



41027-3-II

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

State of Washington
Respondent

v.

CLAYTON T. ROBINSON
Appellant

41027-3-II

On Appeal from the Superior Court of Lewis County

Cause Number 09-1-00213-9

The Hons. Nelson Hunt & James Lawler

BRIEF OF APPELLANT

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II. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The court erred in finding the alleged child victim was testimonially competent.
2. The court erred in finding the child's hearsay was reliable.
3. The court erred in admitting the hearsay without corroboration.
4. The court erred in admitting testimonial hearsay in violation of the Sixth Amendment Confrontation Clause.
5. The court erred in permitting the State's untimely motion to reopen the child hearsay inquiry.
6. The following Findings are not supported by the record.
 - i. Finding 1.3, CP 30. LH spontaneously told her grandmother she had something to tell her.
 - ii. Finding 1.4, CP 30. LH told her grandmother that Robinson touched her and rubbed her vagina under her clothes.
 - iii. Finding 1.5, CP 30. LH then sought out her mother and told her that Robinson rubbed her vagina under her clothes.
 - iv. Finding 1.7, CP 30. LH told a CPS investigator Robinson touched her under her clothes.
 - v. Finding 1.8, CP 30. LH told the CPS worker this happened two days in a row.
 - vi. Finding 1.9, CP 30. LH said Robinson touched her private parts the previous Christmas.
 - vii. Finding 1.15, CP 30. LH told Young she immediately went and told her grandmother.

viii. Findings 1.11–1.19, CP 30-31. Alleged statements at sexual assault clinic.

ix. Conclusion 2.2, CP 31.¹ LH understands the concept of truth, has the mental capacity to accurately receive information and sufficient memory to retain an independent recollection, is able answer simple questions in words.

x. Concl. 2.3, CP 31. LH's statements to LR, Chief Williams, Jeff Copeland and Nancy Young are reliable.

xi. Concl. 2.5, CP 31. LH's hearsay to CPS and Police Chief was non-testimonial.

7. The evidence is insufficient to prove 3 counts.

8. The following Findings and Conclusions are based on inadmissible testimony: Findings 1.1–1.9 and Conclusions 2.1–2.7, CP 40-42.

9. The following Conclusions are erroneous: Concl. 2.6–2.9, CP 31-32. That all LH's statements to LR, Copeland, Williams, and Young are admissible, conditioned on LH's testifying competently at trial.

10. The court erroneously allowed defense counsel to withdraw without good cause, denying Appellant the Sixth Amendment right to effective representation.

11. The sentencing court erroneously accepted the State's inadequate foundation for alleged out-of-state convictions.

12. It was misconduct to tell the jury it had to convict or find the State's witnesses were lying.

13. The cumulative weight of error denied Appellant a fair trial as guaranteed by Washington Constitution article 1, section 22 and the Fifth and Fourteenth Amendments.

¹ Findings are findings, even if mislabeled. *See, State v. Evans*, 80 Wn. App. 806, 820, 820 n.35, 911 P.2d 1344 (1996).

B. Issues Pertaining to Assignments of Error

1. (a) Did the court abuse its discretion in ruling that a four-year-old child was competent to testify where the child could not remember the relevant events or her prior statements or answer simple questions in words?

(b) Did the court abuse its discretion by ruling the child was competent provided the State remedied the deficiencies by trial time?

2. Was the child hearsay inadmissible for lack of substantial compliance with the *Ryan*² reliability factors?

3. Was the child hearsay inadmissible for lack of independent corroboration?

4. Was the child hearsay inadmissible under *Crawford*?³

5. Did the court deny Appellant a fair trial under Const. art. 1, § 22 by reopening the child hearsay proceedings after it had entered its written findings, conclusions, and order?

6. Was the evidence sufficient to support the court's pretrial findings of fact?

7. Was the evidence sufficient to support guilty verdicts on Counts 2 and 3?

8. Did fundamental fairness require that judge, prosecutor and defense counsel not all be substituted between pretrial hearings and the trial?

9. Was Appellante denied a fair trial under Wash. Const. art. 1, § 22 and the Fifth, Sixth and Fourteenth

² *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

³ *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Amendments when defense counsel withdrew without good cause?

10. Is the evidence insufficient to prove the offender score based solely on uncertified out-of-state charging documents with no citation to a criminal code section; randomly designated degrees of the offense; and vague confessions with no indication they were knowing and intelligent?

11. Does the cumulative weight of error require reversal to avoid a manifest injustice?

III. **QUESTION PRESENTED:**

The dominant issue is: In a prosecution for child sexual abuse, where the evidence establishes that the child was not testimonially competent, but the court provisionally rules that the child may testify if the State can remedy her deficiencies before trial, and the child takes the stand and denies or cannot remember, does this violate the Sixth and Fourteenth Amendments by denying Appellant the requisite opportunity to cross examine but creating the legal fiction that he did so?

IV. **STATEMENT OF THE CASE:**

The State charged Clayton T. Robinson with Count I, one act of first degree child molestation between December 1, 2008 and Dec 25, 2008; Count 2, one attempted act of first degree child molestation between December 1, 2008 and Dec 25, 2008; and Count 3, one act of first degree child molestation sometime in December, 2007. CP 1-2; HRP 2.⁴

The alleged victim was LH, born March 16, 2004. CP 29; MRP 18. LH's mother, LR,⁵ was the daughter of Robinson's sister, Debbie.

⁴ The verbatim report of proceedings is in one blue volume for Judge Hunt containing pretrial motions (MRP), and six green volumes for Judge Lawler. Of the latter, HRP contains continuously-paginated hearings dated 5/21/09; 1/21/10; 2/25/10; and 3/4/10. A hearing on 1/14/10 is in its own green volume (1/14RP). Jury trial is in three continuously-paginated green volumes I, II and III (JRP). Sentencing is SRP. An unbound volume for January 28, 2010, is designated 1/28 RP.

⁵ Mother and child are referred to by their initials for privacy purposes.

MRP 9. They all lived in the home of the family matriarch, Rosealice Robinson. MRP 18.

LR testified pretrial that Debbie approached her on December 25, 2008, to say she should talk to 4-yr-old LH. MRP 20. LR is profoundly deaf and communicates with LH in sign language. MRP 22, 148. She asked LH what was going on, and LH said she and her Uncle Clayton were playing in his room — as they often did (JRP 36, 217) — and he had touched her. LR did not ask what LH meant by this. MRP 21. LR was learning this for the first time. “I said, really, he touched you. And she said, yes. And I said, okay. So I started to feel that I needed to be protective of her[.]” MRP 20-21. A couple of days later, someone (not LR, MRP22) called CPS, triggering a criminal investigation. MP 8.

LH made statements to her grandmother, Debbie; her mother, LR, CPS Investigator Jeff Copeland; Winlock police chief Terry Williams; and a sexual assault nurse, Nancy Young. MRP 20, 21, 8, 78.

The Hon. Nelson Hunt held pretrial hearings October 16 and 28, 2009, to decide LH’s testimonial competency and the admissibility of the child hearsay. MRP 4-128. Findings, Conclusions and an Order were eventually filed January 5, 2010. CP 29-32. The court ruled that the State had now shown that LH could express her memory in words, but that she was nevertheless competent to testify provided the State could elicit

“meaningful” testimony at trial. The court admitted all hearsay statements to LR, Copeland, Williams and Young. CP 31-32.

On January 14, 2010, the court allowed defense counsel to withdraw based on a perceived conflict of interest because he served on the board of Cascade Mental Health, of which the State had just added two staffers to its witness list. 1/14 RP 4.

On January 26, 2010, over a defense objection (MRP 132), the court granted the State’s motion to reopen the child hearsay inquiry based on a claim of recently-discovered evidence from the new witnesses. MRP 131. CP 37. The re-do hearing was on March 19, 2010, with Findings and Conclusions filed June 28, 2010, admitting additional hearsay testimony. CP 40-42.

Judge Hunt conducted the pretrial proceedings, with Kenneth Johnson for the defense and Theodore Miller for the State. CP 29. At the jury trial, Judge James Lawler presided, Jonathan Meyer represented Robinson and Colin Hayes appeared for the State. JRP 3.

At trial, LH testified that nothing happened in Robinson’s room that she did not like. JRP 37. Robinson touched her one time, outside her clothes. JRP 37, 41-42, 44. He never touched her underneath her clothes. JRP 38-39. He never asked her to touch any body part she did not like. JRP 42. She did not know whether he showed her any movies but there

was no touching during any movie. JRP 42-43. LH never saw Robinson's penis. JRP 43; 47-48. He was always nice. JRP 53. LH remembered talking to William and Young, but did not remember what about. She was not asked if she talked to Copeland. JRP 44.

The hearsay witnesses, testified that LH said Robinson touched her vagina, inside her clothes and inside her body; that he showed her a dirty movie during which he molested her; that he made her touch his penis; and that slime came out of it. MRP 105; JRP 128, 132, 154.

Robinson had told LR he simply attended to LH when she wet herself. JRP 208-09.

The jury convicted Robinson on all counts. CP 65-67. He was sentenced to a minimum term of 252 months on a disputed offender score of 12. CP 90, 92. He appeals.

V. ARGUMENT

1. [REDACTED]

Every witness must be competent to testify. ER 601. A witness is not competent if she appears unable to receive just impressions of the facts or to relate them truly. RCW 5.60.050(2). This court reviews competency determinations for abuse of discretion. *In re Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998).

The judge must evaluate five factors. *State v. Allen*, 70 Wn.2d

690, 692, 424 P.2d 1021 (1967). A child is not competent unless she exhibits all five. *A.E.P.*, 135 Wn.2d at 223. She must (1) understand the obligation to speak the truth in court; (2) have had the mental capacity at the time of the alleged occurrence to receive an accurate impression of it; (3) be able to retain an independent recollection; (4) be able to express her memory in words; and (5) understand simple questions. *Allen*, 70 Wn.2d at 692. The burden is on the State to prove competency by a preponderance. *State v. Karpenski*, 94 Wn. App. 80, 102-04, 971 P.2d 553 (1999). Because competency in a young child is often difficult to discern from the record, the reviewing court generally defers to the judge who observed her manner, capacity and intelligence. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). But this discretion is not unfettered. This Court will reject the court's evaluation if a review of the entire record affirmatively shows it is wrong. *A.E.P.*, 135 Wn.2d at 223.

The court here simply recited the *Allen* factors and declared LH competent. Concl. 2.2, CP 31. But the record lacks substantial evidence to support this. LH's lack of competency is manifest.

(1) ***LH Did Not Understand Truth.*** The judge thought LH had outstanding ability "for a four-year-old" to understand the need for truth. MRP 123. But "ability for a four-year-old" is not necessarily "ability." The record shows that LH did not grasp the concept of truth. She believed

truth is what you say to avoid getting into trouble. MRP 38, 39. But arguably, staying out of trouble is the main reason children lie.

Specifically, potty accidents meant trouble for LH. Ex. 7 Tr. at 9.⁶ Robinson said LH wet herself that Christmas night. JRP 205. If so, LH-style truth would be that he touched her, without the bit about the accident. At trial (when LH was eight months older) the new judge stated on the record that LH said pretty much anything counsel wanted. JRP 60-61. LH agreed that a lot of people helped her remember and told her what to say in court. JRP 55.

The *Allen* truth factor clearly defeats a claim of competency.

(2) *Contemporaneous Ability to Perceive Events*. The court must find the child was able to receive an accurate impression at the time of the event. *Ryan*, 103 Wn.2d at 174. This can be accomplished with questions about unrelated contemporaneous events. *A.E.P.*, 135 Wn.2d at 225. Perception is “better tested against objective facts known to the court, rather than disputed facts and events in the case itself.” *Id.*

The court heard no testimony and made no findings about LH’s mental capacity in 2007, as charged in Count 3. The only evidence for Count 3 is confused hearsay Copeland allegedly heard a year later. MRP 16; JRP 130, 214.

⁶ Ex. 7 Tr. denotes the transcript of the Young tape.

Without this inquiry, Copeland's hearsay about 2007 was inadmissible. Count 3 should be dismissed.

LH also could not distinguish the true from the false regarding contemporaneous facts in 2008-09. Like most 4-year-olds, she was a walking compendium of false impressions. She thought her great grandmother's first name, Rosealice, was her own last name. MRP 32. She thought she and moved out of Rosealice's home a week ago instead of ten months. MRP 32, 146. She thought she had ten sisters. MRP 55. She thought Copeland interviewed her one or two days ago instead of ten months before. MRP 56.

Consideration of this factor would have shown that LH was not competent, either to testify about the events at trial, or to make sufficiently reliable statements to satisfy the child hearsay statute. Please see Issue 3.

(3) ***Insufficient Independent Recollection.*** The record shows that LH had no independent recall of the facts. MRP 124. Investigator James Armstrong witnessed an interview at the prosecutor's office on October 9, 2009, a few days before the competency hearing. MRP 88. LH could not remember why she did not like her Uncle Clayton. MRP 92, 94. She said she and her mother moved because Robinson touched her crotch, but she had no memory of it. She did not remember talking to

Debbie or LR about it. She did not remember how, where, or when she was touched. She remembered nothing at all about it. MRP 94-95.

But at the hearing just a few days later (October 16), when the judge asked her to get closer to mike when she entered the witness box,

LH spontaneously blurted out:

LH: Okay. Can I tell you something first?

Ct: Sure.

LH: You know my Uncle Clayton?

Ct: I know who he is, yes.

LH: He touched me in the wrong spot.

MRP 31. In defense counsel's words: Something happened to this little girl in the intervening week. MRP 113.

The prosecutor asked LH three times how Robinson had upset her, and three times she did not know. MRP 43. When he reminded her that she had just said he touched her in the wrong spot, LH categorically disavowed the statement and said she did not know why she said it. MRP 44. Nor did LH remember what she talked about to Copeland or Young. MRP 45, 53. The State simply produced no substantial evidence to support a ruling that LH had sufficient independent memory to be testimonially competent.

Moreover, LH contradicted herself repeatedly at trial on essential facts. She had told Copeland and Young that Robinson touched her skin inside her clothes, but she testified that there was only one touch. JRP 37,

41-42, 44. It was on top of her clothes. JRP 38-39. Robinson never asked her to touch him. JRP 42. She never saw his penis. JRP 43; 47-48. She did not remember watching a movie, but if she did, there was no touching. JRP 42, 43. She did not remember a time when he was not nice. JRP 53.

The prosecutor impeached LH with her inconsistent statements to Copeland and Young. JRP 43-44. He also impeached her with her own inadmissible hearsay that she told a counselor Robinson touched her. JRP 46. The counselor never testified to this. JRP 89.

(4) ***LH Could Not Use Words.*** The court ruled that LH was able to express herself. Concl. 2.2, CP 31. The record shows otherwise. Throughout the hearing, LH nodded and shook her head randomly, sometimes for yes, sometimes for no. The prosecutor repeatedly had to ask, Was that a yes? Was that a no? MRP 30-56. He explained to LH that it was important to answer in words, but to no avail. MRP 32, 43.

The court stated on the record that LH was completely nonverbal when asked about the actual events. MRP 125. And the court reporter noted extensive yes-nods indistinguishable from no-nods. MRP 30. The court doubted whether LH would be able to use words at trial:

So the real question here to my mind is what happens if she gets on the stand and does similar to what she did at this hearing, and that is not answer questions having to do with the actual events that are the basis of the trial.

MRP 126. The court knew that meant the hearsay was inadmissible without corroboration, and there was no corroboration. MRP 118, 128; Concl. 2.4, CP 31; Concl. 2.3, CP 41.

(5) ***LH Could Not Answer Simple Questions.*** The court stated that LH was able to understand simple questions. MRP 125. Again, the record does not support this. For example, to the simple question did she know what year she was born, the simple answer was “no.” MP 34. LH could not manage this but kept trying to come up with the “right” answer: March 6th — July 24th — on March — March 6th — and, finally, “I don’t remember.” When the prosecutor repeated, “You don’t remember?” she immediately resorted to guessing again. “March 16th.” MRP 34-35. This was not a competent witness, but a child desperately trying to please.

The Conditional Ruling Denied Robinson the Protection of the Confrontation Clause. The court clearly recognized that LH had no independent memory of the events or her statements, that she could not answer a simple question, and that she was mute on the essential facts. The court nevertheless ruled she was competent on the off-chance the State could elicit ‘meaningful’ testimony at trial. Concl. 2.6–2.9, CP 31-32. The court advised counsel to prepare for either contingency — either LH would testify meaningfully or she would not. MRP 127. In this way, the court deferred its competency determination until the trial.

This pseudo ruling makes sense in light of *Ryan, Crawford*, and RCW 9A.44.120. Putting LH on the stand and asking material questions she would not be able to answer brought her hearsay within the *Crawford* exception articulated in *State v. Price*, 158 Wn.2d 630, 648, 146 P.3d 1183 (2006). See Issues 2 – 4. This could not have happened had the court done what it was supposed to do and entered the only ruling supported by the evidence – that LH was not testimonially competent.

As it turned out, the State was able to coax some words from LH at trial. But the new judge remarked that “both counsel were able to get her to say whatever [they] wanted her to say[.]” JRP 61. Upon receiving an “I don’t know” to an open-ended, non-leading question, the prosecutor repeatedly rephrased the question to suggest the correct answer and elicit a “Yes.” For example, Robinson allegedly showed LH a grown-up movie:

Q: Did the grownups have clothes on?
A: I don’t know.
Q: Were any of the grownups wearing no clothes?
A: Yeah.

JRP 43.

The equivocal competency ruling was an abuse of discretion that caused irreparable damage to Robinson. Besides compromising his ability to prepare a proper defense, it virtually invited the State to coach the child. More serious, the ruling allowed LH’s inadmissible hearsay to come before the jury. Please see Issues 2–4.

Accordingly, this Court should reverse the convictions.

2. [REDACTED]

Hearsay by a child under age ten describing sexual contact is admissible if the time, content and circumstances of the statement's making bear sufficient indicia of reliability. RCW 9A.44.120(a)(1); *Ryan*, 103 Wn.2d at 174.

A child need not be testimonially competent in order for her out-of-court statements to be reliable; the analysis is different. *C.J.*, 148 Wn.2d at 681. The competency determination looks forward to see if the child will be able to participate fully in cross examination. But a hearsay exception, looks back to the making of the statement for evidence the statement is trustworthy. *C.J.*, 148 Wn.2d at 683.

Ryan sets forth nine factors derived from *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982), and *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970): (1) apparent motive to lie; (2) child's general character; (3) number of witnesses to the statement; (4) whether the statement was spontaneous or elicited in response to questions; (5) timing of the statement and witness's relationship to the child; (6) whether the statement asserts past facts; (7) whether cross-examination could show the child's inability to understand the alleged act; (8) likelihood that the child's recollection is faulty; and (9) whether the circumstances suggest

the child misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76.

This Court reviews a child hearsay ruling for abuse of discretion. *Woods*, 154 Wn.2d at 623. The court's findings must be based on substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Not every factor need be satisfied, but they must be "substantially met." *Woods*, 154 Wn.2d at 623-24. The statement's reliability must be evident in the record. *State v. Stevens*, 58 Wn. App. 478, 487, 794 P.2d 38 (1990). And it must be reliable when made; reliability may not be based on hindsight. *Ryan*, 103 Wn.2d at 174.

Here, we cannot discern which factors the court deemed were substantially met. The court says it weighed the *Ryan* factors but does not say which factors were present or the relative weight afforded to those that were present and those that were not. Concl. 2.3, CP 31; Concl. 2.1, CP 41. The court did not consider the statements individually, but admitted every statement to LR, Williams, Copeland, and Young. This was error.

(1) ***Motive to Lie.*** The court heard on the Young tape that LH was subject to potty accidents she did not want her mother to know about. MRP 83; Ex. 7 at 9. And Robinson showed LR a wet spot where LH peed on the floor Christmas Day, 2008. JRP 205. LH had a motive not to

mention this when quizzed by her grandma and LR. It was error for the court not to consider this.

The reliability of the witnesses also was doubtful. Beginning with *Ryan*, Washington courts have addressed only the child's motive to lie to a hearsay witness. *Ryan* at 176. This is a corruption of *Dutton* where the issue was the witness's motive to lie to the court. *Dutton*, 400 U.S. at 88.

Robinson's prosecution started with the grandmother, Debbie, who died in September, 2009, before the child hearsay hearings. MRP 19. The court thus had no information about Debbie's manner, the nature of any questions, or Debbie's bias against Robinson. We know that Debbie and LR were "not happy" when Robinson moved in and wanted him gone. JRP 207-08. And LH told Young that Robinson had tried to hit Debbie. Ex. 7 at 6. The jury never learned this, because the State fast-forwarded through that part of the Young interview tape. JRP 140.

LR was inconsistent, at best. Pretrial, LR said she noticed nothing before December 25, 2008 — LH and Robinson seemed fine together. MRP 24, 29. She asked LH no follow-up questions. MRP 21. But six months later at the "do-over" hearing,⁷ LR said she learned in October,

⁷ Please see Issue 5.

2008, that Robinson showed LH a “dirty movie.” MRP 142.⁸ By trial time, LR was describing an earlier incident in a park, JRP 177, and thought she responded to the disclosure on December 25 by asking if it was like what happened in the park. JRP 180. Pretrial, LR was adamant that LH said the incident was on December 25. MRP 27-28. At trial, she said it was December 24. JRP 209. LR first said LH said Robinson gave her lemonade or something to drink on Christmas day, 2008. MRP 21. Later, she said this happened in September, 2008. JRP 178. She also said it was in January, 2010. MRP 146-47.

It was error to rule that LR was reliable. Concl 2.5, CP 42.

(2) **Child’s Character.** This factor goes to the child’s reputation for truthfulness. *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). LH was a four-year-old who told “little-kid lies.” MRP 29. This is not grounds to disparage her character.

(3) **Past Facts.** All hearsay is about past facts. This is a non-issue. *State v. Swan*, 114 Wn.2d 613, 650-51, 790 P.2d 610 (1990).

(4) **More Than One Person.** Corroboration is good. *Swan*, 114 Wn.2d at 651. Here, LH made statements to several people, but the statements are not marked by consistency. This factor is a wash.

⁸ She repeated this at trial. JRP 189, 190. But she also said LH told her about the movie for the first time on Christmas Day, 2008. JRP 182. She also first heard in January, 2010. JRP 192.

(5) *Spontaneity*. Statements in response to leading questions are not spontaneous. *Kennealy*, 151 Wn. App. at 883. Non-leading questions are open-ended and do not invite a particular response. *Kennealy* at 883. Young’s questions were leading. For example, LH said the touching did not feel good.

Q: “Okay, you said it felt not good. Did you remember it hurting? How would you say that felt?”

A. Um.

Q: What kind of hurt? (LH has not said it hurt.)

A: Um, I don’t know.

Q: Can you think of something else that’s hurt you that was like? Not another person, but like if you fell down or somebody pinched you or um, somebody scratched you?

A. It hurted like somebody um, pinched me.

Q: Do you remember if it hurt to go pee after? How did that feel?

A: Um, it hurted.

Ex. 7 at 4.

Other examples: “Did you ever see his private part?” Ex. 7 at 4.

“And he brought his penis out and then what happened?” Ex. 7 at 5. “Did you ever see anything come out of Clayton’s penis?” Ex. 7 at 6.

Q: Did he touch you with anything else besides his hand?

A. Um, no.

Q: Just his hand? Is that right? Just his hand? Or was there something else?

A. Um, um. I don’t remember what else he did.

Q: So you said he touched you with maybe something else? And what was that something else?

A. Um, he only touched me with his hands.

This was a blatant attempt to elicit evidence, not the truth.

(6) ***Timing and Relationship.*** According to *Kennealy*, children trust police officers and nurses, so are likely to tell them the truth.

Kennealy at 884. But it just as likely that kids, like adults, tell the police and other uniformed authority figures what they think they want to hear.

(7) ***Value of Cross-Examination.*** This addresses whether cross-examination could show the child's lack of knowledge. Here, it could have shown that LH had insufficient mastery of the nuances of language to distinguish child care touching from criminal touching. No one ever asked LH about this, and nothing in this record suggests she knew the difference. Did he touch you there? Well, yeah.

(8) ***Possibility of Faulty Recollection.*** The subtleties of touching and four-year-olds also applies here. And graphic sexual descriptions are beyond most children's experience and make abuse claims more credible. *Kennealy*, at 884. LH just said she was touched – as she would have if Robinson simply took care of her when she was wet.

(9) ***Circumstances Surrounding the Statement.*** As with factor (1), Washington courts focus this inquiry on whether the child misrepresented the facts. *Kennealy*, at 885. But, again, LH may have misconstrued the word “touch.” As to the adult witnesses, LR kept adding

new hearsay about more suspicious circumstances in more places at earlier times, and Young was a stranger to responsible interviewing techniques.

A review of the entire record shows that circumstances of LH's statements do not support the court's reliability findings.

3. [REDACTED] ED.

In addition to the "the time, content, and circumstances" inquiry, if the child is unavailable as a witness, the State must produce independent corroboration that a criminal act occurred. RCW 9A.44.120(a)(2); *Ryan*, 103 Wn.2d at 174. A child is "unavailable" under RCW 9A.44.120(2)(b) if her testimony cannot be obtained. *Ryan* at 171. That is, if she is incompetent. *State v. Hopkins*, 137 Wn. App. 441, 449, 54 P.3d 250 (2007). Or if she cannot remember the events or her statements. *Ryan* at 170, citing ER 804(a).⁹

LH was unavailable at trial as to virtually all the hearsay. She denied most of the alleged conduct and was not asked about her statements. She unequivocally asserted there was only one touch, and she could not remember what she talked about with CPS and Young. JRP 37-42. This prevented Robinson from testing the evidence from these witnesses in the "crucible" of cross examination. *See, Crawford* at 61.

⁹ Note that *Ryan* says statutory and constitutional availability are the same, except that the latter requires a good faith effort to produce the witness. *Ryan* at 170-71.

Therefore, corroboration was required. But the court said on the record and in its written findings that no corroboration existed. MRP 118, 128; Concl. 2.5 at CP 31; Concl. 2.3, CP 41-42.

The hearsay violated the statute.

Competency Ruling Revisited. The court knew an adverse competency ruling would end the State's case by excluding not only testimonial hearsay under *Crawford*, but pretty much everything else under *Ryan* and RCW 9A.44.120(a)(2). MRP 119, 121. The January 5, 2010, order declaring LH competent now emerges as a tactic to get around *Crawford* and put this child's incriminating statements before the jury in violation of the statute and the Sixth Amendment.

Abhorrence of the charged crime does not justify departing from the rules of evidence and constitutional principles. The Court should reverse.

4 [REDACTED]

The Sixth and Fourteenth Amendments guarantee that an accused may confront the witnesses against him. *Dutton*, 400 U.S. at 79, citing *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 3 L. Ed. 2d 923

(1965).¹⁰ A *Crawford* challenge may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Alvarez-Abrego*, 154 Wn. App. 351, 361, 225 P.3d 396, review denied 168 Wn.2d 1042 (2010).

Crawford eliminated the reliable hearsay exception to the confrontation clause. *Crawford*, 541 U.S. at 62. *Crawford* particularly disapproved reliability tests such as those of *Ryan*, that depend heavily on “which factors the judge considers and how much weight he accords each of them.” *Crawford*, 541 U.S. at 63. Robinson’s case illustrates the wisdom of this.

But Washington courts cling to the view that, if RCW 9A.44.120 is satisfied, so is the confrontation clause. *Ryan* at 170; *State v. Shafer*, 156 Wn.2d 381, 392, 128 P.3d 87 (2006); *C.J.*, 148 Wn.2d at 681, citing *Idaho v. Wright*, 497 U.S. 805, 818-19, 110 S. Ct. 3139, 3148, 111 L. Ed. 2d 638 (1990).

These cases contravene *Crawford*, which announced a new rule. *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1181 (2007). *Crawford* unambiguously rejects the “reliability” standard set forth in *Ohio v. Roberts*¹¹ and *Idaho v. Wright*. An unavailable witness’s testimonial statements must be subject to the rigors of cross-examination.

¹⁰ Pointer recognized as exceptions dying declarations, statements by a witness who died before trial and “analogous” situations. 380 U.S. at 407. No such situation is present here.

¹¹ 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980).

Crawford, 541 U.S. at 53-54. The Court declined to leave the Sixth Amendment's protection to "amorphous notions of 'reliability'" because admitting statements deemed reliable by a judge "is fundamentally at odds with the right to confrontation." *Crawford*, 541 U.S. at 60.

Cross-examination is optional only if the indicia of trustworthiness are so clear that it would be superfluous. "Where cross-examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation is "constitutional error of the first magnitude" such that it is inherently prejudicial and incurable. *Ryan*, 103 Wn.2d at 175, citing *Davis*, 415 U.S. at 318. Specifically, a child's testimonial hearsay is barred without an opportunity to cross-examine, even if the court finds it is reliable. *Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir.2005), *amended*, 408 F.3d 1127 (9th Cir. 2005), *reversed on other grounds sub nom.*, *Whorton v. Bockting*, 549 U.S. 406.

In *Price*, 158 Wn.2d 630, the Washington Court holds that the State satisfies the cross-examination requirement by putting a child on the stand and asking her about the events and her statements. *Price*, 158 Wn.2d at 648.

First, *Price* relies entirely on pre-*Crawford* cases in holding that impossibility does not deny a defendant an opportunity to cross examine. *Id.* This is contrary to several pages at the heart of *Crawford* devoted to

the history of the Confrontation Clause and concluding that it came into being to eliminate criminal convictions based on ex parte examinations. *Crawford* at 46-51. The Clause exists to enable defendants to cross-examine the evidence against them. *Pointer*, 380 U.S. at 406-07. This means more than being allowed to confront a witness physically. It secures the opportunity cross-examine. *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Here, Robinson was convicted based on ex parte examinations by LR, Copeland and Young, which he had no opportunity to cross-examine. And, by contrast with *Price*, the prosecutor and the court knew very well that LH was virtually certain to say nothing from the stand that would provide a toe-hold for meaningful cross examination.

Price is also factually distinguishable in that a major premise was that the child was testimonially competent. *Price*, 158 Wn.2d at 634, 650. Robinson disputes that LH was competent. By definition, a child who cannot talk about the alleged events or her prior statements, and who cannot articulate answers to simple questions about prior accusations, is not competent and is not available as a witness. RCW 5.60.050(2); *Allen*, 70 Wn.2d at 692.

Moreover, the pretrial judge here expressly conditioned the admissibility of LH's hearsay statements on her testifying "meaningfully"

at trial. MRP 127. Robinson contends this was error because the judge should have entered an unambiguous finding of non-competency pretrial. But if this was not reversible error, then the trial judge was obliged to enforce the ruling and keep out LH's statements regarding anything she did not testify "meaningfully" about.

Even if LH was competent, moreover, she testified only that one touch happened, that it was outside her clothes, and that she never saw Robinson's penis. JRP 37-42. But all she remembered about her hearsay statements was telling LR Robinson touched her. JRP 40-41. She could remember nothing about the interviews with Copeland or Young. JRP 44. And, because the State did not ask about any of the chilling accusations that came out of the mouths of these people, Robinson could not cross-examine LH about these statements and had no chance to show the jury why they were unreliable. Consequently, they chose the unexamined, untested prior statements from the mouths of professionals over the in-court statements of a terrified five-year-old.

Because the defense could not ask LH about the circumstances surrounding the making of her out-of-court statements, they were inadmissible under *Crawford* if they were testimonial. The State had the burden of establishing that they were not testimonial. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 362, 225 P.3d 396 (2010).

Statements to a CPS investigator are testimonial when there is no longer an ongoing emergency, and the investigator acts in a governmental capacity and obtains statements for use in prosecuting the defendant.

Hopkins, 137 Wn. App. at 458. Statements are testimonial if the questioner's primary purpose is to establish facts potentially relevant to later criminal prosecution and there is no ongoing emergency. *Alvarez-Abrego*, 154 Wn. App. at 363. Statements made in the course of a police investigation are always testimonial. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Here, CPS investigator Copeland brought the police chief to the interview. MRP 8. The chief believed he was there for a criminal investigation. MRP 50. The Copeland statements were testimonial.

Likewise, statements to child abuse investigators like Nancy Young are testimonial. *See, e.g., People v. Warner*, 14 Cal. Rptr. 3d 419, 429 (Ct. App. 2004) (child interview specialists); *People v. Virgil*, 104 P.3d 258, 262 (Colo. Ct. App. 2005) (physician member of child protection team); *Blanton v. State*, 880 So. 2d 798, 800-01 (Fla. Dist. Ct. App. 2004) (police investigator); *Flores v. State*, 120 P.3d 1170, 1178-79 (Nev. 2005) (child abuse investigator).¹²

¹² Cited in Laird C. Kirkpatrick, NON-TESTIMONIAL HEARSAY AFTER CRAWFORD, DAVIS AND BOCKTING, 19 Regent U. L. Rev. 367, 372, fn 35 (2006-2007).

A child's statements to family members are testimonial unless the court makes "some threshold evaluation of the underlying circumstances" sufficient "to meet the constitutional strictures of *Crawford* and *Davis*[".]” *Alvarez-Abrego*, 154 Wn. App. at 364. Here, the court made no such inquiry, and the State made offered no such proof. In fact, far from being too young to realize the testimonial implications of her statements to Copeland as the court found, MRP 127, LH believed that Robinson had been jailed for touching her in December, 2007. MRP 112. So she was not too young. Therefore, as in *Alvarez-Abrego*, 154 Wn. App. at 364, the Court should hold that LH's statements to Debbie and LR were admitted in violation of the confrontation clause.

The court stated that LH knew after the October, 2009, hearings that anything she said could be used against Robinson and was testimonial. MRP 178. But the same is true before, when she was questioned by CPS investigator Copeland, Williams, and Young.

Crawford violations are subject to harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The Court applies the overwhelming untainted evidence test. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). The error is harmless only if the State can show beyond a reasonable doubt that the "verdict is unattributable to the error." *Watt*, 160 Wn.2d at 635, citing

Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The Court looks solely at the untainted evidence to determine if it is “so overwhelming that it necessarily leads to a finding of guilt.” *Watt*, 160 Wn.2d at 636.

The verdict here is clearly attributable to the errors and the untainted evidence is non-existent.

5. **THE 'RE-DO' CHILD HEARSAY HEARING VIOLATED DUE PROCESS**

The child hearsay hearing was held on October 9 & 16, 2009. the court finally filed findings, conclusions and order on January 5, 2010. CP On January 26, 2010, the State moved for reconsideration. MRP 130-136.

Defense counsel opposed giving the State a “redo” but could not cite any authority. MRP 132. This was ineffective assistance of counsel. (See Issue IAC, below.)

CR 7(b) governs motions practice in criminal cases. CrR 8.2. Motions for reconsideration fall under CR 59. 15A WAPRAC § 65.1. Any decision may be subject to reconsideration, and a successful motion “will” result in the vacation of the previous order. CR 59(a); 15A Wash. Practice § 65.1 The motion must be in writing. CR 7(b).

Motion Not Timely. The motion must be filed within 10 days of the decision. CR 59(b); *Schaefco, Inc. v. Columbia River Gorge Com’n*,

121 Wn. 2d 366, 849 P.2d 1225 (1993); 15A WAPRAC § 65.1. The hearing must be within 30 days “unless the court directs otherwise.” CR 59(b). The court may not extend the time. CR 6(b); *Kaech v. Lewis County Public Utility Dist. No. 1*, 106 Wn. App. 260, 23 P.3d 529, 91 A.L.R.5th 727 (2001). A motion to extend time must be filed within the 10-day limitations period. CR 6(b)(1). A court may extend certain time limits for excusable neglect, but not motions under CR 59(b). CR 6(b)(2).

No Valid Grounds. The motion must “identify the specific reasons in fact and law as to each ground on which the motion is based.” CR 59(b). The only permissible grounds are those listed in CR 59. The only one that is remotely applicable here is that for newly discovered evidence. CR 59(a)(4).

No Other Motion Permitted. The court tried to characterize the State’s motion as something other than a motion to reconsider. MRP 135. But the rules include no motion procedure to provide “a second bite at the apple” based on existing evidence. 15A WAPRAC § 65.1, citing cases.

The court granted the motion on the ground that “kids change.” Arguably, this meant previously undiscoverable competency evidence, but the court had already ruled that LH was competent. CP 31.

The State argued for additional child hearsay obtained during counseling for PTSD with Kari Tjersland. MRP 131. But LR disclosed

this on October 16. MRP 24. The State also hinted at a mysterious new disclosure to LR and Austin. MRP 131. This did not meet the specificity requirement of CR 59(b). And the State had unlimited access to LR since the information was filed. There was no new evidence.

Prejudice. At trial, the prosecutor got LH to say she told Tjersland that Robinson touched her. JRP 46. Tjersland did not testify to this. Findings 1.6-1.9, CP 41. Moreover, the court expressly excluded hearsay to Tjersland. Concl. 2.7, CP 42. And LR was able to hint that something happened in a park in September, 2009, without actually saying so.



The State Proved Only a Single Count. The evidence is sufficient to support a conviction if a rational jury could find the essential elements beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. Insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

No Evidence for Counts 2 & 3. The State charged Robinson with two offenses in December, 2008. But LH was adamant that only one touch happened.

First, the only evidence for Counts 2 and 3 was inadmissible hearsay, as discussed in Issues 2-4. Even if that evidence was properly considered, the sole basis for Count 2 – a second 2008 incident – is LR’s inconsistent testimony as to whether the one incident was on December 25th or 24th. MRP 20; JRP 202. This is not evidence for two counts. Moreover, LH described only one incident. JRP 37-39, 40, 42. She gave Copeland and Williams the idea something also happened on Christmas 2007, but did not testify to this and no factual basis was ever produced. Moreover, the court did not inquire into her competence in 2007, and Copeland’s hearsay fails *Ryan*.

Dismissal is the remedy following reversal for insufficient evidence. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

**7. THE RECORD DOES NOT SUPPORT THE
PRETRIAL FINDINGS AND CONCLUSIONS**

The following states Robinson’s specific objections to these findings and conclusions. Supporting argument is presented elsewhere.

Finding 1.3, CP 30. There is no evidence that LH’s statements to Debbie were spontaneous and not in response to questions. Debbie did not testify.

Findings 1.4 & 1.5, CP 30. We know nothing about what LH told Debbie. LH told LR simply that she was touched. MRP 20-21; JRP 41.

Findings 1.7–1.9, CP 30. LH’s statements to Copeland were inadmissible for lack of a competency finding, lack of *Ryan* reliability,

lack of corroboration, and because they were testimonial and not subject to cross examination.

Findings 1.11– 1.19, CP 30. Statements to Young were inadmissible for lack of competency, lack of corroboration, because they were testimonial and lacked cross examination, and because they violated *Ryan*, especially in light of Young’s leading and suggestive questions.

Concl. 2.2, CP 31. The record refutes the competency findings.

Concl. 2.3, CP 31. The court’s *Ryan* analysis was inadequate to support a finding that LH’s statements to LR, Williams, Copeland and Young are reliable. The record demonstrates otherwise.

Findings 1.1–1.9 and Concl. 2.1–2.7, CP 40-42, are from evidence unlawfully obtained in the reconsideration hearing of March 19, 2010.

Concl. 2.5–2.9, CP 31-32. Admitting LH’s statements to LR, Copeland, Williams, and Young conditioned on LH’s giving meaningful testimony at trial exceeded the court’s authority. The court should have ruled LH incompetent based on the evidence before it.

8. **ROBINSON WAS DENIED EFFECTIVE ASSISTANCE
WHEN COUNSEL WITHDREW**

After the extensive pretrial hearings, the court permitted defense counsel Kenneth Johnson to withdraw for a perceived conflict of interest because he served on the board of Cascade Mental Health, two employees of which the State had belatedly named as witnesses. 1/14RP 2; CP 33-35. Robinson acquiesced to the change of representation. CP 34.

This was error. The substitution violated the rules of criminal procedure and constructively denied Robinson effective representation. The prejudice to Robinson outweighed other concerns and was avoidable.

CrR 3.1(b)(2): When constitutional requirements combine with a court rule, they lead to a result that is broader than either one alone. CrR 3.1(b)(2) provides for representation by counsel that is constitutionally guaranteed. *State v. Robinson*, 153 Wn.2d 689, 696, 107 P.3d 90 (2005).

CrR 3.1(b) provides for continuity of representation. It says: “A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e) because geographical considerations or other factors make it necessary. CrR 3.1(b)(2). Section (e) governs the withdrawal of defense counsel. “Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown. CrR 3.1(2)(e).

Constitutional Right to Effective Counsel: Criminal defendants have the right to counsel in all critical stages of the criminal proceedings against them. U.S. Const. amends. VI & XIV; Const. art. I, § 22; CrR 3.1(b)(2); *Gideon v. Wainwright*, 372 U.S. 335, 337, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The right to counsel means the right to effective counsel. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The right to effective assistance of counsel exists, “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), quoting *United States v. Cronin*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The chief purpose of this right is to ensure that defendants have an effective advocate at trial. *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000).

The test for whether a defendant received effective assistance is whether the Court can say, after considering the entire record, that the accused received a fair trial. *State v. Rhodes*, 18 Wn. App. 191, 196, 567 P.2d 249 (1977), quoting *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538, 542 (1976), citing *State v. Johnson*, 74 Wn.2d 567, 570, 445 P.2d 726, 728 (1968). The burden is on Robinson to demonstrate prejudice. *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). But the defendant need only show a reasonable probability the outcome would have differed — sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 687, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Considering the entire record of this prosecution, it is clear that Robinson was denied a fair trial and was prejudiced.

Before permitting defense counsel to withdraw from ongoing criminal proceedings, CrR 3.1(b)(2) requires the court to conduct an

adequate inquiry into an alleged potential conflict. The disposition of a motion to substitute counsel cannot be arbitrary. And it must provide the defendant with competent representation. *Roberts*, 142 Wn.2d at 516.

(a) No Washington case has addressed whether a court abuses its discretion by failing to conduct an adequate inquiry with the result — not that a meritorious claim of conflict is erroneously rejected — but rather that an illusory conflict is elevated over a criminal defendant’s right to continuity of counsel at a point in the proceedings where substitute counsel could not be effective.

The court implicitly found, without citing the rule or conducting an adequate inquiry, that “other factors” as contemplated by CrR 3.1(e) applied such that substitution was permissible. *See, e.g., Roberts*, 142 Wn.2d at 516, note 16 (“a new appointment by the court is allowed after withdrawal of initial counsel if “other factors make it necessary.”)

(b) No case has addressed whether the right to effective assistance is properly subordinated to a perceived conflict of interest — not with the defendant — but with a third party in the person of a state’s witness.

The Court applies canons of statutory interpretation when construing a court rule. *Robinson*, 153 Wn.2d at 693. In determining whether a disqualifying conflict exists, the relevant inquiry is whether

counsel represented a witness with directly competing interests who may be adverse or hostile to the defendant. *Myers*, 86 Wn.2d at 424. Also whether the witness's testimony is essential to the State's case. *In re Darr*, 143 Cal. App. 3d 500, 191 Cal. Rptr. 882 (1983).

18 A.L.R.4th 360 provides many examples,¹³ such as *Pinkerton v State*, 395 So 2d 1080, *cert denied*, 395 So 2d 1090 (Ala 1980) (representing non-codefendant prosecution witnesses in other proceedings); *People v Drysdale*, 51 Ill. App. 3d 667, 9 Ill Dec 137, 366 NE2d 394 (1977) (continuing confidential relationship with State's witness that could prevent effective cross examination.) In every case, counsel would have had to violate a duty to former clients by cross-examining them, possibly using confidential information learned in the course of prior representation. *See, e.g., Santiago v. Commissioner of Correction*, 87 Conn. App. 568, 867 A.2d 70 (2005).

That is not the case here. The proposed witnesses had no interests in conflict with Robinson's. Their testimony added almost nothing to the State's case. Counsel would not have had to cross examine them using confidential information. Johnson's membership on a board would not

¹³ CIRCUMSTANCES GIVING RISE TO PREJUDICIAL CONFLICT OF INTERESTS BETWEEN CRIMINAL DEFENDANT AND DEFENSE COUNSEL—STATE CASES. 18 A.L.R.4th 360 (Originally published in 1982).

have inhibited cross-examination as to the nature of these witnesses' expert credentials and the factual basis for their opinions.

The most closely comparable Washington case is *State v Rhodes*, 18 Wn. App. 191, 567 P2d 249 (1977). No conflict of interest arose where defense counsel served as a prosecutor for a town where a prosecution witness was police dispatcher and jailer. Moreover, in contrast with Robinson's case, the court in *Rhodes* considered alternatives such as having a different attorney to cross examine that witness. *Rhodes*, 18 Wn. App. at 195. Faced with a withdrawal motion that is untimely and unwarranted, the proper course is for the court to require that counsel remain on the case. *State v. Bandura*, 85 Wn. App. 87, 97-98, 931 P.2d 174 (1997). Here, Johnson's claimed conflict was illusory, the prejudice to Robinson was grave, and the alternatives simple and available.

No Waiver: The Court will find a waiver only where a defendant voluntarily relinquishes a known right. *State v. Quismundo*, 164 Wn.2d 499, 505, n.4, 192 P.3d 342 (2008) (the only means by which a constitutional right may be relinquished is by a voluntary and knowing waiver.) The court indulges every reasonable presumption against the waiver of fundamental rights. *United States v. Allen*, 831 F.2d 1487, 1498 (9th Cir. 1987), quoting *Glasser v. United States*, 315 U.S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942).

The record suggests that Robinson passively acceded to the substitution. CP 34. This cannot be deemed an effective waiver without a real investigation into whether counsel had a genuine conflict. *State v. Dhaliwal*, 150 Wn.2d 559, 568, 79 P.3d 432 (2003). Also, a waiver cannot be effective absent a showing that Robinson understood the potentially devastating impact of changing counsel.

By analogy, a defendant does not waive a conflict of interest if he is not warned of possible negative consequences of conflicting representation. *People v Easley*, 46 Cal 3d 712, 250 Cal. Rptr. 855, 759 P2d 409 (1988); 18 A.L.R.4th 360. Here, Robinson could not knowingly agree to the withdrawal of his counsel based on a spurious claim of conflict where he was not advised of the dangers of proceeding with new counsel and was offered no alternatives.

Court Failed to Exercise Discretion. A court deny substitution, notwithstanding a waiver “when an actual conflict is ‘very likely’ and where the particular circumstances are such that a waiver “will compromise the integrity of the advocacy process.” *Wheat v. United States*, 486 U.S. 153, 158, n.2, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). In *Wheat*, the defendant wanted to waive his counsel’s actual conflict of interest. *Wheat*, 486 U.S. at 157-58. But the rationale applies equally to the situation presented here, where counsel asserts a spurious conflict and

the defendant unwittingly waived the right to continuity of counsel without which is defense was irreconcilably compromised. The trial court had an obligation to give first priority to Robinson's right to a fair trial.

Prejudice Is Presumed. Where defense counsel's actions render the process unreliable, prejudice is presumed and no specific showing of prejudice is required. *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). A presumption of prejudice arises when the adversarial process breaks down. *Cronic*, 466 U.S. at 656-57.

Here, the adversarial process broke down such that Robinson was denied effective counsel at his trial. Crucial pretrial proceedings had been held eight months prior with an entirely new cast of characters. Consequently, it was not possible for either the court or defense counsel to protect Robinson's rights or effectively enforce the pretrial rulings.

9. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENDER SCORE

"A sentencing court acts without statutory authority ... when it imposes a sentence based on a miscalculated offender score." *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002), quoting *In re Pers. Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997). "In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or

proved in a trial or at the time of sentencing.” RCW 9.94A.530(2); *Goodwin*, 146 Wn.2d at 875. Misclassification of out-of-state convictions may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). The State has the burden of proving both the existence and the comparability of out-of-state priors. RCW 9.94A.500; *Ford*, 137 Wn.2d 4at 485.

Here, Robinson’s sentence exceeded the court’s authority, because the State did not produce prove the out-of-state convictions underlying the alleged criminal history.

Existence: The State must prove by a preponderance that a prior conviction exists. Former RCW 9.94A.500 (2006); *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). The best evidence is a certified copy of the judgment. *Ford*, 137 Wn.2d at 480. The State may also rely on documents of record or transcripts. *State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987).

Here the only certified record is a judgment and sentence from Lewis County. Sentencing Exhibit (SE) No. 2.

SE 1 is a Lewis County booking sheet for the current offense; SE 3 is a collection of uncertified Texas booking sheets accompanied by a business records affidavit; SE 4 is an uncertified Texas finger print card dated 10-19-1978; SE 5 is an uncertified Texas judgment on plea of guilty

dated 11-01-1999. The offense is designated as burglary of a building felony. The degree of the offense is SJ.¹⁴ The document contains no statement of the defendant admitting any specific act from which a Washington court can conclude he understood the nature of the offense and how his conduct constituted that offense. There is also no judicial finding of a factual basis for the plea. SE 6 is an uncertified Texas Information charging burglary of a building on 10-29-1999; SE 7 is a second uncertified copy of the same Texas information with the addition of a stipulation: "I stipulate that I committed this offense along with Bernice Richmond." This is insufficient on its face to constitute a knowing and voluntary guilty plea because it does not specify the conduct supposedly satisfying the elements of the offense. SE 8 is an uncertified Texas Judgment on Plea of Guilty dated 09-13-1990 for third degree forgery with unspecified enhancement.¹⁵ Again, the purported judgment does not does not identify a statute or otherwise say what the elements of forgery are and does not state any basis for assigning a degree to the crime. And it does not say what conduct the defendant admitted to that would meet the statutory elements. SE 9 is an uncertified Texas grand jury indictment for forgery dated 07-13-1990. SE 10 is a second

¹⁴ SJ = State Jail Felony. Ex. 7 p.4 (page 2 of the admonishments). Texas classifies felonies as capital, first, second or third degree, or State Jail. Ex. 5

¹⁵ An "enhancement" appears to be an alleged prior offense.

uncertified copy of the SE 9 indictment with the addition of a purported waiver of rights, agreement to stipulate, and judicial confession in the following form: “I understand the above allegations and I confess that they are true and that the acts alleged above were committed on June 29, 1990. In open court I consent to the oral and written stipulation of evidence in this case and to the introduction of affidavits, written statements of witnesses, and other documentary evidence. I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him. ***I intend to enter a plea of guilty*** and the prosecutor will recommend that my punishment should be set at 15 yrs [in the Texas Department of Corrections].” An intent to plead guilty is not the same as a guilty plea. Moreover, this document is not signed by a judge, but by the district court clerk.

SE 11 is another uncertified Texas judgment on plea of guilty to burglary of a building with intent to commit theft in the second degree, dated 09-13-1990 with an offense date of 07-02-1990. It contains no elements, no factual basis, and nothing to indicate why it is second degree; SE 12 is an uncertified Texas grand jury indictment regarding the offense in SE 11. The criminal history is listed as a single prior burglary conviction on 11-07-1986. SE 13 is as second uncertified copy of SE 12 with the same purported waiver of rights and confession discussed in SE

10. It is signed by a clerk, not a judge. SE 14, dated 11-07-1986 is an uncertified Texas judgment on plea of guilty to burglary of a building with intent to commit theft on 06-24-1986. Without explanation, it is classified as second degree. SE 15 is an uncertified Indictment relating to SE 14, dated 07-10-1986. It refers to two undefined priors as sentencing enhancements. One for burglary of a habitation on 07-11-1980, and one for burglary of a building on 06-14-1982. SE 16 is another uncertified copy of the same thing in which the State abandons the allegation of priors. It includes a purported waiver and is signed by a district court clerk. SE 17 is an uncertified copy purporting to be minutes of some sort of proceeding on 06-14-1982 regarding a charge of burglary of a building. It is not signed by anybody.

SE 18 is an uncertified Texas indictment from 02-24-1982 for burglary of a building alleging an unspecified prior conviction for burglary of a habitation. SE 19 is an uncertified partial copy of SE 18. SE 20 is an uncertified copy of a purported Texas bail bond dated 03-24-1982. SE 21 is an uncertified Texas judgment dated 10-20-1978 purporting to be based on a guilty plea to the offense of burglary of a habitation on 10-18. Nobody signed it. SE 22 is an uncertified Information relating to the 10-18-1978 charge with an eight-year sentence suspended with probation

subsequently revoked. SE 23 is an uncertified order suspending the sentence. It includes no judgment.

Comparability: Reviews of a challenge to the classification of an out-of-state conviction is de novo. *State v. Beals*, 100 Wn. App. 189, 196, 997 P.2d 941 (2000).

The Sentencing Reform Act, requires out-of-state convictions to be classified ““according to the comparable offense definitions and sentences provided by Washington law.”” *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994), quoting former RCW 9.94A.360(3) (1992); former RCW 9.94A.525. To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of the alleged comparable Washington crime. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); *Wiley*, 124 Wn.2d at 684.

A court applies a two-part test to determine comparability. *Morley*, 134 Wn.2d at 605-06. The court first compares the legal elements of the disputed crime with the relevant Washington statute. If the elements are comparable, then the foreign conviction counts. *State v. Thomas*, 135 Wn. App. 474, 480, 144 P.3d 1178 (2006). Otherwise, the court may not consider it. *Ford*, 137 Wn.2d at 482.

Where the elements of an out-of-state crime are different or broader, the court considers the second comparability prong— a factual analysis of the defendant’s conduct based on undisputed facts in the record to determine whether it would violate a comparable Washington statute. *Thomas*, 135 Wn. App. at 480. The sentencing court may rely solely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); *State v. Farnsworth*, 133 Wn. App. 1, 22, 130 P.3d 389 (2006). The court may look to charging documents, plea agreements, transcripts of plea hearings, and explicit findings of fact made by the trial judge and assented to by the defendant. *Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). But a court must base factual comparability solely on facts proved, admitted or stipulated to. *Thomas*, 135 Wn. App. at 482.

Here, evidence for the alleged Texas convictions is inadequate for comparability analysis. The charging documents do not identify the Texas statute under which the defendant is being charged. SE 3-23.

When establishing the offender score, the State need not prove the constitutional validity of a prior conviction before it can be used in a sentencing proceeding. *Ammons*, 105 Wn.2d at 187. But the sentencing

court cannot consider a prior conviction that is constitutionally invalid on its face. *Ammons*, 105 Wn.2d at 187-88.

The Texas convictions are facially invalid because they lack sufficient information to conclude that the pleas were knowing and voluntary.

A guilty plea is not voluntary and intelligent unless it is made with an understanding of the nature of the charges. *State v. A.N.J.*, 168 Wn.2d 91, 106, 225 P.3d 956 (2010). The record must show that the defendant knew the elements of the offense and understood how his conduct satisfied those elements. *Id.*; *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006); *see also In re Pers. Restraint of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). In assessing whether a plea is voluntary and intelligent, the court must ascertain that the defendant possessed sufficient information to understand the law in relation to the facts and to appreciate the nature of the charge against him. *In re Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987); *In re Clements*, 125 Wn. App. 634, 645, 106 P.3d 244 (2005).

Moreover, an inadequate factual basis may affect this understanding. *Clements*, 125 Wn. App. at 645. A factual basis sufficient to support a guilty plea does not exist unless there is sufficient evidence for a jury to conclude that the defendant is guilty. *State v. Amos*, 147 Wn. App. 217, 228, 195 P.3d 564 (2008). The factual basis need not be

established by the defendant's admissions; any reliable source may be used. But the material the trial court relied on must be made part of the record. *State v. Osborne*, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

No Waiver. An agreement to a sentence in excess of statutory authority does not bind the defendant or constitute a waiver. *State v. Hunsicker*, 129 Wn.2d 554, 561, 919 P.2d 79 (1996) (restitution). *Goodwin*, 146 Wn.2d at 870. The invited error doctrine cannot validate a sentence based upon an incorrect offender score, because a sentence based upon a miscalculated offender score is a complete miscarriage of justice that requires resentencing. *Goodwin*, 146 Wn.2d at 872, citing *State v. Call*, 144 Wn.2d , 315, 321, 327-28, 28 P.3d 709 (2001). Our courts are not bound by erroneous concessions related to matters of law. *Goodwin*, 146 Wn.2d at 875, quoting *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988). Specifically, a defendant cannot confer sentencing power in excess of the court's statutory authorization. *Goodwin*, 146 Wn.2d at 870. An erroneous offender score is grounds for reversing the erroneous portion of the sentence. *Goodwin*, 146 Wn.2d at 870.

The elements of the charged crime underlying a foreign conviction are the cornerstone of the comparison. *Morley*, 134 Wn.2d at 606. Moreover, the court should not draw conclusions about facts a defendant admitted to if in a foreign jurisdiction if there was no incentive to dispute

those facts. *Lavery*, 154 Wn.2d at 258. Here, for example, Robinson had no incentive to dispute facts that in Washington would determine the degree of the crime, because the prosecutor appears to have selected randomly from various degrees and something called “SJ”.¹⁶

Similarly, in *Thomas*, this court reversed a determination of factual comparability made by the trial court as being inconsistent with *Shepard* and *Lavery*. *Thomas*, 135 Wn. App. at 488. Specifically, we held that in analyzing whether a California burglary conviction was factually comparable to a Washington burglary, the trial court incorrectly found that the State had proved that the defendant’s entry of a building had been “unlawful” based on the allegation in the charging document and a jury verdict convicting him of the crime charged. *Thomas*, 135 Wn. App. at 487. We reasoned that unlawful entry was not an element of the California offense, as it was under Washington law, and thus there was a “lack of incentive for Thomas to admit or mount a defense to an allegation that [did] not affect the determination of guilt.” *Thomas*, 135 Wn. App. at 487, 144 P.3d 1178, citing *Lavery*, 154 Wn.2d at 258.

Whether a guilty plea to burglary under a foreign burglary statute necessarily admitted elements of burglary in this jurisdiction is determined

¹⁶ State Jail Felony. Ex. 7 p.4 (page 2 of the admonishments). Texas classifies felonies as capital, first, second or third degree, or State Jail. Ex. 5

solely by the terms of the charging document, a plea agreement, or a transcript of colloquy between judge and defendant in which the defendant confirmed the factual basis for the plea, or to some comparable judicial record. In *Shepard*, 544 U.S. 13, the United States Supreme Court addressed the comparability of a particular State's burglary statute to the elements of a so-called 'generic' burglary offense that triggered sentencing enhancements. *Shepard*, 544 U.S. at 15. The Court concluded that tried and pleaded foreign convictions should be treated the same.

Specifically, in pleaded cases:

A later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Shepard, 544 U.S. at 16.

No. 65047-5-I at 8-9: In some states, a guilty plea automatically admits the facts charged in the information. In Washington, however, the court must establish a factual basis for the plea.

Robinson was sentenced to 252 months, based on an offender score of 12. But the evidence establishes no more than a single prior Lewis County offense. Sent. Ex. 2. The remaining allegations of criminal history rely on documents out of Texas purporting to be judgments based

In closing, the prosecutor said there were only two possible scenarios: Either LH and LR woke up one day and decided to hatch an evil plan to frame Robinson for absolutely no reason and “coach this tiny, tiny girl to say these horrible things for no reason,” or Robinson “did terrible, terrible, terrible things to [LH] and that she’s been telling an accurate story ever since. I would submit to that the second option is a lot more reasonable than the first one.” JRP 287.

This was flagrant and ill-intentioned. It omitted the third scenario: that well-meaning people inadvertently put into the mouth of a 4-yr-old words that, like a Hollywood-style monster, once aroused cannot be stopped until lives and families are destroyed. Reversal is required.

[REDACTED]

The cumulative error doctrine applies where the weight of several errors denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). That is the case here. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). A presumption of prejudice arises where, as here, the adversarial process breaks down. *Cronic*, 466 U.S. at 656-57.

Here, the danger of a profound miscarriage of justice is very grave. The prosecution was set in motion by insinuations from a person whose death prevented any inquiry into her potential bias, leading or suggestive questioning or miscommunication with a very young child. These were picked up by a person who was profoundly deaf. The pretrial judge, concerned that the Confrontation Clause would deny justice to a possible victim, overshot the mark by entering an equivocal competency ruling that not only allowed unreliable hearsay to be admitted, but prevented the accused from exposing its weaknesses at trial or challenging it on appeal. Allowing the State to reopen the hearsay hearing brought in additional, even less reliable, hearsay. Doing the trial with a new judge, new prosecutor and new defense counsel caused the pre-trial testimony effectively to disappear. New counsel was in the dark regarding crucial inconsistencies, as was the judge, who was not able fairly to carry out the pretrial judge's conditional competency ruling. Finally, Robinson was sentenced based on an offender score derived from unproven foreign convictions.

V. CONCLUSION

For the foregoing reasons, Mr. Robinson asks the Court to reverse his convictions and dismiss the prosecution for insufficient evidence. In

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the alternative, he seeks remand for a new trial, or, at minimum,
resentencing.

STATE OF WASHINGTON
BY [Signature]
COUNSEL

Respectfully submitted this 18th day of January, 2011.

[Signature: Jordan McCabe]
Jordan B. McCabe, WSBA No. 27211
Counsel for Clayton T. Robinson

CERTIFICATE OF SERVICE

Jordan McCabe mailed this day, first class postage prepaid, a copy of this
Appellant's Brief to:

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[Signature: Jordan McCabe] 1-18-2011

State v. Robinson, 41027-3

AMENDED CERTIFICATE OF SERVICE OF OPENING BRIEF

On January 18, 2011, Jordan McCabe mailed a copy of the Appellant's Brief addressed to:

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19 January 2011

Jordan McCabe