

COURT OF APPEALS
DIVISION II

No. 41027-3-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE PROSECUTOR
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

CLAYTON T. ROBINSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was L.H. competent to testify?
- B. Did the trial court impermissibly admit hearsay statements L.H. made?
- C. Did the trial court erroneously allow Robinson's original defense counsel to withdraw?
- D. Did the deputy prosecutor commit misconduct during his closing argument?
- E. Was there sufficient evidence presented to find Robinson guilty of Count Two, Attempted Child Molestation in the First Degree, and Count Three, Child Molestation in the First Degree?
- F. Did the trial court error when determining Robinson's offender score?
- G. Were there errors such that the cumulative weight would require reversal to avoid a manifest injustice?

II. STATEMENT OF THE CASE

The State filed an information, on April 13, 2009, charging Clayton Troy Robinson¹ with Counts One and Three, Child Molestation in the First Degree, and Count Two, Attempted Child Molestation in the First Degree. CP 1-3. The State alleged that Counts One and Two occurred on or about and between December 1, 2008 and December 25, 2008. CP 1. The State alleged Count Three occurred on or about and between December 1, 2007 and

¹ Hereafter, Robinson.

December 31, 2007. CP 2. The victim in all three counts is L.R.H., whose date of birth is March 16, 2004. CP 1-2. Robinson is L.R.H.'s great uncle. MRP 19². In 2007 through 2008, L.R.H. lived in Winlock, Washington with her mother, Lujuanne³, her grandmother Debbie, her great grandmother Rosealice and her husband and Robinson. MRP 18-19.

There was a competency and child hearsay hearing held on October 16, 2009 and October 28, 2009. MRP 4, 78; CP 29-32. At the hearings L.R.H., Lujuanne, Jeff Copeland, Nancy Young, Terry Williams, James Armstrong and Robinson testified. MRP 2-3; CP 29. L.R.H. testified, "You know my Uncle Clayton? . . . He touched me in the wrong spot." MRP 31. L.R.H. spelled her name, stated she was in kindergarten, explained she lived in Centralia now but used to live in Winlock with her grandma. MRP 32-33. L.R.H. told the court who else lived with her when she lived in Winlock, she was five years old and born on March 16. MRP 33-35. L.R.H. knew she went to school Monday through Friday, listing all the days

² In an attempt to be consistent with Appellant's citing of the record, the State will refer to the following verbatim reports as follows: Jury Trial – JRP; Sentencing – SRP; Motion Hearings on 10-16-09, 10-28-09, 01-26-10, 03-19-10, 07-08-10 and 07-22-10 – MRP. The miscellaneous hearings will be referred to as follows: Hearings on 05-21-09, 01-21-10, 02-25-10 and 03-04-10 – 1RP; Hearing on 01-14-10 – 2RP; Hearing on 09-17-09, 01-28-10 and 06-24-10 – 3RP.

³ The different family members will be referred to by their first names to avoid confusion, there is no disrespect intended.

of the week, her teacher's name and her favorite part of school was recess. MRP 35-36. L.R.H. explained what the truth was and what a lie was. MRP 38. L.R.H. also testified that telling the truth was a good thing and that she was going to answer the questions asked of her truthfully. MRP 39-40. L.R.H. knew that she had spoken to Jeff (Copeland), he had recorded their conversation and there was also a police officer named Terry with Jeff. MRP 44-45. L.R.H. said she told her mom and grandma Debbie what Robinson had done to her. MRP 46-47. L.R.H. testified, albeit with a lot of head nodding and gesturing, that Robinson had touched her three times in the area where she goes to the bathroom. MRP 49-50. L.R.H. also stated it happened during two different Christmas's. MRP 50. L.R.H. stated she remembered speaking to the child doctor (Nancy Young).

At the child hearsay hearing Jeff Copeland, a Child Protective Services (CPS) worker testified and the court listened to the recorded interview Mr. Copeland did with L.R.H.. MRP 6-17; Mot. Ex. 2⁴. Winlock Police Chief Terry Williams accompanied Mr. Copeland. MRP 8, 60-61; CP 30. During the interview with Mr.

⁴ There are exhibits from the sentencing hearing that will be referred to as Sent. Ex. and the State is filing a supplemental designation of exhibits for the exhibits admitted at the motion hearings, which will be designated as Mot. Ex.

Copeland L.R.H. stated Robinson had touched her on her “private parts”, pointing at her crotch, while his hand was on the inside of her underpants. MRP 23; CP 30; Mot. Ex. 2, 3. L.R.H. also stated Robinson had touched her on her private parts two days in a row around Christmas 2008 and he had also touched her the previous Christmas. CP 30, Mot. Ex. 2, 3. Lujanne testified in regards to the disclosures L.R.H. had made to her about the molestation and that L.R.H. had disclosed on December 25, 2008. MRP 17-30; CP 30. Nancy Young, a nurse at the sexual assault clinic, testified about the examination that was performed on L.R.H., including a recorded interview with L.R.H. MRP 70-87; Mot. Ex. 1. The CD of the interview was played for the court. MRP 83; Mot. Ex. 1. During the interview L.R.H. disclosed that Robinson touched her in a wrong place, pointing at her crotch area and saying down there. CP 30; Mot. Ex. 1. L.R.H. said it did not feel good, it felt like someone had pinched her. CP 30; Mot. Ex. 1. L.R.H. also said Robinson told her not to tell anyone but she did tell her grandma Debbie. CP 30-31; Mot. Ex. 1. L.R.H. told Ms. Young that she had seen Robinson’s private parts, he asked her to touch his private parts and she saw something that looked like slime coming from Robinson’s privates. CP 31; Mot. Ex. 1.

At the conclusion of the competency and child hearsay hearing the judge found L.R.H. competent and ruled the hearsay testimony would be admissible, provided L.R.H. testify in a meaningful fashion at the trial. MRP 124-127; CP 31-32. Findings of Fact and Conclusion of Law were entered on January 5, 2010. CP 29-32.

A new deputy prosecutor took over Robinson's case in January 2010. The new prosecutor supplemented the witness list with three additional witnesses, two of whom worked for Cascade mental health. 2RP 2-3; CP 37-38. The State also requested to present supplemental evidence regarding child hearsay, some of which was new disclosures that had been made since the child hearsay hearing in October, 2009. 2RP 3; CP 37-38. Due to the additional witnesses, Mr. Johnson now had a conflict of interest and filed a written motion requesting the court's permission to withdraw from the case. 2RP 2-4; CP 33-35. The trial court granted Mr. Johnson's request and appointed new counsel for Robinson. 2RP 4. Robinson never objected to having new counsel appointed. 2RP 2-4.

A second child hearsay hearing was conducted on March 19, 2010, with Robinson's new counsel. MRP 138; CP 40. At this

hearing Lujuanne, Kaye Austin, Russell Funk and Kari Tjersland testified. CP 40. The court found the hearsay statements by L.R.H. to Kaye Austin in front of Lujuanne were admissible. CP 41-42. Statements L.R.H. made to Mr. Funk and Ms. Tjersland were not admissible under the child hearsay exception. CP 42.

A jury trial was held June 28, 2010 through June 30, 2010. JRP 1, 139, 242. L.R.H. testified at the trial. JRP 32-58. L.R.H. testified that she had lived in a house with Robinson and he had his own room in the house. JRP 36. L.R.H. testified that Robinson had done a bad touch on her one time, in his room, on December 25. JRP 37-38, 40. L.R.H. stated that she was touched by Robinson on top of her clothes in a place that her underpants would cover. JRP 39. L.R.H. said Robinson told her not to tell but she told her mom anyway. JRP 39. L.R.H. testified that the touch did not hurt and Robinson never asked her to touch him. L.R.H. did testify Robinson gave her a lemonade drink that she did not like because it made her feely icky. JRP 45. On cross-examination L.R.H. testified that Robinson's door was closed when she was in his room. JRP 49. L.R.H. testified where her grandmother's room was located in relation to Robinson's. JRP 50. L.R.H. also testified about playing Monopoly with Robinson. JRP 51-52. Robinson's

trial counsel never asked L.R.H. about the alleged acts of molestation.

The trial court ruled L.R.H. had meaningfully testified and the hearsay statements she had made to Lujuanne, Jeff Copeland, Terry Williams and Kaye Austin were therefore admissible. JRP 63. Ms. Austin testified L.R.H. had pointed at some beer in the grocery store and stated, "That's the beer that my Uncle Clayton gave me." JRP 110. Ms. Austin said L.R.H. told her Robinson had touched her (L.R.H.'s) pink thingy. JRP 110. Ms. Austin also said L.R.H. told her Robinson made L.R.H. watch inappropriate movies and touch his thingy. JRP 112. Mr. Copeland testified he spoke to L.R.H. on December 29, 2008. JRP 123. Mr. Copeland stated L.R.H. told him that Robinson had touched her privates, pointing at her crotch area. JRP 127. Mr. Copeland testified L.R.H. said Robinson touched her inside her underpants with his hand and it happened two days in a row. JRP 128-129. Mr. Copeland further testified that L.R.H. had told him Robinson had touched her underneath her underwear on Christmas 2007. JRP 128-129. Ms. Young testified L.R.H. pointed to her crotch area when she said she was touched down there. JRP 154. A portion of the recording of the interview with L.R.H. was played for the jury, the same

recording that had been played at the child hearsay hearing. JRP 154; Mot. Ex. 1. Lujuanne testified that L.R.H. told her on the evening of December 25, 2008 that “Uncle touched me down here in the privates.” JRP 178. Lujuanne testified that L.R.H. told her Robinson had touched L.R.H. on more than one occasion. JRP 180-181. Lujuanne testified that L.R.H. had told her Robinson had watched dirty (pornographic) movies with her. JRP 182. Lujuanne stated L.R.H. told her that L.R.H. had touched Robinson’s penis. JRP 191. Chief Williams testified that L.R.H. said Robinson touched her that Christmas (2008) and the Christmas before. JRP 214. There was also testimony from Kari Tjersland that L.R.H. had said during counseling sessions that Robinson scares her. JRP 99.

The jury convicted Robinson on all three counts. CP 65-67. After a sentencing hearing, Robinson was sentenced to a minimum term of 252 months in prison. CP 93.

ARGUMENT

A. L.R.H. WAS COMPETANT TO TESTIFY.

A person, including children, are considered competent to be a witness, except as provided by court rule or statue. ER 601. Every person of sound mind and discretion may be a witness in any action or proceeding. RCW 5.60.020. A witness is incompetent to

testify if he or she is not capable of perceiving just impressions of the facts and truthfully relating them. RCW 5.60.050(2). Children are incompetent to testify if they do not have the capacity of receiving just impressions of the facts about which they are examined or do not have the capacity of relating them truly. CrR 6.12(c)

“Preliminary questions concerning ... the admissibility of evidence shall be determined by the court [i]n making its determination it is not bound by the rules of evidence except those with respect to privilege.” ER 104(a). “Ordinarily, the competency of a witness is a preliminary fact question to be determined by the trial court. The determination lies within the sound discretion of the trial court and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.” *State v. Watkins*, 71 Wn. App. 164, 170, 857 P.2d 300 (1993) (*citations omitted*). The trial court abuses its discretion only when its decision is based on untenable reasons or grounds or is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 688, 701, 940 P.2d 1239 (1997). When a trial judge addresses a competency-related question of preliminary fact, he or she has discretion to inquire whether the evidence

preponderates in favor of that fact. *State v. Karpenski*, 94 Wn. App. 80, 103-4, 971 P.2d 553 (1999).

All witnesses, including children, are presumed competent to testify. *State v. S.J.W.*, 170 Wn.2d 92, 239 P.3d 568 (2010).

A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly. The *Allen*⁵ factors continue to be a guide when competency is challenged.

Id. Absent any challenge by the parties to a child's competency, the decision of whether to conduct a competency examination is within the trial court's discretion. *State v. C.M.B.*, 130 Wn. App. 841, 845, 125 P.3d 211 (2005). "Intelligence, not age, is the proper criterion to be used in determining the competency of a witness of tender years." *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

The true test of the competency of a young child as a witness consists of the following: (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. The determination of the witness's ability to meet the requirements of this test and

⁵ See, *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021, 1022 (1967).

the allowance or disallowance of leading questions rest primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review. Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.

Id. (citations omitted).

As long as the child can demonstrate some independent recollection of the events in question, has the ability to describe them, and understands the obligation to speak the truth in court, the child's equivocation or inability to recall details goes to the weight of the testimony rather than its admissibility. *State v. Pham*, 75 Wn. App. 626, 629-30, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002 (1995); *State v. Guerin*, 63 Wn. App. 117, 122-3, 816 P.2d 1249 (1991). Similarly, inconsistencies in a child witness's testimony bear on credibility, not admissibility. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). Furthermore, a child's reluctance to testify about specific acts of abuse does not render him or her incompetent. *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991); *State v. Leavitt*, 111 Wn.2d 66, 69, 758 P.2d 982, (1988) (court affirmed competency ruling for child whose testimony at competency hearing was given through social worker to whom child whispered answers).

The trial court did not abuse its discretion by finding L.R.H. competent to testify. The trial court based its decision on the testimony of L.R.H. elicited at pretrial hearing and entered findings of facts and conclusions of law supporting its decision. MRP 123-125; CP 29-31. L.R.H. demonstrated she understood the obligation to speak the truth on the witness stand. The deputy prosecutor asked, "We're going to ask you a bunch of questions today, okay. And when you answer those questions, are you going to answer truthfully or answer with lies?" MRP 40. L.R.H. replied, "[t]ell the truth." MRP 40; CP 31. L.R.H. had demonstrated earlier that she understood the difference between a truth and a lie. MRP 38-39. L.R.H. spoke to Jeff Copeland from Child Protective Services (CPS) on December 30, 2008, five days after Robinson molested her. MRP 10-13; Mot. Ex. 2 and 3. L.R.H.'s responses to Mr. Copeland demonstrated L.R.H.'s mental capacity and therefore she had the mental capacity at the time of the occurrence to receive an accurate impression of it. MRP 124; CP 30-31. L.R.H.'s testimony in regards to day to day life, kindergarten, the people she has relationships and statement that Robinson touched her in a wrong spot sufficiently demonstrate L.R.H.'s ability to retain an independent recollection of the occurrence. MRP 31-33, 35-37, 43;

CP 31. L.R.H. expressed that Robinson had “touched me on a wrong spot.” MRP 21, 43; CP 31. L.R.H. answered, although sometimes by nodding her head, simple questions about the molestation during the motion hearing. MRP 42-54; CP 31.

The trial court's competency ruling was reasonable given the testimony that was elicited at the hearing. The trial court was able to hear the testimony from L.R.H., see her demeanor and make a decision based on that testimony. There is no showing by Robinson that the trial court's decision was based on untenable grounds or manifestly unreasonable. Therefore the ruling by the trial court that L.R.H. was competent to testify as a witness should not be disturbed.

Robinson also alleges the ruling of competency by the trial court was “conditional” and the trial court deferred its competency determination until the trial. Brief of Appellant 10. This is a misstatement of the trial court's ruling. The trial court held that L.R.H. was competent, stating “I thought she was very much more of a conversational five-year-old than I've seen in many of these cases. So I find she's competent.” MRP 125; CP 31. Therefore, Robinson's argument that the trial court denied Robinson the protection of the confrontation clause is without merit.

B. THE CHILD HEARSAY STATEMENTS OF L.R.H. WERE PROPERLY FOUND AS RELIABLE AND THEREFORE ADMISSIBLE CONTINGENT ON L.R.H. TESTIFYING AT THE TRIAL .

Statements to another by children under the age of ten years regarding sexual abuse may be admitted at trial under certain circumstances. Child hearsay statements are admissible when:

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

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

RCW 9A.44.120.

The Washington Supreme Court has listed nine factors to be applied in determining whether a child's out-of-court statement is reliable. *State v. Ryan*, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984). The *Ryan* court derived the first five factors from *State v. Parris*, 98 Wn.2d 140, 654 P.2d 77 (1982): (1) whether there is an

apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement; (4) whether the statements were made spontaneously, and (5) the timing of the declaration and the relationship between the declarant and the witness. *Ryan*, 103 Wn.2d at 175-176. The remaining four factors derive from *Dutton v. Evans*, 400 U.S. 74, 27 L.Ed.2d 213, 91 S. Ct. 210 (1970): (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 the defendant's involvement. *Ryan*, 103 Wn.2d at 175-176.

“[R]eliability does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it to be reliable. The trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability.” *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990) (*footnotes omitted*). The trial court must determine the reliability of each statement offered for admission, not the reliability of the witness to whom the statement

was made. *State v. McKinney*, 50 Wn. App. 56, 62-63, 747 P.2d 1113 (1987), *review denied*, 110 Wn.2d 1016 (1987).⁶

The trial court has "considerable discretion" in evaluating the indicia of reliability and determining whether a statement is admissible. *State v. Swan*, 114 Wn.2d at 648. In establishing a foundation for the admissibility of child hearsay testimony, the State need not satisfy every one of the nine criteria set out in *Ryan*. *Id.* at 652. "No single factor is decisive; rather, reliability is based on an overall evaluation of the factors." *C.M.B.*, 130 Wn. App. at 848. The test is whether, on the whole, the criteria substantially have been met. *Swan*, 114 Wn.2d at 652; *State v. Borland*, 57 Wn. App. 7, 20, 786 P.2d 810, 817 (1990). The Court of Appeals has commented that "... we find that the *Dutton* factors are not useful in determining which statements are admissible under RCW 9A.44.120. Nonetheless, they remain part of the Washington rule for admission until changed by the Supreme Court." *Borland*, 57 Wn. App. at 20 (footnote omitted); *see also State v. Henderson*, 48 Wn. App. 543, 551 n5, 740 P.2d 329, 334 n5 (1987).

⁶ A witness' faulty recollection of a child's statement does not render the child's statement unreliable necessarily; "*Ryan* does not require the trial court to determine if the *witness's* memory or articulation of the child's statement is reliable."

The trial court held that L.R.H.'s statements to Lujane Robinson, Chief Terry Williams, Jeff Copeland and Nancy Young provided sufficient indicia of reliability and therefore were admissible under RCW 9A.44.120(1). MRP 125-126; CP 31. The trial court stated in its ruling that the statements "were made spontaneously, they were made in a timely fashion and without inappropriate questioning, that's certainly true for the mother." MRP 126. In regards to the statements L.R.H. made to Jeff Copeland the trial court ruled that the statements "[t]o the CPS worker, they were close in time to the original disclosure [and] [t]he child did not know the purpose in advance for the interview and the questioning was appropriate and non-leading." MRP 126. The trial court ruled that the statements L.R.H. made to Nancy Young were "relatively consistent, she [L.R.H.] was interviewed appropriately, the disclosure part of what she talked about was spontaneous, albeit, in response to some questioning, and she was told that the purpose of the interview was for a medical exam . . . it is unlikely she [L.R.H.] was thinking in terms of convicting the defendant when she was making those statements." MRP 126. The trial court found that all of the statements were nontestimonial. CP 31. The trial court applied the *Ryan* factors and concluded that L.R.H.'s

hearsay statements about the sexual abuse were admissible, but only under RCW 9A.44.120(2)(a), because the trial court found that the statements were not corroborative. MRP 126-127; CP 31-32.

In the supplemental child hearsay hearing held on March 19, 2010, the trial court heard testimony from Kaye Austin, Kari Tjersland, Russell Funk and Lujane Robsinson. See MRP 141-172. The trial court held in that hearing that statements by L.R.H. made in the presence of Kaye Austin and Lujanne Robinson⁷ were admissible because there were sufficient indicia of reliability and were nontestimonial. MPR 177; CP 41-42. The trial court did not find that the statements were corroborative. MPR 178; CP 42. The trial court did not find the statements to Kari Tjersland or Russell Funk admissible under 9A.44.120.

Robinson argues that testimony elicited at trial rendered the hearsay statements unreliable. Brief of Appellant 13-15. This is not the standard. The child hearsay admissibility was a pretrial decision. The hearsay was ruled admissible subject to L.R.H. testifying in a meaningful manner. MRP 126-127, 178; CP 31-32, 42. After L.R.H. testified at the jury trial the trial court found “that clearly she [L.R.H.] testified in a meaningful manner with regard to

⁷ The findings of fact refer to Lujanne Harris. Lujanne Harris is Lujanne Robinson.

the touching that occurred on December 25, 2008.” JRP 60. The trial court further found that just because L.R.H. denied any additional molestation did not render her testimony meaningless because defense counsel was able to have meaningful cross examination with L.R.H. JRP 61-63.

“The Confrontation Clause requires the term ‘testifies,’ as used in the child hearsay statute, RCW 9A.44.120(2)(a), to mean the child gives live, in-court testimony describing the acts of sexual contact to be offered as hearsay.” *State v. Rohrich*, 132 Wn.2d 472, 482, 939 P.2d 697 (1997). A child satisfies the definition of testifying merely by providing information beyond minor details, thereby permitting meaningful cross-examination:

Although [the victim] did not describe the sexual contact in great detail, she testified beyond incidental details. She sufficiently identified [the defendant], stated that he was alone with her in the nurse's office on the occasion of her playground injury, that he touched her "inside," and that she had told others the truth about what happened. Although it is a close question, we conclude that [the victim's] testimony was sufficient under *Rohrich* to meet the statutory requirement. The testimony was sufficiently detailed to permit meaningful cross-examination.

State v. Montgomery, 95 Wn. App. 192, 199, 974 P.2d 904 (1999).

“Cross-examination is constitutionally adequate even if the witness cannot remember the incident at trial ... or even though the witness

denies the incident at trial.” *State v. Clark*, 91 Wn. App. 69, 76-77, 954 P.2d 956 (1998)⁸.

L.R.H. meaningfully testified, therefore under RCW 9A.44.120 her hearsay statements are admissible. Robinson’s argument that pursuant to *Crawford*⁹ the hearsay testimony should be excluded because it was testimonial is without merit. “[P]rior statements must be excluded under the *Crawford* rule only if a witness is unavailable at trial for purposes of the confrontation clause.” *State v. Price*, 158 Wn.2d 630, 639, 146 P.3d 1183 (2006). The court held that if the child witness testifies and is asked about the hearsay statements and the event the confrontation clause is not violated if the defendant is provided the opportunity to fully cross-examine the witness. *Id.* at 644, *citing State v. Clark*, 91 Wn. App. at 159. “[A] witness’s inability to remember does not implicate *Crawford* nor foreclose admission of pretrial statement. *State v. Price*, 158 Wn.2d at 650. In *Price*, the child victim testified at trial, under oath, stating that she forgot when asked about the molestation. Price’s defense attorney had the ability to cross examine the child but chose not to. The child’s

⁸ The trial court properly admitted the victim’s previous hearsay statements because victim’s recantation at trial allowed for adequate cross-examination

⁹ *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

statements to her mother and a police officer were admitted and the Supreme Court held *Crawford* and the confrontation clause were not violated. *Id.* 650-651.

There is no showing by Robinson that the trial court's decision regarding the admissibility of the child hearsay statements was based on untenable grounds or manifestly unreasonable. Therefore the ruling by the trial court that L.R.H.'s hearsay statements made to Lujanne Robinson, Kaye Austin, Nancy Young, Terry Williams and Jeff Copeland were admissible under the child hearsay exception should not be disturbed. Further, the admission of L.R.H.'s hearsay statements at the jury trial were proper given the trial court found L.R.H. testified meaningfully and Robinson has not shown that the trial court abused its discretion when making that determination.

C. THE TRIAL COURT DID NOT ERROR WHEN IT ALLOWED ROBINSON'S ORIGINAL TRIAL COUNSEL TO WITHDRAW DUE TO A NEWLY DISCOVERED CONFLICT OF INTEREST.

To prevail on an ineffective assistance of counsel claim Robinson must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 688, 687, 80 L. Ed. 674, 104 S.

Ct. 2052 (1984). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Robinson asserts he was denied effective assistance of counsel when his trial attorney was allowed to withdraw due to a conflict of interest and new counsel was appointed on January 14, 2010. Brief of Appellant 30; 2RP 2-4; CP 33-36. Robinson now claims that any conflict was only perceived and untimely, the trial court violated the criminal rules by failing to determine if there was sufficient and good cause for the withdrawal and the prejudice

suffered by Robinson was “grave.” Brief of Appellant 30-35. This is simply not the case.

Once a criminal case has been set for trial an attorney must get the court’s permission to withdraw. CrR 3.1(e). The court will only grant withdrawal from such a case upon a showing of a good and sufficient reason for the withdrawal. CrR 3.1(e). A conflict of interest may arise under a number of different circumstances as outlined in RPCs 1.7 through 1.9. “A trial court has a duty to determine whether an actual conflict exists before it may grant a motion to withdraw and substitution of counsel.” *State v. Vicuna*, 119 Wn. App. 26, 30, 79 P.3d 1 (2003). Trial court determinations regarding conflicts of interest are reviewed de novo. *Id.* In *Vicuna* defense counsel, on the eve of trial, stated there was a conflict of interest and asked to withdraw from the case, but did not elaborate. *Vicuna* objected to the withdraw stating he did not understand what was going on and he did not know what the alleged conflict was. The trial court in *Vicuna* did not get any specific information from trial counsel in regarding the alleged conflict.

Robinson’s case is distinct from *Vicuna* because Robinson’s trial counsel, Kenneth Johnson, filed a written motion requesting permission from the court to withdraw and cited his reasons for the

request and outlined the conflict. CP 33-35. On the record Mr. Johnson stated that given the new witness list submitted by the State, adding two witnesses from Cascade Mental Health, for which he was a long standing member of the board, he had a conflict of interest. 2RP 2. In the written motion and on the record Mr. Johnson clearly states that Robinson understood the situation, understood the conflict and was in agreement that new counsel should be appointed. 2RP 2; CP 34. The trial court ruled “[g]iven Mr. Johnson’s representations regarding the additional witnesses, I agree there is a conflict.” 2RP 4. There was sufficient information given to the trial court in regards to the conflict of interest for the trial court to find good and sufficient cause to allow Mr. Johnson to withdraw as counsel. Further, Robinson did not object.

Robinson fails to mention anywhere in his brief how his counsel’s performance was deficient. Robinson’s trial was not held until June 28, 2010, giving his new counsel ample time to prepare. JRP 1. Robinson also cannot point to any prejudice suffered due to ineffective assistance of counsel. Robinson’s claim of ineffective assistance of counsel fails.

D. THE DEPUTY PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HIS CLOSING ARGUMENT.

A claim of prosecutorial misconduct is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “If defense counsel fails to object to an improper remark, we will reverse only if the remark is so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice.” *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.2d 553 (2009), citing *State v. Belgrade*, 110 Wn.2d at 508.

The standard for review of claims of prosecutorial misconduct is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). To prove prosecutorial misconduct, the defendant must show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003); *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing *State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). A comment is prejudicial when “there is a substantial likelihood the misconduct affected the jury's verdict.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007(1998).

Robinson is alleging statements made by the deputy prosecutor in his rebuttal closing were misconduct. Brief of Appellant 48-49. The deputy prosecutor argued:

Defense wants you to think there's a big red herring here, there's some puppet master out there masterminding this whole thing against the defendant for some unknown reason. Well, let's think about it like this: what's the more reasonable scenario? One day wither Luella and Lujuane woke up and said I'm going to hatch an evil plan today to get the defendant in trouble for absolutely no reason and I'm going to put us through this process that's going to go on for years for no reason, let's coach this tiny, tiny girl to say these horrible things for no reason, so there's that scenario. Or there's the second scenario, that he did terrible, terrible, terrible things to Luella and that she's been telling an accurate story ever since. I would submit to you that second option is a lot more reasonable than the first one.

JRP 287. This argument was in response to Robinson's trial attorney's closing argument, "I submit to you somebody has made that child a pawn. I don't know who. And for our purposes here today it doesn't matter. But we know she's not being truthful." JRP 280.

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing State v. Gregory*, 158 Wn.2d at 860. That wide latitude is especially true

when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

In Robinson's case the deputy prosecutor was responding to an issue raised by Robinson's attorney during his closing argument. The deputy prosecutor's statements during rebuttal closing argument were not flagrant and ill-intentioned. The jury was instructed that they are the sole determiners of a witness's credibility in the standard WPIC 1.02. CP 47-49. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007)(citations omitted). If, for the sake of argument, the court were to find the deputy prosecutor's comments flagrant and ill-intentioned, any prejudiced would have been eliminated with a curative instruction.

E. THERE IS SUFFICIENT EVIDENCE TO SUSTAIN ROBINSON'S CONVICTIONS IN COUNTS TWO AND THREE.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. 14; *In re Winship*, 397 U.S. 358, 362-65, 25 L.Ed.2d 368, 90 S. Ct 1068 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a

conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

Viewing the evidence in the light most favorable to the State, there is sufficient evidence to support Robinson's convictions for Counts Two and Three. While L.R.H. did not testify regarding those incidents of attempted molestation and molestation, the hearsay testimony was sufficient to support convictions on both counts. Specifically Jeff Copeland's testimony regarding that L.R.H. had told him Robinson had touched her twice, inside her underpants, in December 2008 and once the prior Christmas is sufficient to sustain the convictions. JRP 127-129.

F. ROBINSON'S OUT OF STATE CONVICTIONS WERE PROPERLY ADMITTED DURING THE SENTENCING HEARING AND THE TRIAL COURT THEREFORE SENTENCED ROBINSON USING THE CORRECT OFFENDER SCORE.

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.150. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. *State v. Jackson*, 129 Wn. App. 95, 105, 117 P.3d 1182 (2005), citing *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1991). Illegal or erroneous sentences may be challenged for the

first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004)(citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When calculating a person's offender score for purposes of sentencing, "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability or is unsupported in the record." *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999)(citations omitted).

Robinson claims there is insufficient evidence to support his offender score of 12 and therefore he was sentenced erroneously. Several of Robinson's claims in regards to the lack of supporting evidence are unfounded. Specifically, the sentencing exhibits five through 23 are all certified copies, contrary to Robinson's assertion in his brief.¹⁰ Brief of Appellant 38-42, 48. Robinson also asserts

¹⁰ After reading Robinson's opening brief, the State was concerned regarding the evidence submitted at sentencing. The below signed deputy prosecutor inspected the exhibits at the Clerk's Office for the Court of Appeals, Division II, and found sentencing exhibits 5-23 all had certifications. The certification can be found on the back of the last page of each document.

that his Texas convictions are facially invalid because they lack sufficient information to conclude the pleas were knowing and voluntary. Brief of Appellant 44. While the Washington Supreme Court has held that out-of-state convictions that are constitutionally invalid on its face or unconstitutionally obtained may not be considered in a sentencing hearing, it has also been held that requiring the State to prove a prior convictions constitutional validity would turn a sentencing hearing into appellate reviews of all prior convictions. *State v. Ammons*, 105 Wn.2d 175, 187-188, 713 P.2d 719 (1986). The court explained constitutional invalidity “on its face means a conviction which without further elaboration evidences infirmities of constitutional magnitude.” *Id.* at 188. None of Robinson’s convictions are constitutionally invalid on their face.

The trial court properly counted the burglary convictions as part of Robinson’s offender score. It is important to note that the sentencing court excluded the Texas conviction for forgery, finding it washed. SRP 35; Sent Ex. 8, 9, 10; CP 91. Also, Robinson’s contentions that the judgments were not signed by a judge are false. Brief of Appellant 48; See Sent Ex 5, 8, 11, 14, 17, 28.

The 1999 burglary conviction, as listed on the judgment and sentence criminal history number two, is supported by the certified

documents provided at the sentencing hearing. Sent Ex. 5, 6, 7, CP 91. The elements of the burglary offense are listed in the information, that on or about October 29, 1999, Robinson unlawfully entered a building with the intent to commit theft. Sent Ex. 5. This is comparable to burglary in the second degree, a class B felony, in Washington. RCW 9A.52.030. The plea statement admits the burglary offense and sufficiently contains acknowledgment of rights. Sent Ex. 7. The judgment and sentence lists the parties, contains language that the court found Robinson guilty and Robinson was mentally competent, understood his rights and freely and voluntarily gave up his rights when he entered his guilty plea. Sent Ex. 5.

The 1990 burglary conviction, as listed on the judgment and sentence criminal history number four, is supported by the certified documents provided at the sentencing hearing. Sent Ex. 11, 12, 13; CP 91. The elements of the burglary offense are listed in the information, that on or about July 2, 1990, Robinson entered a building not then opened to the public, owned by another, without consent, with the intent to commit theft. Sent Ex. 12. This is comparable to burglary in the second degree, a class B felony, in Washington. RCW 9A.52.030. The plea statement admits the burglary offense and sufficiently contains acknowledgment of rights.

Sent Ex. 13. The judgment and sentence lists the parties, contains language that the court found Robinson guilty and Robinson understood his rights and freely and voluntarily gave up his rights when he entered his guilty plea. Sent Ex. 11.

The 1986 burglary conviction, as listed on the judgment and sentence criminal history number five, is supported by the certified documents provided at the sentencing hearing. Sent Ex. 14, 15, 16; CP 91. The elements of the burglary offense are listed in the indictment, that on or about June 24, 1986, Robinson entered a building not then opened to the public, owned by another, without consent of any kind, with the intent to commit theft. Sent Ex. 15. This is comparable to burglary in the second degree, a class B felony, in Washington. RCW 9A.52.030. The plea statement admits the burglary offense and sufficiently contains acknowledgment of rights. Sent Ex. 16. The judgment and sentence lists the parties, contains language that the court found Robinson guilty and Robinson understood his rights and freely and voluntarily gave up his rights when he entered his guilty plea. Sent Ex. 14.

The 1981 burglary conviction, as listed on the judgment and sentence criminal history number six, is supported by the certified

documents provided at the sentencing hearing. Sent Ex. 17, 18, 19; CP 91. The elements of the burglary offense are listed in the indictment, that on or about February 24, 1982, Robinson entered a building not then opened to the public, owned by another, without consent of any kind, with the intent to commit theft. Sent Ex. 18. This is comparable to burglary in the second degree, a class B felony, in Washington. RCW 9A.52.030. The judgment and sentence lists the parties, contains language that the court found Robinson guilty and Robinson was mentally competent and understood his rights and freely and voluntarily gave up his rights when he entered his guilty plea. Sent Ex. 17.

The 1978 residential burglary conviction, as listed on the judgment and sentence criminal history number seven, is supported by the certified documents provided at the sentencing hearing. Sent Ex. 21, 2, 23; CP 91. The elements of the residential burglary offense are listed in the information, that on or about October 18, 1978, Robinson entered a habitation, owned by another, without consent, with the intent to commit theft. Sent Ex. 22. This is comparable to residential burglary, a class B felony, in Washington. RCW 9A.52.025. The judgment and sentence lists the parties, contains language that the court found Robinson guilty and

Robinson was sane and understood his rights and freely and voluntarily gave up his rights when he entered his guilty plea. Sent Ex. 21.

The State met the required preponderance of the evidence standard when proving Robinson's prior out-of-state convictions. His offender score of 12 should stand and his sentence should be affirmed.

G. THERE IS NO CUMALITVE ERROR WHICH WOULD WARRANT DISMISSAL OF ROBINSON'S CASE.

The doctrine of cumulative error applies in situations where there are a number of trials error, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). The doctrine does not apply in Robinson's case. L.R.H. was competent to testify at trial, testified meaningfully and her hearsay statements were properly admitted. There was no conditional competency ruling the judge clearly stated L.R.H. was competent to testify. MRP 125; CP 31. The admissible hearsay evidence lead to there being sufficient evidence to convict Robinson on all three of the charged counts.

Robinson was not denied a fair trial. Robinson's first trial counsel was properly allowed to withdraw and Robinson's new trial counsel had six months to prepare a defense for him. A criminal defendant does not have the right to have the same judge or prosecutor throughout his proceedings. Finally, Robinson was sentenced appropriately, using the correct offender score. There is no cumulative error.

CONCLUSION

For the foregoing reasons, this court should affirm Robinson's conviction in counts one and three for child molestation in the first degree and count two attempted child molestation in the first degree. Robinson's sentence should be affirmed because at the sentencing hearing the State sufficiently proved Robinson's out-of-state prior offenses, therefore his offender score of 12 is correct and his sentence should stand.

RESPECTFULLY submitted this 21st day of March, 2011.

JONATHAN L. MEYER
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by: 
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Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
Respondent,)
vs.)
CLAYTON T. ROBINSON,)
Appellant.)
_____)

NO. 41027-3-2-II
DECLARATION OF
MAILING

11 MAR 21 PM 2:26
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY *SJ* DEPUTY

Ms. Teri Bryant, paralegal for Sara I. Beigh, Deputy
Prosecuting Attorney, declares under penalty of perjury under the
laws of the State of Washington that the following is true and
correct: On March 21, 2011, the appellant was served with
a copy of the **Respondent's Brief** by depositing same in the
United States Mail, postage pre-paid, to the attorney for Appellant
at the name and address indicated below:

Jordan B. McCabe
Attorney for Appellant
PO Box 6324
Bellevue, WA 98008-0324

DATED this 21st day of 2011, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office