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A. ARGUMENT IN REPLY

1. WHEN A CHILD WITNESS'S COMPETENCY IS CHALLENGED, THE BURDEN IS ON THE PROPONENT OF THE TESTIMONY TO ESTABLISH COMPETENCY BASED ON THE ALLEN FACTORS.

If the mere presumption of competency were sufficient to overcome a challenge to a child's competency, then in the absence of any evidence, the child should be held competent. Yet in State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999), the court found the evidence insufficient to support a finding of competency. 94 Wn. App. at 106. And in In re A.E.P., 135 Wn.2d 208, 222, 956 P.2d 297 (1998), the court held that, without any evidence of one of the five child competency factors from State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), the trial court abused its discretion in finding the child competent to testify. 135 Wn.2d at 225-26.

The State argues neither A.E.P. nor Karpenski stands for the proposition that the proponent of child testimony has the burden to establish competency. While the opinions in A.E.P. and Karpenski do not contain precisely those words, in each case the court required the proponent of the child's testimony to establish the Allen factors by a preponderance of the evidence. A.E.P., 135 Wn.2d at 222 (citing Allen, 70 Wn.2d at 692); Karpenski, 94 Wn. App. at 106.

In A.E.P., the Washington Supreme Court began its analysis by stating the rule that, “Five factors must be found before a child can be declared competent.” A.E.P., 135 Wn.2d at 222 (emphasis added). The court then listed the Allen factors. Id. In concluding, the court explained, “we find A.E.P.’s competence to testify was not properly established, due to the absence of the critical information.” A.E.P., 135 Wn.2d at 234. Even the two dissenting justices agreed that in order to determine a child witness is competent, the court must find the five Allen factors are met. A.E.P., 135 Wn.2d at 235.

In Karpenski, after a lengthy survey of prior cases, the court concluded, “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.” 94 Wn. App. at 103-04 (emphasis added). In applying the Allen factors to the facts at hand, the court phrased the issue as “could a trial judge reasonably find it to be more likely true than not that Z was capable of distinguishing truth from falsity?” 94 Wn. App. at 105-06. Ultimately, the court held, “the evidence is insufficient to support a finding that Z was capable of distinguishing truth from falsity and that Z was incompetent to testify.” Karpenski, 94 Wn. App. at 106.

A.E.P. and Karpenski show that Washington courts have required the proponent of child testimony to show competency under the Allen factors

once competency has been challenged. However, as argued in S.J.W.'s opening brief, even if this Court were to depart from precedent and place the burden on S.J.W. to show incompetence, that burden was met.

2. EVIDENCE OF MEMORY TAIN T MAY NEGATE A CHILD'S COMPETENCY UNDER THE ALLEN FACTORS.

The State cites A.E.P. for the proposition that any evidence a child's memories were tainted by suggestive questioning goes to credibility, rather than competency. But the A.E.P. court did not make this assertion and indeed, expressed exactly the opposite view. The court specifically said memory taint can negate one of the necessary elements of child competency:

“a defendant can argue memory taint at the time of the child's competency hearing. If a defendant can establish a child's memory of events has been corrupted by improper interviews, it is possible the third Allen factor, “a memory sufficient to retain an independent recollection of the occurrence[,]” may not be satisfied. Allen, 70 Wn.2d at 692.”

A.E.P., 135 Wn.2d at 230.

Thus, the A.E.P. court explicitly tied memory taint to competency under the Allen factors. A.E.P., 135 Wn.2d at 230. Indeed the problem with suggestive interview techniques is that they influence memories of the event, such that all later statements, including those given on the stand, are tainted. See A.E.P., 135 Wn.2d at 220 (quoting doctor's testimony regarding the influence of the first interview on subsequent memory of events).

The attorney's decision in A.E.P. to focus on how the taint affected the hearsay statements is irrelevant. The court held that a separate hearing on memory taint was not required precisely because this issue is properly addressed in the context of either hearsay or competency. 135 Wn.2d at 230.

Although some of the standards for child hearsay and competency are similar, the A.E.P. court did not confuse the two. After discussing how memory taint can negate competency under the Allen factors, the court went on in the next paragraph to discuss how memory taint relates to the child hearsay criteria. A.E.P., 135 Wn.2d at 230. Memory taint can negate either child competency or reliability of child hearsay or both. Id. Therefore, in this case, the trial court abused its discretion in declining to hear evidence that improperly suggestive interviewing had tainted the child witness's memory.

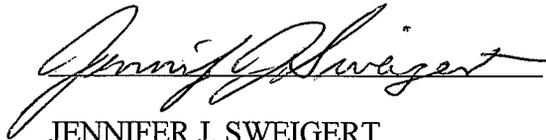
B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 11th day of December, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", written over a horizontal line.

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