

66617-7

66617-7

NO. 66617-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JHONNY GODINEZ BASTIDA,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUL - 1 PM 4: 08

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge

BRIEF OF APPELLANT

Christopher R. Black
Attorney for Appellant

LAW OFFICE OF CHRISTOPHER BLACK, PLLC
119 First Avenue South, Suite 500
Seattle, WA 98104
Phone: 206.623.1604
Fax: 206.682.3002

TABLE OF CONTENTS

A. <u>ASSIGNMENTS OF ERROR</u>	1
B. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
C. <u>STATEMENT OF THE CASE</u>	2
D. <u>ARGUMENT</u>	13
1. THE TRIAL COURT ERRED IN CONCLUDING V.O. WAS COMPETENT TO TESTIFY, IN VIOLATION OF DEFENDANT’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 OF THE WASHINGTON CONSTITUTION.....	13
a. <u>The admission of an incompetent person’s testimony in a criminal trial violates the due process right to a fair trial</u>	14
b. <u>The evidence viewed in the light most favorable to the State did not support the determination that V.O. understood the obligation to speak the truth on the witness stand</u>	16
c. <u>The evidence viewed in the light most favorable to the State did not support the determination that V.O. had memory sufficient to retain an independent recollection of the occurrence</u>	21
2. BECAUSE V.O. WAS NOT COMPETENT TO TESTIFY, THE TRIAL COURT ERRED IN ADMITTING HER OUT-OF-COURT STATEMENTS AS CHILD HEARSAY, IN VIOLATION OF DEFENDANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION.....	26
a. <u>V.O. was unavailable because she was incompetent to testify</u>	26
b. <u>The State did not meet its burden of establishing</u>	26

	<u>that V.O.’s statements were not testimonial.....</u>	
c.	<u>V.O.’s statements to the examining nurse and to the child interview specialist were testimonial.....</u>	28
d.	<u>The defendant had not had a prior opportunity for cross-examination.....</u>	29
3.	BECAUSE V.O. WAS NOT COMPETENT TO TESTIFY, THE TRIAL COURT ERRED IN ADMITTING HER OUT-OF-COURT STATEMENTS AS CHILD HEARSAY, IN VIOLATION OF DEFENDANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION.....	29
4.	THE TRIAL COURT ERRED IN ADMITTING UNRELIABLE CHILD HEARSAY, IN VIOLATION OF DEFENDANT’S RIGHT TO DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 OF THE WASHINGTON CONSTITUTION.....	31
5.	MR. GODINEZ’S CONVICTIONS MUST BE REVERSED.....	33
E.	<u>CONCLUSION</u>	34

TABLE OF AUTHORITIES

WASHINGTON DECISIONS

<u>In re Dependency of A.E.P.</u> , 135 Wn.2d 208, 956 P.2d 297 (1998).....	15, 21
<u>Jenkins v. Snohomish County Public Utility Dist. No.1</u> , 105 Wn.2d 99, 713 P.2d 79 (1986).....	21
<u>State v. Allen</u> , 70 Wn.2d 690, 424 P.2d 1021 (1967).....	14, 15, 21, 25
<u>State v. Alvarez-Abrego</u> , 154 Wn.App. 351, 225 P.3d 396 (2010).....	27, 28
<u>State v. Borland</u> , 57 Wn.App. 7, 786 P.2d 910 (1990).....	16, 32
<u>State v. C.J.</u> , 148 Wn.2d 672, 63 P.3d 765 (2003).....	16, 32
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	33
<u>State v. Floreck</u> , 111 Wn.App. 135, 43 P.3d 1264 (2002).....	34
<u>State v. Karpenski</u> , 94 Wn.App. 80, 971 P.2d 553 (1999).....	16, 17
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	26
<u>State v. Kronich</u> , 160 Wn.2d 893, 901, 161 P.3d 982 (2007)....	26
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	33
<u>State v. Perez</u> , 137 Wn.App. 97, 151 P.3d 249 (2007).....	28
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	30, 32, 33
<u>State v. S.J.W.</u> , 170 Wn.2d 92, 239 P.3d 568 (2010).....	15, 16
<u>State v. Swan</u> , 114 Wn.2d 613, 645, 790 P.2d 610 (1990).....	26, 30
<u>State v. Woods</u> , 154 Wn.2d 613, 114 P.3d 1174 (2005).....	15
<u>State v. Young</u> , 62 Wn.App. 895, 802 P.2d 829 (1991).....	32

WASHINGTON CONSTITUTIONAL PROVISIONS

Const. art. I, § 3.....	1, 13, 31
-------------------------	--------------

UNITED STATES SUPREME COURT DECISIONS

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824,17 L.Ed.2d 705 (1967).....	33
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S.Ct.1038, 35 L.Ed.2d 297 (1973).....	14
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	26, 28

<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266,165 L.Ed.2d 224 (2006).....	27
--	----

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI.....	1, 26, 33
U.S. Const. amend. XIV.....	1, 13, 14, 31, 33

STATUTES

RCW 5.60.020.....	14
RCW 5.60.050.....	14, 29
RCW 9A.44.120.....	9, 29, 30, 31

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that child witness V.O. was competent to testify, in violation of defendant's right to due process under the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

2. Because V.O. was not competent to testify, the trial court erred in admitting her out-of-court statements as child hearsay, in violation of defendant's Sixth Amendment right to confrontation.

3. The trial court erred in admitting the uncorroborated hearsay of an unavailable juvenile, in violation of Washington State's child hearsay statute.

4. The trial court erred in admitting unreliable child hearsay, in violation of defendant's right to due process protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was child witness V.O. competent to testify, where she did not understand the obligation to speak the truth on the witness stand, and did not have a memory sufficient to retain an independent recollection of the occurrence?

2. Where V.O. was not competent to testify at trial, does admission of her prior statements violate defendant's Sixth Amendment right to confrontation?

3. Where V.O. was not competent to testify at trial, and thus unavailable, are V.O.'s uncorroborated prior statements admissible?

4. Did the trial court err in concluding that V.O.'s multiple prior statements were reliable enough to be admissible?

C. STATEMENT OF THE CASE

Jhonny Godinez Bastida (hereinafter "Mr. Godinez") met Eleanora Michelle Ocampo (hereinafter "Ms. Ocampo") through his ex-sister-in-law in 2005. RP 453. They began dating and moved in together about two months after they met. Id. At the time Mr. Godinez and Ms. Ocampo began dating, Ms. Ocampo had an ten-month old daughter, V.O. RP 453-54. Over the years that Mr. Godinez, Ms. Ocampo and V.O. lived together, Mr. Godinez developed a father-to-daughter relationship with V.O. RP 454. V.O. called him "daddy." Id. Mr. Godinez lived with Ms. Ocampo and V.O. in an apartment in Everett. RP 222. He lived with them through January 16, 2010, which is the day that Ms. Ocampo called the police to report that V.O. had made an allegation that Mr. Godinez had touched her. RP 508-09. V.O. had turned six years old ten days prior. RP 221.

Mr. Godinez worked in construction during the time that he lived with Ms. Ocampo and V.O. RP 456-57. Ms. Ocampo worked cleaning houses. RP 221-22. Mr. Godinez became unemployed in July, 2009, due

to lack of work in the construction industry. RP 457. Ms. Ocampo provided the sole income for the family from July, 2009, through January, 2010. RP 225. Ms. Ocampo became angry at Mr. Godinez about this overtime. RP 516. While Mr. Godinez and Ms. Ocampo generally had a stable relationship, they sometimes got into arguments. RP 454-56. When they argued, V.O. would get scared and cry. RP 456.

During the time that Mr. Godinez was out of work, he usually watched V.O. on Saturdays that Ms. Ocampo had to work. RP 457. Ms. Ocampo's mother and aunt watched V.O. on some Saturdays, when Mr. Godinez helped Ms. Ocampo with her housecleaning job. RP 458. V.O. went to daycare during the week. RP 457.

January 16, 2010 was a Saturday on which Ms. Ocampo went to work and Mr. Godinez stayed home with V.O. RP 458. Ms. Ocampo left for work at around 8:45 a.m. RP 227; RP 458. She finished work at around 3:00 p.m. and returned home shortly thereafter. RP 229-30. At the time Ms. Ocampo entered the apartment on her return home, Mr. Godinez was in the bathroom, getting ready to take a shower. RP 258; RP 464-65. Shortly thereafter, Ms. Ocampo entered the bathroom and asked Mr. Godinez why he had not done the chores that she had requested he do. RP 465. Ms. Ocampo was upset and speaking loudly. RP 233; RP 465-66. V.O. believed that Ms. Ocampo was mad at Mr. Godinez. RP 319. Mr.

Godinez then took a shower. RP 466. A short time later, Ms. Ocampo returned to the bathroom and confronted Mr. Godinez, asking him what he had done to V.O. RP 466. Mr. Godinez denied that he had done anything inappropriate to V.O. RP 237. Ms. Ocampo told Mr. Godinez that she did not know whether V.O. was lying, but that he needed to leave, which he did. RP 237; RP 467.

Mr. Godinez testified at trial that, while he was watching V.O. that day, he made breakfast for her, and then watched a movie on the couch in the living room while V.O. played in the kitchen. RP 460-61. Mr. Godinez fell asleep during the movie, and awoke to V.O. jumping on him. RP 462. Her knee hit his genitals, causing pain. RP 462-63. Mr. Godinez quickly and forcefully moved V.O. off of him. RP 463. When he was moving her away, he touched her in between her legs. RP 472-73.

Ms. Ocampo testified that, after she arrived home, and spoke to Mr. Godinez, she then asked V.O. what they had been doing all morning, and inquired why she had not cleaned her room. RP 233-34. V.O. responded by saying that that Johnny had been “playing all morning”. RP 233-34. Ms. Ocampo testified that V.O. then told her mother that Mr. Godinez had touched her “butt.” RP 234. Ms. Ocampo was taken aback by this statement, as it was the first time that V.O. had ever made such an allegation. Id. According to Ms. Ocampo, V.O. said that “He [Mr.

Godinez] put his butt on my butt.” RP 235. Ms. Ocampo testified that V.O. pointed to the front when she said this. RP 236. Ms. Ocampo also testified that V.O. sometimes referred to a penis as a “butt.” RP 236. Ms. Ocampo testified that V.O. said that Mr. Godinez had pulled his own pants down, as well as hers, and “put his butt on my butt.” RP 239.

After Mr. Godinez left, Ms. Ocampo called 911. RP 238. Once the police arrived, Ms. Ocampo took V.O. to Providence Regional Medical Center in Everett to be examined. RP 240; RP 324. While there, Registered Nurse Marissa Green examined V.O. RP 328. Nurse Green testified that V.O. told her that her dad had tried to put his butt in her butt. RP 335. V.O. also said that he tried to hit her butt. Id. Nurse Green did not recall V.O.’s demeanor at the time she made her statement. RP 69. She indicated, however, that she would have noted that V.O. appeared upset, if she had so appeared at the time. RP 71-72.

Nurse Green performed a physical exam, in which she determined that V.O. appeared to be a typical six-year-old. Id. The only fact she noted was that there appeared to be redness around V.O.’s urethra. RP 339. Nurse Green testified that this redness “could indicate” that something happened. RP 342. She could not make a determination that a sexual assault occurred, and could also not rule it out. Id. She did not note any redness in V.O.’s anal region. RP 347.

V.O. had previously had issues with irritation in her genital region. RP 265. This irritation manifested as redness and pain. Id. Ms. Ocampo attributed it to not wiping after going to the bathroom, and treated it with Vaseline. Id. This condition had occurred on multiple instances. Id.

Nurse Green took a number of swabs during her examination of V.O., including swabs of the genitals and anus. RP 341-42. Lisa Casey, at the Washington State Crime Laboratory, later examined these swabs for the presence of a variety of substances. RP 393. The swabs tested negative for both saliva and semen. RP 396. The samples from V.O.'s genitals were negative for the presence of male DNA, and the samples from her anal region were inconclusive for the presence of male DNA and for a male-specific enzyme. RP 396; RP 399-400. Ms. Casey could not draw any conclusions about the possible presence of either the male enzyme or male DNA from the results of the tests of the swabs from V.O.'s anal region. RP 402.

On January 22, 2010, Amanda Harpell-Franz, a child interview specialist with the Snohomish County Sheriff's Office, interviewed V.O. RP 74. During this interview, V.O. described two incidents of Mr. Godinez touching her back private part. RP 75. She said that one incident occurred in the bedroom and one incident on the couch. Id. This interview

was recorded on DVD, and was ultimately played for the jury. RP 76; RP 178.

During V.O.'s interview with Ms. Harpell-Franz, in addition to asking questions about V.O.'s allegations against Mr. Godinez, Ms. Harpell-Franz also performed a number of tests designed to gauge V.O.'s ability to distinguish truth from falsehood and to gauge whether she understood the importance of telling the truth. RP 79-80. These tests were part of the training manual for child interviewing published by the Harborview Center for Sexual Assault and Traumatic Stress. RP 183; RP 193. The tests were developed from research conducted with children. RP 193. The tests are designed to be used with young children and are not complicated. RP 194-95. On the tests designed to determine whether a child can distinguish the truth from a lie, V.O. only got two out of four correct. RP 81-82, RP 180. V.O. did not demonstrate any confusion about the tests. RP 195-96. Further, when asked whether it was better to tell the truth or a lie, V.O. responded, "I don't know." RP 196.

Ms. Harpell-Franz testified about the special precautions that need to be taken when questioning young children about allegations of sexual misconduct, and the reasons those precautions need to be taken. RP 183-94. She testified that one of the dangers in questioning children is that, rather than trying to remember what actually happened, they try to

anticipate the questions and give answers they think adults want to hear. RP 187. Ms. Harpell-Franz also testified that asking a child the same question more than once can make it appear that the adult did not get the answer he or she wanted. RP 191. Repeating the same questions gives the child the opportunity to give what the child perceives as the correct answer. Id. Sometimes children feel like adults are looking for a certain answer and want to provide that answer even if they do not know what it is. RP 192. Ms. Harpell-Franz testified that children are suggestible, and that the younger a child is, the more likely it is that an answer could be suggested to the child. RP 192-93. Children often want to please the adults around them. RP 193.

The Snohomish County Prosecuting Attorney's Office charged Mr. Godinez with two counts of child molestation in the first degree, and sent a summons to Mr. Godinez to appear for an arraignment on May 19, 2010, which he did. CP 6; CP 8. Mr. Godinez was taken into custody at that time. CP 8.

The trial court conducted a hearing on December 13, 2010, to determine whether V.O. was competent to testify at trial, and whether the multiple hearsay statements described above (1. V.O.'s statement to her mother on January 16, 2010; 2. V.O.'s statement to Nurse Marissa Green on January 16, 2010; 3. V.O.'s statement to Amanda Harpell-Franz, child

interview specialist, on January 22, 2010) would be admissible at trial under Washington's child hearsay statute, RCW 9A.44.120. RP 5-6. The court found that V.O. was competent to testify and that the three hearsay statements would be admissible at trial. RP 97-99; RP 99-101.

V.O. testified at both the competency hearing and trial. RP 12; RP 289. She testified regarding the details of her allegations and regarding her prior statements. V.O. at one point described the January 16, 2010 incident by saying that that Mr. Godinez, while wearing clothes, had touched her body with his "back butt." RP 37-38. V.O. said at another point that Mr. Godinez had touched her "back butt" with his "back butt." RP 427. The following exchange occurred during a pretrial interview with a defense investigator and was recounted at trial:

Q. So the last day that you saw Jhonny, do you remember that day?

A. Yeah.

Q. Okay. Can you tell me about that day?

A. Sticking his butt to my butt.

Q. Sticking his butt to your butt? Okay. So is his butt a front butt or a back butt?

A. Back.

Q. His back butt? Okay. Was that going to your front butt or your back butt?

A. My back butt.

Q. Your back butt. Okay. So what else do you remember about that day?

A. He still wanted to do it.

Q. What?

A. He still wanted to do it.

Q. Okay. He still wanted to stick his butt to your butt? And we are still talking about back butts or front butts?

A. Back butts.

RP 427-28. V.O. also described the incident by saying that he touched her “back butt” with his “front butt.” RP 45-46. She stated during the competency hearing that she had previously been untruthful during an interview with defense counsel regarding whether it was the front or back. RP 45.

V.O. said at various times (the competency hearing and the interview with defense counsel prior to the trial) that she and Mr. Godinez both were wearing clothes the whole time. RP 36-37; RP 46. During the competency hearing, the following exchange occurred between the prosecutor and V.O.:

Q. You were still laying on the bed? Okay. When he was doing that to you, where were your clothes? Did you have your clothes on?

A. Yeah.

Q. You had all of your clothes on?

A. Yeah.

Q. You had your shirt on?

A. Yeah.

Q. Did you have your pants on --

A. Yeah.

RP 36. When the prosecutor continued asking whether V.O. had her clothes on, she changed her answer and said that Mr. Godinez had taken her pants off. RP 37.

When V.O. was later asked by defense counsel why she changed her answer about whether she was wearing clothes, she acknowledged that she changed her answer because she believed that she was giving the wrong answer. RP 47. The following exchange took place:

Q. When Mr. Okoloko asked you questions, do you think that there is a right answer and a wrong answer, or do you think you're just supposed to answer them?

A. Answer them.

Q. Answer them? Okay. When he -- when Mr. Okoloko was just asking you about whether your pants were on or off when were you on the bed, do you remember that?

A. Yeah.

Q. Okay. And you told him that your pants were on; right?

A. Yeah.

Q. And then he asked you more times the same question; right?

A. Uh-huh.

...

Q. Why did you change your answer after he asked you several times?

A. I don't know.

Q. You don't know? Okay. Was it because you were giving -- you thought you were giving the wrong answer?

A. Yeah.

RP 46-47.

Pursuant to a question from the prosecution regarding whether Mr. Godinez was wearing clothes, the following exchange occurred:

Q. Did Jhonny have his clothes on?

A. Yeah. I mean no.

Q. What do you mean when you say no? Did he have his shirt on?

A. Yes.

Q. Did he have his pants on?

A. No.

Q. What do you mean when you say no? Where was his pants?

A. It was on. Yeah, it was on.

Q. He had his pants on?

A. Yeah.

RP 37.

V.O. at one point said that Mr. Godinez had touched her while on the couch in the living room, and at another point said that it had only happened in the bedroom. RP 75; RP 306. She said at one point that when Mr. Godinez had touched her he was behind her, and at another point that they were lying on their backs on the bed, side by side. RP 34; RP 209.

V.O. could not answer questions about what had happened at Thanksgiving, less than a month prior, at either the competency hearing or at the trial. RP 46-47; RP 318.

V.O. acknowledged that she changed her answers to questions about the incident based on what she perceived the person questioning her wanted her to say. RP 46-47. She also made statements that were inconsistent with each other, and statements that conflicted with reality. RP 428-30. When asked how many times V.O. had discussed the incident with her mother, she at one point said that it was six times. RP 428. At another point during the same interview, she said it was 30. RP 429. During the competency hearing, V.O. said she had discussed the incident with her mother four times. RP 43. When asked whether it was four or thirty, she said "Four times and thirty times." RP 44.

V.O. made varying statements about whether there had been more than one incident where Mr. Godinez touched her. During her interview with Ms. Harpell-Franz, Ms. Harpell-Franz asked her whether it happened one time, to which V.O. replied that it did. RP 201. Ms. Harpell-Franz clarified by asking, “Did it happen one time or more than one time?” Id. V.O. responded, “One.” Id. V.O. then said “He did -- he did it before or did it once.” Id. Later in the interview, Ms. Harpell-Franz asked the question again, and V.O. said that she did not know whether there had been more than one occasion. RP 203.

Mr. Godinez denied ever touching V.O. in a sexual manner. RP 488.

The jury returned verdicts of guilty on counts 1 and 2. CP 66, 67. The court sentenced Mr. Godinez to an indeterminate sentence of 89 months on each count, to run concurrently. CP 87.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN CONCLUDING V.O. WAS COMPETENT TO TESTIFY, IN VIOLATION OF DEFENDANT’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 OF THE WASHINGTON CONSTITUTION.

The trial court erred in finding V.O. competent to testify, as the trial record, viewed in the light most favorable to the state, establishes that V.O. was incapable of understanding the obligation to speak the truth on

the witness stand, and that V.O. did not have a memory sufficient to retain an independent recollection of the occurrence. Each of these facts should have precluded her testimony under the test set forth in State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

- a. The admission of an incompetent person's testimony in a criminal trial violates the due process right to a fair trial.

An accused person has a right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet baseline requirements of fairness and reliability. U.S. Const. amend. XIV; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct.1038, 35 L.Ed.2d 297 (1973). In keeping with this constitutional guarantee, the Washington Legislature has barred testimony from incompetent persons. RCW 5.60.020 provides in pertinent part: "Every person of sound mind and discretion ... may be a witness in any action, or proceeding." A person is not competent to testify if he or she is "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2).

The Washington Supreme Court, in State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), established the criteria for when a child witness is competent to testify. The Court held that a child witness is competent to testify only when the child: (1) understands the obligation to

speaking the truth on the witness stand; (2) has the mental capacity at the time of the occurrence to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words his or her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence. Id.; State v. S.J.W., 170 Wn.2d 92, 102, 239 P.3d 568 (2010). If any of the Allen factors are not present, the child is incompetent to testify. In re Dependency of A.E.P., 135 Wn.2d 208, 225, 956 P.2d 297 (1998); S.J.W., 170 Wn.2d at 98.

In determining whether a child witness is competent to testify, the court must consider not only the child's competency at the time of giving testimony, but also his or her "ability to receive just impressions at the time of abuse." State v. Woods, 154 Wn.2d 613, 619, 114 P.3d 1174 (2005) (plurality opinion); A.E.P., 135 Wn.2d at 224-26. To be competent, the child must have an independent recollection of the event. Woods, 154 Wn.2d at 618.

The Court of Appeals has held that the determination of a child witness's competency will turn on three preliminary questions of fact:

One is whether the witness, at the time of his or her in-court statement (i.e., his or her "testimony"), is describing an event that he or she had the capacity to accurately perceive (or, in alternative terms, an event about which he or she could "receive just impressions"). Another is whether the witness, at the time of his or

her in-court statement, is describing an event that he or she has the capacity to accurately recall. A third is whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately relate. The third question subdivides into at least the following: (a) whether the witness has the capacity to understand simple questions about the event; (b) whether the witness has the capacity to express in words his or her memory of the event; (c) whether the witness has the capacity to speak in the formal courtroom setting; (d) whether the witness has the capacity to distinguish truth from falsehood; and (e) whether the witness has the capacity to understand and carry out his or her obligation to speak the truth.

State v. Karpenski, 94 Wn.App. 80, 101, 971 P.2d 553 (1999), abrogated on other grounds by, State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765 (2003).

The party challenging a witness's competency bears the burden to establish that the witness is incompetent. S.J.W., 170 Wn.2d at 102. An appellate court reviews a determination that a child witness is competent to testify for an abuse of discretion, and considers the entire trial record in its review. State v. Borland, 57 Wn.App. 7, 10-11, 786 P.2d 910, review denied, 114 Wn.2d 1026 (1990).

- b. The evidence viewed in the light most favorable to the State did not support the determination that V.O. understood the obligation to speak the truth on the witness stand.

One of the necessary predicates to support a finding of competency in a child witness is that the child understood the obligation to speak the truth on the witness stand. Allen, 70 Wn.2d at 692. In the context of a

child competency determination, the precise question the appellate court must consider is whether, “[t]aking the record in the light most favorable to the State, could a trial judge reasonably find it to be more likely true than not true that [the child] was capable of distinguishing truth from falsity?” Karpenski, 94 Wn.App. at 105-06.

In Karpenski, the court answered this question in the negative:

At the outset of the competency hearing, Z took the oath and solemnly “promised to tell the truth about everything that happened.” He also promised not to “make up any stories.” Moments later, he was describing in vivid detail how he and his younger brother had been born at the same time. As the State notes on appeal, “This is impossible because Z is seven and his little brother is two.” As the trial court noted, this is “impossible” because it is “beyond understanding” that Z was in the room when his little brother was born. 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. Accordingly, we hold that the evidence is insufficient to support a finding that Z was capable of distinguishing truth from falsity, and that Z was incompetent to testify.

Id. at 106 (emphasis in original).

In this case, the evidence amply establishes that V.O. could not distinguish truth from falsity in the context of her duty to speak the truth on the witness stand about her allegations against Mr. Godinez.

First, V.O. failed the standardized test designed to determine whether a child can distinguish the truth from a lie. The test is part of the training manual for child interviewing put out by the Harborview Center for Sexual Assault and Traumatic Stress, and is research-based. It is designed to be used with young children and is not complicated. When V.O. took the test, she did not demonstrate any confusion about it. V.O. gave correct answers to only two out of four questions.

Such a result patently reveals that the child taking the test cannot distinguish truth from falsity. The results are at best commensurate with random guessing. It is hard to overstate the importance of this test result, as it goes directly to the question at hand, whether V.O. could distinguish the truth from falsehood. Further, when asked during her forensic interview whether it was better to tell the truth or a lie, V.O. responded, “I don’t know.” RP 196.

Second, during the competency hearing, V.O. acknowledged that she gave answers that she thought that the people questioning her wanted to hear, and did not distinguish “right” answers from “wrong” answers. The following exchange took place:

Q. When Mr. Okoloko asked you questions, do you think that there is a right answer and a wrong answer, or do you think you're just supposed to answer them?

A. Answer them.

Q. Answer them? Okay. When he -- when Mr. Okoloko was just asking you about whether your pants were on or off when were you on the bed, do you remember that?

A. Yeah.

Q. Okay. And you told him that your pants were on; right?

A. Yeah.

Q. And then he asked you more times the same question; right?

A. Uh-huh.

...

Q. Why did you change your answer after he asked you several times?

A. I don't know.

Q. You don't know? Okay. Was it because you were giving -- you thought you were giving the wrong answer?

A. Yeah.

RP 46-47. This exchange reveals that V.O. changed her testimony regarding issues crucial to the case upon repeated questioning. She acknowledged that she did so because of her perception that she was giving the “wrong” answer. The only conclusion that can be drawn from this fact is that V.O. either did not understand the difference between “right answers” and “wrong answers,” i.e. truth and falsehood, or did not understand her obligation to give only truthful answers.

V.O.’s demonstrated suggestibility fell in line with the pattern typical of young children. In this case, Ms. Harpell-Franz testified that special precautions that need to be taken when questioning young children about allegations of sexual misconduct. She testified that one of the

dangers in questioning children is that, rather than trying to remember what actually happened, they try to anticipate the questions and give answers they think adults want to hear. She also testified that asking a child the same question more than once can make it appear that the adult did not get the answer he or she wanted, and that repeating the same questions gives the child the opportunity to give what the child perceives as the correct answer. Such questioning is particularly dangerous given children's tendency to feel like adults are looking for a certain answer and want to provide that answer even if they do not know what it is. Children are suggestible, and the younger a child is, the more likely it is that an answer could be suggested to the child. The record reveals that this is exactly what happened in this case.

The act of changing answers to questions on the witness stand in response to one's perception about what the questioner wants to hear is completely incompatible with an understanding of the duty to tell the truth. Very young children often lack this capacity, and the record plainly reveals that V.O. lacked it in this case.

Because the ability to understand the obligation to speak the truth on the witness stand is one of the preconditions for a finding of competency, and because the record shows that V.O. did not understand

that obligation, the trial court erred in finding V.O. competent. Allen, 70 Wn.2d at 692.

- c. The evidence viewed in the light most favorable to the State did not support the determination that V.O. had memory sufficient to retain an independent recollection of the occurrence.

Another necessary predicate for a finding that a child is competent to testify is that the child have memory sufficient to retain an independent recollection of the occurrence. Allen, 70 Wn.2d at 692. Internally inconsistent statements and contradictory statements weigh against a finding that a child has sufficient memory to retain an independent recollection of an event. Jenkins v. Snohomish County Public Utility Dist. No.1, 105 Wn.2d 99, 102-03, 713 P.2d 79 (1986). A defendant can establish a child does not have a memory sufficient to retain an independent recollection of the occurrence by showing that that the child's memory of events has been corrupted by improper questioning. A.E.P., 135 Wn.2d at 230.

In this case, the evidence clearly established that V.O. did not retain an independent recollection of events at the time she testified at trial. First, V.O.'s description of what exactly she was alleging that Mr. Godinez did varied strikingly between her various statements. V.O. at one point described the January 16, 2010 incident by saying that that Mr.

Godinez, while wearing clothes, had touched her body with his “back butt.” RP 37-38. Ms. Ocampo testified that V.O. said that “He [Mr. Godinez] put his butt on my butt.” RP 235. Ms. Ocampo testified that V.O. pointed to the front when she said this. RP 236. During a pretrial interview with a defense investigator V.O. said that Mr. Godinez had “[stuck] his butt to [her] butt.” RP 427. When asked whether it was his “front butt” or “back butt,” V.O. replied “back.” Id. At another point, V.O. described the incident by saying that he touched her “back butt” with his “front butt.” RP 45-46.

V.O.’s statements regarding important details surrounding her allegations also varied widely. One of these details was whether or not she and Mr. Godinez were wearing clothes during the occurrence. Ms. Ocampo testified that V.O. said that Mr. Godinez pulled his own pants down, as well as hers, and “put his butt on my butt.” RP 239. V.O. said at both the competency hearing and the interview with defense counsel prior to the trial that she and Mr. Godinez both were wearing clothes the whole time. RP 36-37; RP 46. During the competency hearing, the following exchange occurred between the prosecutor and V.O.:

Q. You were still laying on the bed? Okay. When he was doing that to you, where were your clothes? Did you have your clothes on?

A. Yeah.

Q. You had all of your clothes on?

A. Yeah.
Q. You had your shirt on?
A. Yeah.
Q. Did you have your pants on --
A. Yeah.

RP 36. When the prosecutor continued asking whether V.O. had her clothes on, she changed her answer and said that Mr. Godinez had taken her pants off. RP 37.

V.O. was similarly inconsistent about whether Mr. Godinez was wearing clothes. During the competency hearing, the following exchange occurred:

Q. Did Jhonny have his clothes on?
A. Yeah. I mean no.
Q. What do you mean when you say no? Did he have his shirt on?
A. Yes.
Q. Did he have his pants on?
A. No.
Q. What do you mean when you say no? Where was his pants?
A. It was on. Yeah, it was on.
Q. He had his pants on?
A. Yeah.

RP 37.

V.O. also provided inconsistent and vague responses about whether she was alleging that there had been more than one time when Mr. Godinez touched her. During her interview with Ms. Harpell-Franz, Ms. Harpell-Franz asked her whether it happened one time, to which V.O. replied that it did. RP 201. Ms. Harpell-Franz clarified by asking, "Did it

happen one time or more than one time?" Id. V.O. responded, "One." Id. V.O. then said "He did -- he did it before or did it once." Id. Later in the interview, Ms. Harpell-Franz asked the question again, and V.O. said that she did not know whether there had been more than one occasion. RP 203.

V.O. provided inconsistent responses about where and how the incidents or incidents had happened. At one point she said that Mr. Godinez had touched her while on the couch in the living room, and at another point said that it had only happened in the bedroom. RP 75; RP 306. She said at one point that when Mr. Godinez had touched her he was behind her, and at another point that they were lying on their backs on the bed, side by side. RP 34; RP 209.

V.O. made statements that were inconsistent with each other, and statements that conflicted with reality. RP 428-30. When asked how many times V.O. had discussed the incident with her mother, she at one point said that it was six times. RP 428. At another point during the same interview, she said it was thirty. RP 429. During the competency hearing, V.O. said she had discussed the incident with her mother four times. RP 43. When asked whether it was four or thirty, she said "Four times and thirty times." RP 44.

V.O.'s testimony regarding unrelated past incidents demonstrated that she did not have a memory sufficient to remember events in the past.

V.O. could not answer questions about what had happened at Thanksgiving, less than a month prior, at either the competency hearing or at the trial. RP 46-47; RP 318.

The record in this case shows a striking pattern of serious inconsistencies in the details of V.O.'s allegations. These inconsistencies reveal that, at the time of her testimony, she did not actually remember what had happened. That this is the case is confirmed by her lack of memory regarding independent prior events. Evaluating these inconsistencies in conjunction with V.O.'s demonstrated suggestibility, and admitted changing of answers to give the answer that she perceives is desired, rather than the answer she believes to be true, renders it extremely unlikely that V.O. possessed an independent recollection of the occurrence.

Because one of the preconditions for a finding of competency is that the child have memory sufficient to retain an independent recollection of events, and because the record shows that V.O. did not have such an independent recollection, the trial court erred in finding V.O. competent to testify. Allen, 70 Wn.2d at 692.

2. BECAUSE V.O. WAS NOT COMPETENT TO TESTIFY, THE TRIAL COURT ERRED IN ADMITTING HER OUT-OF-COURT STATEMENTS AS CHILD HEARSAY, IN VIOLATION OF DEFENDANT’S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

The confrontation clause of the Sixth Amendment prohibits the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Appellate courts review alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

- a. V.O. was unavailable because she was incompetent to testify.

A witness who is incompetent to testify is unavailable. State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). V.O. was incompetent to testify. See, Section (D)(1) of this brief, *supra*. As such, V.O. was unavailable.

- b. The State did not meet its burden of establishing that V.O.’s statements were not testimonial.

The State bears the burden of establishing that hearsay statements are not testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009). Although a child’s statements to family members may often be non-testimonial, in order to meet the constitutional strictures of

Crawford and [Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266,165 L.Ed.2d 224 (2006)] a trial court must make some threshold evaluation of the underlying circumstances of the statement prior to admitting it at trial. State v. Alvarez-Abrego, 154 Wn.App. 351, 364, 225 P.3d 396 (2010).

In this case, the trial court did not examine whether the statements were testimonial, and did not consider the circumstances in which each statement was made. Testimonial and potentially testimonial statements were admitted in the absence of individualized determinations. The defense does not anticipate that the State will argue that the statements to the nurse or to the child interview specialist are nontestimonial. As to V.O.'s statement to her mother, while it is certainly possible that the statement was not testimonial, we do not know because the trial court did not analyze the question and make a threshold determination. Because this is what is required by Alvarez-Abrego, Mr. Godinez's right of confrontation was violated.

In Alvarez-Abrego, the Court held that because the child witness did not testify, the trial court's failure to evaluate the circumstances surrounding the making of a statement violated the confrontation clause. Id. at 364. In this case, because V.O. was not competent to testify, the admission of her statements similarly violated the confrontation clause. Further, the record in this case does not contain information sufficient for

this Court to evaluate the circumstances of V.O.'s statements to determine whether or not they were testimonial. See, id. For these reasons, the admission of V.O.'s prior statements violated the confrontation clause.

- c. V.O.'s statements to the examining nurse and to the child interview specialist were testimonial.

A statement is testimonial if the declarant would reasonably expect it to be used prosecutorially. Crawford, 541 U.S. at 51-52. Statements are also testimonial “if the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution and circumstances objectively indicate that there is no ongoing emergency.” Alvarez-Abrego, 154 Wn.App. at 363; Davis, 547 U.S. at 822. Statements in the course of a police investigation are nontestimonial only if the primary purpose of the questioning is to allow police to assist in an ongoing emergency. Alvarez-Abrego, 154 Wn.App. at 363. An interviewer who is merely gathering evidence, as opposed to a child sexual abuse therapist, is regarded as an investigator for hearsay purposes. State v. Perez, 137 Wn.App. 97, 106, 151 P.3d 249 (2007).

V.O.'s statements to both the nurse and the child interview specialist were made in the course of a police investigation. The taking of the statements was designed to gather evidence and did so. The statements are testimonial.

- d. The defendant had not had a prior opportunity for cross-examination.

While the defense conducted what could be formally described as a cross-examination of V.O. at the competency hearing and at the trial, these opportunities were in actuality only formal. Due to the fact that V.O. was not competent to testify, these cross-exam opportunities were nullities. Both due process and RCW 5.60.050 prohibited V.O. from testifying in the first place. This prohibition encompassed both her testimony that formally occurred on “direct examination” and “cross examination.”

3. THE TRIAL COURT ERRED IN ADMITTING THE UNCORROBORATED HEARSAY OF AN UNAVAILABLE JUVENILE, IN VIOLATION OF WASHINGTON STATE'S CHILD HEARSAY STATUTE.

Washington's child hearsay statute permits the admission of child hearsay statements only where:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. The statute bars admission of an unavailable child's statements, regardless of their reliability, unless the statements are supported

by admissible independent corroborating evidence. Id., State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984). In the context of the child hearsay statute, a witness who is incompetent to testify is unavailable. Swan, 114 Wn.2d at 645.

In this case, V.O. was incompetent to testify. See, Section (D)(1) of this brief, *supra*. As such, V.O. was unavailable. Swan, 114 Wn.2d at 645.

The trial record does not contain any evidence that corroborates V.O.'s statements to any significant degree. Nurse Green's physical examination revealed only some redness around V.O.'s urethra. RP 339. Nurse Green could not make any determinations regarding whether a sexual assault occurred based on her findings. Id. Similarly, the crime laboratory analyst could not make any conclusive determinations from her examination of the swabs taken from V.O. RP 402. Mr. Godinez denied touching V.O. in a sexual manner. RP 488. The record contains references to vague statements on his part but nowhere indicates any admission of the crimes. There were no other witnesses. Because V.O. was incompetent and thus unavailable, and because the record is devoid of corroborating evidence, the trial court erred in admitting V.O.'s prior statements under child hearsay statute.

4. THE TRIAL COURT ERRED IN ADMITTING UNRELIABLE CHILD HEARSAY, IN VIOLATION OF DEFENDANT'S RIGHT TO DUE PROCESS PROTECTED BY THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3 OF THE WASHINGTON CONSTITUTION.

The admission of V.O.'s prior statements under the child hearsay statute, RCW 9A.44.120, violated the due process clause's guarantee that the evidence used to convict an accused person will be reliable. Under RCW 9A.44.120, proffered child hearsay is only admissible if: "[t]he court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1).

In determining reliability under RCW 9A.44.120, the Supreme Court has identified nine factors that must be considered:

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;

7. Whether the declarant's lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

C.J., 148 Wn.2d at 683-84 (citing State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984)). No single factor is decisive; rather, reliability is based on an overall evaluation of the factors. State v. Young, 62 Wn.App. 895, 902, 802 P.2d 829 (1991). If the factors are substantially met, the statement is sufficiently reliable. Borland, 57 Wn. App. at 20.

In this case, a number of the Ryan factors weigh against the admissibility of V.O.'s prior statements. First, as to the statements to the nurse and to the child interview specialist, they were clearly not spontaneous.

Second, the record reveals that V.O. had a motive to be untruthful. Ms. Ocampo, V.O.'s mother, had been supporting the family for six months at the time of the allegation, because Mr. Godinez was unemployed. Ms. Ocampo was angry at Mr. Godinez about this. When Ms. Ocampo came home on the day in question, she was upset because Mr. Godinez and V.O. had not done what she wanted them to do, clean up the house. It was in response to this questioning that V.O. made the

allegation against Mr. Godinez. The allegation deflected criticism to a target that Ms. Ocampo was already disposed to be upset with. Because V.O. had just turned six years old, it appears that she would not have been able to understand the all the ramifications of making such an allegation.

Last, as to Ryan factors eight and nine, the remoteness of the possibility that the declarant's recollection is faulty, and whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement, the issues pertaining to V.O.'s suggestibility, memory, and inconsistent statements, outlined *supra* in sections (D)(1)(b) and (D)(1)(c) of this brief, apply with equal force to the child hearsay determination.

5. MR. GODINEZ'S CONVICTIONS MUST BE REVERSED.

A constitutional error is presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). On appeal, the State bears the burden of proving beyond a reasonable doubt that the result would have been the same absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). In this case, the trial court abrogated Mr. Godinez's Sixth and Fourteenth Amendment rights when it found that V.O. was competent and permitted her to testify, and admitted unreliable testimonial hearsay evidence.

The facts of this case compel the same result even under the less stringent standard of review for evidentiary error. Under this standard, an error in the admission of evidence warrants reversal if there is a reasonable probability that the error affected the decision. State v. Floreck, 111 Wn.App. 135, 140, 43 P.3d 1264 (2002). Absent V.O.'s testimony and prior statements, there was insufficient evidence to support a conviction.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Mr. Godinez Bastida's convictions for child molestation in the first degree and vacate his sentence.

DATED this 1st day of July, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Jhonny Godinez Bastida

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on July 1, 2011, via U.S. Mail, upon the parties required to be served in this action:

Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave., M/S 504
Everett, WA 98201

Jhonny Godinez Bastida, DOC No. 346354
Airway Heights Correction Center
11919 W. Sprague Avenue
P.O. Box 1899
Airway Heights, WA 99001-1899

DATED this 1st day of July, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Jhonny Godinez Bastida