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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY                       
DEPUTY

No. 33171-3-II  
IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION II

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STATE OF WASHINGTON,  
Respondent

v.

MICHAEL LEE GLAVE  
Appellant

---

OPENING BRIEF OF APPELLANT

---

Appeal from the Superior Court of Pierce County,  
Cause No. 04-1-00795-1  
The Honorable Brian Tollefson, Presiding Judge

---

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**ORIGINAL**

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## **A. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR No. 1** - The Trial Court Unconstitutionally Commented On The Evidence By Providing The Jury With A Reason For Accepting The Prosecutor's Argument That Mr. Glave Sexually Abused B.B. When It Interjected Its Opinion That Hearsay Evidence Was Admissible As "Identity."

### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.1**

1. Whether The Trial Court Unconstitutionally Commented On The Evidence By Providing The Jury With A Reason For Accepting The Prosecutor's Argument That Mr. Glave Sexually Abused B.B. When It Interjected Its Opinion That Hearsay Evidence Was Admissible As "Identity"?

**ASSIGNMENT OF ERROR No. 2** - Joanne Mettler's Testimony Violated The Confrontation Clause Of The United State's Supreme Court And The State Of Washington Because It Was Testimonial And Glave Did Not Have The Opportunity To Cross-Examine B.B. Regarding The Statement Because B.B. Had No Memory Of Making The Statement To Mettler. [Error is assigned to Finding of Fact 2 and Conclusion of Law I]

### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.2**

1. Whether Joanne Mettler's Testimony Violated The Confrontation Clause Of The United State's Supreme Court And The State Of

Washington Because It Was Testimonial And Glave Did Not Have The Opportunity To Cross-Examine B.B. Regarding The Statement Because B.B. Had No Memory Of Making The Statement To Mettler? [Error is assigned to Finding of Fact 2 and Conclusion of Law I]

**ASSIGNMENT OF ERROR No. 3** - The Court Abused Its Discretion In Admitting Statements Made To Joanne Mettler By B.B. Under ER 803(a)(4), The Hearsay Exception For Medical Diagnosis, Because B.B. Did Not Understand The Medical Purpose Of The Interview And There Is No Corroborating Evidence. [Error is Assigned to Finding of Fact 2 and Conclusion of Law I]

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.3**

1. Whether The Court Abused Its Discretion In Admitting Statements Made To Joanne Mettler By B.B. Under ER 803(a)(4), The Hearsay Exception For Medical Diagnosis, Because B.B. Did Not Understand The Medical Purpose Of The Interview And There Is No Corroborating Evidence [Error is Assigned to Finding of Fact 2 and Conclusion of Law I]

**ASSIGNMENT OF ERROR No. 4** - The Court Improperly Admitted The Hearsay Testimony Of Breanna, Michael and Michelle Basich

Because The State Had Not Established B.B. Was Unavailable At The Time Of Their Testimony, And Once B.B. Testified Their Testimony Was Unnecessary And Unfairly Cumulative.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.4**

1. Whether The Court Improperly Admitted The Hearsay Testimony Of Breanna, Michael and Michelle Basich Where The State Had Not Established B.B. Was Unavailable At The Time Of Their Testimony, And Once B.B. Testified Their Testimony Was Unnecessary And Unfairly Cumulative?

**ASSIGNMENT OF ERROR No. 5** - The Court Impermissibly Limited Glave's Cross-Examination Of Detective Harai Regarding The Pierce County Prosecuting Attorney's Office Complaint That He Falsified A Police Report In A Pierce County Investigation.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.5**

1. Whether The Court Impermissibly Limited Glave's Cross-Examination Of Detective Harai Regarding The Pierce County Prosecuting Attorney's Office Complaint That He Falsified A Police Report In A Pierce County Investigation?

**ASSIGNMENT OF ERROR No. 6** - The Court Impermissibly Limited The Examination Of Harai Under ER 608(b) Once The State Elicited The Information That He Was On Administrative Leave.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.6**

1. Whether The Court Impermissibly Limited The Examination Of Harai Under ER 608(b) Once The State Elicited The Information That He Was On Administrative Leave?

**ASSIGNMENT OF ERROR No. 7** - The Court Impermissibly Denied Glave A Constitutionally Guaranteed Fair Trial When It Precluded Him From Presenting Relevant And Admissible Evidence.

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.7**

1. Whether Glave Should Have Been Allowed To Use B.B.'s Medical And School Records To Rebut Her Parents' Allegations That Her Behavior Changed After The Alleged Incident Of Sexual Abuse?
2. Whether Glave Was Denied The Right To Present Relevant And Admissible Evidence Establishing Bias Motive and Undermining The Credibility of the Prosecution Witnesses?

**ASSIGNMENT OF ERROR No. 8 - Glave Was Denied Effective Assistance of Counsel When Defense Counsel Failed to Object To Impermissible Opinion Testimony, Mettler's Identification Of Glave, The Court's Stipulation Regarding Contacts Between The Glave and Basich Families And The Scoring Used At Sentencing.**

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.8**

1. Whether It Was Error For The State To Violate The Court's Pre-trial motion in Limine Not to Call B.B. The "Victim And Glave the "Suspect, And Error For Defense Counsel Not To Object?
2. Whether Mettler or B.B.'s Parents Should Have Been Permitted To Testify To Behavioral Changes In Order To Establish That Sexual Abuse Occurred Where The Basiches Lack The Qualifications To Draw Such An Opinion And The State's Only Expert, Ms. Mettler, Said Behavior Changes "Might or Might Not" Reflect Sexual Abuse Versus Any Number Other Things And Thus Was Not Relevant or Probative?

3. Whether Mettler's Identification Of Glave As The Person B.B. Identified As Her Abuser During Her Medical Interview Was Error Because Identity Of A Non-Family Or Household Member Is Not Reasonably Pertinent To A Medical Diagnosis Of Treatment?
4. Whether The Court Ordered Stipulation Was An Insufficient Substitute For Trial Testimony?
5. Whether Trial Counsel's Failure To Object To The State's Scoring Of The Standard Range Was Ineffective Assisatnce Of Counsel?

**ASSIGNMENT OF ERROR No. 9** - Cumulatively, The Errors Deprived Glave Of A Fair Trial.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR No.9

1. Whether Cumulative Error Deprived Glave Of A Fair Trial?

**ASSIGNMENT OF ERROR No. 10** - There Was Insufficient Evidence Presented To The Jury To Support The Guilty Verdicts Because Did Not Establish The Alleged Events Occurred Between June 1 and August 31, 2003.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR No. 10

1. Whether There Was Insufficient Evidence Presented To The Jury To Support The Guilty Verdicts Because Did Not Establish The Alleged Events Occurred Between June 1 and August 31, 2003?

## **B. STATEMENT OF THE CASE**

### **Procedural Facts**

On February 20, 2004, Michael Glave was charged with two counts of child rape in the first degree contrary to RCW 9A.44.073, alleging oral genital contact occurred between Glave and a six year old neighbor girl, B.B. between August 1 and August 3, 2003. CP 1-3. A Corrected Information was filed on October 25, 2003, expanding the time frame of the two counts of child rape from August 2003 to June 1 through August 31, 2003. CP 18-19.

Glave requested records and the opportunity to depose B.B.'s, counselors and doctors. CP 21-22, 26-30. Several pre-trial hearings were held at which the trial court reviewed medical and school records *in camera* relating to B.B. RP 11/17/04; 1/4/05; 1/10/05. After reviewing the records, the court released the records under a protective order. RP 1/4/05 p.2, 12; RP 1/10/04 p.3. The court would not authorized defense interviews with B.B.'s counselor or pediatrician. RP 1/4/05 p. 14. The court did not permit the defense to establish B.B.'s history of bedwetting

by means of medical records and precluded the defense from even mentioning medical records in its opening statement. RP 54, 57. The court also ruled that Glave would be limited in presenting evidence to rebut the allegations and in cross examining State witnesses to the “day in question.” RP 15.

The court considered the State’s pre-trial motions in limine and precluded Glave from making any reference to B.B.’s counseling records, school records or medical records. CP 75-76.

Hearings on these motions began on January 19, 2005. The court excluded testimony proffered by the defendant to establish the Basich family had improper motives; biases and that would call into question their credibility. RP 15-16. Glave was also precluded from making any reference to allegations of fraudulent behavior on the part of Michael Glave and also ruled that Glave was not permitted to reference other contact between the two families unless the door was opened by the State. RP 15, CP 75-76. Finally, the court excluded as irrelevant 16 of Glave’s identified witnesses. CP 75-76. The further ruled that defendant shall be referred to as Mike Glave, and that B.B. shall not be referred to as the “victim”. RP 61, CP 75-76.

Prior to trial, the trial court conducted pre-trial hearings to

determine whether B.B. was competent to testify at trial, whether B.B.'s various statements were admissible under the child hearsay statute, whether the child hearsay statute was constitutional in light of Crawford v. Washington, *infra*, and whether Glave's statements to law enforcement were admissible. The court took testimony regarding the admissibility of B.B.'s hearsay statements to her mother, father, sister, several neighbors - Mr and Mrs. Anders, a Pierce County Prosecuting Attorney's Office forensic investigator, Keri Arnold-Harms, and a Mary Bridge Children's Advocacy Center nurse, Joanne Mettler. RP 338, CP 77-80.

The court conducted a CrR 3.5 motion to determine the voluntariness of his statements to investigating law enforcement officers. RP 63, CP 220-222.

The court ruled that B.B. was competent. RP 378.

The court also analyzed the child hearsay statute found at 9A.44.120 and determined it was constitutional in light of Crawford<sup>1</sup>. RP 392.

The court then undertook an assessment of the testimonial/non-testimonial nature of the various statements, with in the meaning of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177

(2004), made by B.B. RP 875-888, CP 72-80. After which the court ruled that B.B.'s statements to her sister, Breanna, mother and father, Michele and Michael Basich, were not testimonial and met the test for admissible child hearsay under the Ryan factors and RCW 9A.44.120. RP 880-81, 888, CP 77-80.

The court excluded statements the parents alleged B.B. made to a neighbor, Mr. Anders. RP 888, CP 77-80.

The court determined the statements to the Keri Arnold-Harms, a Prosecuting Attorney's Office forensic child interviewer working at the Child Advocacy Center, were testimonial and would not be admissible unless or until B.B. testified. RP 878, CP 77-80.

The court found the issue of whether child statements made to Joanne Mettler, a nurse employed with the Child Advocacy were "close" to those of Arnold-Harms but were not testimonial because were for the purpose of medical diagnosis and thus admissible as an exception to the hearsay rules under the ER 803(a)(4) exception for medical diagnosis or treatment. RP 879-80, CP 77-80. Defendant moved to exclude her assessment of whether child sexual abuse occurred based solely on the statements made by B.B. and her parents. RP 925, 1569-84. The court

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<sup>1</sup> The Court's assessment that the child hearsay statute is constitutional is confirmed by the recent supreme court opinion State v. Shaffer, \_\_\_ Wn.2d \_\_\_ Slip Op. (Feb 9,

granted the defense motion. RP 1584. Post trial, Glave requested a new trial based on the erroneous admission of these statements. RP 2962, CP 151-172. The court did not grant the motion. RP 2979, CP 225-227.

Subsequent to the hearings, findings of fact and conclusion of law were entered on February 15, 2005. CP. 77-80.

The court conducted a CrR 3.5 hearing, after which it determined Glave's statements were admissible. RP 323-328. Findings of Fact and Conclusions of Law were entered on May 20, 2005. CP 220-222. With respect to Det. Harai the court, the court initially ruled pre-trial that the defense could not ask any questions of Det. Harai that could lead to him to assert his Fifth Amendment rights. RP 893. The court reconsidered this ruling during the course of the trial and modified its ruling to permit a narrow line of questioning concerning the fact that Harai was on administrative leave for allegedly falsifying a police report and that the complaining party was the Pierce County Prosecuting Attorney's Office. RP 938-9, 941, 945. The defense was precluded from any further cross-examination on this topic regarding the specifics, timing and circumstances of the allegations. RP 940-41, 945. A defense motion for a mistrial based on the limitation of cross-examination was denied. RP 1713.

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2006).

At the close of the State's case in chief Glave moved to dismiss Count II. This motion was denied.

Glave objected to the giving of the State's proposed "attempt" instructions for Count II, arguing attempted child rape interjected a different intent element into the crime. RP 2668, 2672, 2673, 2805-7, 2810. CP 101-123 (Instructions 13, 14,15, 16, 17). The Court disagreed and gave the attempt instructions as proposed by the state. RP 2811. The jury returned verdicts of guilty to Count I on Child Rape in the first degree and on Count II to attempted child rape in the first degree. RP 2940-2941; CP 96, 98. Defendant's request to continue sentencing was denied (RP 2960) and sentencing and post trial motions were heard on April 22, 2005.

The court denied defendant's motion to set aside the jury verdict for failure by State to establish proof of age difference (RP 2961). The court clarified it did not rely on unpublished case law when it determined it would permit "attempt" instructions to be given. RP 2979. The court also denied Glave's post-trial motion that Mettler should not have been permitted to testify, that B.B. should not have been permitted to testify holding a teddy bear, that the court erred in limiting cross-examination of Harai and Mulkins and that he was promised by Harai that if passed a polygraph the charges would be dismissed. RP 2979.

Glave was sentenced to a standard range sentence of 140 months to life on Count I and 105 months to life on Count II to run concurrent CP 181- 193, RP 3008.

**Statement of Substantive Facts**

B.B. was seven years old she when she told her parents on September 8, 2003 that their neighbor Mike Glave sexually abused her. RP 1075. B.B. was born on August 3, 1996. RP 1156. At trial, B.B. testified Glave helped her out of the Glave hot tub where she had been playing with both Glave boys, Justin and Brandon, because she needed to go the bathroom. RP 1335, 1373. She did not remember there being a cat litter box and said there was a bathtub in the room. RP 1429-1430. There is a cat box but not a tub. RP 1400, 1429-1430. She said she pulled down her pants, went to the bathroom and pulled her pants back up. RP 1336. She said Glave then pulled her pants back down and he laid her down on the floor and kissed her “privates” then pulled her pants back up. RP 1336. She said he then pulled his pants down and exposed his “private” pushed her head toward it and asked her to lick it. RP 1336-37. She was not able to describe what a penis looked like. RP 1338. She said Glave told her not to tell her parents, sister and not to go to the police because he did not want to go to jail. RP 1337.

B.B. testified she immediately ran home, told her parents and the police came over. RP 1373, 1342, 1380. She denied telling her sister before she told her parents and expressly denied ever telling her while the two of them pulled up garbage cans or played catch. RP 1337, 1415. She testified she told her sister after she told her parents. RP 1338. She said after this happened she never went back to the Glave house. RP 1335. At trial she was sure it occurred on the day she told her parents. RP 1337, 1342, 1373, 1380.

B.B. was clear this only happened one time. RP 1351. She also said Glave helped her out of the hot tub one time only, otherwise Dana Glave was the one who assisted her. RP 1367-68. B.B. said she didn't know why she told defense counsel different answers at his interview. RP 1353, 1354, 1356, 1362. During the defense interview she said no one ever touched her privates and never touched Glave's RP 1403-1404.

B.B. denied any increase in nightmares and said she never had nightmares involving Glave. RP 1350. B.B. did not remember any interview with Joanne Mettler. RP 1348, 1387.

B.B.'s sister, Breanna, testified B.B. told her that one day when she was playing in the Glave hot tub she had to go to the bathroom. RP 1002. She told her Glave helped her out of the tub and gave her a

towel to dry off. RP 1002. She said B.B. told her Glave followed her into the bathroom and that B.B. tried to shut him out but he would not go. RP 1002. She said she went to the bathroom. RP 1002. B.B. pulled her pants up and Glave pulled them back down, laid her on the floor and kissed her on her private. RP 1002. She Glave made her do the same to him. RP. 1002. Breanna says B.B. told her what happened on a Wednesday when they were pulling up garbage cans. RP 1001, 1002, 1005, 1036. Breanna had previously told the defense attorney B.B. revealed the alleged abuse while they were playing paddleball. RP 1036. Breanna did not know the date the alleged abuse occurred but she thought it was a Saturday sometime in the beginning of July. RP 1043, 1062-63. Breanna speculated the abuse occurred sometime in early July because one day B.B. was subdued on a play date. RP 1010-12. She also did not think that Paul and Kathy Dennis were at the Glaves' when B.B. was allegedly sexually abused. RP 1052.

She said after her sister told her they stopped going over to the Glave house and they never went to the races again with the Glaves. RP 1014, 1040-41.

Breanna told B.B. she should tell her parents. RP 1005. Breanna testified she thought B.B. told her before B.B.'s August 3<sup>rd</sup> birthday. RP

1035. However, she was sure that B.B. told their parents within a couple of days while the family was watching television because if B.B. did not tell them she was going to. RP 1005-1006, 1035.

Breanna recounted how her parents called the neighbors, Mr. and Mrs. Anders. RP 1009. The Anders told them they should call the police. RP 1009. Breanna said at one time at the Graves' there was some discussion regarding inappropriate touchings. RP 1034.

B.B.'s parents Michelle and Michael Basich report that on Monday September 8, 2003 while the family was watching Monday night football B.B. told them Mike Glave had sexually abused her. RP 1077. Two days later, on Sept. 10, 2003 his wife went to the police, he had gone to work but went to the police station when she called him down to give a statement. RP 1090, 1105. He had previously told the defense counsel they had gone to the police the very next day. RP 1099 – 1100. He told how the police set up the interviews with Keri Arnold-Harms, the Prosecuting Attorney's forensic child interviewer and then being contacted and told to bring B.B back to the advocacy center for the exam with Joanne Mettler. RP 1131-32. He did not remember either Arnold-Harms or Mettler having separate discussions with the parents. RP 1133-34. He did not remember telling Arnold-Harms that B.B. had been known to

stretch the truth. RP 1140

Mike Basich testified at trial that he and Glave had been good friends up until the summer of 2003 when B.B. told him Glave ad abused her. RP 1074. He testified some time during the summer she started having nightmares and resumed wetting the bed. RP 1075-76. She had been a bed wetter up until she was five and half or six years old. RP 1076. He said these behaviors continued unabated through the time of trial. RP 1088-89 and that seem to be worse when she sees the Glave family because it is so stressful. RP 1089.

Basich said B.B. sat on her mother's lap and whispered in her ear, he heard a little gasp. RP 1108. Michelle Basich then asked B.B. to repeat for her father. RP 1108. According to Michael Basich, B.B. remained on his wife's lap and told him what happened in an audible voice. RP 1109. B.B said that Mike Glave had helped her from the Glave hot tub because she had to use the bathroom. RP 1078-79. She said she triad to close the door but Glave pushed it open and came into the bathroom. RP 1079. She said she went to the bathroom and then Glave "pulled out his private and asked her to kiss it". RP 1079. Basich did not remember if she said "yes" or "no". RP 1079 At the pre-trial hearng he said B.B. said "no". RP 678. B.B. continued telling him in an audible

voice while sitting on her mother's lap that Glave told her not to tell her parents or the police because he did not want to go jail. RP 1079. At the pre-trial hearing he said there were some questions and answers back and forth but he can't really recall because his mind was a "blur". RP 682. He described the Anders coming over. RP 1084. He was not sure whose idea it was to call them. RP 1083. He believed they told him call the police. RP 1086.

At the State's suggestion, he claims he might have "blacked out" some of B.B.'s information to him but he specifically remembers asking her if it ever happened before and B.B. told her it was just the one time. RP 1094. He could not recall when or whether he and/or his daughters attended the races with the Glaves, but he knows they attended some. RP 1111, 1126. On cross-examination he admitted going to a lot of races with the Glaves in July and August 2003. At the pre-trial hearing he testified his kids went in the Glave's hot tub 1 to 2 times per week and that he and Glave and Glave's son Brandon would go to all the races together. RP 673 He did recall the Glaves calling and bringing over a present for Breanna after B.B. told her parents about Glave. RP 1113-1115, 1121-1122. He claimed he allowed Glave over because he feared for his family, although he was not able to articulate any concrete concern regarding

retaliation, other than someone would react if they found out what was said about them. RP 1123, 1142-44.

Michelle Basich described her husband's close relationship with Glave and recounted how all the kids in the neighborhood played together. RP 1159. Her testimony regarding how frequently her children were at the Glaves was all over the board, any where from 2 to 3 time per month to many times. RP 1211, 1204, 1299. Her work schedule had both her and her husband out of the home two days per week. RP 1197, 1219. Michelle Basich also testified she did not send her children to a babysitters or daycare during the summer. RP 571, The Basich children were thus left alone several days a week without a babysitter or supervision while the parents were at work. RP 571. Breanna, the older child was only 10 years old during the summer of 2003.

Michelle testified that on Sept. 8, 2003 B.B. whispered in her ear and told her that Glave had sexually abused her. RP 1166-1168. She has testified on cross she had though the abuse happened before her birthday, and variously a week to a week and half before she told her. RP 1240, 1241. She said B.B. then went over and sat on her father's lap and whispered into his ear. RP 1168. She could not hear what B.B. told him. RP 1169. He went into a rage. RP 1169. She called the Anders to come

over. RP 1173. It was her recollection she had the girls go into another room while they told the Anders what happened. RP 1176. The Anders told them they should go to the police. RP 1263. They did not go until two days later. RP 1263. She reported Det. Harai set up the interview with Arnold-Harms, but she did not recall meeting with Ms. Arnold-Harms before the interview. RP 1267-68.

Michelle Basich said her daughter had bad dreams about the “suspect” and described on going bed wetting, appetite changes and a defiant temperament. RP 1199-1200. Ms. Basich has admitted her recollection of details is not reliable and that she cannot even recall answers give a short two weeks ago because she says she’s under “duress”. RP 1288, 1290. At trial she was unable to recall what answers she gave during previous interviews and in court testimony. RP 1246, 1252, 1254. On cross she admitted she was coloring her testimony to make her daughter’s case as strong as possible. RP 1325.

Unlike Mother’s testimony, Father does not report B.B. climbing onto his lap and whispering in his ear. RP 1108. He remembers B.B. sitting on the couch next to her mother and speaking audibly. RP 1109.

The Anders, an older couple with grown children said they were surprised to be called, but went over to the Basich house. RP 1450, 1458.

Michelle and Michael Basich are reported to have been very emotional and demonstrably angry at Glave. RP 1452, 164-65. The parents told the Anders that B.B. said she had been molested by Glave. RP 1452, 1465. The Anders soothed the situation and recommended the Basiches immediately call the authorities and obtain counseling for B.B. RP 1454, 1466. Mrs. Anders testified it was her impression the Basiches were going to contact the police right away. RP 1468.

B.B. was ultimately interviewed by Pierce County Prosecuting Attorney's Office forensic child interviewer Kelly Arnold-Harms at the Child Advocacy Center. RP 1479. Ms. Arnold-Harms is specifically trained in child interviewing techniques. RP 1472-73, 1526. B.B. told Ms. Arnold-Harms that Glave did not kiss her privates and that she did not kiss his. RP 1566. She indicated that the parents told her B.B. was known to stretch the truth. RP 1552. Defense counsel was not permitted to elicit that parents told her B.B. was "cheerful" even though the family testified B.B. was suffering from changes in behavior including being withdrawn, angry bed wetting and nightmares. RP 1551.

B.B. was also interviewed and examined by Joanne Mettler, A.R.N.P., a pediatric nurse with the Mary Bridge sexual assault unit. RP 1587-88. Mettler's examination did not reveal any physical evidence of

abuse (RP 1602), however, B.B. told her Glave had pulled down her pants and kissed her privates and that she had kissed his. RP 1599.

Glave denied the alleged abuse. RP 1663, 2441. He worked for the Bethel School district as an alarm technician and was put on administrative leave on Sept. 12, 2003. RP 2427. At the time he was put on leave he did not know the nature of the charges or the complaining witness. RP 2427. He voluntarily went in to the police station and gave a statement to Det. Harai and Dogeagle. RP 2433, 2441. Glave believed they promised to dismiss the charges if he took a polygraph. RP 1851. He took and passed a polygraph administered by Sam Holden, a retired Tacoma Police Officer. CP 152-172.

Glave and his wife Dana, her step-father, Paul Denny, their son Brandon and her sister Annette, detailed their family schedule and houseguests visit throughout the summer. RP 1927-1932 (Brandon); 2096 (work schedules); 2099, 2200- 2242 (race day schedule); 2106 (race calendar). Dana's sister Annette came over with her family almost every Sunday for a family dinner. RP 2124, 2133. Glave also described his involvement with racing and the time he spent preparing for the races as very demanding. RP 2394-2399, 2401.

Every Saturday was taken up by racing. RP 2396. During the

work week both parents worked. RP 2096. Dana Glave testified that Glave was gone on a school field trip from June 2 through the 5, 2003. She recounted in specific detail the races the family attended and the times they were out of town. RP 2200 through 2242. She also presented photographs of the downstairs bathroom where the alleged sexual abuse occurred. RP 2144-2154.

Mrs. Glave's parents, Paul and Kathy Dennis, were up vesting for approximately one month from mid-June through mid-July. RP 2095, 2120 (left July 15, 2003). They would watch one Glave son while the other was babysat by Mrs. Glave's sister. RP 2097. Neither Mr. Denny nor his wife, Kathy, permitted the kids to go in the hot tub until Dana came home. RP 2100, 2105. Once Mrs. Glave's parents left, both boys spent their days at the babysitters until Dana Glave picked them up around 5:00 pm and brought them home. RP 2126-27.

Subsequent to the reports by B.B. and the interview by Harai and Dogeagle the relationship between the two families deteriorated. There were numerous reports by the Basiches that Glave was violating a mutual restraining order by doing such things as picking up his sons at the bus stop, and mowing his lawn. The Glave's contended that the Basiches would intentionally send their children out to harass Glave when he attempted to

do simple home maintenance activities, such as mow the lawn, forcing him to go into the house. CP These activities were the subject of several bail hearings after which the trial court did not find any violation and did not change Glave's release status. CP

### C. ARGUMENT

#### **Issue No. 1-The Trial Court Unconstitutionally Commented On The Evidence By Providing The Jury With A Reason For Accepting The Prosecutor's Argument That Mr. Glave Sexually Abused B.B. When It Interjected Its Opinion That Hearsay Evidence Was Admissible As "Identity"**

Wa. Const. art. 4, Sec. 16<sup>2</sup> prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case or instructing the jury that matters of fact have been established as a matter of law. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "Thus, those actions or words which are deemed to be a comment are those which directly or impliedly convey the judge's personal opinion of the weight or sufficiency of evidence submitted." State v. Knapp, 14 Wn. App. 101, 112-113, 540 P.2d 898 (1975). A statement by the judge is a comment on the evidence "if it

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conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial.” State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), rev. denied, 95 Wn.2d 1008 (1981). A comment is constitutional error where it expresses “the court’s attitudes toward the merits of the case or the court’s evaluation relative to a disputed issue is inferable from the statement.” State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706 (1986) (emphasis in original).

Comments by the court must be reviewed in the light of the facts and the circumstances of the case. State v. Painter, 27 Wn. App. at 715, State v. Jacobsen, 78 Wn.2d 491, 495, 447 P.2d 884 (1970).

The constitutional prohibition against comment on the evidence by the court is strictly enforced, Seattle v. Arensmeyer, 6 Wn. App. 116, 491 P.2d 1305 (1971). Due process of law requires that a defendant receive a trial by an impartial jury free from outside influences. Sheppard v. Maxwell, 383 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966). Since a comment on the evidence violates a constitutional prohibition, the defendant’s failure to object or move for a mistrial does not foreclose raising the issue for the first time on appeal. State v. Lampshire, 74 Wn.2d 888,

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<sup>2</sup> Wa. Const. art. 4, Sec. 16: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

893, 447 P.2d 727 (1968). Whether or not the statement was intended by the court as a comment is irrelevant. Lampshire, 74 Wn. 2d at 892.

In the case at bar, the prosecutor was attempting to elicit testimony from a neighbor, Jeanne Anders, that Michelle Basich, B.B.'s mother told her that B.B. told Michelle, that B.B. had been sexually molested by a neighbor. RP 1465. The Prosecutor then asked for the name of the alleged molester. RP 1465. Defense counsel appropriately objected on the basis the information requested called for hearsay. The Court responded, "It's a matter of identity, correct?" Defense counsel answered, "Yes, your honor." The court ruled, "Objection's overruled." RP 1465. The prosecutor then elicited that the neighbor in question was Mike, from across the street. This was a clear reference to Mike Glave, the defendant.

The court overruled the defense objection that the State was interjecting hearsay in to the trial and then provided the jury with the reason why the jury should adopt the accusations of the prosecutor: by stating, "It's a matter of identity."<sup>3</sup> RP 1465. Here, the State was implying that, not only did a crime occur but that defendant Glave

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<sup>3</sup> Moreover, the court was in error in admitting the statement as "identity". Identity is not an exception to the hearsay rule. See ER 801 (definition of hearsay, ER 802 – rule excluding hearsay and ER 803 – exceptions. Identity is identified as an exception to ER 404(b) exclusion of propensity evidence; however, it is not in issue when a defendant simply denies he committed the crime. State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987) (Identity is not at issue because the defendant did not claim mistaken identity, he simply doing the acts with which he was charged.)

committed it. The court's comment that it was a "matter of identity" clearly implied that, it too believed, in fact, a crime occurred and it was merely a question of who committed it and that in this case by permitting the hearsay answer that this particular defendant was guilty of the charged offenses. In sum, the judge impermissibly influenced the jury with personal opinion as to how the jury should weigh and decide the issue of guilt. The Judge's comments reflect the Judge's assumption that a crime has been committed and that the only issue is whether Glave was the person identified as committing the crime.

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d at 838. In such a case, "[t]he burden rests on the State to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." Id. (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). In applying the constitutional harmless error analysis to a case involving judicial comment, our Supreme Court has held:

[E]ven if the evidence commented upon is undisputed, or "overwhelming," a comment by the trial court, in violation of the

constitutional injunction, is reversible error unless it is apparent that the remark could not have influenced the jury.

State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963).

The defense posed by Glave was that he did *not commit the crime*. A reasonable juror could have been influenced by the judge's remark which conveyed the Judge's opinion that a crime *had been committed* and it was only a matter of who committed it. The right to due process requires reversal because a defendant must receive a trial by an impartial jury free from outside influences.

**Issue No. 2 - Joanne Mettler's Testimony Violated The Confrontation Clause Of The United State's Supreme Court And The State Of Washington Because It Was Testimonial And Glave Did Not Have The Opportunity To Cross-Examine B.B. Regarding The Statement Because B.B. Had No Memory Of Making The Statement To Mettler [Error is assigned to Finding of Fact 2 and Conclusion of Law I]**

The Sixth Amendment to the United States Constitution and Article 1, § 22 of the Washington Constitution<sup>4</sup> protect a criminal defendant's right to confront and cross-examine all witnesses against him at trial. Defense timely objected to the testimony of Jeanne Mettler, ARNP employed by the Mary Bridge Children's Advocacy Center as impermissible opinion and hearsay testimony that violated the protections of Crawford v. Washington, supra.

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<sup>4</sup> State v. Shaffer, \_\_\_ W.2d \_\_\_ (Feb. 9, 2006); State v. Vincent, \_\_\_ Wn.2d \_\_\_ 120 P.3d 120 (2005), fn.20 - Whether the Washington State constitution provides more protections is apparently not settled, however after Crawford, it appears that face to face

RP 381, 1585. The court ruled Mettler's testimony was "close" to the testimonial statements given to Arnold-Harms but that it was not "testimonial" because it was for the purpose was medical diagnosis or treatment and admissible as an exception to the hearsay rules, and thus admissible on that basis. ER 803(a)(4). RP 879, 880.

a. The right to confront witnesses is not governed by evidentiary rules of hearsay.

The Sixth Amendment to the United States Constitution and art.1 section 22 of Washington Constitution guarantees an individual the right to confront witnesses face to face. Until 2004, an out-of-court statement was admissible under Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980), so long as the statement had adequate indicia of reliability, which could be inferred if the statement fell within a firmly rooted hearsay exception. State v. Thomas, 150 Wn.2d 821, 855-56, 83 P.3d 970 (2004) (citing Roberts, 448 U.S. at 66). The United States Supreme Court recently overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a "firmly rooted hearsay exception," or was given under circumstances showing it to be trustworthy. Crawford, 124 S.Ct. 1354, 1364. Crawford rejected decisional law that equated the confrontation clause analysis with admissibility under

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confrontation and right to cross examination is required for testimonial statements under

hearsay rules. *Id.* at 1370-71. The Court reasoned that the Sixth Amendment is not based on the evidence's reliability. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 1370. Thus, the fact that the court admitted B.B.'s statements under ER 803(a)(4) as statements made for the purpose of medical treatment or diagnosis has no bearing on whether they are, in fact, testimonial and subject to the searching scrutiny of face to face confrontation.

Crawford "reject[ed]" the view that the reliability-based framework of Ohio v. Roberts, 448 U.S. at 66, or the rules of evidence, govern the admissibility of out-of-court statements, ruling:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

124 S.Ct. at 1375. Crawford reasoned that because the Sixth Amendment provides a defendant the right "to be confronted with witnesses against him" and since a "witness" is defined as a person giving testimony, the confrontation clause requires in person testimony, or a full opportunity for cross-examination where the witness was unavailable, in order to admit out-of-court statements as "testimonial evidence." 124 S.Ct. at 1364. The question becomes is a

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the Sixth Amend.

particular out-of-court statement "testimonial."

Crawford did not define the precise scope of "testimonial evidence." Id. at 1374 ("we leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"). The Court did set out the "core class of 'testimonial' statements" as including not only formal affidavits and confessions to police officers, but also "pretrial statements that declarants would reasonably expect to be used prosecutorially." Id. at 1364. Additionally within the "common nucleus" covered by the Confrontation Clause are, "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id.; see State v. Shaffer, \_\_\_\_ Wn.2d \_\_\_\_ (Feb. 9, 2006); State v. Rivera, 844 A.2d 191 (Conn. 2004) (interpreting Crawford as defining testimonial evidence to include statements made under circumstances where reasonable person would know they would be available for use by the police or prosecution).

The history and purpose of the confrontation clause were the underlying forces determining the Crawford decision. The Framers intended to guard against ex parte accusations. Id. The principle evolved from the idea that physical confrontation would eliminate the risk that a person making a false accusation could avoid scrutiny by declining to repeat the falsehood in court. Id. at 1360-61. Additionally, it was premised on the idea that cross-

examination is an "engine for the truth," which permits the fact-finder to understand the witness's motives, biases, and ability to accurately perceive the incident when deciding whether to believe the accusations. Id. at 1363. Finally, it was based on a notion that one making an accusation should do so in person and in public, so that the weighty claim of criminal activity is delivered at a time where the accuser is aware of the repercussions it may cause, and thus presumably less likely to offer an untrue allegation. Id.; see Sherman Clark, An Accuser-Obligation Approach to the Confrontation Clause, 81 Neb. L.R. 1258, 1267 (2003) (discussing cultural importance of accuser making an in person accusation).

b. Because B.B.'s statements to Mettler are testimonial, Mettler's statements concerning B.B. can not be admitted without providing Mr. Glave the opportunity to confront her.

For purposes of determining whether a statement deprives a defendant of the right to confrontation under the Sixth Amendment, it is irrelevant whether or not a statement might be admissible under the hearsay rules.<sup>5</sup> Crawford, 124 S.Ct. at 1375. At its core the Confrontation Clause seeks to guard against ex parte accusations. 124 S.Ct. at 1364. The right evolved from the idea that physical confrontation would eliminate the risk that

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<sup>5</sup> Here, the trial court incorrectly concluded pre-trial that B.B.'s statements to Ms. Mettler were not testimonial and that they were admissible under the ER 830(a)(4) exception to the hearsay rule as statements made for the purposes of medical treatment or diagnosis. RP 879, 1585. Statements admitted under this hearsay exception do not turn on the unavailability of a witness.

a person making a false accusation could avoid scrutiny by declining to repeat the falsehood in court. Crawford at 1360-61. The out-of-court statement at issue here is of precisely this sort.

The confrontation clause precludes the use of out of court testimonial statements. The Crawford court said the general rule is that a testimonial statement is a statement that the out of court declarant “would reasonably expect to be used prosecutorially.” Crawford at 1364.

The definition the Supreme Court ultimately gives to the concept of testimonial statements is obviously of critical importance in determining whether the new confrontation clause analysis adopted by Crawford affects only a few core statements or applies to a broader class of accusatorial statements knowingly made to individuals working on behalf of the government. See R. Mosteller, “Testimonial” and the Formalistic Definition – A Case For An “Accusatorial” Fix, *Criminal Justice*, Summer 2005, Vol. 20 No. 2 (ABA Section of Criminal Justice.)

Recently, our State Supreme Court has grappled with the meaning of “testimonial.” State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005), State v. Shaffer, \_\_\_\_ Wn.2d \_\_\_\_ (Feb. 9, 2006); “Of the testimonial statements identified as such in Crawford, the common thread binding them together was some degree of involvement by a government official, whether that person was acting as a police officer, as a justice of the peace, or as an

instrument of the court.” Id. The court in Crawford went on to say that casual remarks made to family, friends, and non-government agents are generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused. Id. at 51; accord Davis, 154 Wash.2d at 304, 111 P.3d 844.”

In Shaffer, the court found statements made by a toddler to her mother were not testimonial. The conversation was initiated by the child and while the statements were “not entirely spontaneous” the mother’s questions were what one would expect of a concerned parent rather than a professional interview or structured interview. Furthermore, in Shaffer, the court relied on the fact the police were not involved and there was no reason to expect that the statements would be used at trial. It was for these reasons the Shaffer court concluded the child’s statements to her mother were not testimonial and thus, did not run afoul of the protections announced in Crawford.

Similarly the Court analyzed statements given to her mother’s friend. The Court considered the statements to the friend a “closer question.” The majority of the court considered the friend’s history as a police informant but noted she was not acting for any law enforcement agency at the time she talked to child, and, importantly, the child had no reason to expect that her statements would later be used in court. The

concluded, that on balance, the non-videtaped statements were not testimonial.

Justice Chambers' concurring opinion came to the conclusion statements to the friend were testimonial, rejecting the majority's heavy reliance on the fact the friend was not a law enforcement officer, "The fact that a statement is given to a government official is only one factor to be considered when determining whether evidence is "testimonial" for the purposes of the Sixth Amendment confrontation clause, albeit an important one. Crawford, 541 U.S. at 51-54." Justice Chambers predicts, "what is and is not testimonial under Crawford will be a thorny and difficult issue for trial judges" and offers guidance to the lower courts. He acknowledges that the category of statements made under circumstances that would lead an objective witness to believe the statements would be available for use later at trial, will be the most difficult. He agrees with the majority that, "Obviously the Crawford court intended an "objective" test with respect to whether or not a statement would be available for use at trial at a later time." He concludes the statements made to the family friend would "objectively" be found to be testimonial. He reviewed the following factors, while the friend was not a law enforcement officer she not merely a family friend. "She testified that she had over 10 years' experience as a volunteer investigator and confidential informant for the

Federal Bureau of Investigation, United States Secret Service, Sumner Police Department, Tacoma Police Department, and various drug and gang task forces.” The friend initiated the first interview knowing the defendant had been charged with child rape. The friend solicited statements from the child, rather than the child making statements spontaneously. It was Justice Chamber’s reasoned view that in these types of circumstances, an objective witness would understand from the totality of the circumstances that child’s statements made to the mother’s friend would be used at trial.

The circumstances establishing the testimonial nature of B.B.’s statements to Mettler are compelling in this case. Mettler testified she told B.B. she would give all of her information to the police. RP 512, 528. Father also indicated he when he was told to bring B.B. in for the Mettler exam he was told it was part of the police investigation. RP 726. As well, B.B.’s father told B.B. Mettler worked for the police. RP 726, 1140. Mettler said most of her cases are based on referrals from police, CPS or other medical providers who suspect abuse. RP 1590. She conducts her exams at the same location as the Prosecuting Attorney’s forensic interviewer. RP 1591. Mettler confirmed that she frequently testified in court (RP 501, 543) and is mandated to report all disclosures of sexual abuse. RP 553 Mettler is not paid by the Basich family, but rather by the State for her services. Neither B.B. or her family had any role in setting up the interview with Ms. Mettler, it was all handled by the forensic

interviewer or law enforcement, further substantiating a finding that the Mettler interview and statements given by B.B. were testimonial. RP 519, 1132. Under any formulation of testimonial, a reasonable person would expect the statements made to Ms. Mettler to be used prosecutorially, since she explicitly stated she would forward all of the information she obtained to the police. The totality of the circumstances and the context of B.B.'s statements to Mettler support a finding by this court that statements are testimonial, as a statement knowingly given in response to structured questioning to which B.B. was told would be reported to the police. So even though B.B. did not understand that she was being examined for a medical purpose (RP 510) she did understand that her statements would be used by law enforcement officers against Glave and objective witness would understand from the totality of the circumstances that they would be used at a trial. *cf* 124 S.Ct. at 1364. To hold otherwise would be to engage in farce and perpetuate a fiction. For these reasons the courts Finding of Fact 2 and Conclusion of Law I are not supported by substantial evidence. CP 77-80.

Consequently, B.B.'s statements given to Mettler are testimonial and admission of B.B.'s out-of-court statement deprived Mr. Glave of his federal and state constitutional rights to confront B.B. when Ms. Mettler testified regarding the accusatory statements made by B.B..

c. B.B. was unavailable for cross examination regarding her statement to Mettler

B.B. was “unavailable” for cross-examination because she did not recall making any statements about sexual abuse to Ms. Mettler, thus Mr. Glave was without an opportunity to cross examine B.B. on the purported statements. In State v. Rohrich, 132 Wn.2d 472, 939 P2d 697 (1997), the State Supreme Court determined that the Confrontation Clause is violated if hearsay statements of a child are admitted in cases where the child does not “testify”. At trial in Rohrich, the child victim took the stand but did not testify to the alleged sexual contact. In affirming the Court of Appeals reversal of the trial court’s admission of the hearsay statements, Rohrich court determined that a witness must actively testify in order to satisfy the Confrontation Clause, emphasizing that “testifies” means takes the witness stand and “and describes the acts of sexual contact alleged in the hearsay.” Rohrich, 132 Wn.2d at 481.

Two years later, in State v. Clark, 139 Wn.2d 152, 985 P.2d 377 (1999), where the witness denied she was molested and only hearsay accounts of her prior statements were admitted, this court found the witness available since she did testify and asserted the hearsay statements were lies. Clark, 139 Wn.2d at 159.

Here, B.B. did not recall ever discussing the alleged incident with Mettler. RP 1348, 1387. This is insufficient under Rohrich and Clark. Because Clark requires the declarant be "asked about ... *the* hearsay

statement," 139 Wn.2d at 159, 985 P.2d 377, it necessarily follows that she be asked about the *contents* of that statement to afford the defendant a meaningful opportunity for cross-examination. Rohrich, 132 Wn.2d at 478.

Clark must be read in light of United States v. Owens, 484 U.S. 554, 98 L.Ed.2d 951, 108 S.Ct. 838 (1988), in which the Court determined a defendant's confrontation rights were not violated by introduction of victim's out-of-court identification of defendant as his assailant, even though victim admitted that he could not remember seeing his assailant or whether any visitor at hospital had suggested that defendant was his assailant the witness, who was unable to identify his assailant, was available for cross examination because he could describe the details of his assault. As a result of injuries suffered in an attack at a federal prison, correctional counselor John Foster's memory was severely impaired. Nevertheless, in an interview with the investigating FBI agent, Foster described the attack, named respondent as his attacker, and identified respondent from photographs. At respondent's Federal District Court trial for assault with intent to commit murder, Foster testified, that he clearly remembered so identifying respondent. On cross-examination, however, he admitted that he could not remember seeing his assailant, seeing any of his numerous

hospital visitors except the FBI agent, or whether any visitor had suggested that respondent was the assailant. Defense counsel unsuccessfully sought to refresh his recollection with hospital records, including one indicating that he had attributed the assault to someone other than respondent. Owens, at 554. In this context, the Supreme Court held the witness's lack of memory as to the identity of his assailant did not make him unavailable in the constitutional sense, reasoning the defendant could still "vigorously cross examine the witness, call into question his memory and credibility, and argue the weakness of his testimony to the jury." State v. Bishop, 63 Wn. App. 15, 22, 816 P.2d 738 (1991) (citing United States v. Owens, 484 U.S. at 557-60.) Unlike Owens, where the witness clearly remembered identifying the defendant and the defendant was able to cross examine the witness regarding his inability to explain the basis of his identification, Glave was not able to address any of B.B.'s statements to Mettler because of her complete lack of memory as to ever having made the statements. Owens at 556,

In re Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004), a plurality opinion issued prior to Crawford, this court found the child victim available for Confrontation Clause purposes, reasoning that Grasso had the opportunity to fully cross-examine the witness where she had been (1) questioned about the abuse ("who it was that touched her in a bad way"); and (2) had been

questioned about her hearsay statements (“Do you remember telling the doctor your dad touched you in a bad way?”); and (3) had responded she had been telling the truth when she made her hearsay statements to the doctor. In re Grasso, 151 Wn.2d at 9, 16. And while a plurality decision is not binding on this court, In re Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004), Grasso is easily distinguished from this case on its facts and by the fact Grasso did not analyze the requirements of Crawford, but rather relied on the child-hearsay statute as sufficient support for their admission. Id., RCW 9A.44.120. Ms. Mettler’s testimony relaying B.B.’s identification of the defendant and her statements regarding his alleged activities are without question accusatory statements, and it does not matter whether they might be admissible under some rule of evidence. As accusatory statements to a sexual abuse investigator investigating a crime they are at the core of protections afforded by the Sixth Amendment the right of confrontation. Thus, it was error to permit testimony by Ms. Mettler that relayed the accusatory hearsay statements and identified Glave as the molester.

**Issue No. 3 - The Court Abused Its Discretion In Admitting Statements Made To Joanne Mettler By B.B. Under ER 803(a)(4), The Hearsay Exception For Medical Diagnosis, Because B.B. Did Not Understand The Medical Purpose Of The Interview And There Is No Corroborating Evidence [Error is Assigned to Finding of Fact 2 and Conclusion of Law I]**

This court reviews the trial court's evidentiary decisions under an abuse of discretion standard. State v. Lane, 125 Wn. 2d 825, 831, 889 P.2d 929 (1995). A court abuses its discretion when it exercises such discretion in a manifestly unreasonable way or based on untenable grounds or reasons. State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993) (citing State ex rel Carrol v. Junker, 79 W.2d 12, 26, 482 P.2d 775 (1971)).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' ER 801(c). Unless a rule or statute provides otherwise, hearsay is not admissible at trial. ER 802.

Under ER 803(a)(4), the hearsay rule does not exclude '{s}tatements made for the purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.' "The rule states that the hearsay exception applies only to statements reasonably pertinent to medical diagnosis or treatment. Thus statements as to causation (I was hit by a car) would normally be admissible, but a statement attributing fault (driven by Jane Doe) may not be. Tegland, Washington Practice, p. 395 (2005); In re Penelope B., 104 Wn.2d 643,

656, 709 P.2d 1185 (1985); State v. Huynh, 107 Wn. App. 68, 74-75, 26 P.3d 29 (2001)(statements characterizing event as assault and naming alleged assailant not reasonably pertinent to diagnosis and treatment.) The rationale underpinning the medical diagnosis exception is that the patient will be motivated to be truthful and provide reliable information so as to obtain appropriate medical care. State v. Bishop, 63 Wn. App. 15, 24, 816 P.2d 738 (1992) fn. 8 (Comment ER 803(a)(4)); State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 rev. den 112 Wn.2d 1024 (1989) (adopting the Renville test, United States v. Renville, 779 F.2d 430, 436 (8th Cir.1985)).

Washington courts have recognized that "it is not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability." State v. Ashcraft, 71 Wn. App. 444, 457, 859 P.2d 60 (1993) (distinguishing Renville ); see also State v. Kilgore, 107 Wn. App. 160, 183, 26 P.3d 308 (2001), aff'd, 147 Wash.2d 288, 53 P.3d 974 (2002); State v. Florczak, 76 Wn. App. 55, 65, 882 P.2d 199 (1994). If corroborating evidence supports the hearsay statement of a very young child, and it appears unlikely that the child would have fabricated the cause of the injury, then the statement can be admitted under the medical treatment exception, even without

evidence that the child understood the purpose of her statements. Florczak, 76 Wn. App. at 64-65, 882 P.2d 199; see also Kilgore, 107 Wn. App. at 183, 26 P.3d 308. But see State v. Carol M.D., 89 Wn. App. 77, 87, 948 P.2d 837 (1997) (holding that the nine year old victim was not too young to understand the importance of being truthful with her therapist), *withdrawn in part*, 97 Wn. App. 355, 983 P.2d 1165 (1999). Upon a motion for reconsideration by defense counsel, the court precluded Mettler from testifying that it was her opinion, based on the statement made to her from the child and the child's parents that there was "probable sexual abuse" relying on State v. Carlson, 80 Wn. App. 116, 124, 906 P.2d 999 (1995). RP 1583-84.

The court admitted Ms. Mettler's comments under the medical treatment exception to hearsay. RP 879-80. Here, she conducted a one-time one hour and twenty minute interview with parents and child that did result in any treatment or admissible diagnosis. RP 1603, 1604, 519, 520, 1566. There were no physical findings corroborating the alleged sexual abuse. RP 1602. She said that in 98% of the cases there are no physical findings. RP 504, 1595, 1601. Father's impression was that B.B. did not know it was a medical examine. RP 728. Mettler confirmed Father's impression and reported B.B. did not know why she was there and that she told B.B. she

would send all her information to the police. RP 510, 512, 1600. Ms. Mettler testified the appointment is typically set up by some one other than the complaining witness's family, such as a case worker or law enforcement officer. RP 519.

Here B.B. did not understand that her statements were necessary for medical treatment or diagnosis, she did; however, understand her statements would go to the police. There was there was no corroborating evidence. There are no supporting physical findings and B.B.'s allegations have varied significantly from one telling to another. For instance, B.B.'s statements to Keri Arnold-Harms, an expert trained in forensic child interviews, B.B. expressly denied any actual oral-genital contact between B.B. and Mr. Glave. RP 1566. In contrast, in her statements to Mettler B.B. says there was contact. RP 1600. Thus, it was error to permit Mettler to testify regarding the statements made to her by B.B. under the ER 803(a)(4) exception to hearsay. For these reasons the trial court's Finding of Fact 2 and Conclusion of Law I are not supported by substantial evidence. CP 77-80.

A statement admissible under this exception is also subject to exclusion under ER 403 if unnecessarily cumulative or prejudicial. In re Penelope B, 104 Wn.2d at 656. Here, even if the statement was

admissible, which does not appear to be, it was cumulative and unfairly prejudicial. This case came down to B.B.'s word against Glave's. The State had B.B.'s own testimony for the jury. The jury was able to view and assess her credibility first hand. Repeatedly admitting statements made to others permitted the State to present B.B.'s allegations not once but five times. The sheer repetition bolstered B.B.'s credibility to the State's unfair advantage.

**Issue No. 4 - The Court Improperly Admitted The Hearsay Testimony Of Breanna, Michael and Michelle Basich Because The State Had Not Established B.B. Was Unavailable At The Time Of Their Testimony, And Once B.B. Testified Their Testimony Was Unnecessary And Unfairly Cumulative.**

As the Rohrich Court noted,

**"the Confrontation Clause prefers the State elicit the damaging testimony from the witness while under oath in a face-to-face confrontation. "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986).**

The constitutional preference for live testimony may be disregarded in only two circumstances: (1) when the original out-of-court statement is inherently more reliable than any live in-court repetition would be; or (2) when live testimony is not possible because the declarant is unavailable, in which case the court must settle for the weaker version.

The first exception applies only to those firmly rooted hearsay exceptions which, by their nature, are most reliable when originally made. See Inadi, 475 U.S. at 394, 106 S.Ct. at 1125-26 (co-conspirator statements made during the conspiracy); White, 502 U.S. at 355-56, 112 S.Ct. at 742-43 (spontaneous declarations and statements made to doctor in the course of receiving medical care). Statements falling within this limited class are so treated because they "derive much of their value from the fact they were made in a context very different from trial" and "[e]ven when the declarant takes the stand, his in-court testimony seldom will reproduce a significant portion of the evidentiary value of his statements during the course of the conspiracy." Inadi, 475 U.S. at 395, 106 S.Ct. at 1126. Also see White, 502 U.S. at 355-56, 112 S.Ct. at 742-43 (the reliability of a spontaneous declaration "cannot be recaptured even by later in-court testimony").

For hearsay statements not falling within this small class of "firmly rooted" exceptions, the proffered hearsay is considered "a weaker substitute for live testimony." Inadi, 475 U.S. at 394, 106 S.Ct. at 1126. Under the second exception, the State may admit the hearsay if it "either produce[s], or demonstrate[s] the unavailability of the declarant whose statement it wishes to use against the defendant." Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980).

Turning to the case at hand **we note child hearsay admitted under RCW 9A.44.120 does not fall within a firmly rooted hearsay exception.** See Wright, 497 U.S. at 817, 110 S.Ct. at 3147-48; Ring v. Erickson, 983 F.2d 818, 821 (8th Cir.1992). Nicki Noel Vaughan, The Georgia Child Hearsay Statute and the Sixth Amendment: Is there a Confrontation? 10 Ga.St.U.L.Rev. 367, 380 (1994) ("Child hearsay exceptions, like the residual exceptions, are not

considered to be traditional, firmly rooted exceptions...."). Unlike the firmly rooted exceptions, nothing about child hearsay indicates the hearsay statement would be more reliable than an in-court declaration of the same accusation. Accordingly, the **Confrontation Clause requires the testimony to be presented in court by the witness first unless the witness is unavailable**, in which case the "weaker substitute" alone may be admitted if reliable. *See Rohrich*, 82 Wn.App. at 678, 918 P.2d 512 ("When a conviction rests entirely on out-of-court statements, the right of confrontation is critical and the unavailability of the declarant must be certain."). Here, the child was available and thus the Confrontation Clause's preference for live testimony requires that she herself testify as to the acts of sexual contact alleged in the hearsay as a condition to its admission under RCW 9A.44.120.

State v. Rohrich 132 Wn. 2d 472, 479-481, 939 P.2d 697, 701 - 703 (1997)(emphasis added), citing also State v. Segerberg, 131 Conn. 546, 41 A.2d 101, 102, 157 A.L.R. 1355 (1945) ("testimony is admitted in certain types of cases, including indecent assault upon children, **when the complainant first has testified, in court, to the facts of the alleged occurrence....**")(emphasis added).

Trial counsel timely objected to the testimony of Breana, Michelle and Michael Basich. RP 863-70 (pre-trial) 990. CP 40-55. B.B. did not testify before her parents or her sister testified and, thus, the admission of their testimony regarding statements attributed to B.B. was error. As the Rohrich court notes, there is no justification for producing the "weaker

substitute” when the original declarant is available to testify in-court. The error is more grievous in a case such as this where the credibility of B.B. is continually bolstered by other witnesses repeating statements alleged made by her, even though the statements and recollections vary from telling to telling. The very purpose for such repetition is, as the prosecution knows, that the cumulative impact on the jury cannot be discounted. In fact the whole thrust of the State’s closing argument was B.B. should be believed because she made statements that were consistent enough to a number of people. RP 2829-2845.

**Issue No. 5 - The Court Impermissibly Limited Glave’s Cross-Examination Of Detective Harai Regarding The Pierce County Prosecuting Attorney’s Office Complaint That He Falsified A Police Report In A Pierce County Investigation.**

Glave asserts that he was denied his right to present a defense under the Sixth Amendment and article I, section 22 of the Washington Constitution. The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend. 6; Wash. Const. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Hudlow, 99 Wash.2d 1, 14-15, 659 P.2d 514 (1983). The Sixth Amendment’s Confrontation Clause, made applicable to the States through the Fourteenth Amendment, Pointer

v. Texas, 380 U.S. 400, 403-05, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Davis v. Alaska, 415 U.S. at 315, provides 'in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' The Clause envisions "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Ohio v. Roberts, 448 U.S. 56, 63-64, 100 S.Ct. 2531, 65 L.Ed2d 597 (1980) *reversed on other grounds* Crawford v. Washington, *supra*.

In the constitutional sense, "confrontation" means more than mere physical confrontation. Davis, 415 U.S. at 315-16. The primary and most important component is the right to conduct a meaningful cross examination of adverse witnesses. State v. Foster, 135 Wash.2d 441, 456, 957 P.2d 712 (1998). The purpose is to test the perception, memory, and credibility of witnesses. State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

"It is fundamental that a defendant charged with a crime should be given great latitude in the cross-examination of a prosecution witness to

show motive or credibility.” State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996) *quoting* State v. Peterson, 2 Wn. App. 464, 466, 469 P.2d 980 (1970). Because this case turns on witness credibility the court’s limitation on cross-examination is not harmless error and Glave’s convictions must be reversed.

Here, cross-examination of Detective Harai on his employment issues concerning falsifying police reports was relevant and central to Glave’s defense. This case boiled down to B.B.’s word against Glave’s. Harai was the police officer who interrogated Glave regarding the allegations. Harai is the only officer who wrote a report of the interview he and Deputy Dogeagle conducted with Glave. RP 1756. Harai did not take any notes during the interview. RP 1746, 1747. Even though Harai does not remember when he typed up the October 23, 2003 interview (RP 1683, 1734), Harai included what he attributed as a direct statement defendant that raised a red flag with him that was not contained in the recorded portion of the interview. RP 1655, 1761-62. Harai’s red flag statement was that Glave said he would not “prey” on a young child like B.B. because she was a storyteller and a tattle-tale. This testimony was contrary to Glave’s recollections of specifics of the interview. RP 2437.

During the pre-trial hearings Harai testified his report was printed

on December 17, 2003, almost two months after the October 23, 2003 interview. RP 129. Harai further testified he the November 6, 2003 “entered on” date did usually meant the date the report was prepared on. RP 129. Contrast his explanation for the lag in preparing the report to his trial testimony in which he changed the time frame for the preparation date, claiming that he probably preparing the report before November 6, 2003. RP 1770. Obviously, Harai and the State felt the need to enhance his memory before the jury by insinuating that even though he did not take any notes, he should be perceived as accurate in relating his memory that Glave’s purported statement involving preying on small children is direct quote.

By testifying these words “raised a red flag” Harai raised a “red flag” with the jury. Harai’s “red flag” opinion presented by the State after it took pains to establish that he was an experienced and trained law enforcement officer skilled in interrogation and the investigation of child sexual abuse crimes, suggested the words were probative of guilt on Glave’s part. Curiously, Dep. Harai did not memorialize this “red flag” in Glave’s voluntarily given taped statement.<sup>6</sup> RP 131. This suggests Mr.

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<sup>6</sup> Glave does not have a high school diploma or even a GED, RP 2383 and Glave’s grammar and word usage during his direct and examination support the contention that he would not use the word “prey”.

Glave did not, in fact, use these words that raised a “red flag.” Because the State pitted Glave’s credibility against Harai’s, and labored mightily in front of the jury to demolish Glave’s credibility with employment reviews and the like, Glave was entitled to lay bare for the jury Harai’s credibility problems, including the investigation and allegation that he falsified a police report in another Pierce County Superior Court case, in great and exacting detail in order to let the jury make an informed decision.

In support of Glave’s claim that he did not say he “prey” on young children, Dep. Dogeagle says it was his recollection that Harai’s report gave the “gist” of the conversation. RP 101-2, 1836. Dogeagle did not take any notes or prepare any statements of the interview and had to rely on Harai’s report for his testimony. RP 1830, 1835. During the pre-trial CrR 3.5 hearing Dogeagle did not use the word “prey, yet at trial he parroted that damning phrase for the benefit of the jury, thus Harai’s credibility and veracity were also at issue with Dogeagle’s testimony. RP 101-2, 1827, 1837.

Moreover, Harai was not immune from searching cross-examination because he might have claimed the right not to answer under the Fifth Amendment. Generally, a person accused of a crime has a Sixth Amendment right to compel attendance by witnesses. State v. Lougin, 50

Wn. App. 376, 379, 749 P.2d 173 (1988); see also State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976)(defendant's constitutional right to compulsory attendance of witnesses necessary for his defense is a fundamental element of due process). Opposed to this power to compel the giving of evidence, however, is the Fifth Amendment's declaration that no person " 'shall be compelled in any criminal case to be a witness against himself.' "Lougin, 50 Wn. App. at 379 (citation omitted). The privilege against self-incrimination includes the right of a witness not to give incriminatory answers in any proceeding. Lougin, 50 Wn. App. at 380. (citing Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). If a witness waives his privilege and testifies, however, he is subject to cross-examination on questions germane to his direct examination. Lougin, 50 Wn. App. at 380(citation omitted).

"Once a Fifth Amendment claim is sustained, the question of the scope of immunity arises. A witness does not have the absolute right to remain silent when called to testify, as does a defendant ... on trial." Lougin, 50 Wn. App. at 381 (citing State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971). "In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony." Lougin, 50 Wn. App. at 381 (citation omitted); United States v. Moore,

682 F.2d 853, 856 (9<sup>th</sup> Cir. 1982).

Here, Glave should have been able to cross examine Det. Harai on whether he had falsified a police report or was being investigated for the same, the timing of the allegation, the circumstances of the allegation, the investigation and employment files and the like, in parity with the State's cross examination of Glave. 1684-1688, 1712 (when went on leave, which case). Det. Harai then could have made a decision regarding his testimony and the trial court could have assessed the claim. The court permitted the prosecution and defense to ask very limited questions and completely forbade the defense from asking follow up questions to the State's questions about why he was on leave and who had made the complaint. RP 938, 940, 945. Here, the court improperly insulated Harai and deprived Glave of his Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution federal and state confrontation right to test Harai's testimony, memory, bias and credibility before the jury with probing cross-examination. The limitation also deprived Glave of his Sixth Amendment right to present a defense.

The Court's ruling to limit Glave's cross examination of a police officer is even more prejudicial than limitations placed on less august witnesses. Police officers are imbued by jurors with a special aura of

credibility. Washington courts, as well as, federal courts have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), United States v. Gutierrez, 995 F.2d 169, 172, (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness") quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987).

Washington courts use the "overwhelming untainted evidence test" to determine whether constitutional error was harmless. The court will look only at the untainted evidence to determine whether it overwhelmingly leads to a guilty verdict. State v. McDaniel, 83 Wn. App. 179, 187-88, 920 P.2d 1218 (1996). However, constitutional error cannot be deemed harmless if defendant testified at trial and gave a factually believable and plausible explanation of disputed facts. State v. Heller, 58 Wn. App. 414, 421, 793 P.2d 461 (1990); State v. Gutierrez, 50 Wn. App. 583, 590, 749 P.2d 213 (1988). In this situation, the appellate court cannot determine beyond a reasonable doubt that a jury would not have found the defendant credible. Id. The evidence is not overwhelming. It essentially

consists of B.B.'s statement, albeit repeated five times, and Glave's denial and his wife's testimony regarding the family's busy schedule. Because both Harai and Dogeagle highlighted Harai's damning statement attributed to Glave, the court's limitation on Glave's cross-examination is not harmless.

**Issue No. 6 - The Court Impermissibly Limited The Examination Of Harai Under ER 608(b) Once The State Elicited The Information That He Was On Administrative Leave.**

Not only did the court deprive Glave of his constitutional right to confront Detective Harai (See Argument above) but it also erred when it limited Glave's right to utilize evidence, including personnel records and elicit testimony regarding the scope, timing and content of the allegations forming the basis of his administrative leave. RP 940, 945. As the court said when it ordered the release of Glave's employment records, once the door is open it swings both ways. RP 2571. However, even though the court gave lip service to this axiom, it did not give the benefit of the open door to Glave. The court permitted the State to obtain and cross examine Glave with his employment records, finding that ER 608(b) posed no impediment, yet did not permit Glave the same opportunity with respect to Detective Harai.

ER 608 allows the credibility of a witness to be attacked in two

ways: (1) by reputation evidence of the character of the witness, provided that the evidence only refers to character of truthfulness or untruthfulness; and (2) by specific instances of conduct of the witness with the limitation that the specific instances of the conduct, other than convictions of crimes as provided in ER 609, may be inquired into on cross examination of the witness only at the trial court's discretion.”

Failing to allow cross-examination of a state's witness under ER 608(b) relating to impeachment of a witness with specific instances of witness' conduct that are probative of truthfulness or untruthfulness, is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006, cert. denied 122 S.Ct. 475, 534 U.S. 1000, 151 L.Ed.2d 389 (2001). Specific instances of lying may be admitted whether sworn or unsworn, but their admission is highly discretionary under ER 608(b). State v. Kunze, 97 Wn. App. 832, 859, 988 P.2d 977, reconsideration denied, review denied 140 Wn.2d 1022, 10 P.3d 404 (1999). Washington case law allows cross-examination under ER 608(b) to specific instances that are relevant to veracity. State v. Wilson, 60 Wn.App. 887, 893, 808 P.2d 754, review denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991). Any fact which goes to the trustworthiness of the

witness may be elicited if it is germane to the issue. Id.

The witnesses and testimony which Mr. Glave went directly to Det. Harai's reputation for truthfulness. Here, the trial court never reached the question of whether Harai could be questioned about the administrative leave allegations of misconduct under ER 608, however, had the question been reached, it would have been an abuse of the trial court's discretion to not allow the evidence. Det. Harai's employment problems were relevant to his veracity and would have been germane to the issue of Harai's credibility in the instant case.

This denial is significant because Harai's leave status (and ultimate resignation) bear directly on his credibility and veracity, in the same manner as the prosecution argued that Glave's employment records went to his credibility and veracity. Importantly, in the case of law enforcement the denial is even more prejudicial because it is well established that juries give law enforcement great deference and imbue them with a higher degree of believability. State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), United States v. Gutierrez, 995 F.2d at 172, (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness")

quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987). The denial, thus was especially sensitive here because of the heightened aura of reliability attributed to law enforcement personnel establishes a special need for searching cross examination.

**Issue No. 7 - The Court Impermissibly Denied Glave A Constitutionally Guaranteed Fair Trial When It Precluded Him From Presenting Relevant And Admissible Evidence.**

Under the Sixth Amendment of the United States Constitution and Wa. Const. art. 1, § 22 (amend. 10), a criminal defendant has the right to present all admissible evidence in his defense. State v. Clark, 78 Wn. App. 471, 898 P.2d 864 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. Clark at 477; ER 401, 402, See also State v. Austin, 59 Wn. App. 186, 194-195, 796 P.2d 746 (1990)(every criminal defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible).

The right to offer testimony of witnesses, and to compel their attendance, if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

State v. Maupin, 128 Wn.2d at 924, quoting, Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), cited with approval by State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Criminal defendants have a constitutional right to impeach prosecution witnesses with bias evidence. Davis v. Alaska, 415 U.S. at 316-18. And it is reversible error to deny a defendant the right to establish the chief prosecution witness's bias by an independent witness. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003) (citing State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980)). Such errors are presumed prejudicial and require reversal unless no rational jury could have a reasonable doubt that the defendant was guilty even absent the error. State v. Orndorff, 122 Wn. App. 781, 787, 95 P.3d 406 (2004); Spencer, 111 Wn.App. at 408, 45 P.3d 209 (citing State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998)). “Where a case stands or falls on the jury’s belief or disbelief of essentially one witness, that witness’s credibility or motive must be subject to close scrutiny.” State v. Smith, 130 Wn.2d at 227 quoting State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

- a. Glave Should Have Been Allowed To Use B.B.’s Medical And School Records To Rebut Her Parents’ Allegations That Her Behavior Changed After The Alleged Incident Of

### Sexual Abuse.

A trial court's decision on the admissibility of evidence is reviewed for an abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, Campbell v. Washington, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526, cert. denied, Campbell v. Wood, 511 U.S.1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

“Where a case stands or falls on the jury’s belief or disbelief of essentially one witness, that witness’ credibility or motive must be subject to close scrutiny.” State v. Smith, 130 Wn.2d at 227. Here, Glave sought to introduce medical records<sup>7</sup> that would have established that B.B. was a chronic bed wetter and had to take medication to control this activity. Medical records would also have addressed pre-existing behavioral concerns parents had reported to the child’s pediatrician. This evidence would have cogently and persuasively rebutted B.B.’s parents’ highly colored and biased testimony that her bed wetting, appetite and anger issues were directly related to the alleged sexual abuse.

Court also erred in limiting the examination of Ms. Mulkins,

B.B.'s first and second grade teacher. Here, the defense wanted to elicit testimony based on B.B.'s school records regarding B.B.'s performance and special education needs arguing that these items would be probative of B.B.'s behavior, perceptions and her credibility. RP 2004-5, 2009, 2019, 2023-34, 2027(court will not allow school records). Defense also sought to highlight the discrepancies in B.B.'s statements to Ms. Mulkins vis-à-vis her statements to other testifying witnesses. Clearly the State understood only too well the highly probative nature of the information when it argued the jury would use this information in evaluating B.B.'s testimony to draw adverse conclusions regarding her credibility, memory and behavior. RP 2025. Additionally, this independent evidence would have rebutted B.B.'s parents' unchecked testimony of their perceptions of the B.B.'s school performance, abilities, behavior. This excluded evidence and testimony was relevant and admissible impeachment going to B.B.'s credibility, bias and motive to testify against Glave, as well as the Basich parents' credibility and perceptions.

B.B.'s credibility was central to this case. The court was permitting numerous witness to reinforce her testimony with their own recollections of B.B.'s interviews and statements, despite the fact that B.B. was never able to establish a time or date of the offense and that her

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<sup>7</sup> Defense counsel stipulated that it would not be seeking or relying on counseling records.

recollection of events varied considerably upon each telling. (Arnold-Harms – no touching RP 1566, Mettler oral-genital contact, B.B. says “no” - RP 1600, Breanna RP 402.) An error is harmless beyond reasonable doubt only if the reviewing court is convinced that any reasonable juror would have convicted, despite the error beyond a reasonable doubt. Because there was no independent witness testimony, no physical findings and contradictory accounts of the alleged incident, the error is not harmless. Moreover, as argued above, when the defendant testifies at trial and gives a factually believable and plausible explanation of disputed facts, in this situation the appeals court cannot determine beyond a reasonable doubt that a jury would not have found defendant credible. Heller, 58 Wn. App. at 421; Gutierrez, 50 Wn. App. at 589-90. Such is our case, and the limitations imposed by the court were error.

b. Glave Was Denied The Right To Present Relevant And Admissible Evidence Establishing Bias Motive and Undermining The Credibility of the Prosecution Witnesses

Glave repeatedly sought to present such evidence in his defense. RP 15, 16, 31, 38, 39, 1538, 1543, 1547, 1947, 1956-58, 2258, 2262-65, 2327,2336 . Denial of this evidence (CP 75-76) prejudiced Glave’s ability to present his theory of defense, requiring vacation of his sentence and a remand for a new trial. Mr. Glave’s defense at trial was that the alleged

rapes never happened and that he suspected the allegations were in retaliation for knowledge regarding B.B.'s father's scams against his employers or his insurance company or that prior CPS reports influenced the reporting. RP 1615, 1270, 1274. Glave also sought to present evidence rebutting the Basiches' descriptions of B.B.'s demeanor but was not allowed to. RP 1551.

The Basich family and B.B.'s credibility, or lack thereof, was key to Glave's theory of defense. The trial court's exclusion of evidence relating to instances of fraudulent or vindictive behavior by the Basiches' denied Glave his Constitutional right to present a defense.

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless.

State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Denial of Glave's constitutional right to present witnesses and evidence in his defense is therefore assumed to be prejudicial.

The right to confront and cross-examine witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend VI, Washington const. art 1 § 22. Exposing a witness's motivation in testifying is a proper and important function of the right of cross-examination as

embodied in the Confrontation Clause of the Sixth Amendment. Delaware v. Van Arsdale, 475 U.S, 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) quoting David v. Alaska, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested .' Davis, 415 U.S. at 316. A defendant has a constitutional right to impeach a prosecution witness with evidence of bias. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing David v. Alaska, 415 U.S. at 316-17.) Any error in excluding such evidence is presumed prejudicial, but it is also subject to a harmless error analysis. Spencer, 111 Wn. App. at 408. However, Constitutional error cannot be deemed harmless if defendant testified at trial and gave a factually believable and plausible explanation of disputed facts. State v. Heller, 58 Wn. App. at 421; State v. Gutierrez, 50 Wn. App. at 590. Additionally, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as bias. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Criminal defendants have a constitutional right to impeach prosecution witnesses with bias evidence. Davis v. Alaska, 415 U.S. at 316-18. And it is reversible error to deny a defendant

the right to establish the chief prosecution witness's bias by an independent witness. State v. Spencer, 111 Wn.App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003) (citing State v. Jones, 25 Wn. App. at 751). Such errors are presumed prejudicial and require reversal unless no rational jury could have a reasonable doubt that the defendant was guilty even absent the error. State v. Orndorff, 122 Wn.App. at 787; Spencer, 111 Wn.App. at 408, 45 P.3d 209 (citing State v. Johnson, 90 Wn. App. at 69).

“Where a case stands or falls on the jury’s belief or disbelief of essentially one witness, that witness’s credibility or motive must be subject to close scrutiny.” State v. Smith, 130 Wn.2d at 227 quoting State v. Roberts, 25 Wn. App. at 834.

Here the State successfully blocked the defendant from presenting his theory of defense. CP 75-76 The granted the State’s motions in limine to exclude defense witnesses that would have been used to impeach the Basiches’ credibility with witnesses who could testify to the Basich family’s conduct showing animosity and false allegations directed at Mr. Glave and his family. RP 1/19/05 7. Additionally, these witnesses could address the claim by Michael Basich said he did not stop Glave from coming over to the Basich house on Sept. 13, 2003, even though B.B. had

told him Glave had molested, her because he was afraid of Glave, or feared retaliation. RP 1123-24. The witnesses also were necessary to rebut the Basich family's testimony that B.B. was terrified of Mike Glave and every time she saw him she had a panic attack. RP 1/19/05 p.8, RP 1551. They included school personnel who verified Glave's work schedule rebutting false allegations by B.B. that she had seen Glave at school. RP 1/19/05 p. 8- Mr. Arger- co-worker. Ms. Mulkins, B.B.'s teacher who was not permitted to present school record testimony showing B.B. was in special education programs since kindergarten to rebut the parents claims of decreased school performance. RP 1/19/05 p. 8). As defense cogently argued, this case rests on the word of one child and her credibility and her family's is at the heart of the case, Glave needed to present evidence that would help a jury understand and assess their credibility. RP 13. Clearly, if B.B. misrepresented her contact with Glave at school, it is relevant and probative evidence for the jury to use to assess her accuracy regarding the child rape charges. RP 13. Likewise, if B.B.'s parents are concocting other incidents of reputedly bad behavior by Glave it is important and necessary information for the jury. Similarly, if Michelle Basich was willing to fudge the details by increasing Justin's age regarding the CPS incident between her daughter Breanna and Glave's son

Justin, it was relevant to show the jury she was willing to do so when a claim involved a Glave family member. RP 1270, 1274. If Michael Basich is willing to “take his employers for a ride” with a false injury claim, the jury should be provided with this information to better assess his credibility and veracity. RP 39 (Umfleet testimony). If after Sept. 13, 2003, the Basiches were willing to rile up neighborhood sentiment extending to calling the police on the Glave boys for riding a motor scooter in the neighborhood, it is information a jury needs to have to assess the bias and motives of the Basich family. RP 1431, 1432. And finally, just as the court permitted the State wide latitude in cross examining Glave and in bringing other witnesses to discuss other instances of bad behavior related to Glave,<sup>8</sup> as matter of fundamental fairness Glave should have been allowed to present testimony by his proffered witnesses that was similar. For these reasons the court’s ruling limiting testimony and the Glave’s opportunity to cross examine witnesses to the day the alleged events occurred is in error. RP 15.

The confrontation clause requires that a defendant be allowed to explore a witness's motivation for testifying on behalf of the State. "The partiality of a witness is subject to exploration at trial, and is 'always

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<sup>8</sup> The court permitted the State on rebuttal to call witnesses whose sole purpose was to present evidence of other instances of questionable unrelated employment behavior by

relevant as discrediting the witness and affecting the weight of his testimony.' "Davis v. Alaska, 415 U.S. at 316, quoting 3A J. Wigmore, *Evidence* § 940, p. 775 (Chadbourn rev.1970))

The court erred when it thwarted the defense's attempts to produce evidence regarding the continued contacts between the Glave and Basich family after B.B. told her parents that she had been sexually abused by Glave. This proffered evidence went to B.B.'s veracity and the family's motives, bias and credibility.

Belatedly the Court realized its mistake in limiting the defense from presenting evidence regarding the Basich/Glave family history of contacts and interactions and requested a "stipulation" go to the jury explaining that there were other contacts but that the court had limited the information that could be presented. RP 2335-36, CP 92. However, the stipulation was not sufficient to cure the problem because the jury was still without the evidence needed to assess B.B. and her family's credibility, bias and motive. By precluding the full panoply of interaction between these two families the jury was left with an unfairly incomplete picture that deprived Glave of his right to a fair trial and due process of law.

**Issue No. 8 – Glave Was Denied Effective Assistance of Counsel When Defense Counsel Failed to Object To**

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Glave. See e.g. Laurie Barclay, RP 2694-2761).

**Impermissible Opinion Testimony, Mettler's Identification Of Glave, The Court's Stipulation Regarding Contacts Between The Glave and Basich Families And The Scoring Used At Sentencing .**

Generally, to preserve an evidentiary issue for appellate review, the party challenging the ruling must make a timely and specific objection. ER 103, RAP2.5(a); State v. Avedano-Lopez, 79 W. App. 706, 710, 904 P.2d 324 (1994). If the court finds that any of the following arguments was waived for failing to timely object, Glave was denied effective assistance of counsel.

a. Ineffective Assistance Standard

The Washington State and United States Constitution guarantee a criminal defendant the right to effective assistance of counsel. Const. Art. 1 § 22 (amend. 10); U.S. Const. Sixth amend.; U.S. Const. Fourteenth amend § 1; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

The right to counsel means the right to the effective assistance of counsel. State v. Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993) citing Strickland v. Washington, 466 U.S. at 686. A defendant has not had effective assistance of counsel when the performance of counsel was deficient and the deficient performance prejudiced the defendant. Riley, 122 Wn.2d at 780. A defendant claiming ineffective assistance of counsel

must demonstrate: (1) that the defense attorney's representation fell below an objective standard of reasonableness, and (2) the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987), Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's legitimate strategy or tactics do not constitute ineffective assistance unless, those tactics would be considered incompetent by lawyers of ordinary training and skill in the criminal law." State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

b. It Was Error For The State To Violate The Court's Pre-trial Motion in Limine Not to Call B.B. The "Victim And Glave The "Suspect, And Error For Defense Counsel Not To Object.

Defense counsel secured a pre-trial ruling in limine precluding reference to B.B. as the victim and Glave as the "suspect". CP 75-76. However, during trial testimony by Det. Harai there was no objection to his use of the words "victim" to refer to B.B. or "suspect" to refer to Glave. Generally this court does not consider issues raised for the time on appeal but may if the error affects a constitutional right. RAP 2.5(a). Here, in an abundance of caution Glave asserts the issue, both as a

reviewable constitutional infringement of his right to a jury trial as well as ineffective assistance of counsel. Clearly, the failure to object was not trial strategy, because defense counsel recognized the significant damage to a defendant that flows from such language. CP 75-76, RP 61.

It is well established under settled Washington law that no witness, lay or expert, may comment on the guilt or innocence of the defendant. Moreover, it is well established that it invades the province of the jury for a witness to express an opinion as to whether another witness is telling the truth and it is improper for the State to elicit such testimony. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Carlson, 80 Wn. App. at 123; State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991). See also City of Tacoma v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (credibility issues strictly reserved for the trier of fact). Such testimony is also argumentative, unfair and misleading. State v. Walden, 69 Wn. App. 183, 186-87, 847 P.2d 956 (1993); State v. Casteneda-Perez, 61 Wn. App. at 362-63.

In State v. Kirkman, 126 Wn.2d 97, 107 P.3d 133 (2005) this court held that because an improper opinion violates a constitutional right, State v. Saunders, 120 Wn. App. 800, 813, 86 P.3d 232 (2004), it may be raised first time on appeal. Saunders at 811. Improper opinion testimony

violates a defendant's right to a jury trial and invades the fact-finding province of the jury. Kirkman, 126 Wn. App. at 106, citing State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Here, detective Harai repeatedly referred to B.B. as the "victim" and Glave as the "suspect" in direct violation of the court's pre-trial ruling. CP 75-76. RP 1637,1638, 1649, 1650). Michelle Basich also called him "suspect. "RP 1199-1200. Because the only issue was whether B.B. was a "victim" testimony identifying her one conveyed an improper opinion of credibility and the officer's and mother's belief in her statements to the jury.

Washington courts as well as federal courts have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), United States v. Gutierrez, 995 F.2d 169, 172, (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness") quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987).

As in Kirkman, 126 Wn. App. At 105, police officer's testimony may particularly affect a jury because of its "special aura of reliability".

Harai's repeated assessment that B.B. was a victim was an impermissible opinion that invaded the province of the jury. Such error is not harmless beyond a reasonable doubt in this case because the critical issue was the credibility of B.B., the evidence was not overwhelming, there were no physical findings substantiating abuse, there were no independent witnesses. State v. Guloy, 104 Wn.2d 412, 425,705 P.2d 1182 (1985). Because this court cannot say the error was harmless beyond a reasonable doubt, Glave's convictions must be reversed and the matter remanded for a new trial.

c. Neither Mettler Nor B.B.'s Parents Should Have Been Permitted To Testify To Behavioral Changes In Order To Establish That Sexual Abuse Occurred Because The Basiche's Lack The Qualifications To Draw Such An Opinion And The State's Only Expert, Ms. Mettler, Said Behavior Changes "Might or Might Not" Reflect Sexual Abuse Versus Any Number Other Things And Thus Was Not Relevant or Probative.

The State elicited testimony from Breanna Basich that B.B. had an increase in nightmares in the summer of 2003 and that she would wake up screaming, "no, no, no get away." RP 1014. Mr. Basich testified that in the summer of 2003 she had nightmares and resumed bedwetting. RP 1075. She had been a bed wetter up until 5 years old. RP 1075. The State also asked him about other changes and he described B.B. as becoming quieter, less appetite and more defiant. RP 1088. He claimed these behaviors

increase whenever she saw the Glaves. RP 1089. Michelle Basich also testified B.B. suffered an increase in nightmares and a resumption of bed wetting. 1163. The Basiciches' expressed the opinion these behaviors were a result of being sexually sexually abused by Glave. RP 1165.

The only medical expert to testify in this matter was Joanne Mettler. During her pre-trial testimony, Mettler testified that behavioral changes are not indicative of anything specific and that she could not connect the reported behaviors with prior or current abuse. RP 507, 522, 1597 (might or might not be related). She also was clear she was not doing a psychological or mental evaluation of the child. RP 1610. At trial, Mettler stated that if behavioral changes occur in temporal proximity to the alleged incident of abuse then she "might wonder" if they were related to sexual abuse. RP 1603.

A basic criterion for admission of evidence is that it be relevant to prove an issue in the case. United States v. Powell, 587 F.2d 443 (9<sup>th</sup> Cir. 1978); ER 401, ER 402, ER 404(b). Under ER 401, 'relevant evidence' is any evidence, 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Davidson v. Mun. of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986). Evidence that

is not relevant is not admissible. ER 402.

In Washington, so-called expert testimony that rests on conjecture and speculation is inadmissible. Queen City Farms Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wn.2d 50, 104, 882 P.2d 703 (1994). In State v. Warness, 77 Wn. App. 636, 893 P.2d. 665 (1995), the court points out the difference between speculation by an expert and a qualified opinion. An opinion that has no basis, that is unsupported by the facts and applicable scientific theory, amounts to mere speculation and is inadmissible. Consequently, in a case such as this in which testimony about B.B.'s behavioral changes that at best "might make one wonder" if abuse occurred and cannot be connected to prior or current abuse do not logically tend to prove or disprove a material issue, consequently, such testimony is irrelevant. See also Tegland, Washington Practice, p. 342 (2005) (The courts, however, will not tolerate an opinion that seems to lack any basis whatsoever.")

In cases where a medical opinion is called for, medical testimony is held to a specific standard, one of reasonable medical certainty. Karl B. Tegland, Courtroom Handbook on Washington Evidence, p. 343 (2005). It further states, "The reason for the requirement of reasonable medical certainty is not based upon Rule 702 because, as mentioned, Rule 702 does

not require any particular degree of certainty for admissibility. The reason is instead based upon the requirement of relevance. Medical testimony on causation is simply regarded as irrelevant if the medical expert cannot say, with reasonable medical certainty, what the cause of the injury was.” In this case no witness testified with any reasonable medical certainty that physical behaviors reported by the parents relate to the alleged incident of sexual abuse. Testimony of such would be pure speculation, one without any evidentiary basis.

Moreover, the Basich family testimony linking behavioral changes to the alleged abuse as a way of corroborating B.B.’s allegations is not admissible as a lay opinion under ER 701. ER 701(c) does not permit a lay opinion that is based on scientific, technical, or otherwise specialized knowledge with the scope of ER 702.

Here the reported behaviors, according to the State’s own expert could not be connected to reported abuse. RP 1596, 1603. This does not make any fact in issue more probable. Permitting such irrelevant testimony was not proper, and the impropriety was compounded by the State’s closing argument pointing to such behaviors as somehow corroborating B.B.’s testimony that she was sexually abused by Glave. RP 2846.

- d. Mettler's Identification Of Glave As The Person B.B. Identified As Her Abuser During Her Medical Interview Was Error Because Identity Of A Non-Family Or Household Member Is Not Reasonably Pertinent to Medical Diagnosis Or Treatment.

Under ER 803(a)(4), a statement made for the purpose of medical diagnosis or treatment is admissible as an exception to the hearsay rule.

The rule states:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

"The rule states that the hearsay exception applies only to statements reasonably pertinent to medical diagnosis or treatment. Thus statements as to causation (I was hit by a car) would normally be admissible, but a statement-attributing fault (driven by Jane Doe) may not be. Tegland, Washington Practice, p. 395 (2005); In re Penelope B., 104 Wn.2d at 656; State v. Huynh, 107 Wn. App. at 74-75,(statements characterizing event as assault and naming alleged assailant not reasonably pertinent to diagnosis and treatment.) The justification for this hearsay exception is the patient's motivation to be truthful. State v. Bishop, 63 Wn. App. at 24, fn. 8 (Comment ER 803(a)(4)). A statement admissible

under this exception is also subject to exclusion under ER 403 if unnecessarily cumulative or prejudicial. In re Penelope B, 104 Wn.2d at 656. Statements attributing fault to a member of the victim's immediate household may be reasonably pertinent to treatment and are thus admissible because it is "relevant to the prevention of recurrence of injury." State v. Butler, 53 Wn. App. 214, 221, 776 P.2d 505, *review denied* 112 Wn.2d 1014 (1989). If the abuser lives in the same household identity is important since child abuse can involve psychological as well as physical injury and there is a risk of further injury if the child and the abuser live in the same household. State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).

Thus any statements attributing fault to Glave whether identified by his name or as Mike who lives across the street were not admissible because our case is unlike Butler, Penelope B or Bishop, 63 Wn. App. 15, 816 P.2d 738 (1991); we do not have a toddler or a member of the immediate family implicated. Furthermore, B.B. never returned to the Glave's home and the families obtained restraining orders precluding contact. RP 1335, 1014, 1040-41. Moreover, unlike Bishop, *supra*, here there is little corroborating evidence, for instance there has never been a bathtub in the powder room and no one could tie a time frame any closer

than summer 2003. B.B. believes she went directly home and told her parents she was sexually abused after playing in the Glave hot tub and that the police came to her house and there was absolutely no supporting medical evidence. Thus, here there is insufficient evidence that B.B. had a proper motivation to ensure trustworthiness of her statements.

Secondly, Glave is not a family member, the Glave family sold their home and moved to another housing development and B.B. never returned to the Glave home, eliminating the concern that reoccurring abuse by an immediate family member needed to be prevented. By permitting Mettler, a very experienced and highly regarded professional to identify Glave, the court erred because this testimony unfairly bolstered the credibility of B.B. to Glave's detriment.

e. The Court Ordered Stipulation Was An Insufficient Substitute For Trial Testimony.

As argued above, Glave was entitled to present a full defense and challenge the State's evidence and witnesses. In an abundance of caution, if this court finds that defense counsel, by complying with the court's directive to draft a stipulation regarding the limitation of evidence, waived a challenge to his claimed error, Glave received ineffective assistance of counsel.

f. Trial Counsel Failed To Object To The State's Scoring Of The Standard Range

Inexplicably, defense counsel did not object to the offender score, even though State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), was directly on point regarding the scoring the two offenses as the same criminal conduct. The court imposed a sentence on an offender score of three that was in turn based on the other current offense. RCW 9.94A.525(16) (count three points for each adult and juvenile prior sex offense); RCW 9.94A.589(1)(a) (count all other current convictions as if they are prior convictions for the purposes of the offender score).

Pursuant to RCW 9.94A.589(1)(a), when a person is to be sentenced for two or more current offenses, the offender score is computed by counting all other current and prior offenses. However, if the court finds that some or all of the current offenses encompass the same criminal conduct, then those offenses are counted as one crime. RCW 9.94A.589(1)(a). 'Same criminal conduct' means 'crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.' RCW 9.94A.589(1)(a). All three requirements under RCW 9.94A.589(1)(a) must be satisfied for the trial court to find same criminal conduct. Price, 103 Wn. App. 845, 856, 14 P.3d 841

(2000), and here all three requirements are met because the two convictions for child rape and attempted child rape were committed at the same time, involved the same victim and encompassed the same intent. Haddock, 141 Wn.2d at 110.

As noted in the recent Washington Supreme Court case In re Personal Restraint of Markel, 154 Wn.2d 262, 274, 111 P.3d 249 (2005), the default rule in Washington is that all convictions must count separately. A finding of same criminal conduct provides an exception to the default rule and operates to decrease the otherwise applicable sentencing range. Markel, 154 Wn.2d at 274. Because a finding of same criminal conduct could only lower a defendant's sentencing range, the constitutional concerns in Apprendi and Blakely are not implicated. Id. at 274-75.

Glave contends he received ineffective assistance of counsel when his attorney failed argue that his two rape convictions did not encompass the same criminal conduct. As noted above, two crimes may be considered the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Generally assertions of same criminal conduct are disallowed in a narrow construction of the statute. State v.

Price, 103 Wn. App. 845, 855, 14 P.3d 841 (2000). One exception to this general rule is when the defendant commits the same crime against the same victim over a short period of time. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

The same criminal conduct requires: (1) the same criminal intent; (2) the same time and place; and (3) the same victim. State v. Israel, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999), *aff'd*, 148 Wn.2d 350 (2003). In determining whether the crimes are the same criminal conduct for purposes of sentencing the trial court makes factual determinations and utilizes its discretion. State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). A trial court's determination of what constitutes the same criminal conduct will not be reversed absent an abuse of discretion or misapplication of the law. State v. Walden, 69 Wn. App. 183, 188, 847 P.2d 956 (1993).

In Tili, the court addressed two questions--the first being whether three counts of rape, each act of penetration occurring within moments of another, constituted the same criminal conduct; and second, whether the counts of assault and burglary would also fall under the rule of the same criminal conduct. 139 Wn.2d at 128. The Tili court concluded that the three rape counts were the same criminal conduct and that the assault was

part of the rape; but it found that the assault did not merge with the burglary. 139 Wn.2d at 123. The court pointed to the rule that the relevant inquiry for the intent prong is to what extent the criminal intent, when viewed objectively, changed from one crime to the next. Tili, 139 Wn.2d at 123.

In State v. Tili, 139 Wn.2d 107, 985 P.2d 365 (1999), the defendant was charged with three acts of rape occurring nearly simultaneously: anal and vaginal penetration with fingers, and vaginal penetration with the penis immediately following. Concluding that the three offenses occurred 'nearly simultaneous in time,' Id. at 123, and that the acts were committed with the same criminal intent, Tili held that the crimes encompassed the same criminal conduct and should have been counted as one crime for offender score purposes. Id. at 124-25. Given that the facts here are indistinguishable, and that the only described acts occurred within a very short period of time, failure to object to the trial court's calculation of Glave's offender score as a three based on scoring the other current offense rather than a zero was error.

**Issue No 9. – Cumulatively, The Errors Deprived Glave Of A Fair Trial.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101

Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Precaciado-Cordobos, 981 F.2d 1206, 1215 n. 8 (11<sup>th</sup> Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9<sup>th</sup> Cir. 1992); United States v. Pearson, 746 F.2d 789, 796 (11<sup>th</sup> Cir. 1984).

Here, the numerous errors at trial individually and cumulatively combined to deny Glave a fair trial. Even if this court determines the constitutional errors argued above were not harmless, in and of themselves, they certainly are cumulatively. Here, Glave was denied his right to fully cross examine Det. Harai, Michelle and Michael Basich and present competent evidence in his defense. Glave was also deprived of his right to confront B.B via Mettler's testimony. The State used this repetitive testimony of its witnesses to impermissibly invade the province of the jury by bolstering B.B.'s credibility. The State also elicited improper opinion testimony that B.B.'s behavioral changes were indicative of sexual assault coupled with the error in limiting the defense the opportunity to present evidence that would establish bias, motive and undermine the prosecutions witnesses this court cannot conclude the errors were harmless.

Constitutional errors may be considered harmless if the reviewing

court is convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. State v. Thompson, 151 Wn.2d 793, 92 P.3d 228, 235-36 (2004) citing State v. Brown, 140 Wn.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination the reviewing court utilizes the “overwhelming untainted evidence” test. State v. Smith, 148 Wn.2d 122, 139, 59 P.23d 74 (2003). Under this test, the reviewing court considers the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt. Id. In this case, the only evidence that Glave committed the sexual offenses were the statements made by B.B. There was no corroborating evidence. The State’s entire case hinged on B.B.’s and her family’s credibility. Taking together all the errors argued above there was insufficient untainted evidence at trial that Glave sexually assaulted B.B.

**Issue No. 10 – There was insufficient evidence presented to the jury to support the guilty verdicts Because Did Not Establish The Alleged Events Occurred Between June 1 and August 31, 2003.**

The State bears the burden of proving each of the essential elements of the charged offense. In a criminal prosecution the State is required to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368

(1970); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 1980).

In determining whether evidence supports a conviction “the standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational finder of fact could have found the essential elements of the charged crime beyond reasonable doubt”. State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990), citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979). All reasonable inferences from the evidence are drawn in favor of the State. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

To establish the charged crime of child rape in the first degree RCW 9A.44.073, as charged in count 1 of the amended information the State needed to prove beyond a reasonable doubt that Glave had sexual intercourse with B.B., that B.B. was less than 12 years of age, that Glave was at least 24 months older than B.B., not married to B.B. and that the acts occurred in the State of Washington between June 1, 2003 and August 31, 2003. CP 101-123. (Instruction 11) To establish the lesser crime of attempted child rape in the first degree as instructed for Count 2, the State needed to prove beyond a reasonable doubt that Glave intended to commit the crime of child rape in the first degree and did an act which was

a substantial step in its commission and that this occurred between June 1, 2003 and August 31, 2003. CP 101-123 (Instruction 17).

Here, the state failed to establish that the acts occurred between June 1, 2003 and August 31, 2003. The testimony from B.B. was she ran home and immediately told her parents the day the acts occurred. RP 1373, 1342, 1380. She was clear everything happened at the same time and only happened one time. The parents report that she told them on September 8, 2003. B.B.'s sister Breanna reports she thinks her sister told her on a Wednesday, because she remembers being told while they pulled the garbage cans up, and Wednesday is garbage day. RP 1005-6, 1035. She said her sister told their parents a couple of days later. RP 1005-6. There was no testimony that the abuse in fact occurred between June 1 and August 31, 2003. The parents after the fact try to relate behavioral changes to when they think the abuse occurred, however, such changes may or may not even relate to sexual abuse and besides they could not pinpoint a time frame for the changes claim to have observed.

The evidence presented at trial failed to establish that either the child rape in the first degree charged in Count I or the Attempted Child Rape, forming the basis for the conviction in Count 2 occurred between June 1, 2003 and August 31, 2003. Since the State failed to present sufficient

evidence as to both Count 1 and Count 2, this Court must reverse his convictions with instructions to dismiss the Counts. To do otherwise would violate double jeopardy.

**D. CONCLUSION**

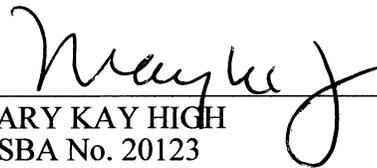
For these reasons Appellant Glave requests the court reverse his convictions.

DATED: February 21, 2006

Respectfully submitted,

THE LAW OFFICE OF MARY KAY HIGH

By



MARY KAY HIGH  
WSBA No. 20123  
Attorney for Appellant  
109 Tacoma Avenue North

## APPENDIX A



04-1-00795-1

1  
2  
3 3. That B.B.'s statements to the forensic child interviewer, Keri Arnold-Harms, are testimonial in  
4 nature. The forensic interview is conducted with the express purpose of presenting evidence in Court. As  
5 a consequence, statements made in the course of a forensic interview are clearly testimonial in nature.

6 4. That in considering the Ryan factors, the court finds the following:

7 i. B.B. had no motive to lie. This factor weighs in favor of admitting the hearsay  
8 statements.

9 ii. The evidence presented suggests that B.B.'s character for trustworthiness was typical for  
10 a child her age. The evidence presented does not suggest that B.B. is not trustworthy. This factor weighs  
11 in favor of admitting the hearsay statements.

12 iii. B.B. made statements about the alleged abuse to more than one person. This factor  
13 weighs in favor of admitting the hearsay statements.

14 iv. With the exception of B.B.'s statement to Steve Anders, all of her statements were  
15 spontaneous in nature. She was not prodded, coached or otherwise pressured by anyone to make  
16 statements about the alleged abuse. This factor weighs in favor of admitting the hearsay statements.

17 v. The timing of the statements to B.B.'s sister and parents, and her relationship with those  
18 witnesses, weighs in favor of admitting the hearsay statements.

19 vi. The proffered statements contain express assertions of past facts.

20 vii. The declarant will be available for cross-examination.

21 viii. The number of people to whom B.B. disclosed the abuse suggests that the possibility of  
22 faulty recollection is remote.

23 ix. The surrounding circumstances give no reason to suppose that the declarant  
24 misrepresented the defendant's involvement. The different statements in this case are consistent in  
25 describing who the alleged perpetrator was, where the alleged abuse happened, and what constituted the  
26 alleged abuse. The statements differ in detail, with B.B. disclosing more to those she is comfortable with,  
27 and less to those she is less comfortable with. As a consequence, this factor weighs in favor of admitting  
28 the hearsay statements.

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3 5. B.B.'s statement to Steve Anders can be distinguished, in that it lacks the spontaneity that  
4 characterized her other statements. The lack of spontaneity, and the circumstances surrounding B.B.'s  
5 statement to Steve Anders, weigh against admitting her statement to Mr. Anders.

6  
7 From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

8 CONCLUSIONS OF LAW

9 I

10 That B.B.'s statements to her sister, her parents, Steve Anders and Joanne Mettler are  
11 nontestimonial in nature for purposes of applying Crawford v. Washington. As a consequence, if these  
12 statements are otherwise admissible under a recognized hearsay exception, then they are admissible in the  
13 defendant's trial, regardless of whether the declarant testifies and is available for cross-examination

14 Further, based on the court's application of the Ryan factors, B.B.'s statements to her sister,  
15 mother and father meet the requirements of RCW 9A.44.120. As a consequence, these statements are  
16 admissible in the defendant's trial.

17 Further, based on the circumstances under which B.B. spoke to Joanne Mettler, her statements fit  
18 within the recognized hearsay exception for statements made for medical diagnosis. As a consequence,  
19 B.B.'s statement to Joanne Mettler will be admissible in the defendant's trial.

20 II

21 That B.B.'s statement to Steve Anders was made under different circumstances than those in  
22 which she made statements to family members. Because of this, the statement to Mr. Anders was not  
23 spontaneous in nature. As a consequence, the court concludes that B.B.'s statement lacks sufficient  
24 trustworthiness under Ryan to be admitted in the defendant's trial.

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III.

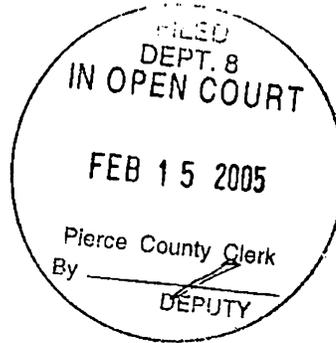
That because B.B.'s statement to Keri Arnold-Harms is testimonial within the meaning of Crawford v. Washington, that statement cannot be admitted unless B.B. testifies and is available for cross-examination. The Statement to Keri Arnold-Harms is otherwise admissible under RCW 9A.44.120.

DONE IN OPEN COURT this 15 day of February, 2005.

*[Signature]*  
Presented by:

PATRICK HAMMOND  
Deputy Prosecuting Attorney  
WSB # 23090

*[Signature]*  
\_\_\_\_\_  
JUDGE



Approved as to Form:

*[Signature]*  
BRIAN L. MEIKLE  
Attorney for Defendant  
WSB # 13740

pjh

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II OF THE STATE OF  
WASHINGTON

STATE OF WASHINGTON,  
Respondent,

v.

MICHAEL GLAVE,  
Appellant.

NO. 33171-3-II

CERTIFICATE OF MAILING

CERIFICATE OF MAILING

I hereby certify, under penalty of perjury under the laws of the state  
Washington that on February 21, 2006, I mailed via first class US mail,  
postage prepaid and properly addressed to:

1. Mr. Michael Glave, c/o Dana Glave, 10420 193<sup>rd</sup> St. Ct. E,  
Graham, WA 98338, a true and correct copy of the  
Appellant's Opening Brief; and

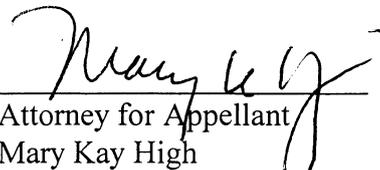
AND that I hand-delivered a true and correct copy of the  
Appellant's Opening Brief to:

1. Pierce County Prosecuting Attorney's Office, Appellate

1 Div. 9<sup>th</sup> Floor County City Building, 930 Tacoma Avenue  
2 S, Tacoma, WA 98402, a true and correct copy of the  
3 Appellant's Opening Brief; and the verbatim report of  
4 proceedings.  
5

6  
7 DATED: February 21, 2006.

8 Respectfully Submitted,

9  
10 By 

11 Attorney for Appellant  
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