##### STATE’S TRIAL BRIEF: ASSORTED ISSUES

**Competency to Testify**

##### Child Hearsay

**Use of Colposcope**

**Testimony by Expert at Trial**

**Defendant’s Drug Use**

##### State of Washington

 Defendant is charged by second amended information with the following crimes: four counts of First Degree Statutory Rape/Rape of a Child in the First Degree; one count of Attempted First Degree Statutory Rape/Attempted Rape of a Child in the First Degree; two counts of Indecent Liberties; one count of First Degree Statutory Rape; three counts of Indecent Liberties/Child Molestation in the First Degree, and one count of Sexual Exploitation of a Minor. His co-defendant, Tom Jones, is charged with one count of Sexual Exploitation of a Minor, two counts of Indecent Liberties/Child Molestation in the First Degree, and one count of Indecent Liberties. The basic facts of the case are set forth in the original and supplemental affidavits of probably cause. The victims in this case are B.D., M.D., and J.D.. The birth mother of the D. children was married to defendant S. at the time of the crimes charged. Mr. S. and Mr. J. were friends at the time. Mr. J. also partook in the abuse of the children.

 All three D. children are under nine.

 This case will present a variety of legal issues, some of which are discussed below.

1. **COMPETENCY TO TESTIFY**

 The State intends to call all three D. children as witnesses. The State is confident that the older two children, B.D. and M.D., will be found competent to testify. J.D., who is now five and was as young as three at the time charged for the crimes, may present a closer question.

 There are no age limitations for competency of child witnesses in Washington. Wash. R. Evid. 601. However, a child must have capacity to receive just impressions of the facts about which the child is examined, and the child must be able to relate those facts truly. CrR 6.12(c), RCW 5.60.050.

 A long line of Washington cases establishes the following factors to determine whether a child is competent to testify:

1. an understanding of the obligation to speak the truth on the witness stand;
2. the mental capacity, at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
3. a memory sufficient to retain an independent recollection of the occurrence;
4. the capacity to express in words his memory of the occurrence; and
5. the capacity to understand simple questions about it.

The determination of the witness’ ability to meet the requirements of this test… rest(s) primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. There are matters that are not reflected in the written record for appellate review. Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of a manifest abuse of discretion.

*State v. Allen*, 424 P.2d 1021, 1022 (1967).

 The second prong of the *Allen* test may be inferred by the court on the basis of the child’s “overall demeanor and the manner of his/her answers…” *State v. Sardinia*, 713 P.2d 122, 125 (1986). There is no requirement that the child testify about the particular issue in controversy at the competency hearing. *State v. Przybylski*, 739 P.2d 1203, 1205 (1987). At a minimum, however, he/she should be able to testify about events contemporaneous with that incident. *Przybylski*, 739 P.2d at 1205; *Sardinia*, 713 P.2d at 125.

So long as the witness demonstrates by his/her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding these incidents as well. At trial, the defendant is then free to impeach the child witness’ credibility, like any other witness, by pointing out inaccuracies and inconsistencies in his/her testimony.

*Przybylski*, 739 P.2d at 1205.

 Reported opinions of the courts of this State have indicated that children as young as 3-1/2 have been qualified as competent, and that the determination of competency is to be based on the intelligence of the child and rests within the discretion of the trial court. *State v. Hunsaker*, 693 P.2d 724 (1984).

 Callowness is not necessarily an impediment of finding a child competent. For example, embarrassment or extreme difficulty in talking about the incident does not render the child witness incompetent. *State v. Johnson*, 639 P.2d 1332 (1982); *State v. Justiniano*, 740 P.2d 872, 875 (1987).

 Similarly, inconsistencies in statements concerning the event do not preclude the court from finding a child capable to testifying. *State v. Stange*, 769 P.2d 873, 875 (1989), *State v. McKinney*, 747 P.2d 1113, 1117 (1987); *Przybylski*, 739 P.2d at 1205; *State v. Woodward*, 646 P.2d 135 (1982). In addition, the inability of a child to explain the difference between the truth and a lie does not make the child incompetent. *State v. Sims*, 480 P.2d 228 (1971).

 The focus of the court’s assessment is whether the child is competent at the time of his/her testimony, not his/her competence at the time of earlier declarations which may be admissible through the child hearsay statute. *State v. Doe*, 719 P.2d 554, 557-58 (1986); *State v. Clark*, 765 P.2d 916 (1988); *State v. Hunt*, 741 P.2d 566, 569-70 (1987). The *Hunt* court stated:

… we reject Hunt’s contention that the trial court, in addition to carrying out the statutorily required determination that the ‘time, content, and circumstances’ provides sufficient indicia of reliability, must make a separate finding regarding testimonial competency of the child declarant at the time the statements were made.

Given the delay that frequently occurs between the time of a statement and the time of trial and the age of victims, we question whether the trial court could, in many cases, determine in any meaningful sense the declarant’s testimonial competence at the time of the statement. More important, a finding of testimonial incompetence at the time of the hearsay statements would not necessarily affect reliability. *Id.*

 The State, therefore, urges the Court to listen to the testimony of the children in light of the authority discussed above, making allowances for their youth, yet giving them credit for their intelligence.

1. **CHILD HEARSAY**

 Statements made by the children to others describing any act of sexual contact is admissible if the court finds:

1. The statements have sufficient indicia of reliability and *either*

2a) The child testifies at the trial; or

2b) There is corroborative evidence of the act.

RCW 9A.44.120; *State v. Ryan*, 691 P.2d 197 (1984).

 There are nine factors that the court must consider in determining reliability. All of the factors need not be in favor of admission, *State v. Jackson*, 711 P.2d 1086 (1985). The court may decide what weight to put on each factor. The factors are:

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. Whether the statements were made spontaneously.
5. The timing of the declaration and the relationship between the declarant and the witness.
6. The statement contains no express assertion about past fact.
7. Cross-examination could not show the declarant’s lack of knowledge.
8. The possibility of the declarant’s faulty recollection is remote.
9. The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant’s involvement.

*State v. Ryan*, 691 P.2d 197 (1984); *State v. Gitchell*, 706 P.2d 1091 (1985). But see *State. Stange*, 769 P.2d 873 (1989), which states that express assertion of past fact is no longer a *Ryan* factor.

 While the court should consider the spontaneity of the child’s remarks, the statements may be in response to questions. *State v. Henderson*, 740 P.2d 329 (1987); *State v. Robinson*, 722 P.2d 1379 (1986).

 Other factors courts have considered in assessing the reliability of a child hearsay statement include whether the substance of the statement would ordinarily be beyond the child’s realm of experience, *State v. Frey*, 718 P.2d 846 (1986); *Gitchell*, *supra*, and whether there was a predisposition by the witness to believe that the defendant committed sexual abuse. *State v. Ramirez*, 730 P.2d 98 (1986); *Robinson*, *supra*.

 The child hearsay statements sought to be admitted in this trial can be roughly categorized into three groups: statements made to the children’s parents, statements made to police personnel, and statements to staff at W. Mental Health, where the children went for counseling. Oral argument will be presented after testimony that the statements made by the children in these three settings are sufficiently reliable to permit their admission at trial.

 In the event that a child is unable to testify at trial, the hearsay statements are still admissible if there is some corroboration of the sexual abuse. The corroboration need not itself be admissible. *State v. Jones*, 772 P.2d 496 (1989).

 Corroboration under its usual meaning would include eyewitness testimony, physical evidence, or a confession. In addition, descriptions of the child’s behavior such as bed-wetting, nightmares, etc., has been held to be corroborative that an act occurred. *See In re Penelope B.*, 709 P.2d 1185 (1985). Precocious knowledge of sexual activity also constitutes corroboration. *Jones*, 772 P.2d at 499-500.

 In the case at bar, the State intends to produce the witness testimony of J.D.’s siblings as corroboration of the abuse he suffered. Testimony of other children can be corroboration of the act alleged under the child hearsay statute. *State v. Justiniano*, 740 P.2d 872 (1987).

 The State will also call Dr. C.R. to testify concerning a physical examination she made of J.D. and how her observations are consistent with a child who was experienced anal penetration. This is the type of intercourse John has spoken of in his statements to others. Medical evidence interpreted to be consistent with sexual abuse is sufficient corroboration under the statute to justify admission of child hearsay when the child is unavailable as a witness. *Gitchell*, *supra*; *Justiniano*, *supra*. The State will also offer as corroborative evidence unusual behavior by the children such as acting out sexually, enuresis, encopresis, and nightmares. S.L. will testify (outside the presence of the jury and in support of admission of the hearsay statements), that based on her expertise, demonstrations of this type by a child are indicative of sexual abuse. Case law supports the use of behavioral peculiarities as corroboration of child hearsay statements, particularly when explained by an expert. *State v. Hunt*, 741 P.2d 566 (1987) (play with anatomically detailed dolls and explanation as corroborative evidence); *State v. Claflin*, 690 P.2d 1186 (1984).

 The evidence will show the precocious knowledge of sexual activity on the part of all three children as well. Such knowledge also corroborates the statements made.

1. **USE OF COLPOSCOPE**

 The Court will hear that the physical examinations of the children was done with assistance of a colposcope.

 A colposcope is little more than a magnifying instrument which enables a physician to perform a detailed genital examination. Photography equipment may be built into the colposcope, yielding photographic slides of the vagina or anus to depict trauma. The colposcope has been used for many years and does not involve any new or novel scientific principles which might require court review for acceptance in the community. *State v. Black*, 745 P.2d 12 (1987); *State v. Canaday*, 585 P.2d 1185 (1978).

1. **TESTIMONY BY EXPERT AT TRIAL**

 The State will call S.L. of \_\_\_\_\_\_\_ Mental Health and \_\_\_\_\_\_\_ Community College at both the child hearsay hearing and the trial. She will testify about various behavioral phenomena of abused children. Her testimony will include a discussion of delayed and drawn out disclosure. Ms. L.’s experience and education establish her expertise to testify on the topics for which she will be called. Wash. R. Evid. 702.

Expert testimony is often necessary to explain the affect and behaviors of children during the disclosure process and during the child’s courtroom testimony, especially where the behaviors and affect may be different than juror’s common expectations. *See*, *e.g*., Susan Morison and Edith Greene, *Juror and Expert Knowledge of Child Sexual Abuse*, 16 Child Abuse and Neglect 595 (1992), providing empirical data on the lack of knowledge jurors have in many areas of child sexual abuse, supporting the need for expert testimony to assist them in their decision making; Nick Maroules and Charles Reynard, *Voir Dire in Child-Victim Sex Trials: A Strategic Guide for Prosecutors*, Illinois State's Attorney Appellate Prosecutor Child Witness Project (1993), summarizing results of prospective juror’s expectations regarding child sexual abuse vicitms. *See also*, Masaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395 (1985).

Expert testimony may also be necessary where the child’s interview with law enforcement or social workers is videotaped and will be shown to the jury. Research reveals that while jurors place a large emphasis on the demeanor and appearance of child witnesses in rating their credibility, such reliance is frequently misplaced. *See*, Pamela C. Regan and Sheri J. Baker, *The Impact of Child Witness Demeanor on Perceived Credibility and Trial Outcome in Sexual Abuse Cases*, 13(2) Journal of Family Violence 187-195 (1998). For a summary of past research findings see Bette L. Bottoms & Gail Goodman, *Perceptions of Children’s Credibility in Sexual Assault Cases*, 24(8) Journal of Applied Social Psychology 702-732 (1994). For example, expert testimony often is necessary to explain to jurors the reasons for a child’s poor or idiosyncratic courtroom demeanor. Without expert testimony to disabuse jurors of their misperceptions it is likely that jurors will reach the wrong conclusions from the evidence presented.

Despite recent attacks on the use of expert witnesses by the prosecution in sexual abuse cases, case law generally supports their use. See generally, John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1 (1989); John E.B. Myers, *Evidence in Child Abuse and Neglect Cases*, 3d ed., Chapter 5 (1997). This is especially true when the expert is testifying that the child’s behaviors are typical of those children who are victimized, or are not inconsistent with children who have been abused, rather than having the expert offer an opinion that the child was abused because of the behaviors displayed.

 Typical characteristics of sexually abused children are relevant in a case where sexual abuse is charged and the victims have displayed such characteristics. *State v. Maule*, 667 P.2d 96 (1983).  *See also*, William N. Friedrich & Patricia Granbasch, et. al., *Child Sexual Behavior Inventory: Normative and Clinical Comparison* 4(3) Psychological Assessment 303-311 (1992), discussing empirical research supporting the position that age inappropriate sexual knowledge and behavior is significantly associated with child sexual abuse; Frank Lindblad, et. al., *Preschoolers’ Sexual Behavior at Daycare Centers: An Epidemiological Study*, 19(5) Child Abuse & Neglect 569-77 (1995), discussing the low incidence of sexualized behavior or play for this age group; Marsha Heiman, et al., *A Comparative Survey of Beliefs About “Normal” Childhood Sexual Behaviors*, 22(4) Child Abuse & Neglect 289-304 (1998), discussing beliefs held by public and professionals regarding these behaviors in children.

 Testimony educating the trier of fact about the reasons for a child’s delay in reporting is also admissible. *State v. Madison*, 770 P.2d 662, 666 (1989) (citing *State v. Ciskie*, 751 P.2d 1165 (1988) and *State v. Petrich*, 683 P.2d 173 (1984)). Behavioral science research supports the conclusion that delayed reporting of abuse by children, and the display of various seemingly paradoxical behaviors by abused children are not unusual. *See generally*, Sorenson & Snow,  *How Children Tell: The Procwsss of Disclosure in Child Sexual Abuse*, 70(1) Child Welfare (1991); McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecution*, 77 J. Crim. L. & Criminology 1, 1-68 (1986). *See also*, Tom Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation Syndrome*, to appear in J. Conte, (ed.), The Knowns and Unknowns of Child Sexual Abuse: Essays in Honor of Roland Summit; and Myers, *Evidence in Child Abuse and Neglect Cases*, *supra*, summarizing this research.

 Studies have also shown that children may refuse to disclose abuse even when there are medical findings indicative of sexual abuse. *See* Howard Dubowitz, M. Black, & D. Harrington*, The Diagnosis of Child Sexual Abuse*, 146 Am. J. of Diseases of Children 688-93 (1992); Louanne Lawson & Mark Chaffin, *False Negatives in Sexual Abuse Disclosure Interviews: Incidence and Influence of Caretaker’s Belief in Abuse Cases of Accidental Abuse Discovery by Diagnosis of STD*, 7 J. Interpersonal Violence 532-42 (1992); Stacy Gordon & Paula K. Jaudes, *Sexual Abuse Evaluations in the Emergency Department: Is the History Reliable?* 20(4) Child Abuse and Neglect 315-322 (1996).  *See also*,Karen J. Saywitz, et al., *Children’s Memories of Physical Examinations Involving Genital Touch: Implications for Reports of Child Sexual Abuse.* 59 Journal of Consulting and Clinical Psychology 682-91 (1991).

1. **EVIDENCE OF DEFENDANT’S COCAINE USE**

 State will offer evidence at trial that defendant exchanged pornographic pictures of the D. children for cocaine. Such evidence is directly relevant to the charge of Sexual Exploitation of a Minor (Counts XII and XIV of Information.) Moreover, a jury is entitled to know the entire story surrounding a crime. *State v. Tharp*, 637 P.2d 961 (1981); *State v. Rahier*, 681 P.2d 1299 (1984). This is true even if the surrounding facts make reference to unlawful drugs. *See State v. Brower*, 721 P.2d 12, 15-16 (1986); *State v. Traweek*, 715 P.2d 1148, 1151 (1986); *State v. Clark*, 743 P.2d 822, 830-31 (1987); *State v. Brooks*, 579 P.2d 961 (1978) (evidence that defendant offered to pay for commission of crime with drugs held admissible).

Respectfully submitted this \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ day of March, \_\_\_\_\_.

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Deputy Prosecuting Attorney