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COURT OF APPEALS
DIVISION II

NO. 37852-3

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

A.A, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 07-8-01791-4

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court abuse its discretion in finding that the child victim was competent to testify? 1

 2. Did the trial court abuse its discretion in finding that the child victim's hearsay statements were admissible; or alternatively, is any error in the admission of these statements harmless where the trial court admitted almost identical statements under the medical diagnosis and treatment exception to the hearsay rule? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts..... 4

C. ARGUMENT..... 14

 1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT K.A. WAS COMPETENT TO TESTIFY..... 14

 2. THE TRIAL COURT'S ADMISSION OF THE CHILD VICTIM'S STATEMENTS WAS PROPER UNDER THE CHILD HEARSAY STATUTE AND THE CONFRONTATION CLAUSE..... 21

D. CONCLUSION. 29

Table of Authorities

State Cases

<i>Dependency of A.E.P.</i> , 135 Wn.2d 208, 956 P.2d 297 (1998)	15, 16, 18, 22
<i>Dependency of S.S.</i> , 61 Wn. App. 488, 494, 814 P.2d 204 (1991)	.....21
<i>State v. Allen</i> , 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)	.....14, 15, 16, 17, 18, 19, 21
<i>State v. Avila</i> , 78 Wn. App. 731 at 736-37, 899 P.2d 11 (1995)	.....19
<i>State v. Borland</i> , 57 Wn. App. 7, 11, 786 P.2d 810 (1990)	.....14, 22
<i>State v. C.J.</i> , 148 Wn.2d 672, 684, 63 P.3d 765 (2003)	.....24
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)	.....25
<i>State v. Fisher</i> , 130 Wn. App. 1, 108 P.3d 1262 (2005)	.....24
<i>State v. Floreck</i> , 111 Wn. App. 135, 140, 43 P.3d 1264 (2002)	.....25
<i>State v. Gribble</i> , 60 Wn. App. 374, 804 P.2d 634 (1991)	.....21
<i>State v. Hancock</i> , 46 Wn. App. 672, 678-79, 731 P.2d 1133 (1987)	.....25
<i>State v. Hieb</i> , 107 Wn.2d 97, 727 P.2d 239 (1986)	.....25
<i>State v. Justiniano</i> , 48 Wn. App. 572, 580, 727 P.2d 247 (1986)	.....22
<i>State v. Karpenski</i> , 94 Wn. App. 80, 971 P.2d 553 (1999)	.....16, 17, 24
<i>State v. McKinney</i> , 50 Wn. App. 56, 62, 747 P.2d 1113 (1987)	.....22
<i>State v. Medina</i> , 112 Wn. App. 40, 48, 48 P.3d 1005 (2002)	.....27
<i>State v. Parris</i> , 98 Wn.2d 140, 654 P.2d 77 (1982)	.....21
<i>State v. Pham</i> , 75 Wn.App. 626, 630, 879 P.2d 321 (1994)	.....15
<i>State v. Price</i> , 158 Wn.2d 630, 146 P.3d 1183 (2006)	.....27, 28

<i>State v. Przybylski</i> , 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)	14, 19, 24
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	18, 21, 22
<i>State v. Sardinia</i> , 42 Wn. App. 533, 537, 713 P.2d 122 (1986)	19, 20
<i>State v. Shafer</i> , 156 Wn.2d 381, 391, 128 P.3d 87 (2006)	16, 22
<i>State v. Swan</i> , 114 Wn.2d 613, 645, 790 P.2d 610 (1990)	14, 22
<i>State v. Woods</i> , 154 Wn.2d 613, 620, 114 P.3d 1174 (2005)	14, 15
<i>State v. Woodward</i> , 32 Wn. App. 204, 208, 646 P.2d 135 (1982).....	15, 20

Federal and Other Jurisdictions

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).....	26, 27
<i>Dutton v. Evans</i> , 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970).....	22
<i>Kentucky v. Stincer</i> , 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987).....	27
<i>United States v. Owens</i> , 484 U.S. 554, 559, 108 S. Ct. 838, 98 L.Ed.2d 951 (1988).....	27

Constitutional Provisions

U.S. Const. amend. VI.....	27
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Statutes

RCW 5.60.050(2)	14
RCW 9.94A.120	21, 26
RCW 9A.44.120	24

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

1. Did the trial court abuse its discretion in finding that the child victim was competent to testify?
2. Did the trial court abuse its discretion in finding that the child victim's hearsay statements were admissible; or alternatively, is any error in the admission of these statements harmless where the trial court admitted almost identical statements under the medical diagnosis and treatment exception to the hearsay rule?

B. STATEMENT OF THE CASE.

1. Procedure

On May 7, 2008, defendant was charged by amended information with one count of rape of a child in the first degree, and one count of first degree child molestation. RP 396. The charging period was December 6th of 2006, to May 1, 2007. RP 396, CP 34-38.

The matter came before the Honorable Judge Hogan on 4/24/08, for trial and a competency hearing. RP 1-4.

The court entered findings of fact and conclusions of law following the hearing. CP 32-33, Appendix A.

Given that it was a bench trial, the parties agreed to have the court make a hearsay determination during the course of the trial. The court

ruled that K.A.'s¹ statements to D.S. and Cynthia Armstrong were admissible, but declined to admit the statement to Misti Griffin or Tiffany Gordon. RP 441. The court further ruled that K.A.'s statements to Ms. Richards, Ms. Hanna-Truscott, and Ms. Brune were admissible as child hearsay and for the purposes of medical diagnosis and treatment. RP 447. Written findings of fact and conclusions of law were entered. CP 36-38, Appendix A.

a. Competency Hearing Facts

K.A.

K.A. was able to recite her date of birth as 12/6/98, her address (166th Street Court East) and that she currently was in the third grade at Evergreen Elementary. RP 21-22, 25. K.A. was able to recall that in the second grade her teacher was Ms. Mayforth and in the first grade her teacher was Ms. Helms. RP 22. K.A. could recall that she also attended Evergreen Elementary for kindergarten but could not recall her teacher's name. RP 23. K.A. knew that she had lived in the same house from preschool until now. RP 26.

¹ This case involves a juvenile defendant, juvenile victim, and some juvenile witnesses. For privacy purposes the State refers to each of these juveniles with their first and last initials, rather than full names, e.g. victim is K.A. and defendant is A.A. throughout this brief.

K.A. recalled that her biological father died when she was seven. RP 28-29. She was in the second grade when he died and did not return to school regularly following that. RP 29. K.A. recalled that her father died closer to Christmas. RP 41.

K.A. demonstrated a knowledge of truth versus a lie, e.g. it would be a lie to say that mice were running across the courtroom floor and it would be pretend to say that she flew an airplane to court. RP 32.

K.A. was able to recall her 8th birthday and that it was celebrated at home with her mother, her friend, Rachel, and her brothers. RP 35. The last Christmas she received a Nintendo DS. RP 36.

K.A. could recall dressing as a witch last Halloween, and a fairy when she was in the first grade, but could not recall what she wore in the second grade. RP 37. K.A. understood that they were in court to eventually talk about “A” but that they were not going to talk about it today. RP 38.

K.A.’s mother Cynthia Armstrong

Cynthia related that her daughter, K.A., is currently in the third grade and has attended Evergreen Elementary since kindergarten. RP 44. K.A. confirmed that K.A.’s current teacher is Ms. Heyver, her second grade was Ms. Mayforth, and Ms. Nelms was her first grade teacher. RP 46. She could not recall who her daughter’s kindergarten teacher is. RP 46.

K.A. and her mother live at 2103 166th Street Court East, Spanaway. RP 47.

K.A.'s father died January 4, 2007, when K.A. was in the second grade. RP 49-50.

For her eighth birthday they spent it with K.A.'s dying father, her friend Rachel and her mother, at home with dinner, cake and ice cream. RP 52, 53.

She recalled K.A. dressing as a "fairy witch" this last year but could not recall other costumes. RP 55-56.

2. Facts²

The Disclosure

K.A. is the nine year old daughter of Cynthia Armstrong. RP 219. Cynthia has three more children, L.A. (7), D.S.(14), and Jocelyne (20). RP 219.

Cynthia was formerly married to Randy Armstrong over 21 years ago, and although the two went their separate ways, they reconnected around 1998 and have remained friends since then. RP 228-30. Randy had two children in another relationship, A.A., and a younger daughter,

² The State presented testimony of Misti Griffin and Tiffany Gordon. RP 441. Because the court excluded K.A.'s hearsay statements to these witnesses, and these witnesses' testimony largely concerned the hearsay statements, the State has not included this testimony in the recitation of facts. RP 441.

C.A. RP 231. For a period of time they lived in the same apartment complex and the families saw each other every weekend. RP 231, 235. K.A. considered Randy to be her second father. RP 234.

Cynthia recalls that the last day K.A. was at Randy's house was March 30th, because that was the day she got a surprise settlement from Social Security in the mail. RP 235. At this time, Randy's daughter, C.A., was living with Cynthia. RP 233. Randy was at Cynthia's home and K.A. asked to go spend the night. RP 236. K.A. called her mom once while she was at Randy's and said she was having fun watching TV. RP 237. K.A. said that Cassandra was going skating, and Randy was on the computer. RP 237.

Around the last day of April, approximately a month after K.A.'s visit to Randy's, Cynthia recalls her friend Tiffany disclosed to her that Misti had told her that D.S. had told Misti that something had happened between A.A. and K.A.. RP 240. Cynthia immediately called Randy. RP 240. Cynthia then called D.S. and asked him if it was true and he said no. RP 241.

The next morning Cynthia kept K.A. home and told her that she had heard something about her and A.A.. RP 242. Cynthia explained to K.A. that it was important that K.A. tell the truth because this was something serious, and then she asked her if "anybody had touched her inappropriately." RP 242. K.A. replied, "yes." RP 243. Cynthia asked who and K.A. said, "A." RP 243. K.A. said that A.A. threw her on the

bed, took her pants off and stuck his “yuck yuck”³ in her. RP 243.

Cynthia asked her daughter where Randy was during this and she said he was drunk at the computer. RP 243. Cynthia then questioned where C.A. was and K.A. said “skating.” RP 243. Cynthia asked what happened afterwards and she said that A.A. got off of her, pulled her pants up and she went and sat on the couch in the living room. RP 243. Both K.A. and Cynthia began crying. RP 244. K.A. said that she had not told anyone. RP 244.

Cynthia Armstrong was unaware that K.A. had previously disclosed the abuse to Cynthia’s son, D.S., until Cynthia spoke with her girlfriend Tiffany. RP 240-241. D.S. recalls that the last time he was at his cousin’s house, A.A.’s, it was he, A.A., LA, K.A. and C.A. RP 193. A.A. had three TVs in his room, an X-Box and a dresser. RP 194. They had stayed the night and on the way back home he was in the back seat with LA and K.A.. RP 193, 196. K.A. whispered to D.S. that A.A. was touching her and in inappropriate places – “bad places.” RP 196-97, 202. D.S. told her to tell their mother. RP 197-98. D.S. cannot ever recall the two families not getting along. RP 200.

³ Cynthia Armstrong had not discussed the birds and the bees with her daughter, K.A.. RP 226. According to Cynthia, her daughter K.A. calls a boy’s penis a “yuck yuck” or “private.” RP 227. A girl’s private would sometimes be referred to as a “who who” or “private area.” RP 227.

Medical Evaluation

Cynthia took K.A. to her pediatrician, Dr. Jolley, and Dr. Almohammed on May 1, 2007. RP 244, 246, 261. License practical nurse Lisa Richards was called into the consult room because Dr. Almohammed was having problems getting K.A. to speak. RP 266. Dr. Almohammed left the room and Ms. Richards tried to get K.A. to open up by explaining to her that she could share with her things that had happened and that her mother was not going to be mad at her. RP 268. K.A. revealed that she had wanted to go to her uncle's house to stay the night, and C.A. was roller skating that day so she was there by herself with Randy and A.A., watching TV. RP 269. Randy was on the computer. RP 273. A.A. said, "let's go into my room," and picked her up and put her on the bed. RP 272. A.A. then pulled down her pants and stuck his "thing inside of her." RP 272. As K.A. described this she gestured down below. RP 279. When asked how long it lasted she said, "two minutes, or less." RP 272. K.A. explained to Ms. Richards that it just stopped, he pulled up his pants and left the room. RP 272. K.A. was left standing there and sort of scared. RP 272. She did not know what to do so she went into the bathroom to look and see where he put it. RP 272. K.A. also reported that A.A. threatened by saying he was not going to be her friend anymore and buy her anything. RP 272. K.A. did not report any pain or bleeding. RP 272. K.A. also reported that she did not tell her mom because she was scared. RP 274.

K.A. was referred to Mary Bridge Sexual Assault Clinic for a medical exam. RP 247, 283. Nurse practitioner Cheryl Hanna-Truscott met with K.A., her mother, and godmother, Tiffany Gordon Reynolds on May 2, 2007, at the center. RP 350. First Ms. Hanna-Truscott sat down with Cynthia and went over the history. RP 351. Ms. Hanna-Truscott then took K.A. in an examination room with a nurse. RP 352. K.A. was 8 years, and four months at the time of the exam. RP 353. Ms. Hanna-Truscott explained that she was a special kind of nurse that does check-ups on children and showed K.A. the otoscope, stethoscope and culpascope. RP 353.

K.A. explained to Ms. Hanna-Truscott that she saw her own doctor yesterday and that it was “hard” for her because her doctor is a male and she wanted to talk to a girl and that she eventually was able to see a female at the office. RP 354. Ms. Hanna-Truscott explained that she wanted to hear from K.A. and K.A. said, “A.” RP 355. The examiner then said, what happened with A., and K.A. said he put his “yuck yuck” in me. RP 355. K.A. pointed to her genital area to indicate where a boy’s “yuck yuck” is located and then she made a face as if she were describing something “icky.” RP 355. When asked where he put his “yuck yuck,” she replied, “my front private part.” RP 357. Hanna-Truscott asked whether A.A. stayed still or moved and K.A. reported he “stayed still.” RP 357. K.A. at first said that A. said nothing to her but then said that he threatened her. RP 357. He said, “if you tell, I won’t be your friend or

give you stuff.” RP 357. K.A. explained that A. gets her gum and stuff from the store and takes her places and “it’s fun.” RP 357. Ms. Hanna-Truscott asked K.A. to tell her a little bit more and K.A. said, “I went to my Uncle’s house. A asked me to go in his room. Then he pulled down my pants and pulled his down, and he stuck it in.” RP 357. K.A. then drew a picture of herself lying on a bed with A standing over her, sticking his “yuck yuck” in her private. RP 358-59, 361 Pl. Ex. 6. This was done without any prompting. RP 359.

Ms. Hanna-Truscott asked K.A. how it felt and she said, “weird.” RP 362. When asked how it stopped, K.A. replied, he just pulled it down.” RP 362. K.A. then said she stayed “as far away as possible from him.” RP 362. K.A. denied that A.A. used his hands or mouth on her body and denied that she used her hands or mouth on his body. RP 363. K.A. said that nothing like this had ever happened to her before. RP 363.

Ms. Hanna-Truscott then had K.A. unrobe with the nurse in the examination room. RP 364. First Ms. Hanna-Truscott examined K.A. to make sure there were no signs of physical abuse, and then she performed a genital exam. RP 365. Ms. Hanna-Truscott performed a three part genital exam, (1) supine stirrups exam, (2) supine knee/chest, and (3) pro knee/chest. RP 367. Through this examination she uncovered that K.A.’s genitalia were reddened. RP 367. That finding in and of itself was not significant because there can be a variety of reasons why a child’s genitalia may be reddened. RP 367. However, Ms. Hanna-Truscott also

uncovered a “complete transaction,” which is a complete tear in the posterior, or lower part of the hymenal tissue that extends completely to the base of the vaginal wall. RP 367. This was an unusual finding and is correlated with traumatic injury and would be consistent with penile penetration. RP 367-68. Ms. Hanna-Truscott referred K.A. for medical services, including counseling for sexual abuse, lab tests for gonorrhea and Chlamydia, and to continue follow up RP 368.

Child forensic interviewer Kim Brune conducted an interview of K.A. on May 18, 2008, and the interview was videotaped. RP 383-84, 386. The interview was admitted as Pl. Ex. 14. RP 385. During the interview K.A. drew a picture, depicting K.A. on a bed, and A.A. standing vertically. RP 387, Pl. Ex. 9. As an experienced child interviewer, Ms. Brune reported that in her experience, and based on research articles, more than 75 percent of children delay disclosing sexual abuse. RP 389. Ms. Brune also reported that it is common for kids to provide more details and information, as the matter comes out. RP 389. In other words, “disclosure is not an event, it’s a process.” RP 389.

K.A.’s Testimony

K.A. would go over to her Uncle Randy and A.A.’s house and stay there, because K.A.’s dad often stayed there. RP 91. K.A. would play with A.A.’s sister, C.A. RP 92. The house was made up of a kitchen, living room and two bedrooms. RP 92. C.A. and A.A. slept in the bedrooms and Uncle Randy slept on the coach. RP 92. K.A. did not see

A.A. while she was in the third grade. RP 93. The last time she saw him was when she was in the second grade, and the last time she saw him “something” happened with A.A. at Uncle Randy’s house. RP 93-94. K.A. believed it was in the middle of the year that something occurred, sometime before her father died. RP 94-95.

K.A. was over at Uncle Randy’s house, sitting in CA’s room, watching TV. RP 95. L.A., C.A., A.A. and Uncle Randy were also at home that day. RP 95. L.A. was in the room with her at the time. RP 96. A.A. came into the bedroom while she was sitting on the bed and shut the bedroom door. RP 97, 106. LA was next to her on the bed. RP 97. The door to the bedroom was closed. RP 106. A.A. pulled K.A.’s clothes down to her legs. RP 105. While LA was on the bed A.A. touched her “private parts” (indicating front genital area with her hand). RP 98. A.A. touched her front private part with his “front private part.” RP 99. A.A. explained that these front private parts to go to the bathroom. RP 99. K.A. refers to this part of the male body as “yuck yuck.” RP 99. K.A. explained that A.A. “raped” her, but she was uncertain what that term meant. RP 100, 120. Instead K.A. explained that, “he touched me with his on mine.” RP 100.

During the incident K.A. did not look at A.A.’s “yuck yuck” but instead kept her eyes on the TV. RP 123. Her brother, LA, was sitting farther back on the bed, near the pillows. RP 123, 127. Upon further questioning, she was confused as to whether LA was there. RP 128-29.

When A.A.'s privates were in her front private it "felt bad" and "weird." RP 107.

The rape stopped when K.A. told A.A. to stop. RP 108. After A.A. stopped, K.A. went into the bathroom to go pee. RP 108. K.A. never discussed this with A.A. or her Uncle Randy. RP 108.

K.A. never told anyone about what happened. RP 109. She was scared to tell her mother because she was afraid that she would be mad and that she would get in trouble. RP 126. K.A. recalled talking to the child interviewer named Kim as well as another lady who tape-recorded the interview. RP 110-12. She also spoke with a new doctor. RP 112.

During a forensic child interview, K.A. recalls that she drew a picture showing A.A. standing by her while she was lying on the bed. RP 101-103, Pl. Ex. 6. The picture depicts A.A. sticking his front private part into her front part. RP 103. There is a figure coming out of the front of A.A. and above it is the description of "yuck yuck." RP 104. Also in the picture is a red or purple area between her spread legs and it is labeled "K's private part." RP 104, 105.

Randy Armstrong

Randy Armstrong confirmed that his son A.A. lived in his home in 2007, and that the home was a single story, two bedroom home. RP 158. During that time A.A. had his own room, and his daughter CA slept out in the front room. RP 160. A.A.'s room was full of computer equipment,

there were a total of 37 computers, and four servers in that room, and other than accessing the bed, the room was full of computers. RP 160. CA's room at one point had two twin beds and then a big bed was placed in there. RP 161. Also during this time, Randy had a severe drinking problem, drinking anywhere from four to seven beers a night and sometimes up to twelve. RP 164-66.

Randy recalls that the last time K.A. was at his home without her mother was March 30, 2007, a Friday afternoon, because CJ needed a babysitter for K.A. and she allowed her to stay the night. RP 167, 177. K.A.'s brothers were not there. RP 168. Randy, A.A. and CA were home at the time. RP 168. That night Randy was playing games on the computer, drinking beer and making dinner. RP 169. K.A. was either in the front room or in CA's room watching movies. RP 170. A.A., who was 15 at the time, spent much of the day riding his bike or skateboarding, but Randy could not recall what his son was doing in the evening while K.A. was there. RP 170-71.

Several weeks after K.A. stayed the night, Randy learned of the allegations. RP 171. Randy explained that up to this point, other than an issue he had with his daughter CA living with Cynthia Armstrong, their relationship was fine. RP 172. Randy received a telephone call from Cynthia Armstrong where Cynthia stated something had happened with his son and K.A.. RP 173.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT K.A. WAS COMPETENT TO TESTIFY.

Generally, a trial court's competency determination is reviewed for manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). "There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness." *State v. Woods*, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005), (quoting *State v. Borland*, 57 Wn. App. 7, 11, 786 P.2d 810 (1990)). "The competency of a youthful witness is not easily reflected in a written record, and [a trial court] must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." *Id.* (citing *Allen*, 70 Wn.2d at 692; *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)). An appellate court may examine the entire record in reviewing the competency determination. *Id.*

By statute, persons "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly[,] are not competent to testify. RCW 5.60.050(2).

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

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

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Inconsistencies in the child witness's testimony bear on credibility, not admissibility. *State v. Woodward*, 32 Wn. App. 204, 208, 646 P.2d 135 (1982).

“If the child demonstrates she had the ability to accurately perceive events prior to the abuse, the court can infer that the ability also existed at the time of the abuse.” *State v. Woods*, 154 Wn.2d at 620, (citing *State v. Pham*, 75 Wn.App. 626, 630, 879 P.2d 321 (1994)).

In addition to the factors outlined above, a trial court may also consider whether there is any possible "taint" affecting the competency of the child witness. *Dependency of A.E.P.*, 135 Wn.2d 208, 956 P.2d 297 (1998). During a competency hearing, a defendant may argue that a child's memory of events has been "corrupted by improper interviews," and may thereby show that the child does not have a "memory sufficient

to retain an independent recollection of the occurrence." *A.E.P.*, 135 Wn.2d at 230 (citing, *State v. Allen*, 70 Wn.2d at 692). This is not argued in the matter before the court.

Based on the assignments of error and briefing in this matter, only the first (an obligation to speak the truth), third (independent recollection of the event), and fourth (ability to express in words her memory of the incident) *Allen* factors are at issue, and the State will address them accordingly.

a. Understanding of the obligation to speak the truth (First *Allen* factor).

Defendant alleges that K.A. demonstrates an inability to distinguish truth from lies. (Opening Brief of Appellant at 7). It is unclear where the argument lies as defendant did not assign error to FOF #1, which provides that "K.A. understands her obligation to speak the truth on the witness stand," which is now a verity on appeal. See *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (where appellant does not assign error to findings of fact following a hearsay or competency determination, those findings are verities on appeal).

The thrust of defendant's argument stems from *State v. Karpenski*, which is easily factually distinguishable from the case at bar. 94 Wn.App. 80, 971 P.2d 553 (1999). In *Karpenski*, the child victim told wild stories

of fantasy, and according to relatives and professionals alike the child had a propensity for telling imaginary tales which he insisted happened (e.g. vivid accounts of skydiving, his mother winning \$10,000, and a trip to Hawaii – all events which had never occurred). 94 Wn.App. at 83, 86.

In the instant case, K.A. did not similarly hold a history of telling such imaginary tales. Instead, K.A. reported very simple facts regarding events in her life, from classroom teachers to the type of presents she received at her 8th birthday, to the event of her father's death, none of which were full of embellished details, and most of which her mother was able to corroborate. RP 2-22, 35, 36, 28-29, 46, 49-50. K.A. also answered correctly all questions pertaining to whether the prosecutor was telling the truth or a lie when asked, for example, whether it would be pretend to say that she flew an airplane to court. RP 32.

It is undisputed that K.A. understood her obligation to speak the truth on the stand, and that she was able to accurately relate information to the court. Nothing in the record demonstrates that this child was an “incompetent” witness, nor calls into question her ability to distinguish fact from fiction, and the trial court properly found that the first *Allen* factor was met.

b. Sufficient memory to retain an independent recollection of the incident (third *Allen* factor).

Defendant does not argue taint in this case, and there is nothing to support that K.A.'s memory was tainted so that she did not retain an independent recollection of the event.

"[A] defendant can argue memory taint at the time of the child's competency hearing." *In re A.E.P.*, 135 Wn.2d 208, 230, 956 P.2d 297 (1998). "If a defendant can establish a child's memory of events has been corrupted by improper interviews, it is possible the third *Allen* factor, 'a memory sufficient to retain an independent recollection of the occurrence[,] may not be satisfied.'" *In re A.E.P.*, 135 Wn.2d 208, 230, 956 P.2d 297 (1998) (quoting *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)). "The possibility a child's memory or testimony may have been tainted by improper interviews [can also be] addressed by the fifth, eighth and ninth Ryan factors." *A.E.P.*, 135 Wn.2d at 231.

Here, the fifth, eighth and ninth *Ryan* factors are uncontested. *See Argument Infra, sec. 2*. K.A. was able to recount the core details of the abuse. For example, that they were on the bed when it occurred, that defendant was standing over her, and that the incident involved penile/vaginal penetration. RP 99, 105. Defendant's chief complaint centers on minor inconsistencies which have nothing to do with the details of the abuse. Instead, defendant complains that because she was

inconsistent in terms of which bedroom the rape occurred in, or whether her little brother was watching TV at the time, that she was not competent. However, inconsistencies such as these go to the weight, not competency, and the trial court correctly ruled in this regard.

c Ability to express in words her memory of the incident (fourth *Allen* factor).

K.A. demonstrated an ability to answer questions regarding her memory of events surrounding the time of the incident, and that is all that is required for this fourth *Allen* factor. Contrary to defendant's argument, it is not necessary at a competency hearing that the child be able to relate the actual event as long as the witness demonstrates the ability to accurately relate events which occurred at least contemporaneously with the incidents at issue. *State v. Avila*, 78 Wn. App. 731 at 736-37, 899 P.2d 11 (1995); see also, *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987).

The court found in *Sardinia* that parts (3) and (4) of the *Allen* test set out above were satisfied by the child's testimony that she knew who her schoolteachers were and what her performance had been in school, from which "the trial judge was justified in inferring that she had sufficient memory to permit her to retain an independent recollection of the occurrences leading to the events described in this case." *State v.*

Sardinia, 42 Wn. App. 533, 537, 713 P.2d 122 (1986).

Defendant's assertion that a child must testify to the abuse incident during the competency hearing is entirely without merit.

No case cited to this court nor any case revealed by our research indicates that the trial court must necessarily examine a child witness regarding the particular issues and facts of the case to determine competency. In fact, we are persuaded that a witness's memory and perception might be better tested against objective facts known to the court, rather than disputed facts and events in the case itself. So long as the witness demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well. At trial, the defendant is then free to impeach the child witness's credibility, like any other witness, by pointing out inaccuracies and inconsistencies in her testimony. As the court noted in *Woodward*, such evidence would bear upon the weight to be given to the child witness's testimony, not its admissibility.

32 Wn. App. at 208.

Here, K.A. accurately recalled who her teachers were for first, second (the year the abuse occurred), and third grade, and conveyed this information through a question and answer format in court. RP 21, 22, 25. K.A. also accurately related that her father had died while she was in second grade, and that the death occurred "closer to Christmas." RP 41. Cynthia Armstrong confirmed that K.A.'s father died January 4, 2007, while K.A. was in the second grade. RP 49-50.

Because the State provided sufficient evidence to support all of the *Allen* factors, and everything defendant argues to this court deals with inconsistencies, which go to credibility and not competency, this court should affirm exercise of the trial court's discretion in determining competency in this matter.

2. THE TRIAL COURT'S ADMISSION OF THE CHILD VICTIM'S STATEMENTS WAS PROPER UNDER THE CHILD HEARSAY STATUTE AND THE CONFRONTATION CLAUSE.

a. Statutory hearsay concerns – RCW 9.94A.120.

The determination of whether statements are admissible under RCW 9.94A.120, the child abuse hearsay exception, is reviewed for abuse of discretion. *Dependency of S.S.*, 61 Wn. App. 488, 494, 814 P.2d 204 (1991), (citing *State v. Gribble*, 60 Wn. App. 374, 804 P.2d 634 (1991)).

In *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court listed nine factors to be applied in determining whether a child's out-of-court statements are reliable. The first five derive from *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982) and include:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously; and

(5) the timing of the declaration and the relationship between the declarant and the witness.

The next four factors to be considered, derived from *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970), are:

- (1) the statement contains no express assertions about past facts;
- (2) cross-examination could not show the declarant's lack of knowledge;
- (3) the possibility of the declarant's faulty recollection is remote; and
- (4) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

These factors must be "substantially met before a statement is demonstrated to be reliable." *State v. McKinney*, 50 Wn. App. 56, 62, 747 P.2d 1113 (1987), citations omitted. It is not necessary that all the Ryan factors be met. *State v. Swan*, 114 Wn.2d at 652; *State v. Borland*, 57 Wn. App. at 20, (citing, *State v. Justiniano*, 48 Wn. App. 572, 580, 727 P.2d 247 (1986)).

With regards to whether the statements are unreliable due to a "taint", the A.E.P. court held that the fifth, eighth, and ninth *Ryan* factors address the possibility of a child's memory being tainted by improper interviews. *Dependency of A.E.P.*, 135 Wn.2d at 231.

The *Ryan* factors were generally met in this case. All of the factual findings that the trial court entered regarding hearsay are verities on appeal, and they standing alone support the legal conclusion that the hearsay statements are admissible. See *State v. Shafer*, 156 Wn.2d 389,

128 P.3d 87 *cert. denied*, 127 S. Ct. 553 (2006)(where appellant does not assign error to findings of fact following a hearsay determination, those findings are verities on appeal).

The court entered the following uncontested factual findings in this case:

1. K.A. has no apparent motive to lie.
2. K.A. is generally of good character.
3. K.A. made statements to [D.S.], Cynthia Armstrong, Lisa Richards, Cheryl Hanna-Truscott, and Kim Brune and those statements, though at different times with different purpose, were generally consistent;
4. K.A.'s statements were spontaneous as defined by case law,
5. there is nothing about the timing of K.A.'s statements that suggests an improper motive, nor does anything about the relationship between K.A. and the persons she talked to,
6. the possibility K.A.'s recollection is faulty is remote,
7. based on the totality of the circumstances surrounding the making of K.A.'s statements, there is no reason to believe K.A. misrepresented the respondent's involvement.

CP 36-38. The fact that the above findings are verities should end the analysis; however, the State will outline in more detail below why the court's ruling is sound and address defendant's arguments which overlook these verities.

Defendant's argument in this section is somewhat circular: "K.A.'s statements were not reliable because she was not competent to testify." (Opening Brief of Appellant at 14). Defendant then goes on to argue that

K.A.'s inconsistencies in her statement and trial testimony affect admissibility of hearsay. *Id.* However, inaccuracies and inconsistencies go to the weight of the hearsay statements, not their admissibility. *State v. Przybylski*, 48 Wn. App. at 665-66.

Defendant further argues that the court erred in admitting the hearsay, because the facts did not support that at the time the hearsay statements were made, K.A. was competent. OBA at 13 (citing *State v. Karpenski*, 94 Wn. App. at 112 (holding that before admitting a child hearsay statement under RCW 9A.44.120, a trial court must find that the child was competent at the time the statement was made). However, *Karpenski* was abrogated by *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765 (2003). See *State v. Fisher*, 130 Wn. App. 1, 108 P.3d 1262 (2005) (noting that the Supreme Court reversed the holding in *Karpenski* that competency at the time of the statement is a prerequisite to admissibility of child hearsay under 9A.44.120). Defendant's argument under this legal theory is unsupported. There was no requirement that the State establish K.A.'s competency at the time she made the hearsay statements in order to admit those statements under the child hearsay statute:

[T]he legislature did not intend that RCW 9A.44.120 require an additional finding that a child declarant understood the difference between a truthful statement and a false statement at the time the statement was made, or that he understood his obligation to speak truthfully about the incident.

State v. C.J., at 685.

Finally, defendant argues that because K.A. does not retain any memory of making the hearsay statements, they were inadmissible. OBA at 14. This is an inaccurate statement of the law. *See Argument Infra* re: Constitutional Claim.

Even if this court were to conclude that the trial court erred in admitting the child hearsay, any error is harmless where the defendant does not challenge the admission of the medical diagnosis and treatment statements, and these statements were cumulative to the challenged statements. ‘An error in admitting evidence is nonconstitutional if the hearsay declarant and recipient testify and are cross-examined.’ *State v. Floreck*, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). And nonconstitutional error in admitting a hearsay statement is ‘harmless unless, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’ *State v. Hancock*, 46 Wn. App. 672, 678-79, 731 P.2d 1133 (1987) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). In *State v. Hieb*, the Supreme Court held that admission of hearsay observations made by 3-year-old sister of 16-month-old victim amounted to harmless error where medical testimony as to numerous injuries sustained by victim in a three-month period prior to her death pointed overwhelmingly to guilt. 107 Wn.2d 97, 727 P.2d 239 (1986).

Here, in addition to the child hearsay statements which defendant attacks on appeal, there was also the admission of K.A.'s statements to nurse Lisa Richards, nurse practitioner Cheryl Hanna-Truscott, and child interviewer Kim Brune, for medical diagnosis and treatment. CP 36-38. These statements were cumulative of the statements admitted pursuant to RCW 9.94A.120, and in some respects were more compelling given that not only did K.A. report the abuse to them, but she was able to diagram the incident. Pl. Ex. 6 and 9. In addition, the State had corroborating physical documentation of the abuse in the form of the documentation of the "complete transaction," a finding that is rare to have in abuse cases. RP 367. Given all of the cumulative and overwhelming evidence in this case, any alleged error in the admission of hearsay testimony is harmless.

b. Constitutional Claim

Defendant argues that the court admitted the child hearsay in violation of constitutional provisions contrary to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004) where the trial court did not make a finding that K.A. was competent at the time the hearsay statements were made. As outlined below, a trial court does not have to make a finding as to the competency of the child witness at the time the hearsay statement was made.

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause prohibits admission of testimonial statements made out of court by a witness who is *unavailable* for trial unless there has been a prior opportunity for cross-examination. *Crawford*, 541 U.S. 68. Whether a trial court has violated an accused's confrontation rights is an issue reviewed de novo. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

“The Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” *United States v. Owens*, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L.Ed.2d 951 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L.Ed.2d 631 (1987)). “It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, [her] lack of care and attentiveness . . . and even . . . the very fact that [she] has a bad memory.” *Id.*

The issue defendant presents is clearly controlled by the Washington Supreme Court's decision in *State v. Price*, 158 Wn.2d 630, 146 P.3d 1183 (2006). In *Price*, the Court noted that there are three recognized purposes of the Confrontation Clause: (1) to ensure that the witness's statements are given under oath, (2) to require the witness to submit to cross-

examination, and (3) to permit the jury to observe the witness's demeanor.

158 Wn.2d at 640. The court went on to hold:

[A]ll of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall. Thus, we hold that when a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause. We conclude that a witness's inability to remember does not implicate Crawford nor foreclose admission of pretrial statements. ...

158 Wn.2d at 650.

Here, as in *Price*, K.A. took the witness stand and testified under oath. The State did not attempt to impermissibly shield K.A. from answering questions about the allegations. Under the circumstances, K.A. has not established that she was unconstitutionally deprived of her right to confront witnesses against her.

D. CONCLUSION.

The trial court's child competency and hearsay findings are, for the most part, unchallenged in this appeal. For this reason, and because the trial court's findings are sound, the State asks this court to affirm these findings and uphold the determination of guilt.

DATED: January 26, 2009.

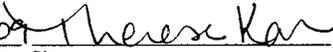
GERALD A. HORNE
Pierce County
Prosecuting Attorney

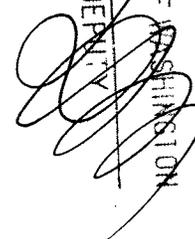


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

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

1-26-09 
Date Signature

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STATE OF WASHINGTON
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APPENDIX "A"

FOF/COL Child Competency

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7
8 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

9
10 STATE OF WASHINGTON,

11 Plaintiff,

CAUSE NO. 07-8-01791-4

12 vs.

13 ANTHONY W ARMSTRONG,

ORDER FINDING CHILD VICTIM
HEARSAY ADMISSIBLE AT TRIAL

14 Respondent.
15

16 On April 24, 2008, this matter came on for trial, the Honorable Judge Vicki Hogan,
17 presiding. The State was represented by Heather de Maine, Deputy Prosecuting Attorney, and the
18 respondent was present and represented by his attorney, Jason Johnson. Before trial, the court
19 held a hearing to determine the admissibility of hearsay statements made by K.A., the child
20 victim in this case. The court reviewed the pleadings submitted by the parties, heard the
21 testimony of witnesses, and heard the arguments of counsel. The court entered an oral ruling
22 finding K.A.'s statements to De'Andre Smith, Cynthia Armstrong, and Kim Brune admissible as
23 child hearsay. Further, the court found that K.A.'s statements to Lisa Richards and Cheryl
24 Hanna-Truscott admissible as child hearsay and as statements for medical purpose/diagnosis.
25 The court now sets out its ruling in writing.
26

27 The court makes the following findings on the Ryan factors:

- 28 1. K.A. has no apparent motive to lie;

ORDER FINDING CHILD VICTIM HEARSAY
ADMISSIBLE AT TRIAL

Office of the Prosecuting Attorney
Juvenile Division
5501 Sixth Avenue
Tacoma, Washington 98406-2697

1.
2. K.A. is generally of good character;

3.
4. K.A. made statements to De'Andre Smith, Cynthia Armstrong, Lisa Richards,
5. Cheryl Hanna-Truscott, and Kim Brune and those statements, though at different times with
6. different purpose, were generally consistent;

7. K.A.'s statements were spontaneous as defined by the case law;

8. there is nothing about the timing of K.A.'s statements that suggests an improper
9. motive, nor does anything about the relationship between K.A. and the persons she talked to.

10. the possibility K.A.'s recollection is faulty is remote;

11. based on the totality of the circumstances surrounding the making of K.A.'s
12. statements, there is no reason to believe K.A. misrepresented the respondent's involvement.

13.
14. The further court finds that K.A.'s statements to nurses, Lisa Richards and Cheryl Hanna-
15. Truscott, were made for purposes of medical diagnosis/treatment.

16. Being duly advised in the law, and based on the foregoing findings, the court hereby
17. enters the following order:

18. **IT IS HEREBY ORDERED** that K.A.'s statements to De'Andre Smith are admissible
19. under the child hearsay statute at the respondent's trial.

20.
21. **IT IS HEREBY ORDERED** that K.A.'s statements to Cynthia Armstrong are
22. admissible under the child hearsay statute at the respondent's trial.

23. **IT IS HEREBY ORDERED** that K.A.'s statements to Kim Brune are admissible under
24. the child hearsay statute at the respondent's trial.

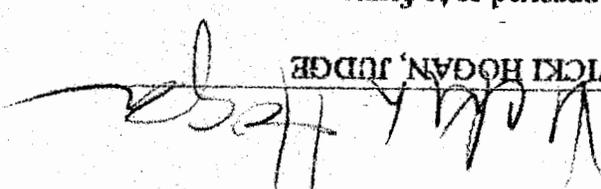
25. **IT IS HEREBY ORDERED** that K.A.'s statements to Lisa Richards are admissible
26. under the child hearsay statute and under ER 803(a)(4) at the respondent's trial.

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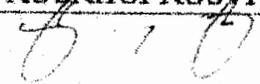
IT IS HEREBY ORDERED that K.A.'s statements to Lisa Richards (Cheryl Hanna-
Truscott are admissible under the child hearsay statute and under ER 803(a)(4) at the
respondent's trial.

The court's oral ruling on this motion was given in open court in the presence of the
respondent on May 7, 2008.

This order was signed in open court this 9th day of May, 2008.


VICKI HOGAN, JUDGE

Approved as to form:


JASON JOHNSON
Attorney for Respondent
WSB # 01813


HEATHER de MAINE
Deputy Prosecuting Attorney
WSB # 95216

Presented by:

ORDER FINDING CHILD VICTIM HEARSAY
ADMISSIBLE AT TRIAL
XXXXXXXXXX - Child Hearsay Order.doc
Page 3 of 2

APPENDIX "B"

FOF/COL Child Hearsay

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7
8 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

9
10 STATE OF WASHINGTON,

11 Plaintiff,

CAUSE NO. 07-8-01791-4

12 vs.

13 ANTHONY W ARMSTRONG,

ORDER FINDING CHILD VICTIM
COMPETENT TO TESTIFY AT TRIAL

14 Respondent.
15

16 On April 24, 2008, this matter came on for trial, the Honorable Vicki Hogan, presiding.
17 The State is represented by Heather de Maine, Deputy Prosecuting Attorney, and the respondent
18 was present and represented by his attorney, Jason Johnson. Before trial, the court held a hearing
19 to determine whether K.A., the child victim in this case, is competent to testify at trial. The court
20 reviewed the pleadings submitted by the parties, heard the testimony of witnesses, and heard the
21 arguments of counsel. The court entered an oral ruling finding K.A. competent to testify. The
22 court now sets out its ruling in writing.
23

24 The court makes the following findings on the Allen factors.

- 25 1. K.A. understands her obligation to speak the truth on the witness stand;
- 26 2. K.A. had the mental capacity at the time of the incident to receive an accurate
27 impression of it;
- 28 3. K.A. has sufficient memory to retain an independent recollection of the incident;

ORDER FINDING CHILD VICTIM COMPETENT
TO TESTIFY AT TRIAL

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Page 1 of 2

Office of the Prosecuting Attorney
Juvenile Division
5501 Sixth Avenue
Tacoma, Washington 98406-2697
Telephone: (253) 798-3400

1
2 4. K.A. has the capacity to express in words her memory of the incident;

3 5. K.A. has the capacity to understand simple questions about the incident.

4 Being duly advised in the law, and based on the foregoing findings, the court hereby
5 enters the following order:
6

7 **IT IS HEREBY ORDERED** that K.A., the child victim in this case, is competent to
8 testify as a witness at the respondent's trial.

9
10 The court's oral ruling on this motion was given in open court in the presence of the
11 respondent on April 24, 2008.

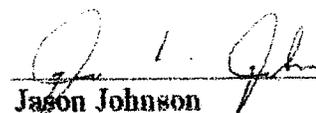
12 This order was signed in open court this 1 day of May, 2008.

13
14 
15 Vicki Hogan, JUDGE

16 Presented by:

16 Approved as to form:

17 
18 _____
19 Heather de Maine
20 Deputy Prosecuting Attorney
21 WSB # 28216

17 
18 _____
19 Jason Johnson
20 Attorney for Defendant
21 WSB # 31913