he was able to express his memory in words. 5/4/09 RP 21, 5/7/09 RP 564-5. The entire transcript shows he had the ability to understand simple questions about the event.

Thus, the record supports the trial court's findings and there was no abuse of discretion in finding C.C. competent. 5/4/09 RP 40-2.

Carlson relies primarily upon two cases where appellate courts have reversed competency determinations based upon the record. Each is distinguishable from the present case.

In State v. Karpenski, the Court of Appeals evaluated a trial court's decision finding an alleged victim of child sex offenses competent to stand trial. State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999). The Court determined that the trial court had abused its discretion because the child when preliminary competency questions were asked on the witness stand testified that his brother who four years younger was born immediately after him on the same day. State v. Karpenski, 94 Wn. App. at 95-6, 971 P.2d 553 (1999). The trial court in its findings held that the child was testifying as to a dream and was unable to separate reality from fact. Id. at 97. The Court of Appeals noted:

No one suggests that Z was intentionally lying; it seems that he actually believed what he was saying, and that he was merely manifesting his long-standing, often-observed inability to distinguish what was true from what was not. The trial court expressly found that Z was "testify[ing] as to an event that he could not possibly have recalled;" that he was "confused"

regarding “dream versus reality;” and that he was “not old enough to be able to separate that confusion.” Inexplicably, however, it then concluded that Z was competent to testify. It is our opinion that the *only* reasonable view of this record is the one expressed by the trial court that Z lacked the capacity to distinguish truth from falsehood.

State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553, 567 (1999) *overruled on other grounds by State v. C.J.*, 148 Wn. 2d 672, 63 P.3d 765 (2003). The Court of Appeals also noted numerous times in the decision that the record showed that the child victim had a long-standing inability to distinguish truth from a lie.⁵ Thus, the Court determined that the trial court abused its discretion.

In contrast to Karpenski, C.C. was not a child who had a demonstrated inability to distinguish between the truth and a lie.

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At all times relevant here, Z told imaginary stories containing vivid detail. He falsely claimed, for example, that he had spoken with his deceased uncle, that his mother had won \$10,000, and that he had gone skydiving. In the skydiving story, “he even had the colors of the parachute.” According to his mother, he sometimes went “for months believing his stories.” According to his grandmother,

... [H]e always exaggerates. He always insists-that's a normal thing for him.-Much more so than I would think most kids. I was a day care director for five years and I've been around children ages one to six, and I never encountered-I mean, kids tell stories, but you usually know-you can usually tell them that's not real and they'll accept that. Z does not accept it.

State v. Karpenski, 94 Wash. App. at 83, 971 P.2d 553 (1999), (decision also described how Z also firmly believed he had gone to Hawaii by plane although he had never been on a plane and was subsequently referred to school psychologist and referred to mental health counseling at page 86).

Although C.C.'s testimony may have been affected by being on the witness stand for an extended period, the testimony at the competency hearing was not as clearly defective as in Karpenski.

In A.E.P. the Supreme Court evaluated whether the trial court had abused its discretion in determining that child was competent to testify. The Supreme Court found that since the trial court had not found out when the alleged abuse had occurred, the trial court could not have evaluated the child's mental capacity at the time of the alleged abuse. Matter of Dependency of A.E.P., 135 Wn.2d at 223-5, 956 P.2d 297 (1998). Therefore the Supreme Court found that the trial court could not have evaluated the second Allen factor and had abused its discretion reversing the finding of competency. Id. at 226.

In contrast to A.E.P., here the trial court was informed of the time frame of the allegations allowing the trial court to properly evaluate the ability to receive an accurate impression of the event. In addition, here C.C. demonstrated the ability to testify to where he was living over the time frame and who his school teacher was, further establishing the ability to receive an accurate impression.

In contrast to these two cases, the present case is much closer to the case of State v. Kennealy, 151 Wn. App. 861, 878, 214 P.3d 200, 208 (2009). In Kennealy, the defendant contested the

competency of one of the child victims. The trial court determined that the child was competent at a hearing prior to trial. Id. at 869. During that hearing, testimony included the fact that the child was treated for ADHD and trouble with sequence. Id. The child had some confusion about the details, may have withheld some information and not always told the truth. Id. During trial, the child had a problem understanding the term promise. Id. at page 870. The child also admitted to making up a story about taking a bath at the defendant's apartment and also had made up a story about taking something from the apartment. Id. When asked how he knew that the defendant sucked his privates, the child testified that he dreamed about the defendant sucking his privates. Id. at 870-1. The child was also confused about where in the apartment the incident took place, whether the bed was round or rectangular and whether the floors were wood. Id. at 871. Despite these problems, the Court of Appeals upheld the trial court's determination of competency.

But S.J. demonstrated that he had an adequate memory of what Kennealy did to him and the mental capacity to relay the information in court: he never changed his story about Kennealy sucking "his privates." RP (Mar. 5, 2008) at 87. S.J. was also able to accurately testify about his age, his home environment, and his birthday. And while he and an officer were in the officer's car, S.J. recognized that they were driving into Yelm and he spelled the word

“Yelm” for the officer. RP (Mar. 10, 2008) at 376-77. Furthermore, the trial court specifically noted that S.J. listened carefully to questions while testifying at the competency hearing and that he tried to provide accurate answers. Finally, S.J. testified that he knew the difference between a truth and a lie and he was able to accurately respond to an example of a truth and a lie. S.J. also knew that he would get in trouble if he told a lie. We hold that the trial court did not abuse its discretion in finding that the Allen factors were met and that S.J. was competent to testify.

State v. Kennealy, 151 Wn. App. 861, 878-879, 214 P.3d 200, 208 (2009).

Similarly here, the trial court did not abuse its discretion in determining that C.C. was competent to testify.

2. The trial court properly determined that the statements by C.C. to family members and friends were admissible.

RCW 9A.44.120 provides that a statement made by a child under ten years of age describing any act of sexual contact, not otherwise admissible, is nonetheless admissible in criminal proceedings if the Court finds that the statement is sufficiently reliable in considering the time, content, and circumstances of its making; and

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.

RCW 9A.44.120, State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009).

Where the child victim testifies at trial, the court need only find that the hearsay statement is reliable. Where the child victim is unavailable to testify, RCW 9A.44.120 requires that the hearsay statement be reliable and that there be some corroboration.

i. Standards relating to review of admission by trial court of child hearsay.

We review a trial court's decision to admit child hearsay statements for an abuse of discretion. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (*quoting* State v. Jackson, 42 Wn. App. 393, 396, 711 P.2d 1086 (1985)). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds that the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009) *rev. denied*, 168 Wn.2d 1012 (2010).

ii. Testimony at the child hearsay hearing.

In response to a motion for admission of child hearsay filed by the State, a hearing was held over two days. 4/22/09 RP 2-111, 4/30/09 RP 2-90. The State indicated it intended to have the trial court find C.C. competent at trial. 4/22/09 RP 3-4, 6. However, for the purposes of the child hearsay hearing the State sought to have the trial court determine reliability and corroboration in case the child was found to be incompetent and therefore unavailable. 4/22/09 RP 5-6. Carlson's counsel did not object to that procedure. 4/22/09 RP 6. Prior to testimony, the defense sought and the State agreed to the admission of the child hearsay statements to child interview specialist, Nicol Flacco. 4/22/09 RP 7-8. Testimony was taken from a number of witnesses.

M.C. testified at the child hearsay hearing. 4/22/09 RP 12-19, 49-81. M.C. was twelve-years-old when she testified. 4/22/09 RP 14. The defendant, William Carlson, is M.C.'s brother. 4/22/09 RP 16. The victim, C.C., is M.C.'s nephew. 4/30/09 RP 15. C.C.'s mother testified that M.C. and C.C. acted like brother and sister and connected by talking to each other. 4/30/09 RP 33. In the end of summer of the prior year, M.C. had seen the alleged victim, C.C., at her house in Rockport. 4/22/09 RP 16-7, 19. M.C. testified that on

an occasion the prior year at the Rockport property, while C.C. was sitting in a chair, the defendant had grabbed C.C. in the private parts outside of the clothes. 4/22/09 RP 49-51. On a second occasion while C.C. was on a couch, the defendant put his hand down C.C.'s pants. 4/22/09 RP 50-1. The defendant has his hands down the pants for about a minute. 4/22/09 RP 50. About a month after the incident where C.C. was touched, C.C. told M.C. that the defendant was touching him in the wrong spot and it didn't feel right. 4/22/09 RP 54. M.C. said C.C. brought the incident up on his own. 4/22/09 RP 54. M.C. also testified about an incident a few weeks before trial where she had heard C.C. go to other children in the family and asked to touch their privates because the defendant had touched his. 4/22/09 RP 78. C.C. had asked the question spontaneously. 4/22/09 RP 79.

Fawn Fields testified at the child hearsay hearing. 4/22/09 RP 20. She is William Carson's sister. 4/22/09 RP 21. She was also the aunt of the allege victim, C.C.. 4/22/09 RP 20-1. Fields was aware that C.C. had visited Rockport and in the summer of the previous year William had lived in Rockport. 4/22/09 RP 24-5.

Fields said she was doing something when C.C. came up to her unsolicited and said "Why did Willy touch me in the private area?"

4/22/09 RP 26, 33. Fields asked C.C. if it had happened and C.C. said it had. 4/22/09 RP 26. Fields said C.C. had made the statement some time before July of 2008. 4/22/09 RP 28. Fields believed the statement was spontaneous. 4/22/09 RP 35. Fields testified that when C.C. made false statements that it was about matters that kids normally blamed each other. 4/22/09 RP 45.

Dorothy Buckley, a friend of the Carlson family, testified. 4/22/09 RP 82-3. She watched C.C. from time to time. 4/22/09 RP 83-4. Buckley had known C.C. fairly well for the previous six years and did not really know him to lie. 4/22/09 RP 85. C.C. was staying with Buckley when a dog started rubbing its' back on the floor. 4/22/09 RP 85-6. When the dog did that C.C. said "Oh, Willy, Oh, Willy." 4/22/09 RP 86. Buckley asked C.C. why he said that and C.C. said because that is what Willy did when Willy put C.C. on his lap and was touching his pee pee. 4/22/09 RP 86. C.C. had said that Willy had pulled his pants down when this occurred. 4/22/09 RP 86-7. Buckley had asked if that had only happened one time and C.C. said it had happened lots of times. 4/22/09 RP 87. C.C. told Buckley that he had told his grandmother and that she had said Willy was sorry. 4/22/09 RP 87. After Buckley got the statements, she called CPS. 4/22/09 RP 88..

Jennifer Carlson, the mother of C.C., testified. 4/30/09 RP 14. Jennifer testified that C.C. stayed at Rockport with her mother sometimes. 4/30/09 RP 15. William Carlson lived there. 4/30/09 RP 15-6. Jennifer said that C.C. would lie on occasion about normal things a child would like about, such as breaking something. 4/30/09 RP 16-7.

Jennifer said that about a year before she testified, her son had told her that Willy pulled her son's pants down and touched him. 4/30/09 RP 18. Jennifer had been out in a field with others when her son told her about being touched. 4/30/09 RP 19. About a month later while Jennifer was waiting at the courthouse for a hearing, her son had told her that Willy had touched him. 4/30/09 RP 20. Jennifer had not asked C.C. anything prior to the statement. 4/30/09 RP 20. C.C. used the words, Willy was a monster and he pulled his pants down a lot and touched his privates. 4/30/09 RP 32. C.C. had never accused anyone else of inappropriate touching. 4/30/09 RP 32.

Duane French resided in Rockport with Anita Carlson. 4/30/09 RP 40-1. In June of the prior summer, C.C. and M.C. came to him and said that Willy had pulled down C.C.'s pants. 4/30/09 RP 41. French was in a field with Jennifer Carlson when the statement was made. 4/30/09 RP 41. Jennifer asked C.C. if he was telling the

truth and he said he was. 4/30/09 RP 41. Jennifer also asked when and where it happened. 4/30/09 RP 42. French said C.C. said it happened either in or by the house. 4/30/09 RP 42. French did not recall C.C. stating when it occurred. 4/30/09 RP 43. French did ask C.C. "What did Willy do?" 4/30/09 RP 45. C.C. said "Willy pulled up behind me and pulled my pants down." 4/30/09 RP 45-6.

The trial court made extensive oral findings that all the statements were admissible. 4/30/09 RP 76-90.

The trial court also specifically found that the statements made by C.C. were not made with the knowledge that they would be used in a court proceeding. The ruling was based in part because they were made to family members and not to law enforcement officers. 4/30/090 RP 90.

iii. The statements were admissible since they were reliable under RCW 9A.44.120 and the child testified.

A. The child testified at trial.

For the purposes of the child hearsay hearing the State sought to have the trial court determine reliability and corroboration regardless of whether the child was found to be competent or

incompetent and therefore unavailable. 4/22/09 RP 5-6. Carlson's counsel did not object to that procedure. 4/22/09 RP 6.

In the present case, the child testified. Carlson claims that the child was incompetent and should have not been permitted to testify and therefore was unavailable.

As explained above, the trial court did not abuse its discretion in determining that the child was competent to testify. Therefore the first portion of the test under RCW 9A.44.120(1) is satisfied.

B. The statements by C.C. were properly determined to be reliable.

The second portion of admission of statements when the child testifies is that the statements must be found to be reliable.

Reliability is not dependent on whether the declarant is competent to testify at trial. State v. C.J., 148 Wn.2d 672, 685, 63 P.3d 765 (2003); State v. Swanson, 62 Wn. App. 186, 192-3, 813 P.2d 614 (1991), *citing* State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). Nor is reliability dependent on whether the declarant was testimonially competent at the time the hearsay statement was made. C.J., 148 Wn.2d at 684; Dependency of S.S. v. State, 61 Wn. App. 488, 496 (1991). "Admissibility under the statute does not depend on whether the child

is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable.”

C.J., 148 Wn.2d at 685.

In determining the reliability of child hearsay statements, the trial court considers nine factors: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. Ryan, 103 Wn.2d at 175-76, 691 P.2d 197 (citing Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); State v. Parris, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)).

Kennealy contends that the trial court should not have admitted the child hearsay statements because the trial court did not specifically mention each Ryan factor in ruling that the children's hearsay statements were admissible. But the trial court expressly stated that the Ryan factors were met, and the factors exist to merely help the trial court determine “whether the comments and circumstances surrounding the statement indicate” reliability. State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990).

No single Ryan factor is decisive and the reliability assessment is based on an overall evaluation of the factors. State v. Young, 62 Wn. App. 895, 902-03, 802 P.2d 829, 817 P.2d 412 (1991). But the factors must be “substantially met before a statement is demonstrated to be reliable.” State v.

Griffith, 45 Wn. App. 728, 738-39, 727 P.2d 247 (1986); see also State v. Stevens, 58 Wn. App. 478, 487, 794 P.2d 38 (1990) (appellate court may affirm admissibility of statements when trial court misapplied Ryan factors if reliability is apparent from the record). The record before us shows that the Ryan factors were substantially met; thus, the trial court did not abuse its discretion.

State v. Kennealy, 151 Wn. App. 861, 880-1, 214 P.3d 200 (2009) *rev. denied*, 168 Wn.2d 1012 (2010), citing Swanson, 62 Wn. App. at 192, citing State v. Parris, 98 Wn.2d 140 (1982) and Dutton v. Evans, 400 U.S. 74 (1970); State v. Quigg, 72 Wn. App. 828, 835-836 (1994). The last four factors come from Dutton v. Evans, 400 U.S. 74 (1970). These four factors have been largely ignored by the Washington courts. See Dependency of S.S. v. State, 61 Wn. App. 488, 498-499 (1991) (the first Dutton factor is “not helpful”; the second Dutton factor “will be rarely, if ever” found; the third Dutton factor “is already encompassed in the Parris factor, ‘timing of the declaration’”; the fourth Dutton factor is “covered by the Parris factors”); State v. Lopez, 95 Wn. App. 842, 852 (1999) (Dutton factors 1 and 2 are “of minimal relevance” to the analysis). Not every factor needs to be satisfied in order for a court to find the statement reliable. State v. Woods, 154 Wn.2d 613, 625, 114 P.3d 1174 (2005).

In the present case, the trial court evaluated the Ryan factors both individually for each witness and also collectively at the end of the ruling. 4/30/09 RP 77-9 (statements to aunt Fawn Fields), 4/30/09 RP 79 (statements to aunt M.C.), 4/30/09 RP 79-81, 4/30/09 RP 81-83 (statements to Dorothy Buckley), 4/30/09 RP 83-87 (statements to mother, Jennifer Carlson).⁶ The trial court concluded:

So having analyzed all of those factors, I don't find there's any significant issue here. The statements are reliable. There were a number of them. They were made to different people; they were almost invariably spontaneous. And although there were on a couple of occasions follow-up questions, the statements themselves came out without any prompting whatsoever. All statements were made around the summer of 2008 to trusted family members or people who were in a very close family member role; that Cody's reputation for truthfulness is such that those statements should be considered reliable. He has no apparent motive to lie about what happened to him. So they are reliable.

4/30/09 RP 87-8.

Carlson does not challenge that there was substantial evidence to support these findings. Carlson does not focus on the full analysis of the Ryan factors. Instead he claims that C.C. had a reputation in his family for untruthfulness, that he knew that "William

⁶ Q. And you thought that Cody may have been lying about what happened; is that true?
A Well, he's been known to, you know, say things, and I follow up on them, you know, to find out they are not true.

Clarson was resented by several family members including his mother” and liked to please people to win favor. Appellant’s Opening Brief at page 26.

Contrary to these assertions, there was no reputation evidence as to truthfulness, only that C.C. occasionally said things that were not true. 4/22/09 RP 35-6, 69.⁷ In addition, a family friend, Dorothy Buckley, testified that C.C. was not known to lie. 4/22/09 RP 85. C.C.’s mother testified he would occasionally lie about normal things a child would lie about, such as breaking something. 4/30/09 RP 16-7. The trial court had a chance to hear all the testimony and evaluate the witness and determined that the child’s propensity to lie was no different from other children. 4/30/09 RP 85.⁸

4/22/09 RP 35.

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Q. Does Cody lie?

A. Sometimes.

Q About what?

A. Normally about taking something small; like my mom went somewhere that’s a small one.

4/22/09 RP 69.

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With respect to his reputation for truthfulness, the testimony is fairly consistent. He lies at times but all kids do. And it appears that the lies that he tells are lies that are designed to avoid unpleasant consequences. Either he’s trying to keep from getting in trouble for doing something that he wasn’t supposed to do; so he says he didn’t do it or he’s saying he did do something that he had been directed to do, and didn’t want to do in order to get out of having to go do it like clean his room or something of that nature. Nobody has testified that Cody has ever lied about anything that was major or ever accused him of

The trial court also specifically found that C.C. did not have a motive to lie, specifically finding that there was no evidence of a custody dispute and none that would give C.C. a motive to lie. 4/30/09 RP 86. The trial court also determined that the fact that C.C.'s mother did not like Carlson would not result in C.C. fabricating improper touching on the part of Carlson. 4/30/09 RP 87.

In light of full consideration of the Ryan factors by the trial court, the trial court did not abuse its discretion in determining that the statements by C.C. were reliable.

iv. The statements were admissible since even if the child was not properly determined to be credible, the statements were reliable and there was sufficient corroborative evidence.

Should this Court determine that C.C. was not properly determined to be competent, the State contends that the statements by C.C. were still admissible as child hearsay because the trial court determined that the statements were reliable and there was corroboration.⁹

doing anything that was a false accusation, particularly with respect to improper touching.

4/22/09 RP 85.

⁹ In A.E.P., the Supreme Court went on to evaluate whether the statements were admissible under RCW 9A.44.120(2)(b) after determining the trial court had erred in determining the child was competent. Matter of Dependency of A.E.P., 135 Wn.2d 208, 226-34, 956 P.2d 297 (1998). The trial court had not evaluated

Competency of the child witness at the time of trial and ability to understand the difference between truthful and false statements at the time child hearsay statements were made is not required for admission of under RCW 9A.44.120(2)(b). State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765 (2003).

A. C.C.'s statements were properly determined to be reliable.

As argued in this brief at section IV. 2. i. b. above the statements were properly determined by the trial court to be reliable.

B. C.C.'s statements were corroborated.

In the context of RCW 9A.44.120(2)(b) corroborative evidence is that which would support a logical and reasonable inference that the act of abuse described in the hearsay statement occurred. Swan, 114 Wn.2d at 622-23, 790 P.2d 610. A trial court is not constrained by formal evidentiary considerations in determining whether there is corroborative evidence of the act claimed by the child declarant. Jones, 112 Wn.2d at 493, 772 P.2d 496.

State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765, 772 (2003).

'The determination of whether there is corroborative evidence of the act involves balancing the goal of making child victim hearsay more readily available as evidence against the concern that the use of such hearsay should not create too great a risk of an erroneous conviction.' In the usual case of child

corroboration and based upon its own review of the record the Supreme Court found there was insufficient corroboration under RCW 9A.44.120(2)(b). Id.

sexual abuse, there is no direct physical or eyewitness evidence. Swan. Thus, to give real effect to the child victim hearsay statute, 'the corroboration requirement must reasonably be held to include indirect evidence of abuse.'

State v. Swanson, 62 Wn. App. 186, 194, 813 P.2d 614 (1991), quoting State v. Swan, 114 Wn.2d 613, 622-623, 790 P.2d 610 (1990).

Indirect evidence of abuse which may corroborate the hearsay statement may include the victim's precocious knowledge of sexual activity, nightmares, and masturbatory behavior. C.J. 148 Wn.2d at 687; Swan, 114 Wn.2d at 634; Swanson, 62 Wn. App. at 194, citing State v. Hunt, 48 Wn. App. 840, 741 P.2d 566 *rev. denied*, 109 Wn.2d 1014 (1987) and State v. Gitchel, 41 Wn. App. 820, 706 P.2d 1091 *rev. denied*, 105 Wn.2d 1003 (1985). The Swanson court noted that the two year old child victim's knowledge of oral sex was precocious in that this is "something outside the realm of the average two year old's experience." Swanson, 62 Wn.App. at 195.

In C.J., there was both some medical evidence of masturbation of a three-year-old child as well as evidence of precocious sexual knowledge of sexual acts. The Supreme Court

noted that the record did not show alternative sources for that knowledge. State v. C.J., 148 Wn.2d at 688-9, 63 P.3d 765 (2003).

In the present case, the trial court relied on two corroborating facts. 4/30/09 RP 88-9. The trial court found that Carlson's placing his hand's down C.C.'s pants did corroborate the molestation noting that touching was sufficient corroboration by itself. 4/30/09 RP 89. The trial court also found that C.C. being angry and upset at being told he had to go to the house where Carlson lived, to the point of throwing up, did amount to a corroborating factor. 4/30/09 RP 89-90.¹⁰

The trial court properly relied upon this as evidence for corroboration.

v. Defense sought and the State stipulated to admission of statements to the child interview specialist.

Carlson complains that the trial court improperly permitted the statements of child interview specialist Nicol Flacco. Appellant's opening brief at page 23. However, no mention was made by

¹⁰ Additional corroborating factors not specifically found by the trial court were C.C.'s reference to the "Oh Willy" dance and C.C.'s use of sexual terms in describing the conduct suggesting precocious sexual knowledge. 4/22/09 RP 85-6. A trial court's evidentiary ruling may be upheld on the grounds the trial court used or on other proper grounds that the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Carlson that it was the defense that sought admission of her testimony.

Prior to testimony, the defense sought and the State agreed to the admission of the child hearsay statements to child interview specialist, Nicol Flacco. 4/22/09 RP 7-8. Thereafter at trial she testified and Carlson actually called Flacco and extensively examined her to show unreliability of C.C.'s statements. 5/8/09 RP 553-615. Given that Carlson sought admission of the statements by C.C. to Flacco defense cannot now object to the court's admission of the testimony. RAP 2.5.

3. The statements to family and friends were properly determined to be non-testimonial.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), held that testimonial hearsay statements of a declarant who is absent from the trial are inadmissible unless there has been a showing of unavailability and a prior opportunity to cross-examine. Thus, Crawford is not a bar to otherwise admissible child hearsay where (1) the hearsay statements are not testimonial in nature or (2) the child testifies at trial.

Under Crawford, 541 U.S. 36, 124 S.Ct. 1354, "testimonial" statements must be subject to confrontation to be admissible. Such statements, the Supreme Court observed, cause the declarant to be a "witness" within the meaning of the confrontation clause, triggering its protections. The Court did not give a comprehensive definition of "testimonial" but observed that the "core" class of "testimonial"

statements included those “pretrial statements that declarants would reasonable expect to be used prosecutorially.” Id. at 51, 124 S.Ct. 1354 (quoting Br. for Pet'r at 23).

State v. Mason, 160 Wn.2d 910, 918, 162 P.3d 396 (2007).

Here the child did testify at trial and was determined to be competent by the trial court. Carlson may claim that C.C. was not subject to confrontation based upon his testimony, but in fact, defense did examine C.C. as to the fact of his prior statements. 5/4/09 RP 102-3, 108, 113.

In addition, the statements by the child were non-testimonial. Case law provides that statements to family members are non-testimonial.

A child's hearsay statements made to family members are nontestimonial and, thus, do not violate a criminal defendant's Sixth Amendment Rights. See Shafer, 156 Wn.2d at 389-90, 128 P.3d 87; Crawford, 541 U.S. at 51, 124 S.Ct. 1354.

In Shafer, a three-year-old child told her mother that her Uncle had “touched her privates” and had told her to kiss his privates. 156 Wn.2d at 383-84, 128 P.3d 87. The child had no previous exposure to sexually explicit material. The trial court denied Shafer's motion to exclude the child's out-of-court statements to a family friend based the United States Supreme Court's Crawford decision. 156 Wn.2d at 384-85, 128 P.3d 87. Our Supreme Court rejected Shafer's contention that the child's statements to her mother were testimonial because the child had relayed events to a family member and the mother had not solicited the statements from her child. 156 Wn.2d at 389-90, 128 P.3d 87. Our Court (1) relied on Crawford's notion that an “accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a

casual remark to an acquaintance does not,” 541 U.S. at 51, 124 S.Ct. 1354; and (2) reasoned that a victim's statements to friends and family are generally nontestimonial statements because there is no “contemplation of bearing formal witness against the accused.” Shafer, 156 Wn.2d at 389, 128 P.3d 87.

State v. Hopkins, 137 Wn. App. 441, 453-454, 154 P.3d 250 (2007).

Here, the trial court determined that all of the statements the State sought to admit were to family members and were not made with knowledge of future use in court proceedings. 4/30/09 RP 90. Thus, the statements were not testimonial in violation of Crawford.

Carlson tries to claim that the trial court did not make sufficient evaluation of the circumstances citing State v. Alvarez-Abrego, 154 Wn. App. 351, 225 P.3d 396 (2010). Appellant's Opening Brief at page 22. However, in that case the trial court had done no evaluation under Crawford and there was no record from which the appellate court could discern where the statement occurred or who was present. The court noted:

Although our court in State v. Hopkins, 137 Wn. App. 441, 453, 154 P.3d 250 (2007) stated bluntly that “[a] child's hearsay statements made to family members are nontestimonial,” we now clarify that such a rule requires some threshold evaluation of the underlying circumstances to meet the constitutional strictures of Crawford and Davis-an evaluation that the Hopkins court properly made.

State v. Alvarez-Abrego, 154 Wn. App. 351, 364, 225 P.3d 396 (2010).

As the trial court did in Hopkins as was approved in Alvarez-Abrego, here there was a record supporting the trial court's determination that the statements were non-testimonial.

4. Any error in admission of statements would not affect the trial court's verdict as to the count of touching observed by the victim's aunt.

Carlson concludes that the claimed error in admission of the statements would result in reversal of both convictions. The State does not concede such error.

Furthermore, the State contends that the trial court specifically found that in incident of touching amounting to Child Molestation in the First Degree was based not upon testimony of C.C. but upon observation of his aunt, M.C.. M.C. testified that she had observed. 5/7/09 RP 488-90. M.C. had observed two incidents of touching, one outside the clothes and the other inside C.C.'s pants. 5/7/09 RP 488-9. The trial court specifically found that one of the incidents of touching amounting to Child Molestation in the First Degree was the incident where M.C. observed Carlson placing his hands down C.C's pants. CP 64.

An error is prejudicial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

Since the conviction on one count was not based upon the testimony from child hearsay statements or testimony of C.C. and should not be reversed should this Court find C.C. was not competent and the statements improperly admitted.

V. CONCLUSION

For the foregoing reasons, this Court must affirm Carlson's convictions for two counts of Child Molestation in the First Degree.

DATED this 9th day of June, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, VICKIE MAUREA declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Susan F. Wilk, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 9th day of June, 2010.



DECLARANT