No. 35988-0-II

IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Plaintiff/Respondent

v.

JERRY CURTIS BERGMAN,

Appellant/Defendant.

APPEAL FROM THE SUPERIOR COURT OF LEWIS COUNTY
THE HONORABLE, RICHARD L. BROSEY, PRESIDING

APPELLANT'S REPLY BRIEF

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III. ARGUMENT

A. THE JUDGMENT AGAINST DEFENDANT WAS ENTERED IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND DUE PROCESS, AND IS THEREFORE VOID.

In order to satisfy the Sixth Amendment's right of confrontation, the State must elicit from a child victim-witness, who has made prior extrajudicial testimonial statements concerning the accused, testimony regarding the underlying events ***and*** any prior statements of the witness admitted at trial. *State v. Price*, 158 Wn.2d 630, 648, 146 P.3d 1183 (2006); *State v. Clark*, 139 Wn.2d 152, 985 P.2d 377 (1999). Specifically, the State is required to inquire into the content of the witness' testimonial statements. *State v. Price*, 158 Wn.2d 648; *State v. Clark*, 139 Wn.2d 159.

The Confrontation Clause bars introduction of extrajudicial statements that are testimonial in nature. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). S.T.B.'s extrajudicial statements to Dr. Hall, Deputy Nelson and Phillip Williams were unquestionably testimonial in nature, as her statements were made under circumstances where there was no ongoing emergency and the primary purpose of each conversation was to establish past events potentially relevant to later prosecution. *Davis v. Washington*, -- U.S.--, 165 L. Ed. 2d 224, 126 S. Ct. 2266 (2006); *State v. Mason*, 160 Wn.2d 910, 918-22, 162 P.3d 396 (2007); *State v. Bird*, 136 Wn. App. 127, 136, 148 P.3d 1058

(2006). The State offers no contrary argument regarding the testimonial nature of S.T.B.'s statements to Dr. Hall, Deputy Nelson and Phillip Williams. The Court may therefore address Jerry's argument on the record before it. *Adams v. Department of Labor & Industries*, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995).

The State argues that Jerry conceded that S.T.B.'s statements to her mother, Brianna, were admissible, but fails to support its argument with citation to authority. BR at 4. The State's argument should therefore not be considered. RAP 10.3 (a) (6) ("*The brief of the appellant or petitioner should contain under appropriate headings and in the order here indicated... The argument in support of the issues presented for review,* ***together with citations to legal authority***... (Emphasis added)"); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995).

The State argues that S.T.B.'s statements to her mother were not testimonial under *State v. Hopkins*, 137 Wn. App. 441, 453, 154 P.3d 250 (2007) and *State v. Shafer*, 156 Wn.2d 381, 389-90, 128 P.3d 87 (2006). BR at 4-5. Both *Hopkins* and *Shafer* are distinguishable here. In *Hopkins*, the disclosures by the two-and-one-half-year-old victim to her mother and grandmother came shortly after the child returned from a visit with the defendant. *Hopkins*, 137 Wn. App. at 446. In *Hopkins*, the mother's

questioning was prompted by an immediate concern for her daughter's physical safety. *Hopkins* thus resembles *Davis*, and not this case. Moreover, in *Hopkins,* the mother and grandmother did not ask the child leading questions. *Hopkins,* 137 Wn. App. 454. Here, in contrast, after S.T.B. watched part of a television show on child molestation, Brianna began her questioning of S.T.B. with "*has that ever happened to you*? RP 2 at 90. Brianna's questioning of S.T.B. was far more suggestive than the questioning in *Hopkins.*

In *Shafer*, in contrast to this case, the victim's disclosure of the molestation to her mother came within hours of the incident, and was not prompted by the mother in any way. *Shafer*, 156 Wn.2d 389-90. Unlike *Shafer,* where the three-year old victim had no expectation that her statements would be used at trial, here, S.T.B. was seven years old when she told her mother. RP 2 at 63-64. S.T.B. also stated that she wanted Jerry to go to jail for what he allegedly did to her. RP 3 at 157. Brianna called 911 within an hour after S.T.B.'s disclosure of the alleged molestation. RP 3 at 15-16. Thus, a reasonable, competent person in S.T.B.'s position would understand the import of her statement to Brianna. *Shafer* is therefore distinguishable from the facts of this case.

The State argues that S.T.B.'s statements to Brianna were not leading or suggestive, but were spontaneous, citing, *inter alia*, *State v. Swan*, 114 Wn.2d 613, 649-50, 790 P.2d 610 (1990). BR at 6. *Swan* contains no discussion whether the child victims' extrajudicial statements were testimonial for purposes of the Confrontation Clause, as *Swan* predated *Crawford* and *Davis*, as illustrated by *Swan's* reliance upon *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1989). *Swan,* 114 Wn.2d 667-68. *Roberts* was overruled in *Crawford*, 448 U.S. 60-68. The State's reliance upon *Swan* is therefore misplaced. Equally misplaced is the State's reliance upon *State v. McKinney*, 50 Wn. App. 56, 747 P.2d 1113 (1987), *State v. Young*, 62 Wn. App. 895, 802 P.2d 829 (1991), and *State v. Henderson*, 48 Wn. App. 543, 740 P.2d 329, *rev. den.,* 109 Wn.2d 1008 (1987). BR at 6. Neither *McKinney* nor *Young* nor *Henderson* addressed whether a child victim's extrajudicial statements were testimonial for purposes of the Confrontation Clause.

The State argues that S.T.B.'s delayed disclosure of the alleged molestation is not unusual. BR at 8. But under *Davis*, the timing of such disclosures is critical in determining whether they are testimonial or not under the Confrontation Clause. *"They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency..."* *Davis*, 126 S. Ct. 2273-74. None of S.T.B.'s statements to

Brianna, Dr. Hall, Deputy Nelson or Phillip Williams were made in an emergency. The State therefore misplaces reliance upon *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1983), *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49 (1995) and *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), as those decisions predate *Davis,* and do not address whether the statements in those cases were testimonial under the Confrontation Clause.

The State argues, again without authority, that it seems as stretch to suggest that a seven-year old child, such as S.T.B., would be able to expect that her statements would be used in litigation. BR at 8. Lacking authority, the State's argument should not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234. The State overlooks that S.T.B. stated that she wanted Jerry to go to jail for what he allegedly did to her. RP 3 at 157.

Inquiry by the State on direct examination into the contents of S.T.B.'s prior extrajudicial testimonial statements is essential to ensure that Jerry is provided a full and fair opportunity to cross-examine her. *State v. Price*, 158 Wn.2d 650; *State v. Clark*, 139 Wn.2d 159. As noted in *Price*, "*...it is the questioning on direct, not the questioning on cross-examination, that is key to the analysis*." *Price*, 158 Wn.2d 648 n. 6 (*citing In re Personal Restraint of Grasso*, 152 Wn.2d 1, 29-39, 84 P.3d 859 (2004) (Sanders, J., dissenting)).

Requiring the State to inquire into the content of S.T.B.'s extrajudicial testimonial statements fosters the purposes of the confrontation clause. *Price*, 158 Wn.2d at 640. ("*The purposes of the confrontation clause are to ensure that the witness's statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor.* (*citing California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)").

It is undisputed that the State failed on direct to inquire into the contents of S.T.B.'s extrajudicial testimonial statements to Dr. Hall, Deputy Nelson and Phillip Williams. RP 2 at 49. *See also* BR at 11-12. Instead, the State argues that it satisfied its obligation under the confrontation clause when it inquired of S.T.B. whom she told. BR at 12-14. The State fails to explain how asking S.T.B., whom she told, without also asking her about what she said, fulfills the second or third purposes of the confrontation clause.

The State offers only passing reference to *Price* and *Clark*. BR at 10. Instead, the State relies upon *State v. Kilgore*, 107 Wn. App. 160, 26 P.3d 308 (2001), and *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322 (2007). BR at 10-13. In *Kilgore*, the confrontation clause was not violated because the victim testified on direct, and was cross-examined by the defendant, about statements the victim made to her mother and a forensic

investigator. *Kilgore*, 107 Wn. App. 174-75. Here, in contrast, there was no similar testimony by S.T.B., either on direct or cross-examination, about the contents of her statements to Dr. Hall, Deputy Nelson and Phillip Williams. *Kilgore* is therefore distinguishable from the facts of this case.

In *Williams*, the victim's testimony on direct was substantially the same as her extrajudicial testimonial statements to the forensic nurse. *Williams*, 137 Wn. App. 745. Here, in contrast, significant differences exist between S.T.B.'s testimony on direct, and her extrajudicial testimonial statements to Dr. Hall, Deputy Nelson, and Phillip Williams. S.T.B. testified that "[*h*]e *tried, but his mom pulled in before that.*" RP 2 at 47. But Dr. Hall testified that "[*s*]he *said that he touched her privates with his private and it hurt...* " EX 7 at 2. Deputy Nelson also testified that "[s]*he said that he'd touched his private to her private... she told me that it did hurt.*" RP 3 at 156. In light of the differences between S.T.B.'s testimony on direct and her extrajudicial testimonial statements to Dr. Hall and Deputy Nelson, under *Price* and *Clark*, it was incumbent upon the State to examine S.T.B. on direct as to the content of her statements to them. *Williams* is therefore distinguishable here.

In *State v. Williams*, the Court rejected the argument that the trial court had violated the defendant's right of confrontation by allowing testimony

by a forensic nurse who examined the victim, regarding the victim's answers to a history questionnaire. Relying on *State v. Clark*, the Court concluded that because the victim testified extensively about how the defendant had raped her, which was what the victim's statements to the nurse were mostly about, the State therefore did not fail to ask the victim about the alleged acts, nor did it prevent the defendant from a full cross-examination of the victim. *Williams*, 137 Wn. App. 745. But in *State v. Clark*, the State asked the victim about both the events and the victim's prior statements. *Clark*, 139 Wn.2d 161. *Williams* also fails to address *Price*, which also requires direct examination of the victim regarding events and the content of prior extrajudicial testimonial statements. *Price*, 158 Wn.2d 648. To the extent that *Williams* cannot be reconciled with *Price* and *Clark*, Jerry urges the Court to follow *Price* and *Clark*.

The State's failure to question S.T.B. regarding the content of her extrajudicial statements to Brianna Ramsey, Dr. Hall, Deputy Nelson or Phillip Williams places Jerry in the same dilemma faced by the defendant in *Rohrich.* By failing to elicit testimony from S.T.B. regarding the content of those statements, the State placed Jerry in an unconstitutionally impermissible Catch-22 of calling S.T.B. on direct or waiving his confrontation rights. *Rohrich*, 132 Wn.2d 478.

The State argues that Jerry did not object to the State's direct examination of S.T.B. at trial. BR at 14-15. The State fails to support its argument with authority, so its argument should not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234. Further, as noted in *Rohrich*, the issue goes to the heart of Jerry's right of confrontation, and is thus a manifest error affecting a constitutional right which may be raised for the first time on appeal. RAP 2.5 (a) (3); *Rohrich,* 132 Wn.2d 476 n. 7; *State v. Clark*, 139 Wn.2d 155-56.

The State agues that its questioning of S.T.B. regarding who she told does not evidence any intent by the prosecutor to shield the child he from cross-examination about her statements. BR at 15. The State offers no authority that intent is an element under the confrontation clause. The State' argument should therefore not be considered. RAP 10.3 (a) (6); *State v. Dennison* 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234.

The State argues that its direct examination of S.T.B. allowed Jerry full opportunity for cross-examination. BR at 15. To the contrary, by failing to question S.T.B. on direct regarding the content of her extrajudicial statements, the State violated Jerry's right to confront the witnesses against him in violation of United States Constitution Amendment 6; Washington Constitution Art. I § 22, *State v. Rohrich*,

State v. Clark, In re Personal Restraint of Grasso, and *State v. Price, supra.*

B. THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OF THE ALLEGED CHILD VICTIM.

The State argues that Jerry waived any claim of error regarding S.T.B.'s competency by failing to contest her competency at the child hearsay hearing. BR at 26. Once again, because the State fails to support its argument with authority, its argument should not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234. Jerry may raise S.T.B.'s lack of competency for the first time on appeal. RAP 2.5 (a) (3); *State v. Hopkins*, 137 Wn. App. 448 n. 6; *State v. Swan*, 114 Wn.2d 646 n. 48; *State v. Griffith*, 45 Wn. App. 728, 732 n. 1, 727 P.2d 247 (1986).

The State argues that the trial court was not required to enter a written finding as to S.T.B.'s competency. A finding of competency is required. RCW 9A.44.120 (2) (b); *State v. Hopkins*, 137 Wn. App. 450 n. 11.

The State argues that the trial court's oral ruling was sufficient. BR 29-30, 36. The State misplaces reliance upon *State v. Thompson*, 73 Wn. App. 122, 867 P.2d 691 (1994). In *Thompson*, the trial court's failure to enter written findings in a CrR 3.5 hearing was excused, in view of the trial court's oral findings. *Thompson*, 73 Wn. App. 130. Here, in contrast, the

findings were statutorily required. RCW 9A.44.120 (2) (b); *Hopkins,* 137 Wn. App. 450 n. 11. As noted in *Hopkins,* compliance with the strict requirements of RCW 9A.44.120 is mandatory. *Hopkins,* 137 Wn. App. 451. As a result of the trial court's failure to comply with those requirements, S.T.B.'s hearsay statements were improperly admitted. *Ibid.*

In *Dependency of A.E.P.,* 135 Wn.2d 208, 956 P.2d 297 (1998), the trial court's finding, that the child victim-witness was competent, was reversed because the second *Allen*[1] factor, mental capacity, at the time of the event to receive an accurate impression of it, was not met, as the trial court had no information as to when the alleged touching incident occurred. *A.E.P.,* 135 Wn.2d 225-26. S.T.B. could not recall how old she was when the alleged abuse occurred, or whether it was winter or summer when the alleged incident occurred, or when she first saw Jerry, or the first thing she did with Jerry, or whether Jerry ever tried to put his private part in her. RP 1 at 19, 20-21, 33, 35, 40. As in *A.E.P.*, the trial court had no information as to when the alleged incident occurred, and therefore could not determine S.T.B.'s mental capacity at the time of the alleged incident, to receive an accurate impression of it. *A.E.P.* is therefore dispositive, and compels reversal of the trial court's oral finding that S.T.B. was competent. RP 1 at 126.

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[1] *State v Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

The State argues that the trial court may infer the child witness' ability to accurately perceive events from the witness' overall demeanor and manner of her answers, thus satisfying the second *Allen* factor, citing *State v.* Woods 154 Wn.2d 613, 114 P.3d 1174 (2005). BR at 29. *Woods* is a plurality opinion, and therefore is of no precedental value. *Harris v. Drake*, 116 Wn. App. 261, 270 n. 24, 65 P.3d 350, *affirmed*, 152 Wn.2d 480, 99 P.3d 872 (2004). *Woods* is also factually distinguishable in that the child victim-witness in *Woods* testified that certain acts of molestation occurred when she was three, which allowed the trial court to narrow the time in which those acts occurred to a nine-month period. *Woods,* 154 Wn.2d 620. S.T.B. offered no similar testimony. Further, four dissenting justices in *Woods* decried the absence of evidence on the second *Allen* factor. *Woods*, 154 Wn.2d 625-28 (Sanders, J., dissenting). Jerry therefore urges the Court not to follow *Woods.*

The State also misplaces reliance upon *State v. Sardinia*, 42 Wn. App. 533, 713 P.2d 122 (1985). BR at 29. In *Sardinia*, the nine-year old child victim-witness testified that between the ages of six and 9, the defendant made several sexual contacts with her. *Sardinia*, 42 Wn. App. 535. S.T.B., however, could not recall how old she was when the alleged incident occurred, or whether it was summer or winter when it occurred. RP 2 at 19, 20-21, 35. *Sardinia* is therefore distinguishable here.

The State argues that it is not unusual for a young child to not recall dates that sexual abuse occurred, and that in other contexts, courts have recognized that children may have difficulty in remembering the exact date of the abuse, citing, *State v. Holland*, 77 Wn. App. 420, 891 P.2d 49, *review denied*, 122 Wn.2d 1008, 898 P.2d 308 (1995), *State v. DeBolt*, 61 Wn. App. 58, 808 P.2d 794 (1991), and *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).[2] BR at 31-32. Neither *Holland*, nor *DeBolt* nor *Petrich* involved competency or reliability of a child victim-witness, nor the sufficiency of the evidence to support the second *Allen* factor. Respondent's reliance upon those decisions is therefore misplaced.

The State argues that Phillip Williams did not use improper leading questions in his interview of S.T.B. BR at 21-23. Once again, because the State fails to support its argument with authority, its argument should not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234. Phillip Williams acknowledged using leading questions in his interview with S.T.B. RP 1 at 62; RP 3 at 100. The trial court therefore erred in finding that the third *Allen* factor had been met. *Allen*, 70 Wn.2d at 692; *Dependency of A.E.P.,* 135 Wn.2d at 230.

The State argues that corroboration of S.T.B.'s hearsay statements was not necessary, as S.T.B. testified at trial, and her statements were

[2] *Overruled in part, other grounds*, *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988).

sufficiently reliable, citing RCW 9A.44.120 and *State v. Ryan*, 103 Wn.2d 165, 691 (1983). BR at 33. As discussed above, S.T.B. was not competent to testify, as the second and third *Allen* factors were not met. Therefore, S.T.B.'s hearsay statements were required to be both reliable and corroborated. RCW 9A.44.120 (1), (2) (b); *Dependency of A.E.P.,* 135 Wn.2d 306. The State offers neither argument nor authority that S.T.B.'s hearsay statements were corroborated.

The State argues that the nine *Ryan* factors were substantially met, citing *State v. Woods,* 154 Wn.2d 624. BR at 33. As discussed above, *Woods* is a plurality opinion, and provides no precedent here. *Harris v. Drake supra.* The *Ryan* factors were not substantially met here, as the possibility that S.T.B.'s memory was tainted by improper interviews with Phillip Williams undermines the fifth, eighth and ninth *Ryan* factors. *Dependency of A.E.P.,* 135 Wn.2d at 231. The State once again argues that Philip Williams did not improperly interview S.T.B., and again fails to support its argument with either citation to the record or authority. BR at 35. The State's argument should therefore not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234.

The State argues that S.T.B. told Brianna, Dr. Hall, Deputy Nelson and Phillip Nelson nearly identical versions of the alleged incident. BR at 35. But repetition of S.T.B.'s statements does not cure the hearsay nature of

those statements. *State v. Ryan*, 103 Wn.2d 203-04. ("*If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition.*").

The State argues again that S.T.B.'s hearsay statements were spontaneous, but cites no authority to support the trial court's oral finding that the fourth *Ryan* factor was met. BR at 35. The State's argument should therefore not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234. S.T.B. disclosed the alleged molestation months after it allegedly occurred, and then only after Brianna asked whether she had been molested. RP 2 at 90. ("*And I asked her,* [S.T.B.], *has that ever happened to you*?). Brianna's question suggested the answer. S.T.B.'s answer was therefore not spontaneous.

The State offers no argument or authority regarding the fifth *Ryan* factor, whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness. BR at 33-36. The Court may therefore address this factor on the record before it. *Adams v. Department of Labor & Industries*, 128 Wn.2d 229.

In light of the foregoing, as S.T.B. was not competent and therefore not available as a witness, and her statements were neither reliable nor corroborated, those statements were not admissible under RCW 9A.44.120. *Dependency of A.E.P.*, 135 Wn.2d 309.

The State argues ER 803 (a) (4) as an alternative basis for the admission of the testimony of Dr. Hall and Phillip Williams. BR at 15-21. In order for S.T.B.'s hearsay statements to either Dr. Hall or Phillip Williams to be admissible under ER 803 (a) (4), the State is required to affirmatively establish the S.T.B. understood that her successful treatment depended upon S.T.B. giving truthful and accurate information to them. *State v. Carol M.D.*, 89 Wn. App. 77. 84-97, 948 P.2d 837, *opinion withdrawn, in part, other grounds,* 97 Wn. App. 3655, 983 P.2d 1165 (1999). Neither Dr. Hall nor Phillip Williams testified that they explained to S.T.B. the need for truthful and accurate answers. RP 3 at 88-102, 104-126. S.T.B.'s hearsay statements through Dr. Hall or Phillip Williams are not admissible under ER 803 (a) (4). *State v. Carol M.D.,* 89 Wn. App. 87.

The State attempts to bolster its argument for the admissibility for S.T.B.'s hearsay statements to Dr. Hall and Phillip Thompson by relying upon the child hearsay hearing pursuant to RCW 9A.44.120. BR at 19-20. As indicated above, the trial court erred at that hearing in finding S.T.B. to be competent and her hearsay statements reliable. It follows that the trial court erred in admitting S.T.B.'s hearsay statements to Dr. Hall and Phillip Williams.

The State argues that S.T.B.'s statements to Dr. Hall and Phillip Williams bear other indicia of reliability under the analysis in *State v.*

Florczak, 76 Wn. App. 55, 882 P.2d 199, *review denied*, 126 Wn.2d 1010, 892 P.2d 1089 (1995). BR at 20-21. The State's reliance upon *Florczak* is misplaced, as significant factual differences distinguish *Florczak* from this case. Central to the court's reasoning in *Florczak* was the child's young age, which the court felt made it impossible for the child to fabricate the allegations of abuse. "*KT's young age indicates that she likely had no reason to fabricate the nature of the abuse, and thus, it is not critical that she understood that her statements to Wilson would facilitate her treatment.*" *Florczak*, 76 Wn. App. 66. Here, in contrast, S.T.B. was seven years old when she spoke to Dr. Hall and Phillip Williams. RP 2 at 64. In *Florczak*, the child's physical exam yielded physical evidence that the examining physician found supportive of sexual abuse. *Florczak*, 76 Wn. App. 63-64. In contrast, Dr. Hall found S.T.B.'s physical exam to be normal. RP 3 at 119; EX 6. In *Florczak*, the child was diagnosed with post-traumatic stress syndrome. *Florczak*, 76 Wn. App. 61, 74. No similar diagnosis of S.T.B. was ever introduced in this case. In *Florczak*, the court noted the unique circumstances before it in that the corroborating evidence appeared simultaneously with the child's hearsay statements. *Florczak*, 76 Wn. App. 67 n. 8. The State has identified no such unique circumstances here. *Florczak* is therefore distinguishable from the facts of this case.

Under *Florczak*'s analysis, in order for the evidence to adequately assure the reliability of the child hearsay statements under ER 803 (a) (4), that evidence must be part of the totality of the circumstances in which the child makes his statements, and to facilitate appellate review, the trial court should identify on the record the specific evidence—drawn from the totality of the circumstances—on which it relies to determine whether or not the child's statements were reliable and admissible. *Florczak*, 76 Wn. App. 65-66. The trial court made no such determination, and did not because the State failed to request it to do so. Instead, the State now requests this Court to make such a factual determination, which the Court cannot do. *Stringfellow v Stringfellow*, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960). ("*Factual disputes are to be resolved by the trial court. The Washington constitution, by Art. IV, § 6, vests that power exclusively in the trial court.*").

Contrary to the State's argument, Jerry's counsel did not waive objection to the admission of S.T.B.'s hearsay statements to Dr. Hall and Phillip Williams. BR at 16, 21. Instead, Jerry's counsel qualified his comment regarding that testimony, stating that ***if*** S.T.B.'s hearsay statements to them fit within ER 803, he would have no objection. RP 1 at 126, 128. Jerry also objected at trial to S.T.B.'s hearsay statements to Phillip Williams. RP 3 at 92-93. As discussed above, S.T.B.'s hearsay

statements to Dr. Hall and Phillip Williams are not admissible under ER 803 (a) (4). In any event, because the State does not support its waiver argument with authority, it should not be considered. RAP 10.3 (a) (6); *State v. Dennison*, 115 Wn.2d 629; *State v. Mills*, 80 Wn. App. 234.

The State argues that if S.T.B.'s hearsay statements to Deputy Nelson were improperly admitted under *Crawford v. Washington*, those statements may nevertheless be admissible under ER 801 (d) (1) (ii), as prior consistent statements. BR at 23-26. The admissibility of S.T.B.'s statements to Deputy Nelson on such grounds will not erase the violation of Jerry's Sixth Amendment right of confrontation resulting from the admission of those statements. *State v. Mason*, 160 Wn.2d 822 ("*To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.*"). *See also Crawford*, 541 U.S. 61 ("*Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence.*").

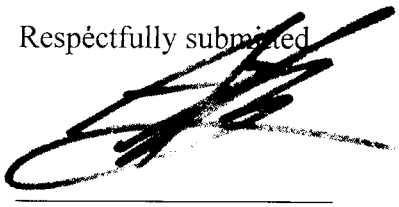
State v. Kirkman, 159 Wn.2d 918, 158 P.3d 125 (2007) does not compel a contrary conclusion here. In *Kirkman*, the court ruled that testimony by an examining physician was admissible on the issue of the child-victim's credibility, and did not constitute manifest error. *Kirkman*, 159 Wn.2d 933. *Kirkman* did not authorize admission of testimony that

violated the Confrontation Clause on an alternative, non-constitutional ground.

IV. CONCLUSION

In light of the foregoing, the Court should reverse the orders, verdict and judgment challenged above.

Respectfully submitted,



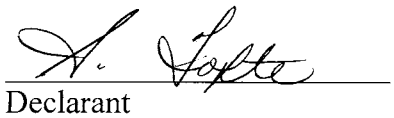
Alan M. Singer WSBA 11970
Attorney for Appellant

V. CERTIFICATE OF MAILING

The undersigned hereby declares that on November 20, 2007, the undersigned served upon Respondent the APPELLANT'S REPLY BRIEF by depositing a copy of same in the United States Mail, First-Class Postage prepaid, addressed to the following:

Lewis County Prosecuting Attorney Lori Smith
345 West Main Street, 2nd Floor MSPRO01
Chehalis, WA. 98532-1900

Dated this 20th day of November 2007 at King County, WA.



Declarant