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

83415-6

No. 26677-0-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

WILLIAM A. BROUSEAU, Appellant.

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**BRIEF OF RESPONDENT**

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## **II. ISSUES**

1. Were statements made by the child victim properly admitted under the child hearsay statute?
2. Was the Trial Court's reliance on an expert's testimony sufficient to find the child victim competent to testify at trial?

## **III. ARGUMENT**

1. The Trial Court properly conducted a child hearsay hearing and based statements made by the child victim were properly admitted in evidence.
2. The Trial Court properly considered whether the child victim was competent to testify at trial.

## I. STATEMENT OF THE CASE

On December 7, 2006, the Appellant, Willaim A. Brousseau was charged by information with the crime of Rape of a Child in the First Degree. Information, Clerk's Papers 1 (hereinafter CP 1). On January 22, 2007, the State filed an Amended Information charging the Appellant with Rape of a Child in the First Degree and Child Molestation in the First Degree. Amended Information. (CP 39- 40). A competency hearing was held before Superior Court Commissioner John R. Henry on March 27, 2007. At that hearing, the Court found that the child victim, J.R., age seven, was competent to testify at trial. Report of Proceedings. (Hereinafter RP, Vol. PT-E2, at 118). Immediately following the competency hearing, the Court began consideration of whether or not child hearsay would be admitted at trial. The child hearsay hearing continued on March 30, 2007. During that hearing, testimony was heard from school counselor Carla Metcalf, Child Protective Services Worker Janet Bietelspacher, Deputy Detective Jackie Nichols, and Ellen Klein. The Court made a lengthy oral pronouncement, finding sufficient indicia of reliability in statements that were made by J.R. to make them admissible under RCW 9A.44.120, commonly known as the child hearsay statute. (RP Vol. PT-F2, 117-123). The Court entered written findings on competency of the child witness on March 30, 2007, (CP 69 -71),

and written findings on Child Hearsay on April 18, 2007. (CP 81-87).

Trial in this matter began on September 11, 2007. At trial, J.R. testified that the Appellant made her play with his penis (Trial Report of Proceedings, Hereinafter Trial RP, 114). She provided details about that event including the fact that the Appellant did not have any clothes on. (Trial RP 116). Later in her testimony, J.R. testified that the Appellant had previously touched her private. (Trial RP 122). She testified that "it didn't feel so good on the outside" and later that it "didn't feel so good on the inside either." (Trial RP 126).

Ellen Klein testified about a conversation that occurred with J.R. on the morning of December 4, 2006, stating that the Appellant had asked her to touch his penis that morning and that he has touched her privates. In the same conversation, J.R. described the touching of her privates by saying, "he just tickles it, but sometimes it hurts me." (Trial RP 170-171). In response to that conversation, Ellen Klein testified that she contacted the school and left a message for school counselor Carla Metcalf. (Trial RP 174).

Carla Metcalf testified that she received the referral from Klein, and spoke with J.R. at the school. (Trial RP 193). Ms. Metcalf then had a "five to ten minute" conversation with J.R. to

enable Ms. Metcalf to determine if J.R. was all right. (Trial RP 196-197). Ms. Metcalf testified that J.R. told her “that her dad made her rub his penis this morning,” and that “her dad plays with her privates.” (Trial RP 197-198). In response to that information, Ms. Metcalf contacted law enforcement and child protective services. (Trial RP 198).

Later, on December 4, 2006, Deputy Jackie Nichols and Child Protective services worker, Janet Bietelspacher, responded to Highland Elementary School to interview J.R. Deputy Nichols testified that herself, Carla Metcalf, Janet Bietelspacher, and the child were present during the interview. (Trial RP 228). During the interview, Deputy Nichols testified that J.R. disclosed “he wanted me to play with his penis.” (Trial RP 236). Deputy Nichols asked J.R. to tell her everything she could remember about that, to which Deputy Nichols testified J.R. responded: “She had been in her bed asleep, and that he had gotten into bed with her and that he didn’t have any clothing on. Ah, and then she said that he said ‘play with my penis.’ She told me that she told him ‘no’ and that he continued to say it, and that he eventually grabbed her hands and put them on his penis.” (Trial RP 237). In response to further questioning, Deputy Nichols testified that “she [J.R.] said that he pulled her on top of him and that she had to turn her head away because her mouth was close to his penis. She continued to say ‘no.’ “ (Trial

RP 237).

After the disclosure of events that occurred on December 4, 2006, Deputy Nichols asked J.R. if anything similar had happened before, to which Deputy Nichols testified J.R. stated that Apellant had touched her privates. Deputy Nichols testified that J.R. described the touching by saying, "he opened it, and put his finger in, and it hurt" while gesturing an opening movement with her hands. (Trial RP 240).

Child Protective Services Worker, Janet Bietelspacher, testified about her role in the interview, stating that she only asked one question for clarification as to what the child was describing as her private. (Trial RP 408). Teresa Forshag, a nurse practitioner testified that she conducted a physical examination of J.R. that was normal. She further testified that insertion of a finger may not cause any damage (Trial RP 387-390). Ms. Forshag also testified that 80% of child molestation cases have no physical findings (Trial RP 392). Dr. Phillip Esplin, an expert offered by the defense agreed, stating that in eighty to ninety percent of sex abuse cases there is no physical evidence available. (Trial RP 519).

Toward the conclusion of the evidence, the State filed a Second Amended Information clarifying the date of the child molestation allegation in Count Two. Second Order Amending

Information (CP 122). The jury returned verdicts of guilty on Counts One and Two. (CP 150, 151). A Judgment and Sentence was entered on November 26, 2007. (CP 192-201). This appeal followed.

#### **IV. DISCUSSION**

1. The Trial Court properly conducted a child hearsay hearing and based statements made by the child victim were properly admitted in evidence.

In his first assignment of error, the Appellant argues that the admission of statements made by J.R. to Ellen Klein, Carla Metcalf, Janet Bietelspacher and Deputy Nichols improperly bolstered J.R.'s testimony. These statements were admitted under the provisions of RCW 9A.44.120. The Court held a separate hearing on child hearsay, applied the applicable law, and deemed the statements admissible. There was no error in the admission of the statements.

The child hearsay statute, RCW 9A.44.120, provides that hearsay statements of children under ten describing sexual conduct are admissible if the trial court finds that the time, content, and circumstances of the statement provide sufficient indicia of reliability and either (1) the child testifies or (2) the child is unavailable and there is corroborative evidence of the act. The standard for appellate review of a trial court's admission of child hearsay statements is abuse of discretion. State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990), cert. denied , 498 U.S.

1046, 111 S.Ct. 752 (1991). In determining whether sufficient indicia of reliability exist, the trial court should consider the nine factors set out in State v. Ryan:

(1) whether an apparent motive to lie exists, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) whether the declarant made the statements spontaneously, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contains an express assertion about past facts, (7) cross-examination could not show the declarant's lack of knowledge, (8) the possibility that the declarant's recollection is faulty is remote, and (9) the circumstances surrounding the statement suggest that there is no reason to suppose the declarant misrepresented the defendant's involvement.

103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Not every factor need be satisfied; it is enough that the factors are "substantially met." Swan, 114 Wn.2d at 652.

In this case, the Court heard testimony and considered each of the nine Ryan factors, in making its determination that sufficient indicia of reliability existed for the statements made by J.R. to be admissible. (CP 69-71; RPVol. PT-F2, 117-122). "A finding that statements are within the statutory child abuse exception should not be reversed absent a showing of manifest abuse of discretion." State v. Wood, 154 Wash.2d 613, 623; 114 P.3d 1174, 1180 (2005) (citing State v. Jackson, 42 Wash.App 393, 396; 711 P.2d 1086 (Div. 1, 1985)).

In his brief, the Appellant does not cite any abuse of discretion. Instead, the Appellant argues that the child hearsay law is an aberration and that corroborative evidence should be precluded if a child testifies at trial. There is no basis in the law for the Appellant's assertions. Under the plain language of RCW 9A.44.120, it is clear that statements are admissible if the court finds that they have sufficient indicia of reliability and the child testifies at trial. If the child is unavailable at trial, the statements are admissible only if there is corroborative evidence of the act. RCW 9A.44.120(2)(b). In this case, the child testified at trial and the Appellant's trial counsel had the opportunity to and did cross-examine the child at length. The State need not show corroborative evidence of the act in order for the statements to be admissible.

The Appellant's argument confuses the issue of corroboration, and seems to argue that admission child hearsay statements should never be allowed when the child testifies at trial. That is simply not the law and is without merit. Finally, the Appellant argues that the child hearsay statements should not have been allowed unless they were offered to rebut a charge of recent fabrication, which would make the statement no longer hearsay under ER 801(d)(1). The Appellant's reliance on ER 801(d)(1) is

misplaced. The statements at issue in this case were correctly admitted under RCW 9A.44.120, and as such are not subject to the requirement of an allegation of recent fabrication.

The Appellant does, however, correctly assert the purpose for the child hearsay statute as set forth in State v. Jones, 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989). The purpose of the statute is to alleviate the difficult evidentiary problems that occur because child sexual abuse often leaves no physical evidence and because children are often ineffective witnesses whose memories dim with time. This case is exactly the type of case that the child hearsay statute was enacted to address. The child hearsay was admitted to alleviate the problems created where a finger was used for abuse and did not leave physical evidence and to alleviate the issues that arise when a seven year old testifies in front of a crowded court room about facts that occurred nine months prior to trial. Therefore, nothing in the Appellant's argument establishes that any error occurred with regard to the admission at trial of statements under RCW 9A.44.120, and the Appellant's assignment of error with regard to those statements is without merit.

In his second "Assignment of Error," the Appellant argues that the trial Court's Findings of Fact 2.5, 2.6, 2.7, and 2.9 entered after the child competency hearing are not supported by the record.

These findings are clearly supported by the record. In finding 2.5, the trial court found “it is undisputed that Jane Doe (D.O.B. 11/08/1999) had the mental capacity at the time of the occurrence of the event she is to testify about to receive an accurate impression of it.” (CP 70). In its oral pronouncement, the Court specifically found that J.R. had the mental capacity to receive accurate impressions of the events, and cited to testimony from the Defense expert Dr. Mabee as evidence of that finding. (RP Vol. PT-E2 116). In fact, in response to the direct question: “Did she have sufficient capacity to accurately store the occurrence of the event in question,” the defense’s expert in the field of psychiatrics, Dr. Mabee, testified: “In general, she has the capacity to store the information. There was, from my observations and talking to her, there was no sensory factors, such as vision, or hearing that would interfere with her being able to take the information and organize it into a reasonable stored, ah, memory.” (RP Vol. PT-E1 40). This clearly supports finding 2.5.

In finding 2.6, the Court found that J.R. “Has a memory sufficient to retain independent recollections of the occurrence.” (CP 70) On direct examination, Dr. Mabee testified that J.R. had a limited memory capacity (RP Vol PT-E1 47). However, on cross examination, Dr. Mabee testified that J.R. was able to describe

specific details of her room and specific details from the allegations. (RP Vol PT-E1 66-70). Eventually, Dr. Mabee testified that "I did not say she lacks memory." (RP Vol PT-E1 70). This testimony clearly supports the trial Court's finding that J.R. has a memory sufficient to retain an independent recollection of the occurrence.

In finding 2.7, the Court found that J.R. had expressed a memory of the occurrence on several occasions, based on the testimony of Dr. Mabee and the police reports on file, which had been stipulated to for the sole purpose of the child competency hearing. (CP 70; CP 2-10). It is clear from the reports that J.R. was able to provide an account of the occurrence to Ellen Klein, Carla Metcalf, Janet Bietelspacher, and Deputy Nichols. Dr. Mabee further testified about specific portions of the morning of December 4, 2006 that J.R. related to him. (RP Vol PT-E1 70). Therefore, the trial Court's finding 2.7 is supported by the record.

In finding 2.9, the Court found that the evidence presented provides an insufficient basis to overcome the statutory presumption that J.R. is competent to testify. (CP 70-71). This finding was likewise supported by the record and by the child competency hearing which was held by the Trial Court.

From the record, it is clear that the Trial Court properly

conducted a child hearsay hearing, then entered findings that were supported by the record, and properly admitted child hearsay statements made by the child victim under RCW 9A.44.120.

2. The Trial Court properly considered whether the child victim was competent to testify at trial.

ER 601 states that “[e]very person is competent to be a witness except as otherwise provided by statute or court rule.” ER 601. While there is no statute addressing the competency of child witnesses, CrR 6.12(c) states that “[t]he following persons are incompetent to testify: (1) Those who are of unsound mind...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.” CrR 6.12(c). Based on this scheme, Washington courts have reasoned that children, like all other people, are presumed competent to testify. See, e.g., State v. C.M.B., 130 Wn.App. 841, 842, 125 P.3d 211 (Div. 1, 2005), review denied by, State v. Boebert, 158 Wn.2d 1007, 143 P.3d 829 (2006). Because of this, “the trial court is under no obligation to rule on the competency of any witness, absent a challenge by any party to the witness's competency.” Id.

In this case, the Court considered the expert testimony of Dr. Mabee, a licensed psychologist, who interviewed J.R. prior to the competency hearing. Based on the opinions and testimony of

the defense expert, the Court found that all five of the factors set forth in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1976), were met. (RP 115-119). While viewing the child on the stand is certainly one way for a trial judge to consider a child's competency, nothing in the law says that a trial judge cannot rely on information gained from the testimony of a psychologists who examined the child in making his determination that a child is competent. Ample case law exist in which children J.R.'s age and younger have been deemed competent to testify. *See: State v. Perez*, 137 Wn.App. 97, 151 P.3d 249 (Div. III, 2007) *Four-year-old child was competent to testify*; State v. Woods, 154 Wn.2d 613, 114 P.3d 1174 (2005) *Victims who were three-years-old and five-years-old during the time of the alleged molestation and only four-years-old and six-years-old at the time of trial competent to testify*; State v. Avila, 78 Wn.App. 731, 899 P.2d 11 (Div. I, 1995) *No abuse of discretion in finding five-year-old child competent to testify about abuse committed when child was four-years-old*; State v. Stange, 53 Wn.App. 638, 769 P.2d 873 (Div. I, 1989) *Four-year-old victim was competent to testify*. A reviewing court should not overturn a finding of competence absent a manifest abuse of discretion. State v. Perez, 137 Wn.App 97. There is nothing in this record to suggest that J.R. was not legally competent to testify or that the trial judge abused

his discretion in finding her competent. As such, the finding should not be overturned.

In subsequent pleadings, the Appellant has brought into question whether or not a child is required to testify in order to be found competent. The State expects that the Appellant will again raise this issue in his Reply Brief, therefore, it will be addressed at this time.

After quite some time reviewing case law, the State is unable to find a single case which requires a child to testify at a competency hearing. In this case, the Court relied on the expert testimony of Dr. Mabee to determine that the child victim was competent to testify. The experts testimony was sufficient, and the State chose not to put the victim on the stand. To hold that where an expert testifies as to competence, a child must testify to be found competent would be an absurd result; especially in the context of a child sexual assault case, where victims are often intimidated in the courtroom by the presence of their abuser.

Should this Court conclude that the finding of competence was in error, that error would clearly be harmless under the facts of this case. A reviewing court can look at the entire record to review a competence determination. State v. Guerin, 63 Wash.App 117; 816 P.2d 1249 (1991). In this case, the child victim testified at trial.

The transcript of the child's testimony clearly shows that the Court Commissioner's ruling as to her competence was not in error. Therefore, any perceived procedural error would be harmless. In the event that the Court finds error, and finds that the error was not harmless, the proper remedy would not be overturning the Appellant's conviction. The proper remedy would be to remand the case for a hearing on competence. Should the child again be found competent, the conviction would stand.

The record makes clear that the child was competent to testify in this case. In many cases, it may be necessary for a child to testify at a competency hearing, but the law does not mandate it in every case. Under the facts of this case, there was no error caused by the child not testifying at the child competency hearing.

The appellant withdrew his claim of ineffective assistance of counsel, therefore, that issue will not be addressed in this brief.

## **V. CONCLUSION**

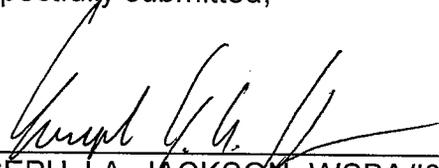
The Trial Court properly admitted statements made by the child victim under the child hearsay statute. There was no error caused by the child not testifying at the child competency hearing

on the facts of this case. Any perceived error would be harmless.

The Appellant's conviction should be affirmed.

Dated this 29 day of December, 2008.

Respectfully submitted,



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