

NO. 83177-7

NO. 61753-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

S.J.W.,

Respondent.

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JENNIFER SWEIGERT  
NIELSEN, BROMAN & KOCH, PLLC

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

The Honorable Vicki I. Churchill, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE

Did the Court of Appeals correctly hold that the proponent of a child's testimony bears the burden of establishing witness competency?

B. STATEMENT OF THE CASE

This case arose out of an unusual factual scenario. At a pre-trial competency hearing to determine whether a fourteen-year-old mentally challenged witness was competent to testify, the witness himself did not take the stand. 2RP<sup>1</sup> 54-55. Instead, defense counsel presented testimony by the witness's parents and doctor regarding his ability to accurately recall and relate facts. 2RP 12, 28-30, 35-38. The juvenile court permitted the witness to testify, finding the defense had failed to meet its burden to rebut the presumption of competence that arose when the witness turned fourteen. 2RP 56-57.

The Court of Appeals upheld the juvenile court's competency determination. State v. S.J.W., 149 Wn. App. 912, 925-27, 206 P.3d 355 (2009). However, the court also held that the juvenile court erred in placing the burden of proof on the defense. Id. at 925. The court held that in a child witness competency hearing, the burden of proof to show competency under

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<sup>1</sup> There are four volumes of verbatim report of proceedings referenced as follows: 1RP – May 2, 2008 (3.5 hearing); 2RP – May 6, 2008 (competency hearing); 3RP – May 7, 2008 (bench trial); 4RP – May 21, 2008 (dispositional hearing).

the factors from State v. Allen<sup>2</sup> rests on the party calling the child. Id. at 922.

C. ARGUMENT

S.J.W. asks this court to affirm the Court of Appeals' holding that the proponent of a child's testimony must affirmatively establish competency. The Court of Appeals' holding is consistent with Washington precedent. It is consistent with Washington statutes and court rules as well as the Legislature's intent. The contrary position advanced by the State is inconsistent with general rules of evidence requiring the proponent of evidence to establish admissibility and would violate due process by imposing an unconstitutional burden on criminal defendants.

1. THE COURT OF APPEALS HOLDING IS CONSISTENT WITH WASHINGTON PRECEDENT REQUIRING THE PROPONENT OF A WITNESS'S TESTIMONY TO ESTABLISH THAT THE WITNESS IS COMPETENT.

The Court of Appeals holding in this case explicitly requires the party offering a child's testimony to establish that the child is competent to testify. S.J.W., 149 Wn. App. at 922. Prior cases on the competency of child witnesses have consistently adhered to this allocation of the burden. In re Dependency of A.E.P., 135 Wn.2d 208, 225, 956 P.2d 297 (1998); Jenkins v. Snohomish County Pub. Util. Dist., 105 Wn.2d 99, 102, 713 P.2d 79 (1986); State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553 (1999),

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<sup>2</sup> State v. Allen, 70 Wn.2d 690, 691, 424 P.2d 1021 (1967).

abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003). The State has presented no authority or reason why this court should depart from established practice.

No Washington case explicitly states which party bears the burden of proof at a child witness competency hearing. However, Washington's courts have traditionally recognized that child witnesses present special problems for the courts. See Jenkins, 105 Wn.2d at 102. While to a certain degree, everyone is suggestible and susceptible to undue influence, children are peculiarly so. Aviva A. Orenstein, Children As Witnesses: A Symposium On Child Competence and the Accused's Right to Confront Child Witnesses, 82 Indiana Law Journal 909, 909 (2007). Children are more dependent, emotionally and physically, rendering them more susceptible to influence, intimidation, and bias. Id. Due to cognitive immaturity, children are more likely to be led astray by suggestive questioning. Id. See also Idaho v. Wright, 497 U.S. 805, 813, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1989) (affirming Idaho Supreme Court decision noting that "children are susceptible to suggestion and are therefore likely to be misled by leading questions").

In recognition of these issues, Washington courts have consistently placed the burden on the proponent of a child's testimony to establish competency. A.E.P., 135 Wn.2d at 225; Jenkins, 105 Wn.2d at 103;

Karpenski, 94 Wn. App. at 106. In each of these cases, in the absence of affirmative evidence of competence, the child witness was held not competent to testify. As the Court of Appeals in this case and other commentators have correctly noted, these cases place the burden on the proponent of the testimony to show competency. S.J.W., 149 Wn. App. at 923-24; Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice 299 (5th ed. 2007); Seth A. Fine, 13B Washington Practice: Criminal Law 19 (Supp. 2008-2009).

There is no conflict with State v. Smith, 97 Wn.2d 801, 650 P.2d 201 (1982) or State v. C.M.B., 130 Wn. App. 841, 125 P.3d 211 (2005), because neither of those cases deals with the burden of proof when a child witness is alleged to be “incapable of receiving just impressions of the facts. . . or of relating them truly.” RCW 5.60.050(2); CrR 6.12(c)(2). This Court should adhere to the longstanding practice of the courts of this state and affirm the Court of Appeals’ allocation of the burden of proof.

2. THE COURT OF APPEALS HOLDING IS CONSISTENT WITH WASHINGTON STATUTES AND COURT RULES.

No statute or court rule prescribes the burden of proof for competency hearings or expressly creates a presumption of competency. Instead, the relevant statutes and rules merely define who is competent to testify and who is not. RCW 5.60.020; RCW 5.60.050; ER 601; CrR

6.12(c). RCW 5.60.020 provides, “Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.” RCW 5.60.050 outlines several exceptions:

The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050.

ER 601 parallels RCW 5.60.020 and provides that “Every person is competent to be a witness except as otherwise provided by statute or by court rule.” CrR 6.12(c) parallels the exception from RCW 5.60.050, except that the second prong is limited to children:

The following persons are incompetent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and
- (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly. This shall not affect any recognized privileges.

CrR 6.12(c).

Thus, RCW 5.60.050 and CrR 6.12(c) are exceptions to the general rule that witnesses are presumed competent. See Smith, 97 Wn.2d at 803 (presumption of competency does not arise if person has been adjudicated

insane). When these statutory exceptions apply, therefore, no presumption arises and the Court of Appeals correctly placed the burden of proof on the proponent of the testimony.

The Court of Appeals holding is also consistent with the general rule that the party offering evidence bears the burden of establishing its admissibility under the rules of evidence. See, e.g., ER 901 (proponent of tangible evidence must show evidence sufficient to support a finding that it is what the proponent says it is); ER 104(b) (conditionally relevant evidence admitted only “upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition); State v. Cissne, 72 Wn. App. 677, 685 P.2d 564 (1994) (Evidence derived from novel scientific procedure not admissible unless proponent of the evidence shows the procedure is generally accepted in the relevant scientific community).

Like authentication, conditional relevance, or the Frye test for novel scientific evidence, witness competency is a preliminary fact upon which admissibility rests. ER 104(a); Karpenski, 94 Wn. App. at 102. When such preliminary facts are disputed, the burden is on the party offering the evidence to establish admissibility. Karpenski, 94 Wn. App. at 102. There, the Court of Appeals correctly placed the burden on the State, as the proponent of the child’s testimony, to demonstrate competency.

3. THE LEGISLATIVE HISTORY OF THE COMPETENCY STATUTE SHOWS NO INTENT TO PRESCRIBE THE BURDEN OF PROOF IN COMPETENCY HEARINGS.

The competency statutes do not, by their plain language, purport to establish a burden of proof for competency hearings. RCW 5.60.020; RCW 5.60.050. Even if this Court believes the Legislature inadvertently omitted provisions regarding the burden of proof, courts do not read into a statute matters that are not there. In re Estate of Hansen, 128 Wn.2d 605, 610, 910 P.2d 128 (1996); King County v. City of Seattle, 70 Wn.2d 988, 991, 425 P.2d 887 (1967).

Assuming the absence of a provision regarding the burden of proof is ambiguous, the legislative history of Washington's competency statutes shows no intent contrary to the Court of Appeals' holding. The Washington Legislature last amended RCW 5.60.050 in 1986. Laws of 1986, ch.195. The purpose of this legislation was twofold: First, the Legislature wanted to end the practice of "automatic" competency hearings for children under ten when neither party requested one. Final Legislative Report SB 4708, 49<sup>th</sup> Leg., 2d Reg. Sess., 209 (1986). Second, the Legislature wanted to eliminate the implication that age alone determines competency. Id. Neither of these purposes is at odds with the Court of Appeals' holding in this case, or the longstanding practice of Washington courts, placing the burden on the proponent of the evidence to establish that the witness is competent.

Indeed, the sponsor of SB 4807 was Senator Philip Talmadge, who later as a justice of the Washington Supreme Court authored the dissenting opinion in A.E.P. A.E.P., 135 Wn.2d at 235 (Talmadge, J., dissenting); SB 4708, 49<sup>th</sup> Leg., 2d Reg. Sess., 209 (1986). Justice Talmadge argued the majority was insufficiently deferential to the trial court's assessment of the child's competency. A.E.P., 135 Wn.2d at 235, 239 (Talmadge, J., dissenting). However, the dissent did not dispute the majority's allocation of the burden of proof in the competency hearing. A.E.P., 135 Wn.2d at 235 (Talmadge, J., dissenting). On the contrary, Justice Talmadge's dissent states, "The majority *correctly* applies the five-factor test for child competency set forth in State v. Allen." Id. (emphasis added). The dissent goes on to explain that in order to determine a young child is competent, the trial court must determine the child meets the Allen factors. Id. Thus it appears that the sponsor of the legislation that became RCW 5.60.050 did not believe it was inconsistent with placing the burden on the proponent of the child's testimony to establish competency.

4.       REQUIRING THE DEFENDANT TO PRODUCE A  
          WITNESS IS INCONSISTENT WITH THE  
          CONSTITUTIONALLY REQUIRED ALLOCATION OF  
          PROOF IN A CRIMINAL TRIAL.

In a criminal case, due process requires the State to bear the burden of proving every element of the crime beyond a reasonable doubt. In re

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1967). That burden includes the burden to prove each element of the offense by *competent* evidence. RCW 10.58.020; State v. Odom, 83 Wn.2d 541, 545-46, 520 P.2d 152 (1974); Estelle v. McGuire, 502 U.S. 62, 78, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)(O'Connor, J., concurring in part and dissenting in part).

By contrast, the defendant has no burden to present evidence or call witnesses in a criminal trial. State v. Montgomery, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Yet the State argues that in this case, S.J.W. was required to call the State's key witness against him to testify at the competency hearing and prove he was incompetent. This proposition is inconsistent with the State's burden of proof.

In this case, defense counsel did not call the child witness to testify at the competency hearing because she did not wish to be in the position of further traumatizing him. 2RP 54. Under the State's theory, accused persons must put themselves in this unenviable position of harassing a fragile child witness by requiring him or her to appear in court twice. Once the child is on the stand, the defense is in the unenviable position of having to prove a negative, namely the absence of one of the Allen factors.

5. JUDICIAL EFFICIENCY AND PROSECUTION OF  
CRIMES AGAINST CHILDREN WOULD BE  
LARGELY UNAFFECTED BY THE COURT OF  
APPEALS HOLDING.

As discussed above, placement of the burden of proof on the proponent of a child's testimony is not a departure from prior Washington precedent or practice. Even assuming common practice to date has not been in line with this burden, the change will not significantly impact the quantity or complexity of hearings or appeals involving child witness competency. The standard for determining the child's competency remains the five Allen factors. Thus, when it is clear a child can meet these requirements, the defense bar will not be more likely to challenge a witness's competency. As the court noted in Karpenski, the competency of most witnesses, even children, is simply not an issue. Karpenski, 94 Wn. App. at 112. The determination is still within the discretion of the trial court and unlikely to be overturned on appeal. This is amply demonstrated by this case, in which despite holding that the trial judge applied the wrong burden of proof, the Court of Appeals' nonetheless upheld the trial court's determination that the witness was competent. S.J.W., 149 Wn. App. at 925-27.

D. CONCLUSION

This Court should affirm the portion of the Court of Appeals decision holding that the burden of proof in a child witness competency hearing rests on the proponent of the child's testimony.

DATED this 9<sup>th</sup> day of October, 2009.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON	)	
	)	
Petitioner,	)	
	)	SUPREME COURT NO. 83177-7
vs.	)	COA NO. 61753-2-I
	)	
S.J.W.,	)	
	)	
Respondent.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9<sup>TH</sup> DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ISLAND COUNTY PROSECUTING ATTORNEY  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF OCTOBER 2009.

X *Patrick Mayovsky*