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COURT OF APPEALS

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STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANDRE ROACH HOPKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathrine Stolz

No. 03-1-02018-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit M.N.'s statements to her mother, grandmother, and the CPS investigator when the statements were not "testimonial," and did not violate the Confrontation Clause under the Sixth Amendment?
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3. Did the trial court properly impose an exceptional minimum sentence based on a judicial finding of aggravating factors when Blakely does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712? (Appellant's Assignment of Error No. 6 & 7).

B. STATEMENT OF THE CASE.

1. Procedure

On May 1, 2003, the State charged ANDRE ROACH HOPKINS, hereinafter “defendant,” with one count of rape of a child in the first degree (Count I), one count of child molestation in the first degree (Count II), and one count of failure to register as a sex offender (Count III), based on allegations that defendant had sexually assaulted his girlfriend’s two year old daughter, M.N. CP 1-4. Prior to trial, the court dismissed Count III. CP 68.

On December 17, 2003, the court held a pretrial hearing to determine if the M.N.’s statements to her mother, grandmother, and the Child Protective Services (CPS) investigator were admissible. RP 2. The prosecutor informed the court that the State would not argue that M.N. was competent and would argue that, because of her incompetency, M.N. would be unavailable as a witness. RP 11. The court reconvened on January 5, 2004, to finish the child hearsay pretrial hearing. RP 61. Again the State conceded that it would not be calling M.N. to testify because she was incompetent. RP 62. Defendant did not refute the State’s claim that M.N. was incompetent, but agreed that she was incompetent, “due to her age.” RP 62. During closing argument at the hearing, defendant argued that M.N. did not testify because, “she’s not considered reliable because

she's so young. She lacks the understanding of the importance of telling the truth." RP 175.

At the hearing, the State presented testimony from Samantha Hannah (M.N.'s mother), Janet Blake (M.N.'s grandmother), and Patricia Mahaulu-Stephens (the CPS investigator). RP 16, 89, 120. Additionally, Julie Roth, a friend of defendant, testified for the defense. The State's witnesses each testified as to various statements M.N. made, starting the day after an overnight visit with defendant. See RP 16-140. Ms. Roth testified that defendant had visited her with M.N. and M.N.'s sister the day he returned the girls to their mother. RP 154. Ms. Roth testified that M.N. was behaving normally toward defendant and that M.N. was clean, well-dressed, and looked well-kept. RP 155-56.

The court ruled that M.N.'s statements were admissible, stating:

All right. I did review the material that you are discussing and I have read the reports. The Court is going to admit the statements. The Court finds that C.J. applies, and the Ryan case factors have been met to a sufficient indicia that the statement by the child will come in.

Obviously, this is a classic case where we have a victim who is under the age of four. We have hearsay exceptions because there are some people who might not meet the burden of being competent but who still may have been injured.

Given the medical and physical findings, I think that there is a logical inference that this child may have been sexual [sic] abused. Whether that is to say beyond a reasonable doubt that it was by the defendant, that a jury might not find some of the explanation, that's not for ruling at this point,

but those statements will come in and the jury will make the determination.

RP 179-80. The court entered Findings of Fact and Conclusions of Law.

CP 360-66. The court concluded that M.N.'s genital examination provided the corroborating evidence required under RCW 9A.44.120 and that the following circumstances satisfied the Ryan¹ factors of reliability:

- a. M.N. had no apparent motive to lie about the contact with the defendant because she loved him and considered him her father.
- b. M.N. had a good general character, there was no indication of misbehavior or maliciousness.
- c. More than one person heard the statements and they were repeated over a period of time that would not support fabrication by a two-year old.
- d. The first statements were spontaneous statements in response to physical pain and the subsequent statements were spontaneous declarations not prompted by any questioning from adults. With regard to the statements to Ms. Mahaulu Stephens, the statements were not prompted by leading questions. Instead they were non-responsive statements made during a safety check.
- e. The timing of the statements and the relationship with the persons they were made demonstrate reliability. They are precisely what would be expected in the case of a two year old seeking comfort from a caregiver or another adult. With respect to the caregivers, the statements are comparable to statements any child would make about a painful experience. With respect to the statements to Ms. Mahaulu Stepens [sic] the statements were context appropriate for the safety check.

¹State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

- f. The possibility of faulty recollection is remote because the first statements were made close in time to the infliction of the injury. Overall the statements were consistent over time.
- g. The overall circumstances of the statements strongly support reliability because the age of the child, the caregivers to whom she spoke, and the reasons for her disclosure do not indicate any reason other than physical injury an appropriate response to it.

CP 364-65.

On January 28, 2004, the parties went to trial. RP 196. Defendant made a motion to suppress any testimony regarding the CPS findings. RP 459. The court agreed, stating that the CPS findings of abuse on the part of defendant would invade the prerogative of the factfinder. RP 463.

At the close of the State's case, defendant made a motion to dismiss Count II due to lack of evidence that any touching was done for sexual gratification, rather than for a legitimate caretaking function. RP 497-98. The court found that there was "sufficient question to suggest to the jury that this touching was done for purposes other than hygiene or in the caretaking role, and that it was done for the sexual gratification of the defendant." RP 499. The court also stated that, "it is difficult when a child that says daddy licked me to understand – or licked my pee-pee to understand how it was for the caretaking role." RP 499.

On February 4, 2004, the jury returned verdicts of guilty on both counts. CP 73, 74; RP 609-12.

Defendant was sentenced on May 14, 2004. CP 369; RP 615. Prior to the sentencing hearing, defendant made a motion based on the U.S. Supreme Court's ruling in Crawford v. Washington², arguing that M.N.'s statements were testimonial. RP 616-21. The court reviewed the purpose behind the confrontation clause and the holding in Crawford. RP 641-42. The court denied the motion to reconsider the pretrial rulings, stating that "[M.N.]'s statements were not testimonial in nature as contemplated by Crawford under the analysis provided by Justice [Scalia]." RP 643-44.

The court found an aggravating factor because of the peculiarly vulnerable age of the victim and sentenced defendant to an exceptional minimum sentence of 260 months on Count I and a high end, standard range, sentence of 130 months on Count II. CP 372-375, 462-64; RP 663-64.

On September 3, 2004, the parties returned to court on defendant's motion for reconsideration. RP 666. Defendant argued that, under Blakely v. Washington³, the court exceeded its authority when it imposed a sentence outside the standard range based on an aggravating factor that was not found by the jury. RP 667. The court denied the motion, stating that it was for the Court of Appeals to determine the applicability of Blakely to defendant's sentence. RP 674.

² Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Defendant filed this timely notice of appeal. CP 385-97.

On March 22, 2005, the Court of Appeals granted the State's motion to stay proceedings pending disposition of State v. Shafer⁴, State v. Clarke⁵, and State v. Borboa⁶. On June 8, 2006, the stay in proceedings was lifted.

2. Facts

a. Facts Adduced at Pretrial Hearing

On January 09, 2003, Samantha Hannah was giving her daughters, two year old M.N. and infant A.H., a bath. RP 79. The girls had returned from a two-day visit with defendant. RP 77-78. Defendant is A.H.'s biological father, but M.N. also calls him "daddy." RP 17, 22-23. When defendant dropped the girls off, Ms. Hannah noticed that they were dirty and "smelled dirty." RP 26.

Ms. Hannah bathed the girls with Johnson & Johnson lavender bath soap on a "mesh sponge." RP 27-28. She had used this particular brand of soap both before and after this night with no ill effects. RP 27. When Ms. Hannah reached M.N.'s genital area, M.N. screamed, "owie." RP 29. M.N.'s outcry came the instant Ms. Hannah touched her genitals

³ Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

⁴ State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006).

⁵ State v. Clarke, 156 Wn.2d 880, 134 P.3d 188 (2006).

⁶ State v. Borboa, ___ Wn.2d ___, 135 P.3d 469 (2006).

with the sponge. RP 30. M.N. did not say why she hurt and she finished her bath without further incident. RP 30.

After the bath, Ms. Hannah dressed M.N. in pull-ups and pajamas, and they sat on the bed while M.N. colored. RP 32. Approximately 30 minutes after her bath, M.N. jumped up and started screaming, “owie, owie, my pee-pee hurt, my pee-pee hurt,” over and over. RP 32. Ms. Hannah pulled M.N.’s pull-up down in the front and saw a little bit of blood on the pull-up, where M.N.’s vaginal opening touched it. RP 32-33. She asked M.N. what happened, but M.N. did not respond. RP 33.

Ms. Hannah took M.N. into the living room where her mother, Janet Blake, was sitting and, upon closer examination, saw that M.N. had blood in her vagina. RP 33. To Ms. Hannah, it looked like M.N. was “having a period.” RP 34. Ms. Hannah and her mother asked M.N., “how did this happen?” and “what happened to you?” RP 35. Again, M.N. did not respond. RP 35. Ms. Hannah asked M.N., “Who did this to you?” RP 35. M.N. responded, “he did it.” RP 35-36. She then asked M.N., “he who?” RP 36. M.N. responded “Daddy.” RP 36. M.N. also stated that, “he hurt my pee-pee,” “daddy hurt my pee-pee,” and “he’s not going to do it again.” RP 37. M.N. also said that he was crying and told her, “I’m in big trouble.” RP 37. Ms. Hannah understood “daddy” to mean defendant. RP 36-37.

Ms. Hannah called defendant to ask him about M.N.’s statements. RP 37. While she was on the phone, she allowed M.N. to speak to

defendant. RP 37. M.N. asked defendant, “why did you hurt my pee-pee daddy? You hurt me.” RP 37. After the phone call to defendant, Ms. Hannah and Ms. Blake took M.N. to the emergency room at Mary Bridge Hospital. RP 38.

In the days and weeks after the incident, M.N. repeated her statements, “out of the blue,” to her mother and grandmother. RP 42. The day she went to the emergency room, M.N. said over and over, “daddy hurt my pee-pee.” RP 42. She also asked, “why did daddy do that?” and “is daddy in trouble?” RP 42. A few days after she went to the hospital, M.N. would act like defendant was in the room with her and she would yell at him for hurting her. RP 100. This behavior occurred 10-15 times over the course of the following month. RP 100. Approximately two weeks after the incident, when she and Ms. Hannah had moved back in with defendant, M.N. stated, “daddy licked my pee-pee.” RP 44.

On February 3, 2003, Patricia Mahaulu-Stephens, a social worker with CPS, visited M.N. while she was living with Ms. Blake. RP 120, 127. Ms. Hannah had moved back in with defendant and left M.N. with her mother. RP 101. Ms. Mahaulu-Stephens’ purpose for the visit was a safety assessment: she did not interview M.N. because CPS normally does not interview two-year-old children. RP 128. She did try to engage M.N. in conversation, but M.N. had just woken up and was uninterested in talking to her. RP 129. Because defendant did not live with M.N. at her

grandmother's house, Ms. Mahaulu-Stephens felt no action was needed at that time. RP 129.

On February 6, 2003, Ms. Mahaulu-Stephens visited M.N. again, this time at Ms. Hannah's residence. RP 130. Again, the purpose of her visit was to perform a safety assessment. RP 132. Ms. Mahaulu-Stephens testified that this time she engaged M.N. in conversation, but still did not attempt to perform a forensic interview because, developmentally, children under the age of four are unable to comprehend what they are being asked. RP 144. Ms. Mahaulu-Stephens asked M.N. several rapport-building questions, including who took care of her and who lived in the house with her. RP 133. M.N. responded that her mom, sister, and dad lived at the house with her, and that defendant was at the park. RP 134. M.N. told Ms. Mahaulu-Stephens that her mommy takes care of her and that her daddy helps. RP 134. Ms. Mahaulu-Stephens asked M.N. if her daddy read books to her, and M.N. responded, "daddy reads to me sometimes." RP 135, 481. M.N. then added, "you know daddy hurt me. He hurt me real bad." RP 135. Ms. Mahaulu-Stephens asked M.N. how defendant had hurt her, and M.N. responded, "with his finger, and with his mouth." RP 135. Finally, Ms. Mahaulu-Stephens asked M.N. if she knew why defendant had hurt her, and M.N. replied "because daddy is bad, bad, bad. He hurt my pee-pee." RP 136. When Ms. Mahaulu-Stephens tried to ask M.N. if she was hurting at the moment, M.N. got up, and was done talking. RP 136.

Ms. Mahaulu-Stephens referred M.N. to the Child Advocacy Council. RP 139-40. She continued to monitor M.N.'s case for approximately two months before closing the case. RP 139.

b. Additional Facts Adduced at Trial⁷

Dr. Thomas Hurt examined M.N. at Mary Bridge. RP 228. Dr. Hurt found a scant amount of blood and increased redness under M.N.'s clitoris and above her urethra. RP 245-46. Dr. Hurt also noticed that the inner aspects of M.N.'s labia minora on each side had increased redness. RP 249. Dr. Hurt could find no obvious source of the blood. RP 247. Dr. Hunt described the redness as a strawberry color rather than the normal pink color. RP 248. M.N.'s other genital structures appeared normal and Dr. Hurt saw no sign of diaper rash. RP 250. Dr. Hurt concluded that the physical examination of M.N.'s genitals was not normal. RP 251. Based on the parental concern for the possibility of abuse coupled with the physical finding, Dr. Hurt referred M.N. to the sexual abuse clinic. RP 252.

Dr. Lynn Jorgenson examined M.N. the following day at the sexual assault clinic. RP 427-28. Dr. Jorgenson testified that there is a very low percentage of child sexual assault cases that result in actual

⁷ Ms. Hannah, Ms. Blake, Ms. Mahaulu-Stephens, and Ms. Roth testified at trial. The State does not recite the trial testimony here, as it was substantially similar to their pretrial testimony.

physical findings, and that superficial damage to the genital area heals within 12-14 hours. RP 421. Dr. Jorgenson saw no redness or blood when she examined M.N., but she thought that the abnormal exam from the emergency room was a concern. RP 437. She testified that the lack of physical trauma was consistent with Dr. Hurt's findings the night before. RP 437. Mary Bridge staff referred the case to CPS. RP 468.

C. ARGUMENT.

1. BECAUSE M.N.'S STATEMENTS TO HER MOTHER, GRANDMOTHER, AND THE CPS INVESTIGATOR WERE NOT "TESTIMONIAL," DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WAS NOT VIOLATED WHEN THE COURT ADMITTED M.N.'S STATEMENTS.

The admission of testimonial hearsay violates a defendant's right of confrontation unless the declarant is unavailable and there was a prior opportunity to cross-examine the declarant. Crawford v. Washington, 541 U.S. 36, 56-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A statement is "testimonial" if a reasonable person in the declarant's position would expect it to be used prosecutorially. Crawford, 541 U.S. at 52; State v. Shafer, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006). "[C]asual remarks made to family, friends, and nongovernment agents are generally not testimonial because they were not made in contemplation of bearing formal witness against the accused." Crawford, 541 U.S. at 51. Statements made by a child declarant are spontaneous where the child

volunteers the information in response to questions that are neither leading nor suggestive. State v. McKinney, 50 Wn. App. 56, 63, 747 P.2d 1113 (1987).

The Washington Supreme Court's analysis in Shafer is directly on point. The Court held that, "where nontestimonial hearsay statements of a child are at issue, the statements are admissible if there is compliance with RCW 9A.44.120 and the Ryan reliability factors." Shafer, 156 Wn.2d at 391. The Court determined that the reasonable person standard turned on the declarant's position, stating that "it defies logic to think that [the victim], as a three-year-old child, or any reasonable three-year-old child, would have an expectation that her statements about alleged sexual abuse could be used for prosecutorial purposes." Id. at 390 n.8. Therefore, Crawford does not limit the application of RCW 9A.44.120 as long as the child's statements are not testimonial. Id. at 391.

In Shafer, the Court examined the three-year-old victim's statements to her mother and to a family friend who also happened to be an informant for law enforcement agencies. 156 Wn.2d at 388. T.C., the three-year-old victim, was visiting her aunt and had fallen asleep by the time her mother picked her up. Id. at 383. Shortly after T.C. woke up the next morning, she told her mother that the defendant had "touched her privates." Id. Her mother asked if she wanted to talk further, and T.C. responded that, "Uncle had touched her privates like this (gesturing) and that Uncle licked her privates like this (indicating). Id. at 384. Her

mother then asked, “Uncle who?” and T.C. identified Shafer. Id. The Court acknowledged that T.C.’s statements to her mother were not spontaneous, but found that the statements were admissible because they “were not the result of leading questions or a structured interrogation.” Id. at 390. T.C.’s mother’s questions were what “one would expect of a concerned parent under the circumstances – she inquired further.” Id. at 389.

Additionally, T.C. discussed the incident with an adult family friend a week later. Id. at 384-85. Since T.C. had no reason to expect that her statements would later be used in court, those statements were not testimonial either. Id. at 390. The parties stipulated that T.C. was not competent to testify. Id. at 385. Because she was incompetent, the court found T.C. was unavailable to testify. Id.

The facts in the present case are similar to those in Shafer. M.N.’s first statements came as an excited utterance in response to pain⁸. CP 361. While M.N.’s later statements were not entirely spontaneous, they were not the result of leading questions or a structured interrogation. Ms. Hannah reacted as a concerned parent and made further, reasonable inquiries of M.N. to determine who hurt her. Like T.C.’s statements in

⁸ Defendant does not assign error to any of the court’s factual findings, therefore, the findings are verities on appeal. See State v. Luther, 157 Wn.2d 63, 78, ___ P.3d ___ (2006); State v. Hill, 128 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001).

Shafer, M.N.'s statements to her mother and grandmother are clearly nontestimonial. Therefore, the court's admission of the statements did not violate defendant's right to confrontation under Crawford.

Additionally, M.N.'s statements to the CPS investigator were not testimonial. Ms. Mahaulu-Stephens had gone to Ms. Hannah's residence to perform a safety assessment, not an interview. RP 132. This assessment was unrelated to the prosecution or criminal investigation of defendant. CP 363. Ms. Mahaulu-Stephens engaged M.N. in conversation, but she did not attempt to perform a forensic interview because, developmentally, children under the age of four are unable to comprehend what they are being asked. RP 144. Ms. Mahaulu-Stephens asked M.N. if her daddy read books to her, and M.N. responded by saying that he did and went on to add that daddy had hurt her pee-pee with his fingers and his mouth. CP 363, RP 135. When Ms. Mahaulu-Stephens tried to ask M.N. if she was hurting at the moment, M.N. got up and started dancing. CP 363.

Again, like T.C.'s statements to a family friend in Shafer, M.N. would have no reason to believe that her statements to Ms. Mahaulu-Stephens later be used in court. Ms. Mahaulu-Stephens engaged M.N. in conversation to assess her safety, not to pursue a criminal investigation. The initial statement by M.N. was non-responsive to Ms. Mahaulu-Stephens' question of whether her daddy read her books. M.N.'s subsequent statements to Ms. Mahaulu-Stephens were made in response to

non-leading questions. The trial court properly admitted M.N.'s statements to Ms. Mahaulu-Stephens.

Because M.N.'s statements were nontestimonial under Shafer and Crawford, they were properly admitted under RCW 9A.44.120.

2. M.N.'S STATEMENTS WERE PROPERLY ADMITTED UNDER RCW 9A.44.120 WHERE M.N. WAS THREE YEARS OLD AT THE TIME OF TRIAL, THE PARTIES AGREED THAT SHE WAS INCOMPETENT TO TESTIFY, THE COURT FOUND THAT HER STATEMENTS SATISFIED THE RYAN FACTORS FOR RELIABILITY, AND THERE WAS CORROBORATING EVIDENCE AS REQUIRED WHEN THE DECLARANT IS UNAVAILABLE TO TESTIFY.

RCW 9A.44.120 provides in relevant part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the state of Washington if:

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

Children under 10 are not statutorily incompetent. State v. Ryan, 103 Wn.2d 165, 172, 691 P.2d 197 (1984). When a confrontable witness is not produced, unavailability must be certain. Id. at 171. A witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness' presence at trial. Id. at 170. However, the good faith effort incumbent on the State to produce the witness does not require a futile act. Id. at 172. An incompetent child is unavailable to testify for the purposes of RCW 9A.44.120. State v. Doe, 105 Wn.2d 889, 895, 719 P.2d 554 (1986).

In Ryan, the victims were four and a half and five years old. 103 Wn.2d at 167. The State did not subpoena either of the victims, believing they were statutorily incompetent to testify. Id. at 171. The defendant had disputed the issue of unavailability at trial, but erroneously conceded the issue on appeal. Id. at 167 n. 1. The Court determined that “[s]tipulated incompetency based on an erroneous understanding of statutory incompetency is too uncertain a basis to find unavailability.” Id. at 172. The Court ultimately held that, “because the State made no apparent effort to produce the children or to excuse their production, the unavailability requirement was not met.” Id. at 172.

The present case is distinguishable from Ryan. The sexual contact and intercourse underlying the charges took place during a three day period when M.N. was only two years old. CP 361; RP 11. The trial took place nearly a year later, when M.N. was three years old. RP 17. From

the beginning of the pretrial hearing, the State argued that M.N. was incompetent and that she was unavailable due to her incompetency. RP 11. Defendant stipulated that, based on M.N.'s age, she was incompetent. RP 62. Ms. Mahaulu-Stephens testified that she did not perform a forensic interview with M.N. because children under four years old are developmentally unable to comprehend what is being asked of them. RP 144. This inability to comprehend the questions limits a child's ability to discern between truth and lying. RP 144. In closing during the pretrial hearing, defendant argued that M.N. would be unable to testify, and that she could not be considered reliable because she was so young. RP 175. The record supports the fact that all parties accepted that calling M.N. to the hearing would be a futile act. While there is no statutorily incompetent age, it defies logic to believe that a two or even a three year old would ever be found competent to testify. Due to her extremely young age, M.N. would have been declared incompetent and unavailable to testify.

Additionally, while the court did not enter an explicit finding that M.N. was unavailable to testify, the court did conclude that M.N.'s

statements were reliable under the Ryan factors and that the genital examination provided corroboration⁹. CP 364-65. The finding of corroborating factors is only required when the child is unavailable to testify. RCW 9A.44.120. The court's finding of corroborating factors is an implicit finding that M.N. was unavailable to testify.

If this court does find that the trial court erred in not making an explicit finding that M.N. was unavailable to testify, the error was harmless. The overwhelming evidence shows that M.N. was, in fact, incompetent to testify, and the case should be remanded merely to enter the appropriate finding. See State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (Holding that failure to enter written findings of fact and conclusions of law requires remand for entry of written findings and conclusions).

⁹ The court relied on only the direct corroboration of the genital exam; however, M's "precocious knowledge of sexual activity," also provided sufficient corroboration. See State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765 (2003) ("In many child sex abuse cases, there is no physical evidence of harm, nor any eyewitnesses, so the corroboration requirement may be satisfied by both direct and indirect evidence."). The State argued that, at two years old, M.N.'s knowledge of oral to genital contact would be sufficient evidence of precocious sexual knowledge. This Court may affirm on any ground. See State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

3. THE TRIAL COURT DID NOT ABUSE ITS
DESCRETION WHEN IT IMPOSED AN
EXCEPTIONAL MINIMUM SENTENCE WHEN
BLAKELY DOES NOT APPLY TO AN
EXCEPTIONAL MINIMUM SENTENCE
IMPOSED UNDER RCW 9.94A.712.

Under Blakely v. Washington, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The “relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Blakely, 542 U.S. at 473.

An offender sentenced under RCW 9.94A.712 is serving a life sentence with the *possibility* of release if, upon expiration of his minimum term, the preponderance of the evidence indicates he will not reoffend. State v. Clarke, 156 Wn.2d 880, 890, 134 P.3d 188 (2006) (emphasis in original). Therefore, sentences with a maximum term of life imposed under RCW 9.94A.712 are indeterminate life sentences. Clark, 156 Wn.2d at 890. The Washington Supreme Court recently held that Blakely does not apply to an exceptional minimum sentence imposed under RCW 9.94A.712 that does not exceed the maximum sentence imposed. See State v. Borboa, ___ Wn.2d ___, 135 P.3d 469, 470 (2006); see also Clarke, 156 Wn.2d at 893.

In the present case, defendant was sentenced under RCW

9.94A.712, which provides in relevant part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

Defendant was convicted of rape of a child in the first degree, and child molestation in the first degree. CP 371. As the court found in Borboa, the court in the present case found the aggravating factor of the peculiarly vulnerable age of the child. RP 663. The court was also concerned by defendant's insistence that he was innocent of a similar crime when the condition of his special sentence required him to admit the act. RP 663. The court ordered an exceptional minimum sentence of 260 months on Count I and a high end, standard range sentence of 130 months on Count II. CP 372-375, RP 664. The maximum term for each count is life. CP 372. Because Blakely does not apply to exceptional minimum sentences imposed under the indeterminate sentencing provision of RCW 9.94A.712, the court did not abuse its discretion when it imposed defendant's sentence.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and sentences.

DATED: JULY 11, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney



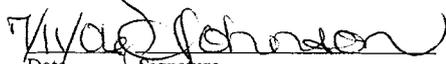
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724



Kimberley DeMarco
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature

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