

**FILED**

SEP 28 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 289877-III

BENTON COUNTY SUPERIOR COURT NO. 09-8-50193-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JAVIER R. LOBOS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Vic L. Vanderschoor, Judge

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APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** \_\_\_\_\_ **iii**

**INTRODUCTION** \_\_\_\_\_ **1**

**A. IDENTITY OF APPELLANT** \_\_\_\_\_ **1**

**B. DECISION** \_\_\_\_\_ **1**

**C. ISSUES PRESENTED FOR REVIEW** \_\_\_\_\_ **1**

**D. STATEMENT OF THE CASE** \_\_\_\_\_ **2**

**E. ARGUMENT** \_\_\_\_\_ **8**

**1. Issue I: AKT should not have been found competent to testify at trial.** \_\_\_\_\_ **8**

**2. Issue II: Hearsay statements which should not have been allowed were allowed, and those statements were prejudicial.** \_\_\_\_\_ **20**

**Other prejudicial hearsay statements should have been ruled inadmissible as they were obtained without the proper foundation being laid.** \_\_\_\_\_ **23**

**3. Issue III: The trial court erred in not granting a mistrial after evidence that was to be excluded pursuant to the 9A.44 hearing was disclosed at trial.** \_\_\_\_\_ **27**

**4. Issue IV: The trial court erred in finding guilt when the State failed to prove every element and ultimate facts of the crime.** \_\_\_\_\_ **28**

**5. Issue V: The Superior Court abused its discretion when it remanded the case back to the Trial Court to remedy the insufficient FFCL.** \_\_\_\_\_ **32**

<b>6. Issue VI: The Conclusions of law do not contain ultimate facts.</b>	<b>36</b>
<b>7. Issue VII: The Trial Court erred by allowing the State to Cross-examine outside the scope direct.</b>	<b>38</b>
<b>8. Issue VIII: Did Defense Counsel provide ineffective assistance of counsel under the Sixth Amendment?</b>	<b>39</b>
<b>9. Issue IX: Was Defendant denied the right to face-to-face confrontation under Article 1, Section 22, of the Washington Constitution?</b>	<b>45</b>
<b>10. Issue X: Did the Trial Court commit reversible error in interfering with Defendants right to continual communication with his Defense Counsel?</b>	<b>48</b>
<b>F. CONCLUSION</b>	<b>49</b>

## TABLE OF AUTHORITIES

### **Cases**

<u>City of Seattle v. Ruffin</u> , 74 Wash.2d 16, 442 P.2d 649 (Wash., 1968)	
_____	41,42
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177	
(2004) _____	21,26,27
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224	
(2006) _____	20,21
<u>Falk v. Keene Corporation</u> , 53 Wn.App. 238, 767 P.2d 576 (1989)	38
<u>In re A.E.P.</u> , 135 Wn.2d 208, 956 P.2d 297 (1998)	15-20
<u>In re Marriage of Moody</u> , 137 Wash.2d 979, 976 P.2d 1240 (1999)	
_____	31-32,35,36
<u>Maryland v. Craig</u> , 497 U.S. 836, 110 S.Ct. 3157 (1990)	46,47
<u>Perry v. Leeke</u> , 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)	
_____	49
<u>State v. Allen</u> , 70 Wn.2d 690, 424 P.2d 1021 (1967)	8,9,17,18,20
<u>State v. Alvarez</u> 128, Wash.2d 1, 904 P.2d 754 (1995)	33,35,36
<u>State v. Avila</u> , 78 Wash.App. 731, 899 P.2d 11 (1995)	8,31,35,36
<u>State ex rel. Biddinger v. Griffiths</u> , 137 Wash. 448, 242 P. 969 (1926)	
_____	31-32

<u>State v. BJS</u> , 72 Wash.App. 368, 864 P.2d 432 (1994) _____	29-32,34-36
<u>State v. Brokob</u> , 159 Wash.2d 311, 150 P.3d 59 (Wash., 2007) _____	40
<u>State v. Carlson</u> , 61 Wn.App. 865, 812 P.2d 536 (1991) _____	9
<u>State ex rel. Carroll v. Junker</u> , 79 Wash 2.d 12, 482 P.2d 775 (1971) ___	20
<u>State v. Cienfuegos</u> , 114 Wash.2d 222, 25 P.3d 1011 (Wash., 2001) ___	40
<u>State v. C.J.</u> , 148 Wn.2d 672, 63 P.3d 765 (2003) _____	16
<u>State v. Davis</u> , 141 Wash.2d 798, 10 P.3d 977 (Wash., 2000) ___	37,40,45
<u>State v. Foster</u> , 135 Wash.2d 441, 957 P.2d 712 (1998) _____	46-48
<u>State v. Goldstein</u> , 58 Wash.2d 155, 361 P.2d 639 (Wash., 1961) _____	42
<u>State v. Hakimi</u> , 124 Wash.App. 15, 98 P.3d 809 (2004) _____	38
<u>State v. Karpenski</u> , 94 Wn.App. 80, 971 P.2d 553 (1999) _____	9,13,14
<u>State v. Koslowski</u> , 166 Wash.2d 409, 209 P.3d 479 (2009) _____	21
<u>State v. Lopez</u> , 107 Wash.App. 270, 27 P.3d 237 (Div. 3, 2001) ___	40-41
<u>State v. Lorenz</u> , 152 Wash2.d 22, P.3d 133(2004) _____	29-31,33-36
<u>State v. Nelson</u> , 63 Wash.2d 188, 386 P.2d 142 (Wash., 1963) ___	41,42,44
<u>State v. Osborne</u> , 102 Wash.2d 87, 684 P.2d 683 (Wash. 1984) _____	39
<u>State v. Parker</u> , 81 Wash.App. 731, 915 P.2d 1174 (1996) _____	30
<u>State v. Price</u> , 158 Wn.2d 630, 146 P.3d 1183 (Wash. 2006) _____	45
<u>State vs. Pugh</u> , 167 Wn 2d 825, 225 P.3d 892 (2009) _____	45
<u>State v. Roberts</u> , 25 Wash.App. 830, 611 P.2d 1297 (1980) _____	38

<u>State v. Roggenkamp</u> (2003) 115 Wash.App. 927, 64 P.3d 92, review granted 150 Wash.2d 1009, 79 P.3d 447, affirmed 153 Wash.2d 614, 106 P.3d 196 _____	30
<u>State v. Rohrich</u> , 132 Wash.2d 472, 939 P.2d 697 (1997) _____	22,23,46
<u>State v. Ryan</u> , 103 Wash.2d 165, 175-76, 691 P.2d 197 (1984) _____	23,25,26
<u>State v. Stevens</u> , 158 Wash.2d 304, 143 P.3d 817 (2006) _____	33-36
<u>State v. Swan</u> , 114 Wash.2d 613,790 P.2d 610 (1990) _____	23
<u>State v. T.E.H.</u> , 91 Wash.App. 908, 960 P.2d 441 (Div. 1, 1998) _____	30
<u>State v. Thomas</u> , 109 Wash.2d 222, 743 P.2d 816 (Wash. 1987) _____	39-40
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004) _____	38
<u>State v. Ulestad</u> , 127 Wn.App. 209, 111 P.3d 276 (Wash.App. Div. 2 2005) _____	48-49
<u>State v. Watkins</u> , 71 Wash.App. 164, 857 P.2d 300 (1993) _____	8
<u>State v. Woods</u> , 154 Wash.2d 613, 114 P.3d 1174 (2005) _____	20
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) _____	39-40,42-44
<u>United States v. Inadi</u> , 475 U.S. 387, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986) _____	22

**Statutes**

RCW 2.24.050 \_\_\_\_\_ 32

RCW 5.60.050 \_\_\_\_\_ 8

RCW 9A.44.010(2) \_\_\_\_\_ 28,29

RCW 9A.44.083 \_\_\_\_\_ 43

RCW 9A.44.083(1) \_\_\_\_\_ 28,37,43

RCW 9A.44.150 \_\_\_\_\_ 46

RCW 9A.44.150(1)(e) \_\_\_\_\_ 47

**Other Authorities**

Frost, 1986 op. cit. Emans, Psychology's Responsibilities in the False  
Accusations of Child Abuse. Unpublished manuscript, University of  
South Dakota (1987) \_\_\_\_\_ 10-11

Piaget, The Moral Development of Children. op. cit. Wakefield, H. &  
Underwager, R. Accusations of Child Abuse. Springfield, IL: Charles  
C. Thomas, Publisher, (1988) \_\_\_\_\_ 10

Richard D. Hicks, The Power, Removal, and Revision of Superior Court  
Commissioners, 32 Gonz. L.Rev. 1, 23 (1996-97) \_\_\_\_\_ 31

Wakefield, H. & Underwager, R. Accusations of Child Abuse,  
Springfield, IL: Charles C. Thomas, Publisher, (1988) \_\_\_\_\_ 10-11

**Rules**

ER 611(b) \_\_\_\_\_ 37  
JuCR 7.11(d) \_\_\_\_\_ 28-30,34  
RAP 2.5(a)(3) \_\_\_\_\_ 23

**Constitutional Provisions**

U.S. Const. amend. VI \_\_\_\_\_ 21,27  
Washington Const. art. I § 22 \_\_\_\_\_ 21,27,45,48

### **III. INTRODUCTION**

#### **A. IDENTITY OF APPELLANT**

Javier R. Lobos, Appellant, asks this Court to accept review of the Superior Courts decision designated in Part B of this motion.

#### **B. DECISION**

Appellant seeks review by the designated appellate court pursuant to RAP 2.2(a)(5), of the Findings of Fact and Conclusions of Law (“FFCL”) dated March 26, 2010, from Commissioner Malone’s chambers, the letter dated March 19, 2010, which is considered an order, from Judge Vanderschoor’s chambers, and FFCL from the Motion for Revision, dated August 12, 2010, from Judge VanderSchoor.

#### **C. ISSUES PRESENTED FOR REVIEW**

1. Should AKT have been found incompetent to testify at trial?
2. Hearsay statements which should not have been allowed were allowed, and those statements were prejudicial.
3. The trial court erred in not granting a mistrial after evidence that was to be excluded pursuant to the 9A.44 hearing was disclosed at trial.
4. The Trial Court erred in finding guilt when the State failed to prove every element and ultimate facts of the crime.
5. The Superior Court abused its discretion when it remanded the case back to the Trial Court to remedy the insufficient FFCL

6. The Conclusions of law do not contain ultimate facts.
7. The Trial Court erred by allowing the State to Cross-examine outside the scope direct.
8. Did Trial Counsel provide ineffective assistance under the Sixth Amendment?
9. Was Defendant denied the right to face-to-face confrontation under Article 1, Section 22, of the Washington Constitution?
10. Did the Trial Court commit reversible error in interfering with Defendants right to continual communication with his Defense Counsel?

**D. STATEMENT OF THE CASE**

Javier Lobos was found guilty of the crime of Child Molestation in the First Degree by Juvenile Court Commissioner Lonna Malone. (CP 48, line 13, CP 574, line 13) Mr. Lobos was represented by public defender, Laurie Magan (“Defense Counsel”). (CP 571, lines 18-19).

Prior to trial, the court held a 9A.44 hearing in which Commissioner Jerry Potts ruled that most of the statements made by the child victim (“AKT”) were ruled admissible. However, the Commissioner ruled that a statement regarding Javier’s touching tongues with the child victim was inadmissible due to its lacking spontaneity. (CP 580, lines 7-10, CP 581, lines 10-12, RP 9A.44 hearing 11/04/09 38, lines 15-19). Commissioner Potts also ruled a DVD containing a victim interview conducted by SARC, a victim’s advocacy agency was admissible. (CP

580, lines 15-20, CP 581, lines 8-10, RP 9A.44 hearing 11/04/09 39, lines 1-8)  
The Commissioner also found AKT competent. (RP 9A.44 hearing 11/04/09 36,  
lines 7-8) The Commissioner cited the Allen factors supporting her findings. (RP  
9A.44 hearing 11/04/09 36, lines 5-25 and 37, lines 1-10).

At trial, the State presented the testimony of the victim's father, Jared Taylor. Mr. Taylor testified that AKT was seven years old. (RP 16, lines 21-22). He further testified he had met Javier Lobos about a year prior and he was 13 or 14 years old. (RP 17 lines 4-5). Mr. Taylor was unsure when the incident alleged happened, other than he thought 5-6 months prior, but then said he could not remember. (RP 19, lines 3-5).

Terri Taylor, AKT's mother, testified that when she came home from visiting her father on Sunday at 2 pm she slept until 6 pm. (RP 32, lines 10-16). Later that evening, AKT refused to allow Ms. Taylor to wipe her bottom after a bowel movement, which Ms Taylor found unusual. (RP 33, lines 2-7). Ms. Taylor wiped ATK anyway and did not see any redness or anything like that. (RP 33, lines 8-9). The following Wednesday, AKT told her mother she thought she had a boyfriend. (RP 34, lines 1-7). Ms. Taylor asked why she had a boyfriend to which she responded that Javi (the defendant) had picked her up and carried her to his bed. (RP 34, lines 13-14). When Ms. Taylor asked if anything else happened in the bed, AKT said that nothing else had happened. (RP 34, lines 15-17). Later that day, Ms Taylor said, "[r]emember when you were telling me this morning

about how you thought Javi was your boyfriend and how he took you into his bed, I said I want you to be honest with me and you are not in trouble, but I want you to tell me if something else happened when Javi put you into his bed, and she said yes.”(RP 35, lines 9-14). She then asked “what?” and Ms. Taylor testified , “ she said he put her hands up her shirt and touched her boobies, he kissed her and touched her butt, he made her get on top of him, she used the word forced, ‘ he forced me to do this, he asked me to touch his penis, but I didn’t want to.’ She said she didn’t want to.” (RP 35, lines 14-19).

As Ms. Taylor was testifying she stated that AKT put her tongue in her mouth, to which she asked her if Javi had done that to her. (RP 37, lines 7-12). Defense Counsel objected as being a statement that was ruled inadmissible and moved for a mistrial. (RP 38, lines 19-25). FFCL were not yet entered, therefore the court took a recess so that the Commissioner who had made the 9A.44 rulings could clarify the ruling. (RP 39-40). When the parties returned, it was determined that statement was inadmissible. Defense counsel renewed her motion. The court denied the motion and indicated she could separate what was admissible and what was not and that the court would not consider matters excluded by the 9A.44 hearing (RP 41-42).

When AKT was called to the stand, the State made a motion to have the witness situated with her back to the Court and half of the courtroom. Defense Counsel objected, stating that the court could use closed-circuit television. The

Court ruled that AKT may not look at Mr. Lobos directly, but must position herself so that only the Court, the State, and Defense Counsel could see her face. (RP 6-7).

During her testimony AKT was asked if she knew the difference between right and wrong and the difference between the truth and a lie. AKT responded with “yes.” (RP 60, lines 7-14). The State attempted to establish the difference between the truth and a lie by giving AKT a color test. (RP 60-61). AKT promised to tell the truth. (RP 61, lines 5-6). No further inquiry was made.

Contrary to her mother’s testimony, when asked what happened in Javi’s room, AKT responded with “I forgot what things he did.” (RP 65, lines 10-11). AKT later stated that Javi put her into Myles’ bed. (RP 65, lines 13-14). She then said that he make her go on top of him. (PR 64, line 34). When asked to clarify, she said on his stomach. (RP 65, line 1). When asked how it felt, she stated that she could not remember how it felt. (RP 66, lines 4-5). When asked if anything else happened, AKT said that he told me “what did you feel?” (RP 66, line 13). AKT responded with “[u]m, that I don’t know.” (RP 66, 13-19). Later, AKT responded with “he said penis.” (RP 66 and 67, line 7).

AKT then stated that he put her hands down his pants and that he touched her butt. (RP 68). AKT stated that Javi then made them touch tongues. (RP 68, lines 13-14). She recalls that they fell asleep and in the morning there was snow. (RP 68, lines 18-19).

When asked if she had been back to Javi's house since the alleged incident happened, AKT responded that she was at his house on the morning it snowed and that they went outside to make "kind of like stuff." (RP 69-70). When asked if the grown up's would leave, was there anyone else that would watch the kids, AKT responded with "we all went outside and played in the snow." (RP 70, lines 15-17). AKT was asked if Javi touched her anywhere else, she responded with "no. I don't remember." (RP 71, lines 5-6).

Defense counsel was able to establish that AKT discussed her testimony the day before trial and the morning of trial. (RP 73, lines 3-20).

When AKT was asked what she did that night, she said that she carved pumpkins because it was close to Halloween. (RP 84, lines 9-13). When confronted about going out into the snow and the time of year, AKT responded with "Christmas." (RP 84, lines 1-3).

When asked what they did the next morning, AKT responded with "I think we carved pumpkins and played in the snow." (RP 97, lines 8-20).

AKT was asked several times about the interview with SARC advocate, AKT does not recall the conversation. (RP 113-116).

AKT's testimony returned to her recalling snow on the ground and that she did not want to build a snowman, and that they had a snow fight while she wore her snow clothes. (RP 121-122).

The State played the DVD for the court. The only objection made was to

the chain of custody. (RP 140-143). The State rested without bringing forth evidence substantiating Mr. Lobos' date of birth.

Defense Counsel renewed her motion at the end of the State's case for failure to make a prima facie showing of all of the elements of the crime of Child Molestation in the First Degree. (RP 168-169). Defense Counsel further states unless the State is going to introduce this element in the defense's case in chief, they have not made a prima facie showing beyond a reasonable doubt. (RP 169 lines 14-19). The Court denied the motion and the Defense put forth their case in chief. (RP 169, lines 20-22).

Defense Counsel called Rodrigo Lobos as a witness to the events of that evening. After direct examination, the State asked him what was his son's date of birth. (RP 228, lines 21-22). Defense Counsel objected as being outside the scope of direct examination. (RP 228, 229). The objection was overruled. (RP 229, line 11). The Defense Counsel rested without renewing her motions. (RP 292, line 11). The trial court entered FFCL; the Commissioner found that the Defendant was 13-14 years of age at the time of the offense. (CP 574, line 2) The court failed to state sexual gratification as an ultimate fact in the FFCL. (CP 571-574)

Defendant filed a motion for review that was heard by the Honorable Vic VanderSchoor. (CP 578). Judge VanderSchoor denied the motion on all issues presented, but reserved on the issue whether the FFCL could be remanded back to the Commissioner to include ultimate facts. (RP Motion for Revision 37, 38).

The parties submitted their arguments via memorandum. (CP 53-59, 50-52). Judge VanderSchoor issued a ruling via letter allowing the FFCL to be remanded for the Commissioner to include ultimate facts. (CP 49). The Commissioner revised the FFCL adding sexual gratification as an ultimate finding of fact, yet again failing to state this element in the Conclusions of Law. (CP 45-48). The FFCL for the Motion for Revision were entered after the Commissioner's Findings. (Supplemental CP 665-667). Judge VanderSchoor incorporated all of the lower court findings in his FFCL. (Supplemental CP 665-667).

**E. ARGUMENT**

***(1) Issue I: AKT should not have been found competent to testify at trial.***

A witness must be competent to testify. RCW 5.60.050. A trial court's ruling on competency is reviewed under the abuse of discretion standard. State v. Watkins, 71 Wash.App. 164, 170, 857 P.2d 300 (1993). *See also* State v. Avila, 78 Wash.App. 731, 735, 899 P.2d 11 (1995).

A child witness is competent to testify if she meets the five *Allen* factors, namely, that such child (1) understands the obligation to speak the truth on the witness stand, (2) has the mental capacity at the time of the occurrence to receive an accurate impression of the matter of her testimony, (3) has a memory sufficient to retain an independent recollection of the occurrence, (4) has the capacity to express in words her memory of the occurrence, and (5) has the capacity to understand simple questions about the occurrence. State v. Allen, 70 Wn.2d 690,

692, 424 P.2d 1021 (1967). A child who has a “long-standing, often-observed inability to distinguish what was true from what was not” may be found incompetent. State v. Karpenski, 94 Wn.App. 80, 106, 971 P.2d 553 (1999).

Inconsistencies in a child's testimony do not necessarily call into question witness competency. Rather such inconsistencies generally relate to the witness's credibility and the weight to give her testimony. State v. Carlson, 61 Wn.App. 865, 874, 812 P.2d 536 (1991).

Appellate courts give great deference to a trial court’s determination of a child’s competency to testify, and the court’s findings will not be disturbed absent proof of a manifest abuse of discretion. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The problem, in this case, is not only were these tests not fully considered, they were also not fully performed.

At the 9A.44 hearing, AKT was asked to testify. During the State’s questions, AKT was asked whether she knew the difference between right and wrong (RP 9A.44 hearing 10/23/09 26, line 9), and the difference between telling the truth and telling a lie. (RP 9A.44 hearing 10/23/09 26, line 14). To both she responded yes. She was then asked if she knew what color counsel for the State’s shirt was. She said black and green (RP 9A.44 hearing 10/23/09 26, line 18), and counsel indicated she was wearing a black and a green shirt (RP 9A.44 hearing 10/23/09 26, line 18). The State then asked if she had said her shirt was purple would that be the truth or would that be a lie to which AKT responded by stating

“Lie.” (RP 9A.44 hearing 10/23/09 26, line 23).

She was then asked if she was told today was Christmas whether that would be the truth or a lie. AKT responded “Lie.” (RP 9A.44 hearing 10/23/09 26, lines 24). Next, when asked if it is better to tell the truth or better to tell a lie, AKT responded “Better to tell the truth.” (RP 9A.44 hearing 10/23/09 27, lines 2-4). She was then asked what would happen if she told a lie, and whether she would get in trouble, or whether her “mommy or dad get mad at [her]?” if she told a lie, to which AKT’s responses were “Um...” and inaudible. (RP 9A.44 hearing 10/23/09 27, lines 17-18). She was then asked if her Mom and Dad tell her to tell the truth or tell a lie, which she said “Tell the truth.” (RP 9A.44 hearing 10/23/09 27, lines 12-13). And whether her teacher wants her to tell the truth or tell a lie to which she responded “Truth.” (RP 9A.44 hearing 10/23/09 27, 14-16).

Instead of continuing to try and establish whether AKT actually knew the difference between the truth and a lie, which is a very complex concept, the State just simply asked AKT if she promised to tell the truth today. The questions of whether or not AKT knew what the consequences of lying would be or if she knew she had to tell the truth were never answered.

Studies have shown that until age five or six children believe that (a) a lie is anything the adult says is a lie (Piaget, The Moral Development of Children. op. cit. Wakefield, H. & Underwager, R. Accusations of Child Abuse. Springfield, IL: Charles C. Thomas, Publisher, (1988).), and (b) anything which is

incorrect is a lie; for example, two plus two equals five. (Frost, 1986 op. cit. Emans, Psychology's Responsibilities in the False Accusations of Child Abuse. Unpublished manuscript, University of South Dakota (1987)).

The questions asked are essentially recognition tasks. "Is my sock red or blue?" "If I say it is raining outside, is that a truth or a lie?" "If I say that I am a girl, is that the truth or a lie?" "If you said that I had a beard, would that be a truth or a lie?" "You are six years old, right?" "If you said that you were 12, would that be true?" The difficulty is that correct answers to such questions do not reveal anything about a child's conception of truth or lie or the competency to assess what is truthful or false about a complex event which occurred in the past. The questions simply test the accuracy of observations of the child and the child's perception of the immediate environmental situation of being expected to provide the answers desired. (Wakefield, H. & Underwager, R. Accusations of Child Abuse, Springfield, IL: Charles C. Thomas, Publisher, (1988)).

As Wakefield and Underwager point out:

The inability of children to engage in the abstract reasoning required to discriminate between truth and falsehood as adults do and the confabulation of fact and fiction, both naturally occurring and as a result of learning, mean that judicial assessment of competency must be carefully assessed. It cannot be assessed in a five to ten minute examination of a child's accuracy of observation coupled with a moral homily on truth telling.

(Wakefield & Underwager, supra, p. 146).

As the State began questioning AKT, nearly every response was inaudible, and it is apparent through the Court's comments and the State's questioning that AKT was simply nodding her head yes or no (RP 9A.44 hearing 10/23/09 28, lines 1-2), and when asked if she could actually say yes or no, she would say "Yes." (RP 9A.44 hearing 10/23/09 28, lines 3-9). But as soon as the next question was asked her answer would again be inaudible. (RP 9A.44 hearing 10/23/09 28, lines 7-14). After approximately 27 minutes of questioning, (not counting a short recess); after moving the grandmother closer to the witness box, (to which the Defense Counsel objected); and after the Court's attempting to coerce AKT to answer more loudly, the only thing AKT could say was that first she was on one individual's bed (RP 9A.44 hearing 10/23/09 36, line 25) and that she was moved to another bed. (RP 9A.44 hearing 10/23/09 37, lines 18-22). After the recess she said "I just want to say one thing." (RP 9A.44 hearing 10/23/09 44, line 11). After many inaudible attempts to get her to say that one thing, she stated that "[h]e made me touch tongues with him." (RP 9A.44 hearing 10/23/09 45, lines 1-5).

Upon cross-examination, counsel for the Defense had nearly as much luck as the State. When asked if she remembered talking about what time of year the incident occurred, AKT responded by saying "I forgot what day it was." (RP 9A.44 hearing 10/23/09 52, line 7). At the end of cross-examination, the State was asked if they had any more questions. The State said they did not, but would like a

five minute recess. (RP 9A.44 hearing 10/23/09 53, lines 2-7). After the recess, the State began re-direct examination and AKT was not asked or questioned any further in regards to her ability to understand the difference between a truth and a lie. No further information or evidence regarding AKT's ability to understand the concept of truth and lie was sought or found.

In the case of State v. Karpenski, 94 Wn.App. 80, 106, 971 P.2d 553 (1999), a seven year old boy was found competent to testify at trial. The appellate court overruled this finding, because the child, Z, described during the competency hearing that he and his younger brother had been born at the same time. This was impossible because the younger brother was two years old. The Appellate court said that no one suggested that Z was intentionally lying because it seemed he actually believed what he was saying. It was the Appellate Court's opinion that the only reasonable view of this record is the one that Z lacked the capacity to distinguish truth from falsehood. State v. Karpenski, 94 Wn.App. 80, 106, 971 P.2d 553 (1999).

While AKT failed to adequately testify or relate any kind of story, the Defense did ask AKT if she "remember us or you and the blond-hair lady talking about that it was Christmas time because you guys went out in the snow?" (RP 9A.44 hearing 10/23/09 52, lines 11-16). AKT was inaudible; Defense Counsel asked the record to reflect that she nodded affirmatively. (RP 9A.44 hearing 10/23/09 52, lines 14-16). On re-direct examination, AKT related that "He made

me get on top of him and he said “What do you feel? And then he said “penis”. (RP 9A.44 hearing 10/23/09 57, line 13). The State asked “[w]hat happened after that?” (RP 9A.44 hearing 10/23/09 57, line 25) and AKT responded “Then it was morning and then it snowed.” (RP 9A.44 hearing 10/23/09 58, line 1). The State asked “Do you remember where everyone else was in the house?” (RP 9A.44 hearing 10/23/09 58, line 2). AKT responded “Then we all went out and played in the snow.” (RP 9A.44 hearing 10/23/09 58, line 3). A few questions later the State asked “Do you remember seeing your dad that night?” (RP 9A.44 hearing 10/23/09 58, line 9). AKT said, “I asked my dad if I could go outside and he said first put on your snow clothes.” (RP 9A.44 hearing 10/23/09 58, line 10).

This is an absolute impossibility. If the alleged incident occurred in early April it was obviously not Christmas time and there would not have been any snow on the ground. It is obvious through this testimony, when AKT finally began to speak, that she did not have the mental capacity to recall and relate the alleged incident. This is analogous to Karpenski; AKT lacked the capacity to distinguish truth from falsehood, or one time-frame from another.

Furthermore, this is most telling that AKT does not possess a memory sufficient to retain an independent recollection of the occurrence. The State never asked AKT to fix a time period during her testimony at the 9A.44 hearing. AKT was only asked once by the State to establish a time frame for when the abuse allegedly occurred in any of the interviews. Ms. Murstig asked AKT “. . .And

when did this happen with Javi?” to which AKT responded “Like...just a little bit ago.” But, as evidenced by Mr. Taylor’s testimony, as well as Ms. Taylor’s testimony, Mr. Taylor had taken AKT to the Lobos’s residence several times in the past several months: upwards of twelve times going back to before October.

In re A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998) requires this court to review evidence of whether AKT has been asked to place the abuse in a timeframe context. This is for two reasons: first, it is the only way this court can determine whether the child possessed capacity at the time of the abuse, and second, whether a child can place the abuse into a temporal context goes directly to the issue of the child’s ability to receive an accurate impression of it. In re A.E.P., 135 Wn.2d 208, 223-25, 956 P.2d 297 (1998).

AKT was never asked during the 9A.44 hearing when the alleged incident occurred, and upon questioning by the state, as previously discussed, indicated that at the time of the alleged incident she put on her snow clothes and went outside and played in the snow. Being that the State contends the incident occurred in early April, snow is unlikely in Franklin County. Furthermore, there being enough snow that AKT would have traveled to the Lobos’s house with snow clothes seems even further from likely.

In In re A.E.P., 135 Wn.2d 208, 223-24, P.2d 297 (1998), the Supreme Court ruled that a child witness is incompetent to testify because no time frame was ever established as to when the abuse occurred. The Supreme Court was

particularly troubled by the fact that the trial record contained “no indication of A.E.P. ever being asked by any of her interviewers to state, even in the most general of time periods, when the events happened.” Id.

In this case, Ms. Taylor testified that it happened the Saturday before Wednesday, April 8, 2009, (RP 9A.44 hearing 10/23/09 10, lines 1-5) but never provides or was never asked to provide what evidence she had indicating as such or if she had asked AKT or if she simply assumed. She also testified that while AKT may not remember exact dates, when asked if AKT would be confused between April and Christmas time Ms. Taylor responded, “No. Definitely not.” (RP 9A.44 hearing 10/23/09 16, lines 11-12). In subsequent interviews with AKT conducted by both the State and the Defense, AKT spoke about its snowing outside and playing in the snow on the morning after the alleged incident, its being Christmas time, as well as carving pumpkins after the snow melted on one occasion. The State ignored these statements and AKT was never asked to clarify what she meant, or how long ago or when the alleged incident actually occurred.

To find AKT competent to testify under the test set forth in State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) the court must find that she had the ability at the time of the events to receive an accurate impression of it. The only way the court can possibly make this determination is to have some evidence that AKT can establish a timeframe for the abuse. In re A.E.P., 135 Wn.2d 208, 223-25, 956 P.2d 297 (1998). The State ignored references to the alleged incident’s occurring

when it was snowing, or that she went out and carved pumpkins after the snow melted, and simply assumed that the alleged incident occurred in early April, and that she must have been able to receive an accurate impression of the abuse. This issue is central to the state's burden of showing testimonial competence, and in fact, was "dispositive of the issue" of testimonial competence in A.E.P. Id. at 223. A.E.P., as found by the Washington State Supreme Court, makes it clear that the court may not presume the timeframe: the court can only make this finding based on evidence in the record, and that record can only be established through the child's testimony as to when the alleged abuse occurred. Without a record showing that she can identify the time the abuse occurred, there is no basis upon which the trial court could have made a finding that she could receive an accurate impression of the events at the time it occurred. As A.E.P. holds, the child's ability to describe the events in a temporal context is a dispositive fact in establishing testimonial competency. This dispositive fact was ignored.

At the conclusion of the 9A.44 hearing the Court ruled in applying the Allen test that AKT "does in fact have an understanding of the obligation to speak the truth on the witness stand. . ." and that AKT "does have the mental capacity as demonstrated by the statements she made." The Court further found that AKT had a memory sufficient to retain independent recollection of the occurrence. Finally, the Court ruled that:

Capacity expressed in words of the memory. That's

a little bit more difficult, although, the Court, as we all struggled to listen to [AKT] talk, she did have a difficult time in expressing words of the memory, but the Court finds that the difficulty was more because of the, I guess, her surroundings and the intimidating atmosphere of this courtroom. . .The capacity to understand simple questions. About that, [AKT] appears to be a very bright young lady and understands what's being asked of her. Weighing those factors the Court finds she is a competent witness. (RP 9A.44 hearing 11/04/09 36-37).

This ruling is manifest abuse of discretion. AKT hardly spoke at all, and when she spoke her testimony mainly consisted of "I forgot"s, head nods, "I don't want to say"s, major inconsistencies and outright impossibilities. Furthermore, a timeframe for when the alleged incident occurred was never established. AKT should not have been found competent to testify.

As stated by the Washington State Supreme Court:

the [trial] court should have determined whether the child has the capacity at the time of the event to receive an accurate impression of the event. This would have required the trial court to fix a time period of the alleged abuse. Absent this critical information, and despite the high level of deference accorded to the trial court's competency findings, we are compelled to hold the trial court abused its discretion in finding A.E.P. competent to testify. The second Allen factor was not met in this case. We reverse the trial court's finding A.E.P. competent to testify.

In re A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998).

The statements made by AKT when she testified both at the 9A.44 hearing

and at trial concerning playing in the snow and carving pumpkins after the alleged incident, indicate that she had been there numerous times throughout a six month period, and show that AKT did *not* have the mental capacity at the time of the occurrence to receive an accurate impression of the matter. If the alleged incident had occurred on April 4, 2009, it would have been a little over six months prior to the 9A.44 hearing. AKT's confusion of carving pumpkins and playing in the snow in the same day after the incident (which, according to the father's testimony, would have been at the very least 2 months apart) indicates that she cannot even separate events which occurred in October to January.

If the offense date is "clearly established," by AKT's manner in which she answered questions during the 9A.44 hearing and trial, then that would lead one to conclude that it clearly happened during a time which AKT put on a snow suit, played in the snow, and when it melted they carved pumpkins. These statements made by AKT at both the 9A.44 hearing and the trial were completely ignored by the State and the Commissioner. This is analogous to In re A.E.P., because the entire record is devoid of any attempt to clarify from AKT when the alleged event actually occurred. In In re A.E.P., A.E.P. was unable to state any particular point in time when the offense occurred and the appeals court found that the offense could have occurred shortly before the disclosure or it could have been two or more years prior to the disclosure as well. In re A.E.P. The appeals court held that the "court cannot possibly rule on a child's 'mental capacity at the time of the

occurrence..., to receive an accurate impression of it [,]' when the court has never determined when in the past the alleged events occurred." State v. Allen, 70 Wash.2d 690, 692, 424 P.2d 1021 (1967)). In accord with In re A.E.P., the conviction should be reversed and the case dismissed.

***(2) Issue II: Hearsay statements which should not have been allowed were allowed, and those statements were prejudicial.***

The trial court admitted into evidence the presentation of a DVD recording containing AKT's interview at SARC. (RP 143). The interview was requested by the State and the scope of the interview was to recount AKT's allegations against Mr. Lobos. The interview was purely testimonial in nature.

The standard of review for a court's decision to admit child hearsay statements is the abuse of discretion standard. State v. Woods, 154 Wash.2d 613, 623, 114 P.3d 1174 (2005). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds or reasons. State ex rel. Carroll v. Junker, 79 Wash 2.d 12, 26, 482 P.2d 775 (1971).

In Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the U.S. Supreme Court held that statements made in the course of a police investigation are nontestimonial if the primary purpose of the questioning is to allow police to assist in an ongoing emergency. Davis, 547 U.S. at 822. But statements *are* testimonial if the primary purpose of the questioning is to establish or prove past events potentially relevant to later criminal prosecution, and

circumstances objectively indicate that there is no *ongoing* emergency. Davis, 547 U.S. at 822. (*emphasis added*). The State has the burden on appeal of establishing that statements are nontestimonial. State v. Koslowski, 166 Wash.2d 409, 417 n. 3, 209 P.3d 479 (2009).

Because the statements made by AKT on the DVD were in response to questioning to establish a past event, and obviously there was no *ongoing* emergency, the statements were testimonial. Davis, 547 U.S. at 822.

As noted by the Court in Davis, the Confrontation Clause applies only to testimonial hearsay. Davis, 547 U.S. at 823. The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantees criminal defendants the right to confront and cross examine witnesses. The confrontation clause provides that the State can present testimonial statements of an absent witness only if the witness is unavailable and the defendant has had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But the State can present nontestimonial out-of-court statements that accord with the traditional hearsay rule and its exceptions, irrespective of the Sixth Amendment. Davis v. Washington, 547 U.S. at 821.

The Confrontation Clause prefers the State elicit the damaging testimony from the witness while under oath in a face-to-face confrontation. State v. Rohrich, 132 Wash.2d 472, 479, 939 P.2d 697 (1997). “If the declarant is

available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version.” United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 1121, 1126, 89 L.Ed.2d 390 (1986).

The only time live testimony should be disregarded is when the hearsay testimony falls into one of two exceptions: (1) when the original out-of-court statement is inherently more reliable than any live in-court repetition would be; or (2) when live testimony is not possible because the declarant is unavailable, in which case the court must settle for the weaker version. State v. Rohrich, 132 Wash.2d at 479.

Because the hearsay statements were made by AKT during a taped interview with Ms. Murstig while she was distracted with coloring books does not make the statements inherently more reliable. Thus, the only remaining factor which would allow the DVD to be admissible in court is if AKT was found to be unavailable as a witness, which at the time of the trial she had been found competent to testify and was available as a witness. The DVD should not have been admitted in trial.

Counsel for Defendant objected to the admission of the DVD but on foundational grounds. Regardless of whether counsel for Defendant objected to the DVD being admitted or not, as the Court of Appeals noted in State v. Rohrich,

82 Wash.App. at 679, the issue goes to the heart of the Defendant's right of confrontation and thus is a manifest error affecting a constitutional right which Mr. Lobos may raise for the first time on appeal. *See also* RAP 2.5(a)(3).

**Other prejudicial hearsay statements should have been ruled inadmissible as they were obtained without the proper foundation being laid**

In determining the reliability of child hearsay statements, the trial court considers nine factors: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wash.2d 165, 175-76, 691 P.2d 197 (1984). Not every factor need be satisfied; it is enough that the factors are "substantially met." State v. Swan, 114 Wash.2d 613, 652, 790 P.2d 610 (1990).

Terri Taylor, AKT's mother, testified during the 9A.44 hearing that on the morning of April 8, 2009, AKT told her mother she thought she had a boyfriend. (RP 9A.44 hearing 10/23/09 7, lines 17-23). According to her mother's testimony, she asked AKT who she thought her boyfriend was. AKT responded "Javi." (RP

9A.44 hearing 10/23/09 7, lines 24-25). Her mother asked “[w]hat did he do that made you think he was your boyfriend?” (RP 9A.44 hearing 10/23/09 7-8). AKT replied that he carried her up to his bed. (RP 9A.44 hearing 10/23/09 8, lines 2-3). Ms. Taylor then stated that she asked AKT what happened when she got into his bed, to which AKT responded by saying “nothing.” Ms. Taylor asked AKT if she was sure, to which AKT responded “Yeah.” Ms. Taylor testified that this made her nervous and upset. Later that evening, Ms. Taylor sat AKT down on the couch and asked her again what had happened. (RP 9A.44 hearing 10/23/09 8-9). AKT’s statements were clearly not spontaneous as they were solicited from her mother.

When Ms. Taylor wouldn’t accept the answer that AKT provided her she pressed her to change her recollection of events. Like all young children who are questioned repeatedly by their parent, AKT changed the answer she was giving Ms. Taylor. This is because the child knows that the answer they are giving is not satisfactory and will change their answer in order to satisfy the parent. If a child who is 6 years of age is repeatedly asked “Then what happened?” by their parent who is upset, the response is not going to be typical, predictable, or even reliably truthful.

On cross-examination during the 9A.44 hearing, Ms. Taylor testified that after AKT changed her answer, that evening she told AKT that she herself had been molested. (RP 9A.44 hearing 10/23/09 15, lines 13-16). Based on her own past experiences, Ms. Taylor effectively elicited a false confession from AKT

because she was nervous, upset and would not accept AKT's answer.

In its oral FFCL at the 9A.44 hearing November 4, 2009, the Court turned to the Ryan factors and the four hearsay statements AKT stated to her mother and the DVD as recorded by Ms. Murstig. In addressing the first Ryan factor the Court stated that AKT did not have an apparent motive to lie. (FFCL CP 580, line 21, RP 9A.44 hearing 11/04/09 37, lines 15-16). This was evidenced, according to the court, by Ms. Taylor's testimony that prior to the incident AKT liked going over to Mr. Lobos's residence. (RP 9A.44 hearing 11/04/09 37, lines 16-18 and 22, lines 10-20). And, by AKT's statements to Ms. Murstig that she enjoyed going over there and thought the Defendant was nice. (RP 9A.44 hearing 11/04/09 22, lines 16-20). The court completely ignored every other factor, including Ms. Taylor's pressing an answer out of AKT by repeatedly asking her what happened.

The second factor, the general character of AKT, the Court found that she intended to be truthful. As stated by the court, the only testimony to this factor was Ms. Taylor's testimony that her daughter is honest and not inclined to make false stories. (RP 9A.44 hearing 10/23/09 14, lines 10-13).

The third factor, more than one person heard the statements, was found to have been satisfied because Ms. Murstig and Ms. Taylor heard the statements.

This leads to the fourth factor, spontaneity. Obviously, if AKT knew why she was there and was being led by the questioning of Ms. Murstig, those statements, as well as the DVD are non-admissible hearsay statements. The court

found that AKT's first statement to her mother about having a boyfriend was spontaneous. The second statement, after being asked three times what had happened, was found to be spontaneous as well. As previously discussed, repeatedly asking the same question from a child, seeking a different answer, will lead the child to give a different answer. This is not spontaneous. The third statement concerning AKT's sticking her tongue in Ms. Taylor's mouth, although it leaked into trial, was actually found *not to be* spontaneous. The fourth statement was found admissible as well, based solely on Ms. Taylor's testimony. (FFCL CP 580, line 10-14, CP 581, line 8-10, RP 9A.44 hearing 11/04/09 38, lines 20-25).

The fifth factor, (the timing of the declaration and relationship), was found to have been met by the court, (again, based solely on Ms. Taylor's testimony that the alleged incident had occurred the previous Saturday). The Court found that it was close enough to satisfy the timing. The court completely ignored AKT's statements concerning its snowing outside or its being Christmas time when the incident occurred.

Factors six through nine were found by the court to have less importance. In regards to the DVD, the court simply did not address its findings and simply stated its conclusion that the DVD met the Ryan factors. The Superior Court Judge hearing the Motion for Revision stated that he was not an expert on Crawford. (RP Motion for Revision 15).

The Court addressed factor eight, (the possibility that the declarant's

faulty recollection was remote). The Court found that AKT's statements have remained consistent. That is simply not true. AKT's stories change from one interview to the next. The trial court abused its discretion in allowing the hearsay statements of AKT.

***(3) Issue III: The trial court erred in not granting a mistrial after evidence that was to be excluded pursuant to the 9A.44 hearing was disclosed at trial.***

The hearsay statement concerning AKT's sticking her tongue into her mother's mouth, the question by the mother, "Is that what Javi did to you?" and AKT's response were found to be inadmissible at the 9A.44 hearing and *should not have* come in at trial. The admission of these statements at trial severely tainted those proceedings. It also severely violated Mr. Lobos's Sixth Amendment confrontation clause rights under Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) because the statement was testimonial.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantees criminal defendants the right to confront and cross examine witnesses. At trial, the statement came in even though it was found to be inadmissible. Defense Counsel objected and moved for a dismissal, or in the alternative, a mistrial. The motions were denied. After a brief recess in the proceedings, it was confirmed with the competency-hearing judge that the previous statements *were* to be excluded from trial. The defendant could not confront the witness concerning those hearsay statements,

thus his right to confrontation was violated.

In denying Defense Counsel's motions for dismissal and mistrial, the Trial Judge stated that she could disregard the impermissible evidence and not use that evidence in reaching a decision. (RP 40, lines 6-11 and RP 42, lines 4-11).

However, the Trial Judge's FFCL contain statements that the Trial Judge claimed she could disregard. (See RP 42, lines 4-11).

***(4) Issue IV: The trial court erred in finding guilt when the State failed to prove every element and ultimate facts of the crime.***

JuCR 7.11(d) provides:

Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. *The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision.* The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal. (Emphasis added).

In a case for child molestation in the first degree the State bears the burden of proving beyond a reasonable doubt that the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim. RCW 9A.44.083(1)

As defined by RCW 9A.44.010(2), "sexual contact" means any touching

of the sexual or other intimate parts of a person done for the purpose of **gratifying sexual desire** of either party or a third party. RCW 9A.44.010(2). **(emphasis added)**.

In the case of State v. BJS, 72 Wash.App. 368, 864 P.2d 432 (1994) the Court of Appeals for Division III found that the facts set forth in the FFCL filed with the court failed to address whether the acts were done for the purpose of gratifying sexual desire. The Court stated that while it could be gleaned from the nature of the case's subject matter, and even highly probable, that the acts were done for sexual gratification "this court can read the testimony, it cannot weigh the evidence nor enter findings of fact." State v. BJS. The Court in BJS continued by stating that a finding that the touching was done for the purpose of sexual gratification is a crucial element, and the facts found by the trial court did not constitute criminal conduct. Based on this alone the conviction was reversed and the case was dismissed.

The Washington State Supreme Court explained in State v. Lorenz, 152 Wash2.d 22, 93. P.3d 133(2004) that JuCR 7.11(d) requires that the findings "state the *ultimate facts* as to each *element* of the crime" (emphasis added), and that while the "BJS court erred in conflating an ultimate fact (sexual gratification) with an essential element (sexual contact). . .The result of BJS is not in error as **it was appropriate to require the finding of sexual gratification because it was an ultimate fact as to the essential element of sexual contact.**

Only the language of BJS listing sexual gratification as an essential element is in error.” State v. Lorenz, 152 Wash 2.d 22, 33, 93 P.3d 133 (2004) (Emphasis added).

“Ultimate facts,” for which findings are required under juvenile court rules, are those which are necessary to determine issues in a case, as distinguished from evidentiary facts supporting them; they are logical conclusions deduced from certain primary evidentiary facts, and final facts *required* to establish plaintiff's cause of action or defendant's defense. State v. Roggenkamp (2003) 115 Wash.App. 927, 64 P.3d 92, review granted 150 Wash.2d 1009, 79 P.3d 447, affirmed 153 Wash.2d 614, 106 P.3d 196. Written findings of fact and conclusions of law do **not** satisfy the requirements of JuCR 7.11 where they fail to state ultimate facts. State v. Parker, 81 Wash.App. 731, 915 P.2d 1174 (1996).

The Trial Court failed to note Sexual Gratification in the FFCL. (FFCL CP 579-581). The case at hand is analogous to BJS, in which it was highly probable that the acts were committed for sexual gratification, and yet the FFCL did not state that, so the case was reversed and dismissed.

The State, in its Response to Motion for Revision, argued that sexual contact described by AKT meets the requirements of sexual gratification. (CP 50, lines 22-23). In the case of State v. T.E.H., 91 Wash.App. 908, 915, 960 P.2d 441 (Div. 1, 1998) the court reasoned that the crime of child molestation requires a

showing of “sexual gratification” because without such a showing, the touching may be inadvertent. There is no indication that the court ever even considered or found a showing of the ultimate fact of sexual gratification.

The State asserted that the proper remedy was to remand to the trial court to reconsider and clarify its findings. Pursuant to State v. Avila, the Superior Court Judge denied the defendant’s motion for revision and remanded back to the trial court for entry of sufficient findings. As the court in Moody discussed, Biddinger 137 Wash. 448, 242 P. 969 (1926), holds that “revision” is the equivalent of “review.” In RE Marriage of Moody, 137 Wash.2d 979, 992, 976 P.2d 1240 (1999). This interpretation required that the Court undertake an appellate court review of the record. Moody, 137 Wash.2d at 992. (quoting Richard D. Hicks, The Power, Removal, and Revision of Superior Court Commissioners, 32 Gonz. L.Rev. 1, 23 (1996-97) (emphasis omitted)). The court in BJS dismissed charges based on insufficient findings of fact and conclusions of law. State v. Lorenz, 152 Wash.2d 22, 93 P.3d 133 (2004), held that the BJS court came to the correct conclusion. As stated by the court in BJS:

Here, the facts found by the trial court do not constitute criminal conduct. Because we hold the judgment was not supported by the findings of fact, we need not address BJS's other contention. The conviction is reversed and the case dismissed.

State v. BJS, 72 Wash.App. at 371,

Furthermore, as previously discussed, the State cites Moody for its earlier

assertion that the superior court judge may make a determination that it would be necessary to remand for further proceedings. The court in that case, as previously mentioned, did not elaborate in which circumstances it would be appropriate to remand. The present case is distinguishable, because FFCL have been entered; no new evidence is being presented; and the court has the entire record to reflect upon. Moody, 137 Wn.2d at 991.

In accord with this logic, this Court should come to the same conclusion as the court in B.J.S.. Even after Remand for entry of the FFCL, the Findings fail to indicate the element of sexual gratification. (FFCL CP 571-574).

***(5) Issue V: The Superior Court abused its discretion when it remanded the case back to the Trial Court to remedy the insufficient FFCL.***

According to RCW 2.24.050, the superior court conducts a de novo review of a court commissioner's ruling. "Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." RCW 2.24.050.

"In an appropriate cases, the superior court judge may determine that remand to the commissioner for further proceedings is necessary." Moody, 137 Wash.2d at 992. But what might not be argued by the State is that in the same case, the Supreme Court stated that according to State ex rel. Biddinger v. Griffiths, 137 Wash. at 451 "revision" means "review," as in an appellate review. Furthermore, remedying insufficient FFCL by way of remand in *a dissolution* case holds far less prejudicial ramifications than remanding to remedy insufficient

FFCL in a child molestation case in juvenile court.

The Superior Court Judge relied on State v. Alvarez 128, Wash.2d 1, 904 P.2d 754 (1995) to remand the FFCL. Alvarez was a harassment case and it was found that the FFCL were entered. However, they were insufficient as they did not state the ultimate facts. The Supreme Court ruled that remand was proper as the evidence in the case supported the findings. In Alvarez the court's findings and conclusions "unequivocally state that "[t]he offense of Harassment has been proven beyond a reasonable doubt." Alvarez, 128 Wash.2d at 20, 904 P.2d 754 (alteration in original).

However, findings of fact and conclusions of law in this case do not indicate that the ultimate fact of sexual gratification had been proven beyond a reasonable doubt. As it has been held by the Washington State Supreme Court in State v. Lorenz, 152 Wash.2d 22, 34-35, 93 P.3d 133 (2004), and State v. Stevens, 158 Wash.2d 304, 143 P.3d 817 (2006) that:

In order to prove "sexual contact," the State must establish the defendant acted with a purpose of sexual gratification. Thus, while sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification. Intent is relevant to the crime of second degree child molestation because it is necessary to prove the element of sexual contact.

State v. Stevens, 158 Wash.2d 304 at 310.

Nowhere among the Findings of Fact and Conclusions of Law does the

trial court specifically outline that the Defendant acted with any intent, nor do the facts lead any rational trier of fact to conclude that the state met its burden to show sexual gratification as part of its burden to prove sexual contact. State v. Stevens, 158 Wash.2d 304 at 310 ("Lorenz held only that the purpose of sexual gratification was not an essential element of first degree child molestation that must be included in the to-convict instruction.")

Furthermore, Stevens and Lorenz are *adult* cases, wherein there is *no* statute or court rule that requires the court to *specifically state* the ultimate facts.

The commissioner in the case at bar is held to an even higher standard than Lorenz and Stevens because this case is a juvenile case, which JuCR 7.11(d) requires the juvenile court's FFCL *specifically state* the ultimate facts necessary to support a conviction. JuCR 7.11(d).

The court in this case has no other choice but to follow the precedent set by State v. BJS. In the case of State v. BJS, 72 Wash.App. 368, 864 P.2d 432 (1994), a case involving a juvenile charged with first-degree child molestation, the findings of fact and conclusions of law were entered, but they failed to address intent or sexual gratification. The BJS case is directly on point with the case at bar. Division III said that the failure to prove and specifically state sexual gratification, which in that case was found to be a crucial element of first-degree child molestation, was in error and the conviction was reversed and the case was dismissed. The case was not remanded for further entry or further subsequent

findings of fact and conclusions of law. State v. BJS, 72 Wash.App. 368, 864 P.2d 432 (1994). In the subsequent Washington State Supreme Court case of State v. Lorenz, 152 Wash.2d 22, 93 P.3d 133(2004), State v. BJS was confirmed. The Washington State Supreme Court noted that sexual gratification is not an essential element as outlined by State v. BJS, but it is an ultimate fact. "*The result of BJS is not in error as it was appropriate to require the finding of sexual gratification because it was an ultimate fact as to the essential element of sexual contact.*" State v. Lorenz, 152 Wash.2d 22, 93 P.3d 133(2004) (emphasis added).

Two years later in 2006, the Washington State Supreme Court in State v. Stevens, *supra*. once again, confirmed the outcome of BJS by confirming Lorenz. It is important to note that these two cases are much more recent than Alvarez and Avila, and they are *both* Washington State Supreme Court decisions.

As outlined by the Washington State Supreme Court in In re Marriage of Moody, 137 Wash.2d 979, 976 P.2d 1240 (1999), a motion for revision places the Superior Court in the position of an Appellate court. State v. BJS is completely analogous, if not right on point to the case at bar. As discussed by the court in BJS:

The facts set forth in the findings fail to address whether the acts were done for the purpose of gratifying sexual desire. Based on the nature of the contact in this case, it may be reasonable to assume, even highly probable, that the acts were done for sexual gratification. However, while "this court can read the testimony, it cannot weigh the evidence nor enter findings of fact." State v. Fellers, 37 Wash.App. 613, 616, 683 P.2d 209 (1984) (citing

Thorndike v. Hesperian Orchards, Inc., 54 Wash.2d 570, 343 P.2d 183 (1959)).

State v. BJS, 72 Wash.App. 368 at 372.

State v. BJS was confirmed by the Washington State Supreme Court in State v. Lorenz, as previously discussed, and in turn State v. Stevens. Under an appellate review concerning this motion for revision, this court must follow the *stare decisis* doctrine established in State v. BJS. There is no alternative. The Washington State Supreme Court has overruled State v. Alvarez and State v. Avila *sub silentio* in this instance by confirming the decision in State v. BJS.

The State has failed to prove that Mr. Lobos acted with the purpose of sexual gratification. The FFCL do not support, outline, or *specifically state* the ultimate fact or finding that the Defendant acted with the purpose of sexual gratification. The Superior Court's remand for further FFCL is improper according to the Washington State Supreme Court and Washington State Court of Appeals Division 3 as laid out in State v. BJS, supra, State v. Lorenz, supra and State v. Stevens. Of which, the latter two are more recent Washington State Supreme Court decisions than State v. Alvarez, supra., In re The Marriage of Moody, supra., and State v. Avila, supra.

***(6) Issue VI: The Conclusions of Law do not contain ultimate facts.***

In addition to failing to prove sexual gratification, the State failed to prove that the defendant was 36 months older than the victim. In a case for child

molestation in the first degree the State bears the burden of proving beyond a reasonable doubt that the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator **is at least thirty-six months older than the victim.** RCW 9A.44.083(1) (emphasis added).

It is well settled that due process “requires the State to prove every element of the crime beyond a reasonable doubt.” State v. Davis, 141 Wash.2d 798, 899, 10 P.3d 977 (Wash., 2000). During the State’s case-in-chief the State failed to prove an essential element of the crime as charged; that the Defendant was 36 months older than the victim. The defendant moved for a dismissal for failure to put forth this element of the crime. The motion was denied. The State was allowed to elicit the defendant’s date of birth through his father on cross-examination. The defendant objected as to the information being outside the scope of direct.

Evidence Rule 611(b) requires that:

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

The standard of review for alleged violations of trial court's authority over witnesses is manifest abuse of discretion, which occurs when court's decisions are manifestly unreasonable, based on untenable grounds, or made for untenable

reasons. State v. Hakimi 124 Wash.App. 15, 98 P.3d 809 (2004).

***(7) Issue VII: The Trial Court erred by allowing the State to Cross-examine outside the scope direct.***

"[C]ross-examination of a witness to elicit facts which tend to show bias, prejudice or interest of a witness is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court." State v. Roberts, 25 Wash.App. 830, 834, 611 P.2d 1297 (1980).

In Falk v. Keene Corporation, 53 Wn.App. 238, 767 P.2d 576 (1989), an asbestos case, the Court found that the trial court had properly restricted cross-examination of a defense expert about the Plaintiff's condition, where the defense expert had not on direct-examination testified as to the plaintiff's condition or its cause. In the case of State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), a murder case, the trial court properly refused to allow defense counsel to cross-examine a police officer about another person who, according to the defendant, the police regarded as a suspect in the case.

In the present case the State was allowed to cross-examine the Defendant's Father concerning his son's age. This should not have been allowed as the subject matter of the line of questioning during direct was solely focused on the night of the alleged incident and had nothing to do with the Defendant's age. This was an abuse of discretion.

***(8) Issue VIII: Did Defense Counsel provide ineffective assistance of counsel under the Sixth Amendment?***

The Washington Supreme Court has repeatedly held that “[t]he purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial.” State v. Thomas, 109 Wash.2d 222, 225, 743 P.2d 816 (Wash. 1987). *See*: State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (Wash. 1984).

The United States Supreme Court, in Strickland, established that to show ineffective assistance of counsel, the following two-prong test must be satisfied:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant a fair trial, a trial whose results is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Supreme Court further stated that “[t]he Strickland test requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstance. Strickland, 466 U.S. at 688.

The State is likely to point out that there is a strong presumption of reasonableness when attacking the first prong of the Strickland test. *See*: Strickland, 466 U.S. at 689. Stated another way, the defendant must prove that “the attorney’s performance was so deficient that it ‘fell below an objective

standard of reasonableness.” State v. Brokob, 159 Wash.2d 311, 344, 345, 150 P.3d 59 (Wash., 2007); (Citing: State v. Thomas, 109 Wash.2d 222, 225-226, 743 P.2d 816 (Wash., 1987)). However, the second prong is satisfied when the defendant can show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

It is important to note that the United States Supreme Court expressly stated that a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Strickland, 466 U.S. at 693.

In Cienfuegos, the Washington Supreme Court stated that “[t]he question of whether counsel’s performance was ineffective is generally not amenable to per se rules, but requires a case by case basis analysis. State v. Cienfuegos, 114 Wash.2d 222, 229, 25 P.3d 1011 (Wash., 2001). As previously discussed, due process “requires the State to prove every element of the crime beyond a reasonable doubt.” Davis, 141 Wash.2d at 899. The defendant in State v. Lopez, alleged that his Defense Counsel was ineffective for failing to move for dismissal of a unlawful firearm possession charge after the State rested. State v. Lopez, 107 Wash.App. 270, 275, 27 P.3d 237 (Div. 3, 2001). The State, in Lopez, failed to present evidence of a prior conviction to satisfy the elements of unlawful possession of firearms in the first degree. Lopez, 107 Wash.App. at 276. In fact

“[t]he sole evidence of a previous conviction was Mr. Lopez’s fleeting admission during his direct testimony in the defense phase of the trial.” Lopez, 107 Wash.App. at Id.

In a criticism of defense counsel’s effectiveness at trial, the Lopez Court stated that “defense counsel should have moved for dismissal of the unlawful possession charge at the close of the State’s case in chief. Because the State had neglected to prove an essential element of unlawful firearm possession, the trial court would have *necessarily granted the motion*.” Lopez, 107 Wash.App. at 277. (*Emphasis added*). The court ultimately found that defense counsel’s representation was deficient. Lopez, 107 Wash.App. at 277.

In a case out of Seattle, the Supreme Court upheld a conviction when the defendant alleged error on the court for failing to grant a motion to dismiss on the grounds of insufficiency of the evidence. City of Seattle v. Ruffin, 74 Wash.2d 16, 17, 442 P.2d 649 (Wash., 1968). In Ruffin, the defense made a motion to dismiss at the close of the city’s case based on insufficiency of the evidence. Ruffin, 74 Wash.2d at 16. The motion was denied and the defendant presented evidence on her behalf. Ruffin, 74 Wash.2d at 16. Defense counsel failed to renew the motion at the close of all the evidence. Ruffin, 74 Wash.2d at 17. The Ruffin Court cited to State v. Nelson, 63 Wash.2d 188, 386 P.2d 142 (Wash., 1963), when holding that “[u]pon denial of the motion, at the conclusion of the state’s case in chief, defendant presented evidence upon his own behalf. He did

not renew his motion at the close of the evidence. He cannot now predicate error upon the trial court's denial of such motion." Ruffin, 74 Wash.2d at 17. *Citing: Nelson*, 63 Wash.2d at 189. *See: State v. Goldstein*, 58 Wash.2d 155, 361 P.2d 639 (Wash., 1961). The effect of presenting evidence after denial of the motion to dismiss due to insufficiency of the evidence, is in fact a waiver of the challenge to the motion to dismiss. Goldstein, 58 Wash.2d at 156.

### **Defense Counsel's Performance was deficient**

In the case at hand, defense counsel's conduct at trial resulted in a waiver of Mr. Lobos's ability to challenge the sufficiency of the evidence and Mr. Lobos has the burden of showing that defense counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment and due process. Strickland, 466 U.S. at 687. Defense Counsel's representation was deficient for failing to preserve error for appeal. The failure of Defense Counsel to recognize that her conduct of eliciting testimony in defense of Mr. Lobos would result in a waiver of his challenge to the insufficiency of the evidence is constitutionally deficient. Defense Counsel even recognized that the State could present this element in her case in chief. Objectively, no rational defense attorney exercising reasonableness would have allowed their client to go forward with such obvious error on the trial court. Therefore, Defense Counsel fell below an objective standard of reasonableness by presenting a defense and

waiving Mr. Lobos's challenge to the insufficiency of the evidence.

**Defense Counsel's Performance Prejudice the Defense.**

Nowhere in the State's case in chief did the State prove Mr. Lobos's age. Proof of Mr. Lobos's age is an essential element to the crime of Child Molestation in the First Degree (RCW 9A.44.083). The State had the burden of proving that the perpetrator was "at least thirty-six months [3 years] older than the victim." RCW 9A.44.083(1). At one point, the victim's father testified that he believed Mr. Lobos was either "13 or 14." Defense Counsel correctly made the motion to dismiss for insufficiency of the evidence at the conclusion of the State's case in chief, however the motion was denied although the statement from the victim's father's that Mr. Lobos was "13 or 14" is insufficient to satisfy the States burden of proof.

Defense Counsel became constitutionally ineffective under the Strickland test by presenting evidence on behalf of Mr. Lobos after the court denied the motion to dismiss for insufficiency of the evidence. The decision to present testimony on behalf of Mr. Lobos actually prejudiced the defense because the State used that opportunity to satisfy their burden of proof in cross-examination.

During cross-examination of Mr. Lobos's father, the State was able to elicit Mr. Lobos's age. Although Defense Counsel objected to the question being outside of the scope of direct, the State would not have been able to elicit information as to Mr. Lobos's age had Defense Counsel not presented testimony

in the first place. Essentially, Defense Counsel's ineffectiveness allowed the State an opportunity to prove an essential element of the crime through a back channel. Defense counsel should have simply rested and chose to appeal a guilty verdict based on the denial of the motion to dismiss for insufficiency of the evidence. Instead, Defense Counsel waived Mr. Lobos's challenge to the insufficiency of the State's evidence based on Nelson and its progeny.

Mr. Lobos has clearly shown that Defense Counsel's deficient performance prejudiced his defense. Not only did Defense Counsel's conduct of presenting testimony result in the State's gathering enough information on cross-examination to establish the elements of the crime, but Defense Counsel waived his ability to appeal the issue of whether the State satisfied the elements of the crime.

It is also important to place emphasis on the fact that the Strickland court specifically stated that Mr. Lobos need not show that Defense Counsel's deficient conduct more likely than not altered the outcome in the case. *See: Strickland*, 466 U.S. at 693. In the case at hand, Mr. Lobo's has actually satisfied this "non-burden" described in Strickland. He has been able to show that Defense Counsel's deficient conduct absolutely altered the outcome of the case. While the outcome of the trial might not have been different based on the trial Judge's denial of the motion to dismiss, Mr. Lobos would have been able to appeal his conviction under Davis as the State failed to prove their case in their case in chief.

***(9) Issue IX: Was Defendant denied the right to face-to-face confrontation under Article 1, Section 22, of the Washington Constitution?***

Under Washington's constitution, the accused also has "the right to ... meet the witnesses against him face to face." Wash. Const. art. I, § 22. The language of article I, section 22, read literally it would require that the "accused" "meet "the speaker " face to face. State of Washington vs. Pugh, 167 Wn 2d 825, 836., 225 P.3d 892 (2009). In State v. Price, 158 Wn.2d 630, 650, 146 P.3d 1183 (Wash. 2006), the 6 year old victim of sexual abuse was physically present in the courtroom; she confronted the defendant face to face; she was competent to testify and testified under oath; the defense retained the full opportunity to cross-examine her and in fact called attention to her lack of memory in closing; and the judge, jury, and defendant were able to view victim's demeanor and body language while she was on the stand, such that they could evaluate for themselves whether the victim was being truthful about her lack of memory. However, in the case at hand, the defendant was not allowed to see her face. The court moved AKT in such a way that she was not to be seen by the defendant. In addition, AKT's responses were mostly inaudible, such that he was also unable to hear what she was saying. In Price, the court notably stated that the "face to face" was to view the victim's demeanor and body language. Id at 650. Here that right was taken away from the defendant in violation of his Right to Confrontation.

The State may assert that "face to face" is not an absolute right. That

“face to face” has exceptions such as closed circuit television. RCW 9A.44.150.

Live testimony is preferred because it is believed that face-to-face confrontation enhances the accuracy of fact-finding. State v. Rohrich, 132 Wash.2d at 479.

However, closed circuit television is only available under stringent circumstances. RCW 9A.44.150.

The Supreme Court has held that a state's interest in protecting child abuse victims from the emotional trauma of testifying is sufficiently important to permit a child witness to testify at trial via one-way closed-circuit television, if the state makes an adequate showing of necessity on a case-by-case basis. Maryland v. Craig, 497 U.S. 836, 855, 110 S.Ct. 3157 (1990). The Court held that the requisite finding of necessity must be case specific and must include: (1) a finding by the trial court that the use of the closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) a finding by the trial court that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) a finding by the trial court that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimus. State v. Foster, 135 Wash.2d 441, 467, 957 P.2d 712 (1998) *citing* Craig, 497 US. at 855-56, 110 S.Ct. at 3169.

The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video

monitor) the demeanor (and body) of the witness as he or she testifies. Foster at 469. The court in Foster went on further to cite Maryland v. Craig, 497 U.S. 836, 851-852, 110 S.Ct. 3175 (1990):

Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation--oath, cross-examination, and observation of the witness' demeanor--adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.... [T]o the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversaries are far greater than those required for admission of hearsay testimony under the Confrontation Clause. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The prosecuting attorney must have made all reasonable efforts to prepare the child for testifying. RCW 9A.44.150(1)(e). The child must be competent to testify, must testify, in person, at trial, must testify under oath, must be subjected to the rigors of cross examination, and must be visible, through electronic means, during testimony so that the jury may observe the child's demeanor during testimony. We hold that these procedures are adequate for ensuring the reliability

of the child's testimony. Foster at 469

Although the testimony was not via closed circuit television, the same analysis applies. If this had been via closed-circuit television, then at minimum the Defendant would have been in a position to observe via the monitor. Mr. Lobos was not even afforded that right. The court failed to even try to have the victim face to Mr. Lobos and his counsel before ruling was made that would turn the victim away. In fact the victim had not even been called to the stand. The prosecutor failed to establish that the victim was uncomfortable near Mr. Lobos. The trial court failed to make a finding that the child would be traumatized. The action of the court was a direct violation of the Defendant's Right to Confrontation guaranteed under the Washington State Constitution, Article 1, section 22.

***(10) Issue X: Did the Trial Court commit reversible error in interfering with Defendants right to continual communication with his Defense Counsel?***

When the court moved the victim and directed defense counsel to reposition herself in the court room to where she could see the victim, the trial court committed reversible error. State v. Ulestad, 127 Wn.App. 209,213, 111 P.3d 276 (Wash.App. Div. 2 2005) Closed-circuit television was allowed with Mr. Ulestad. However, his counsel was required to be in chambers with the prosecuting attorney and the victim while Mr. Ulestad remained in the court room with the judge and jury. *Id.* at 212,213. The court did not provide constant

communication with the defendant and his counsel because they required the proceedings stop if they needed to communicate. *Id.* at 213.

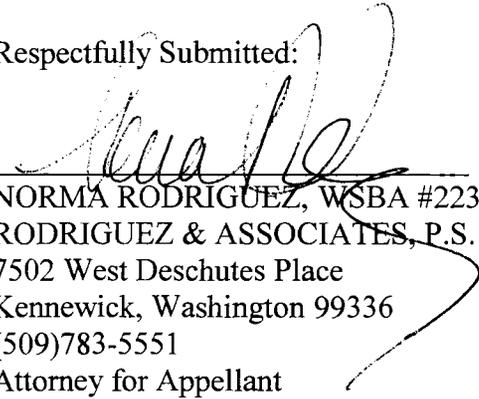
The constitutional right to assistance of counsel includes the "opportunity for private and continual discussions between defendant and his attorney during the trial." *Id.* at 214. And except for a limited right to control attorney-client communication when the defendant is testifying, any interference with the defendant's right to continuously consult with his counsel during trial is reversible error without a showing of prejudice. *Ulestad* at 214-215 *citing Perry v. Leeke*, 488 U.S. 272, 279-80, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989). Although Mr. Ulestad was still able to communicate with his attorney, the court found that the delay interfered with constant communication and therefore was reversible error without a showing of prejudice. *Ulestad* at 215.

### **CONCLUSION**

For all the foregoing reasons the Defendant asks that this Court find that there was reversible error and dismiss the conviction accordingly.

Dated this 27th day of September, 2010.

Respectfully Submitted:



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PROOF OF SERVICE

I, Scott E. Rodgers, being over the age of 18, hereby declare that on the 27<sup>th</sup> day of September, 2010, I caused a true and correct copy of Appellant's Brief, Case Number 289877-III, to be served on the following in the manner indicated below:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27<sup>th</sup> day of September, 2010

By: Scott E. Rodgers  
Scott E. Rodgers, WSBA 41368