

No. 63652-9

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

---

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM CARLSON,

Appellant.

---

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

The Honorable Susan Cook  
The Honorable Dave Needy

---

BRIEF OF APPELLANT

---

Susan F. Wilk  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

2016 FEB 22 PM 4:41  
COURT OF APPEALS  
DIVISION ONE  
CLERK OF COURT

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 9

    1. IN VIOLATION OF DUE PROCESS, THE TRIAL COURT  
       ERRED IN CONCLUDING C.C. WAS COMPETENT TO  
       TESTIFY..... 9

        a. The admission of an incompetent person’s testimony in a  
           criminal proceeding violates the due process right to a fair  
           trial..... 9

        b. The evidence viewed in the light most favorable to the State  
           did not support the determination that C.C. could distinguish  
           truth from falsity, and therefore the trial court erred in finding  
           him competent to testify ..... 14

        c. The State did not establish that C.C. was competent at the  
           time of alleged incidents ..... 18

    2. IN VIOLATION OF CARLSON’S SIXTH AMENDMENT  
       RIGHT TO CONFRONTATION, THE TRIAL COURT FAILED  
       TO MAKE AN INDIVIDUALIZED DETERMINATION THAT  
       MULTIPLE INSTANCES OF CHILD HEARSAY WERE NOT  
       TESTIMONIAL ..... 21

    3. THE HEARSAY STATEMENTS WERE UNRELIABLE AND  
       SHOULD HAVE BEEN EXCLUDED ..... 24

    4. CARLSON’S CONVICTIONS MUST BE REVERSED ..... 27

E. CONCLUSION ..... 28

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

In re Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998)..... 11, 18, 19, 20  
State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967) ..... 10, 20  
State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) ..... 11, 25  
State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) ..... 27  
State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009) ..... 21  
State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) ..... 27  
State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) ..... 25  
State v. Woods, 154 Wn.2d 613, 114 P.3d 1174 (2005) ..... 11

**Washington Court of Appeals Decisions**

State v. Ahlfinger, 50 Wn. App. 466, 749 P.2d 190 (1988) ..... 9  
State v. Alvarez-Abrego, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, No. 38151-6-II, 2010 WL 354371 (February 2, 2010) ..... 22, 23  
State v. Borland, 57 Wn. App. 7, 786 P.2d 910, review denied, 114 Wn.2d 1026 (1990) ..... 12  
State v. Floreck, 111 Wn. App. 135, 43 P.3d 1264 (2002) ..... 27  
State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999) .... 11, 12, 13, 17, 18

**Washington Constitutional Provisions**

Const. art. I, § 3..... 1

**United States Supreme Court Decisions**

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ..... 9

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) ..... 27

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ..... 21, 22

**Federal Constitutional Provisions**

U.S. Const. amend. VI..... 1, 2, 21

U.S. Const. amend. XIV ..... 1, 27

**Statutes**

RCW 5.60.020..... 10

RCW 5.60.050..... 10

RCW 9A.44.120 ..... 24

A. ASSIGNMENTS OF ERROR

1. In violation of the right to due process protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution, the trial court erred in finding child witness C.C. was competent to testify.

2. In violation of the Sixth Amendment right to confrontation, the trial court erred in failing to make individualized determinations that multiple instances of child hearsay were non-testimonial.

3. In violation of the right to due process protected by the Fourteenth Amendment and article I, section 3 of the Washington Constitution, the trial court erred in admitting unreliable child hearsay.

4. To the extent Finding of Fact 2 relies upon testimonial hearsay in violation of the Sixth Amendment, the trial court erred in considering a statement made to child interviewer Nichole Flacco. CP 63-64.

5. Finding of Fact 3 violates Carlson's Sixth Amendment right to confrontation because it relies on testimonial hearsay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment and article I, section 3 require that the evidence used to convict a person at trial be

reliable. For this reason, incompetent persons are not permitted to testify. On appeal of a finding that a child witness was competent, the reviewing court decides whether, viewed in the light most favorable to the State, the State proved by a preponderance of the evidence that the witness understood the difference between truth and falsity. Where a child witness's family members admitted the child had a tendency to lie, and, despite being admonished of the duty to tell the truth on the witness stand, the child insisted multiple untrue claims were true, did the trial court err in finding the witness was competent? (Assignment of Error 1)

2. A competency determination requires the trial court to determine that the child was competent at the time of the alleged abuse. Where the child witness was unable to answer questions regarding the timing of the alleged abuse, no other evidence established when the alleged abuse occurred, and the trial court did not analyze this requisite factor, did the trial court err in finding that the witness was competent? (Assignment of Error 1)

3. A court violates an accused person's Sixth Amendment right to confrontation if it fails to make a threshold evaluation whether proffered hearsay is testimonial. The trial court broadly held that hearsay statements were non-testimonial because they

were made to family members and family friends, without making an individualized inquiry into the surrounding circumstances. Did the admission of the hearsay statements violate Carlson's right to confrontation? (Assignment of Error 2)

4. Statements made for purposes of investigation and prosecution fall within the core class of statements protected by the Confrontation Clause. Did the trial court's reliance on a statement made to the Skagit County child interview specialist after a formal investigation had commenced violate the Confrontation Clause? (Assignments of Error 4 and 5)

5. Child hearsay must be excluded if it is unreliable. Did the trial court err in concluding that multiple instances of unreliable child hearsay were admissible? (Assignment of Error 3)

### C. STATEMENT OF THE CASE

C.C., born May 17, 2002, is the son of Jennifer Carlson and Scott Hendrickson. 4RP 116; 8RP 485.<sup>1</sup> C.C.'s family is highly

---

<sup>1</sup> Eleven volumes of transcripts are cited herein as follows:

April 22, 2009	-	1RP
April 30, 2009	-	2RP
May 4, 2009	-	3RP
May 5, 2009	-	4RP
May 5, 2009 (second volume)	-	5RP
May 6, 2009	-	6RP
May 6, 2009 (second volume)	-	7RP
May 7, 2009	-	8RP
May 7, 2009 (second volume)	-	9RP

dysfunctional. CP 65 (Finding of Fact 5a). They have an uneasy relationship with one another that occasionally devolves into downright hostility. Several members of the family, especially Jennifer, freely use the court system to obtain protection orders against one another. 1RP 74; 4RP 122, 138, 144; 8RP 453. The question at the heart of these controversies is who has the 'right' to occupy the family home in Rockport, Washington. 4RP 133, 135, 138, 146, 166. A corollary and also hotly contested issue is the custody of C.C. 4RP 138-41, 144.

C.C. has little stability in his life. Jennifer is an inconsistent parent at best and is not able to provide C.C. with a permanent home. 4RP 133-44. For much of his childhood, C.C. has been shifted between the homes of his grandmother, Anita Carlson, his aunt, Fawn Fields, and a family friend, Dorothy Buckley. 1RP 17-19, 22. C.C.'s father has no legal right to C.C.'s custody and Jennifer Carlson's boyfriend, Duane French, is very resistant to the idea of Scott Hendrickson having any contact with C.C. whatsoever. Nevertheless, Anita Carlson facilitates Scott Hendrickson's contact with his son, oftentimes with the covert approval of Jennifer Carlson. 8RP 480. Jennifer and Anita Carlson

---

May 8, 2009	-	10RP
May 28, 2009	-	11RP

instruct C.C. that if he is questioned about these visits, he is to lie and say he is at Fawn's house, or he will never see his father again. 4RP 189-90; 6RP 351; 8RP 480.

During the 2007-2008 school year, C.C. was shifted between the residences of his mother, grandmother, aunt, and Dorothy Buckley. 6RP 382, 386-87. Consequently he was enrolled in, then removed from, then re-enrolled in various school districts between Sedro-Woolley, Anacortes, and Concrete, Washington. 6RP 382. C.C. suffers from a learning disability and a speech impediment, and at the age of six, was described as communicating at the level of a four-year-old. 1RP 108.

C.C.'s uncle, appellant William Carlson,<sup>2</sup> was convicted as a juvenile of a sex offense and is a registered sex offender. 1RP 38; 4RP 121. Since his release from custody, William Carlson has been living with his mother, Anita Carlson, in a trailer she bought for him on the property outside of the Rockport home. 8RP 433-36. Carlson is not permitted to have unsupervised contact with children. 8RP 435. Nevertheless, the family relies on him to transport C.C. to and from their various residences, to babysit on occasion, and

---

<sup>2</sup> Because of the shared last names of many family members, to avoid confusion, they are referenced by their first names. Appellant William Carlson is occasionally referred to in this brief as "Willy," usually when describing testimony in which he was identified by this name. No disrespect is intended.

even to give C.C. baths, all without supervision. 1RP 38; 2RP 17; 6RP 315; 8RP 465.

In July 2008, C.C. was staying with Buckley in Anacortes. 1RP 86; 6RP 284. Buckley's dog was on its back on the floor wriggling around, and when C.C. saw this he said, "Oh Willy, oh Willy." Id. Because of C.C.'s speech impediment, Buckley thought at first that C.C. was saying, "Oh, really." 1RP 86. She asked him if he was saying, "oh really" and C.C. responded, "no, Willy." Id. Buckley asked why, and C.C. told her that was what Willy did when he put him on his lap and was touching his "pee-pee." Id. Buckley asked C.C. if this had happened once and C.C. said it had happened lots of times. 1RP 87. She asked how many times were "lots" and he said maybe three. 6RP 311. He said this happened in Willy's trailer. 6RP 312. Buckley telephoned Anita Carlson and she said Willy was sorry so they would not call the police. Id.

Buckley herself reported the incident to Child Protective Services ("CPS") but waited between 48 hours and two weeks to do so. Following a police investigation, other family members claimed C.C. had made similar disclosures. Jennifer Carlson asserted C.C. had told her in July 2008 that Willy had pulled his pants down and touched him. 2RP 18; 4RP 120. Jennifer reported this disclosure

to Anita Carlson, but otherwise did not take any responsive action. 2RP 18. Jennifer Carlson also claimed that a few weeks later, when she went to obtain protective orders against various family members, C.C. told her that Willy had pulled his pants down and “touched his privates.” 4RP 122.

Fawn Fields, William and Jenny Carlson’s sister and C.C.’s aunt, reported that at some point in the spring of 2008 – she was not sure when – C.C. came to her and asked, “Why did Willy touch me in the private area?” 1RP 26. Fawn did not take this incident very seriously. According to Fawn, C.C. “has been known to tell tales.” 1RP 40. Fawn explained that C.C. likes to please people and will say things that are not true for this reason. 1RP 35. Fawn has followed up on some of C.C.’s claims to learn that they are fiction. 1RP 26, 35-36.

Misty Carlson, half-sister of Fawn, Jenny, and William, claimed that when she and C.C. were in Rockport, she saw Willy and C.C. “messing around” on the couch and saw Willy put his hand down C.C.’s pants. 1RP 49. Misty claimed she took C.C. outside and told him that what Willy was doing was wrong. 1RP 50. Misty also described another, earlier, incident in which Willy and C.C. were playing on a medical chair that had been purchased for

the use of Anita's invalid mother. 1RP 52. She said she saw Willy put his hand on C.C.'s "privates" and immediately remove it. Id. She could not tell whether this touch was inadvertent. 1RP 52, 56.

Approximately a month after the couch incident, Misty said that C.C. told her Willy was touching him in the "wrong place" and "it didn't feel right." 1RP 54. Misty also claimed she observed C.C. approach Fawn's children, Allan and Anna, and say "I want to touch your private parts because Willy touched mine." 1RP 78. C.C. also talked about another child at school who told him he wanted to touch C.C.'s "cocoa nuts [sic]." 1RP 80. Like Fawn, Misty acknowledged that C.C. "lies sometimes." 1RP 69.

As part of a police investigation of the allegations, C.C. was interviewed by a child interview specialist working for the Skagit County prosecuting attorney. 8RP 554-55. C.C. also told her that Carlson had touched him and said that it felt "like a turtle was biting him" and "like his wiener was sawed off." 8RP 594-95. During this same interview C.C. said that Carlson needed to "go to jail." 8RP 561.

The Skagit County Prosecuting Attorney charged Carlson with two counts of child molestation.<sup>3</sup> The trial court found (1) that each of the many incidences of child hearsay were reliable and admissible and (2) that C.C. was competent to testify. 2RP 76, 89-90; 3RP 43. Following a bench trial, Carlson was convicted of both counts as charged. 10RP 743; CP 63-80. Carlson appeals. CP 62.

D. ARGUMENT

1. IN VIOLATION OF DUE PROCESS, THE TRIAL COURT ERRED IN CONCLUDING C.C. WAS COMPETENT TO TESTIFY.

a. The admission of an incompetent person's testimony in a criminal proceeding violates the due process right to a fair trial. An accused person has the due process right to a fair trial, and this right includes the guarantee that the evidence used to convict him will meet elementary requirements of fairness and reliability in the ascertainment of guilt or innocence. U.S. Const. amend. XIV; Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also, State v. Ahlfinger, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused's

---

<sup>3</sup> The State also alleged two aggravating circumstances, but as no exceptional sentence was imposed they are not relevant to this appeal.

defense, given “the State’s legitimate interest in excluding inherently unreliable testimony”). In keeping with the constitutional guarantee, RCW 5.60.020 bars the testimony of incompetent persons.<sup>4</sup> A person is not competent to testify if he or she is “incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.” RCW 5.60.050(2).

The Washington Supreme Court has held a child witness is competent to testify if he or she: (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 it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words his or 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). The determination whether a child witness is competent requires the court to consider not only the child’s competency at the time of testimony, but also his or her “ability to receive just impressions at the time of abuse.” State v.

---

<sup>4</sup> RCW 5.60.020 provides in pertinent part: “Every person of sound mind and discretion . . . may be a witness in any action, or proceeding.”

Woods, 154 Wn.2d 613, 619, 114 P.3d 1174 (2005) (plurality opinion); In re Dependency of A.E.P., 135 Wn.2d 208, 224-26, 956 P.2d 297 (1998).

Analyzing this question, Division Two held the determination of a child witness's competency will turn on three preliminary questions of fact:

One is whether the witness, at the time of his or her in-court statement (i.e., his or her "testimony"), is describing an event that he or she had the capacity to accurately perceive (or, in alternative terms, an event about which he or she could "receive just impressions"). Another is whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately recall. A third is whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately relate. The third question subdivides into at least the following: (a) whether the witness has the capacity to understand simple questions about the event; (b) whether the witness has the capacity to express in words his or her memory of the event; (c) whether the witness has the capacity to speak in the formal courtroom setting; (d) whether the witness has the capacity to distinguish truth from falsehood; and (e) whether the witness has the capacity to understand and carry out his or her obligation to speak the truth.

State v. Karpenski, 94 Wn. App. 80, 101, 971 P.2d 553 (1999), abrogated on other grounds by State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765 (2003).

An appellate court reviews a trial court's determination that a child witness is competent to testify for an abuse of discretion based on consideration of the entire trial record. State v. Borland, 57 Wn. App. 7, 10-11, 786 P.2d 910, review denied, 114 Wn.2d 1026 (1990). The Court in Karpenski explained this review process. The Court first clarified that when a trial judge addresses a competency-related question of preliminary fact, she has discretion to determine whether the evidence preponderates in favor of that fact. Karpenski, 94 Wn. App. at 103-04. Next, the court distinguished between a competency determination based on documentary evidence – in which case the appellate court may substitute its own judgment for that of the trial court without deferring to the lower court – contrasted to where the trial court observed the witness in person, in which case “its information is better than the appellate courts, and the appellate court will limit itself to determining whether the evidence is sufficient to support the trial court's ruling.” Id. at 105 (citations omitted).

Thus, in a child competency determination, the precise question posed by the “abuse of discretion” standard is whether, “[t]aking the record in the light most favorable to the State, could a trial judge reasonably find it to be more likely true than not true that

[the child] was capable of distinguishing truth from falsity?” Id. at 105-06. In Karpenski, the court answered this question in the negative:

At the outset of the competency hearing, Z took the oath and solemnly “promised to tell the truth about everything that happened.” He also promised not to “make up any stories.” Moments later, he was describing in vivid detail how he and his younger brother had been born at the same time. As the State notes on appeal, “This is impossible because Z is seven and his little brother is two.” As the trial court noted, this is “impossible” because it is “beyond understanding” that Z was in the room when his little brother was born. No one suggests that Z was intentionally lying; it seems that he actually believed what he was saying, and that he was merely manifesting his long-standing, often-observed inability to distinguish what was true from what was not. The trial court expressly found that Z was “testify[ing] as to an event that he could not possibly have recalled;” that he was “confused” regarding “dream versus reality;” and that he was “not old enough to be able to separate that confusion.” Inexplicably, however, it then concluded that Z was competent to testify. It is our opinion that the only reasonable view of this record is the one expressed by the trial court that Z lacked the capacity to distinguish truth from falsehood. Accordingly, we hold that the evidence is insufficient to support a finding that Z was capable of distinguishing truth from falsity, and that Z was incompetent to testify.

Id. at 106 (emphasis in original).

b. The evidence viewed in the light most favorable to the State did not support the determination that C.C. could distinguish truth from falsity, and therefore the trial court erred in finding him competent to testify. C.C. testified both for purposes of the competency hearing and at trial. Additionally, C.C. participated in a videotaped interview with Nichole Flacco. Several family members said C.C. “told tales” and even lied, 1RP 25, 35-36, 69, and these claims were amply substantiated by C.C.’s testimony.

At the competency hearing, immediately after he promised to tell the truth and drew elementary distinctions between “the truth” and “a lie,”<sup>5</sup> C.C. testified he had never spent the night at Rockport and that this was “the truth.” 3RP 19. He then stated he had never spent the day there when Carlson was there. 3RP 20. He obediently testified that Carlson had “touch[ed his] privates,” but then claimed this had happened “like a hundred” times.<sup>6</sup> 3RP 21. He said that after he told Misty what had happened, “Misty beat him up with a minute worth of chain.” 3RP 28. He then stated, confusingly, that Misty beat up Mike (not Carlson) and “her got that

---

<sup>5</sup> The prosecutor’s examples of “lies” included such hypotheticals as, “If I were to tell you that this lady sitting in front of you is a boy, would that be the truth or would that be a lie?” and “If I told you that eight came after one would that be right or wrong?” 6RP 16-18.

<sup>6</sup> Although the prosecutor established that C.C. could count to ten, 6RP 17, there was no indication that he understood larger numbers.

chain thing.” Id. He said that Mike put bruises on him “yesterday at Disney.”<sup>7</sup> 3RP 31. After explaining that he was “mad at Mike” for “him took me to wrestle and play,” C.C. said spontaneously, “I was doing this all day and make it big and big and big, and pop.” 3RP 32-33.

Defense counsel asked, “Did that really happen?” 3RP 33. C.C. responded, “Yes.” Id. Defense counsel asked, “Are you sure?” and C.C. said again, “Yes.” Id. Defense counsel asked “When?” and C.C. again said, “Yesterday.” Id. Defense counsel asked, “What was yesterday?” and C.C. told her, “Yesterday was Friday.” Id. In fact, C.C. testified on Monday, May 4, 2009, so “yesterday” was Sunday.<sup>8</sup>

C.C.’s trial testimony was no better. At trial, C.C. asserted that Carlson had touched him 50 times. 4RP 92. He explained to defense counsel that he had told “Ms. Rosemary”<sup>9</sup> that Carlson was to “go to jail” because he “touched my fender.” 4RP 105. He then said, “They say ha ha to Willy and me. I was just picking up all of the cars and throwing the back of his truck, Misty and us. And one

---

<sup>7</sup> There was no evidence C.C. had been to Disneyland, either “yesterday” or at any time in the past.

<sup>8</sup> See  
<http://www.timeanddate.com/calendar/monthly.html?year=2009&month=5&count ry=1>

<sup>9</sup> The trial prosecutor was Rosemary Kaholokula.

of my uncles dropped an escalator--” 4RP 106. At this point defense counsel interrupted and asked, “smashing the cars?” Id. C.C. responded, “yes.” Id.

C.C.’s testimony then devolved into complete fantasy:

Q (by defense counsel): What does that mean when somebody touches you? What does that mean?

A (by C.C.): Willy opened my closet in there. Ghost is haunted in my bedroom. And I shut the door, shut my bedroom door. And I would go up, so up to the ceiling.

Q: Was that fun?

A: I climbed on the ceiling, and I jumped on the end of the (indicating) -- oh, no. Oh, brother.

Q: Do you remember what I asked you before you said that, about the ghost in the closet?

A: And I runned away so fast. And I go -- (indicating sound.) And I got some, some -- I got the sun, and I go (indicating sound.) Back in my closet in the attic.

Q: Is that real?

A: Yeah.

Q: Is it?

A: (Shakes head up and down.)

4RP 108-09. C.C. then refused to answer further questions about what “touching” meant, and denied ever saying that Mike had “put

bruises” on him, although he had made this claim just four days earlier. 4RP 109-13.

Like the trial court in Karpenski, the trial judge here was confused about what the competency determination entailed:

The mental competency to receive an accurate impression about the events about which the witness is testifying, I don't know if that's supposed to be broader than simply the alleged criminal events or where he stayed, who he stayed with, what happened yesterday, whether he was in Disneyland or not[.]

3RP 37.

Yet, despite C.C.'s plainly untruthful answers, the court found, “He expressed the ability to know a truth from a lie” and noted that C.C. was able to tell the court his age, his birthday, what grade he was in, and the name of his teacher. 3RP 41. The court attributed C.C.'s fantastical answers to defense counsel to a waning attention span. 3RP 40-41.

The trial court's ruling was incorrect. Although C.C. asserted that Carlson had touched his “privates” and during the trial itself said this happened in Carlson's bedroom while C.C.'s pants and underwear were off, 4RP 88, 92, he otherwise could offer no detail about the touching or even tell the court what “touching” meant other than that it was a “bad thing.” 3RP 109. Despite having

parroted his obligation to tell the truth in court, C.C. immediately told several untruths, not all of which could reasonably have been attributed to a waning attention span. See e.g., 3RP 19-21, 28; 4RP 92. When pressed on these fictions, C.C. insisted they were true, or “real,” although they were controverted by evidence in the record or else consisted of outright fantasy.

Even with respect to the allegation underlying the charged offenses, C.C. made several related claims for which there was no factual support. For example, C.C. told Nichole Flacco that when Carlson touched him, it felt “like a turtle was biting him,” and as if his “wiener” was “sawed off.” 8RP 594-95. There was no evidence that C.C. suffered injury as a consequence of any improper contact. As in Karpenski, there was no credible evidence that C.C. was able to distinguish truth from falsehood as it pertained to his duty to tell the truth in court. The trial court erred in finding C.C. competent to testify.

c. The State did not establish that C.C. was competent at the time of alleged incidents. The court did not address the question of C.C.’s competency at the time of the described event, but instead focused solely on “whether he’s competent or not at this time.” 3RP 42. Under A.E.P., this

omission precludes a finding that C.C. was competent to testify.  
135 Wn.2d at 224.

In A.E.P., as here, the alleged child victim was unable to testify about when the alleged touching occurred. The Supreme Court observed, “If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it.” Id. at 225. The Court noted that the child herself could not answer questions about when the event occurred, and found that “[h]er confused answer raises questions about her capacity at the time of the alleged event.” Id. at 224.

The Court stressed, “[t]o be competent to testify, A.E.P. must have had the mental capacity at the time of the alleged abuse to receive an accurate impression of it.” Id. at 224 (emphasis in original). A child’s inability to recollect when an incident forming the basis of criminal charges occurred undermines the trial court’s capability to determine the child’s competency at the time of trial: “Without any concrete reference, there is no way to guarantee the child’s recall of details is based on fact, as opposed to fantasy.” Id. at 225.

As in A.E.P., the prosecutor did not even try to pinpoint when the alleged abuse occurred through C.C.'s testimony. 135 Wn.2d at 225. And no other witnesses were able to recall when C.C. made disclosures to them, let alone whether these disclosures were close in time to any alleged abuse. The Court in A.E.P. emphasized: "The [trial] 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." Id. at 225 (quoting Allen, 70 Wn.2d at 692). For this reason, even though A.E.P. had specifically stated that her father touched her "where she did not like," was able to describe what she was wearing at the time, told a detective that her father "poked her" with an index finger, and said that he touched her "inside," the Supreme Court held the trial court abused its discretion in finding her competent to testify. 135 Wn.2d at 218, 226.

Here, likewise, notwithstanding the deference accorded to a trial court's competency findings, this court's failure to engage in any inquiry regarding when the abuse occurred and that C.C. was competent at that time requires the competency determination be reversed.

2. IN VIOLATION OF CARLSON'S SIXTH AMENDMENT RIGHT TO CONFRONTATION, THE TRIAL COURT FAILED TO MAKE AN INDIVIDUALIZED DETERMINATION THAT MULTIPLE INSTANCES OF CHILD HEARSAY WERE NOT TESTIMONIAL.

The trial court also permitted multiple witnesses to testify as to child hearsay. The court did not first make an individualized determination that the multiple instances of child hearsay were non-testimonial. Indeed, in its findings of fact and conclusions of law, the court even relied on statements made to the Skagit County Prosecutor's child interviewer in support of its guilty verdict. The court's failure to make an individualized determination that the child hearsay was non-testimonial requires reversal.

The confrontation clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The State bears the burden of establishing that hearsay statements are not testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

A statement is testimonial if the declarant would reasonably expect it to be used prosecutorially. Crawford, 541 U.S. at 51-52. Statements are also 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.” State v. Alvarez-Abrego, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, No. 38151-6-II, 2010 WL 354371 at 5 (February 2, 2010).

Although a child’s statements to family members may be nontestimonial, the trial court must make “some threshold evaluation of the underlying circumstances to meet the constitutional strictures of Crawford and [Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)].” Alvarez-Abrego, 2010 WL 354371 at 6. In this case, although the trial court understood its obligation to determine whether admission of the statements would violate Carlson’s right to confrontation, the court assumed without analysis that statements to family members are not testimonial. 3RP 90. The court did not examine the various statements individually and did not consider the circumstances in which each statement was made.

Because the trial court did not make an individualized determination regarding each statement, multiple potentially testimonial statements were admitted. For example, although one of C.C.'s statements to Jennifer Carlson was made during an informal family gathering, C.C.'s second statement to her was made outside of the court clerk's office while she was in the process of applying for a restraining order against William Carlson. 4RP 120-22. C.C. made many statements to Nichole Flacco which were also considered at trial, even though these statements were made after a formal investigation had commenced. By the time Flacco interviewed him, C.C. understood that a potential consequence of Carlson's alleged conduct would be that he could "go to jail," 8RP 561, further underscoring the conclusion that his statements to Flacco were testimonial.<sup>10</sup>

In Alvarez-Abrego, the Court held that because the child witness did not testify, the trial court's failure to evaluate the circumstances surrounding the making of a statement violated the confrontation clause. Id. at 6. Here, because C.C. was not competent to testify, the admission of his statements similarly

---

<sup>10</sup> As the court concluded this disclosure supported conviction on one of the charged counts, CP 64, if the court erred in its competency determination, then this conviction must be stricken as it is based on testimonial hearsay.

violated the confrontation clause. Further, because the State did not attempt to meet its burden below, this Court cannot conclude from the scant record that it could have done so. Id. Carlson's convictions must be reversed.

3. THE HEARSAY STATEMENTS WERE  
UNRELIABLE AND SHOULD HAVE BEEN  
EXCLUDED.

Even assuming some of C.C.'s statements were not testimonial, their admission nevertheless violated the due process clause's guarantee that the evidence used to convict an accused person will be reliable. Under RCW 9A.44.120, proffered child hearsay is only admissible if:

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

RCW 9A.44.120.

In determining reliability under RCW 9A.44.120, the Supreme Court has identified nine factors that must be considered:

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;
7. Whether the declarant's lack of knowledge could be established by cross-examination;
8. The remoteness of the possibility that the declarant's recollection is faulty; and
9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

C.J., 148 Wn.2d at 683-84 (citing State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984)).

The trial court determined the statements were reliable because they were (1) made to several people; (2) spontaneous; and (3) made to family members. 3RP 87-88. The trial court also concluded C.C. had “no apparent motive to lie.” 3RP 88. In so ruling, the court abused its discretion.

C.C. had a reputation within his family for untruthfulness. 1RP 25, 35-36, 69. He knew that William Carlson was resented by several family members, including his mother. 1RP 38-39; 3RP 28-29; 4RP 104. C.C. also liked to please people and was known to say things that were not true in order to win favor. 1RP 36. Thus, although C.C. made statements to more than one person, in light of the dysfunctional family dynamic and C.C.'s awareness that accusing Carlson might win him favor, this factor carries little weight. This Court should conclude that the trial court abused its discretion in finding C.C.'s hearsay statements were reliable.

With respect to corroboration, the court identified two salient considerations: first, that Misty Carlson allegedly observed William Carlson put his hand down C.C.'s pants, and second, that when he stayed at Buckley's home, C.C. would throw up if he learned he was returning to Rockport. 3RP 88-90. But there was no evidence that C.C.'s physical response to going to Rockport was connected to Carlson. In fact, Buckley believed that C.C. disliked the home in Rockport because it was dirty and chaotic, not because William Carlson lived there. 1RP 93. Thus, the only "corroboration" of C.C.'s allegations was Misty Carlson's testimony. Of the two incidents she described, one occurred while C.C. and Carlson were

playing with a lift chair and did not appear to be intentional. 1RP 56. There was insufficient evidence to corroborate the unreliable hearsay statements.

#### 4. CARLSON'S CONVICTIONS MUST BE REVERSED.

A constitutional error is presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). On appeal, the State bears the burden of proving beyond a reasonable doubt that the result would have been the same absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The court violated Carlson's Sixth and Fourteenth Amendment rights when it concluded he was competent to testify and admitted unreliable hearsay without conducting an individualized determination of whether the statements were testimonial.

The same result is required even under the more lenient standard of review of an evidentiary error. Under this standard, an error in the admission of evidence merits reversal if there is a reasonable probability that the error affected the decision. State v. Floreck, 111 Wn. App. 135, 140, 43 P.3d 1264 (2002). Absent C.C.'s testimony, there was little evidence to support a conviction.

And clearly, had the hearsay been excluded, the State would have been unable to proceed. Carlson's convictions must be reversed.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Carlson's convictions for child molestation in the first degree.

DATED this 22<sup>nd</sup> day of February, 2010.

Respectfully submitted:

 <sup>2010</sup> for  
\_\_\_\_\_  
SUSAN F. WILK (WSBA 28250)  
Washington Appellate Project (91052)  
Attorneys for Appellant

## **APPENDIX A**

JH

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF SKAGIT

The State of Washington,

Plaintiff,

vs.

WILLIAM CARLSON,  
Defendant.

No.: 08-1-00656-4

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW IN BENCH  
TRIAL**

18

I. FINDINGS OF FACT

The defendant is more than thirty-six months older than C.C. Between the dates of September 1, 2007, and July 30, 2008, C.C. was five and six years of age and had never been married to anybody. Between those dates, the following specific acts of child molestation occurred:

1. M.C., C.C. and the defendant were at the extended family home in Rockport, Skagit County, Washington. C.C. and the defendant were on the couch. M.C. observed the defendant to put his hand down the front of C.C.'s pants and keep it there for up to a minute.
2. C.C. related an incident to Nicol Flacco that occurred in C.C.'s bedroom at the Rockport residence where the defendant pulled down C.C.'s pants and

000063

20

86

underwear, and put C.C. on the defendant's lap and touched C.C.'s  
genitals.

3. C.C. related an incident to Dorothy Buckley where C.C. and the defendant were in the defendant's trailer located in Rockport and the defendant pulled down C.C.'s pants and underwear, put C.C. on the defendant's lap, the defendant moved back and forth, and the defendant touched C.C.'s  
genitals.

M.C. had also related an incident where she observed the defendant grabbing C.C. in the genitals as C.C. was on or coming off of a "lift chair" at the Rockport residence. The court does not find that this incident was a criminal act. However, the court does find that the act described by M.C. that occurred on the couch at the Rockport home was an act of Child Molestation in the First Degree. The Court finds that the act disclosed by C.C. to Flacco was an act of Child Molestation in the First Degree. The Court finds that the act disclosed by C.C. to Buckley was an act of Child Molestation in the First Degree.

C.C. made the further following additional disclosures:

1. To Jennifer Carlson:
  - a) That the defendant pulled his pants down;
  - b) That the defendant pulled his pants down and touched his privates and  
that this happened a lot;
2. To Buckley:
  - a. That the incidents of the defendant touching C.C. happened many  
times;
3. To Andy Carlson:

- a. That the defendant puts C.C. on his lap and rubs back and forth and that the defendant touches C.C.'s privates;

4. To M.C.:

- a. That the Defendant was touching him in the wrong spots and it didn't feel right;
- b. M.C. overheard C.C. telling his younger cousins that he was going to touch their privates because the defendant touched his privates;

5. To Fawn Carlson:

- a. That C.C. asked why Willy touched him in his private area.

C.C.'s family is dysfunctional in its relationships with each other and its treatment of and care for C.C. It cannot be determined from the testimony of the family where, during various parts of the charged time frame, C.C. was actually residing.

The evidence does not support any sort of conspiracy of or among the family members to get C.C. to say things that weren't true.

The person who first reported C.C.'s disclosure was Dorothy Buckley. There is no motive for her to lie. In fact, the evidence shows that Buckley waited anywhere from forty-eight hours to two weeks before reporting the disclosure to CPS. When testifying, Buckley was more emotional for the defendant than she was for C.C. She did ultimately determine that her concern for C.C. outweighed her concern for reporting the allegations against the Defendant.

Andy Carlson appeared to testify honestly despite his motivation to protect his son, the defendant.

There was no evidence of any motive to embellish or coach C.C. on the parts of Jennifer Carlson, Fawn Fields, or M.C.

The defense argued that Jennifer's motivation was to gain occupancy of the Rockport residence. However, Jennifer's statement of C.C.'s disclosure was minimal and was unreported until Jennifer was approached first by law enforcement.

There was no motive on the part of Fawn to fabricate.

M.C. was only twelve at the time she reported the disclosure. It is not believable to conclude that she came up with a false disclosure or that she was coached into providing a false disclosure.

All of the disclosures of C.C. to the above named witnesses are consistent; i.e., that the defendant touched him on his genitals. The variations in the disclosures came in terms of the detail of the disclosure rather than the act described in the disclosure.

C.C. is a six year old child who is less attentive and articulate than the average six year old. It is not believable that C.C. even had the ability to make up the allegations and remain consistent throughout the multiple disclosures.

C.C. was able to accurately testify as to such details and which adults resided in the relevant addresses. He never accused any of the other adults in his life of sexually touching him.

The defendant had sole access to C.C. on many occasions for significant periods of time due to the defendant being placed in the role of caregiver for C.C. and also being the one who frequently provided transportation for C.C. from, to and among Buckley's home in Anacortes, the Rockport residence, and Fawn's home in Sedro Woolley.

*The defendant was more than thirty six months older than C.C. between the dates of Sept 1, 2007 and July 31, 2009, and C.C. was less than twelve years of age and not married to the defendant throughout all acts of molestation*

The sexual touching was done by the defendant for the purpose of sexual gratification.

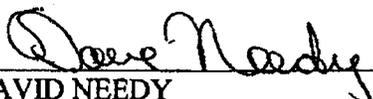
II. CONCLUSIONS OF LAW RE:

The defendant had sexual contact with C.C. on numerous occasions between September 1, 2007, and July 31, 2008. The sexual contacts occurred in Skagit County Washington at a time when C.C. was less than twelve years of age and not married to the defendant and the defendant was at least thirty six months older than C.C..

The defendant is guilty of both counts of child molestation in the first degree.

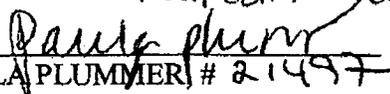
As to the aggravating factors alleged, the court finds that although C.C. was vulnerable, because his particular vulnerability arose from the family's negligence rather than any action of the defendant, the court will not affirmatively find this aggravating factor to exist. As to the second alleged aggravating factor, the court finds that although there were multiple episodes of sexual contact over a prolonged period of time, the court declines to use this factor as a basis for an exceptional sentence.

DATED this 1 day of July, 2009.

  
\_\_\_\_\_  
DAVID NEEDY  
SUPERIOR COURT JUDGE

Presented by:

  
\_\_\_\_\_  
ROSEMARY H. KAHOLOKULA, #25026  
Deputy Prosecuting Attorney

Copy received and approved to form:  
*with corrections noted*  
  
\_\_\_\_\_  
PAULA PLUMMER, # 21497  
Attorney for Defendant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	COA NO. 63652-9
Respondent,	)	
	)	
v.	)	
	)	
WILLIAM CARLSON,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

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

1. THAT ON THE 22ND DAY OF FEBRUARY, 2010, A COPY OF *APPELLANT'S OPENING BRIEF* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES LISTED.

Rosemary Hawkins Kaholokula  
Skagit County Prosecuting Attorney  
605 S 3rd St  
Mount Vernon WA 98273-3867

William Carlson  
330798  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

FILED  
COURT OF APPEALS  
2010 FEB 22 PM 4:42

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2010

x- Ann Joyce