No. 83415-6

OWENS, J. (dissenting) -- The constitutional requirement of due process of law and the trial procedures that derive from it exist to safeguard against wrongful convictions. This case is about what process is constitutionally required to protect a defendant from facing trial based on incompetent witness testimony. Our deferential review of a trial court's competency determination for abuse of discretion is premised on our appreciation that it is the trial judge who can see, hear, and otherwise observe a witness's testimony, replete with mannerisms, tone, poise, and any unease or hesitations. Here, the trial court had no such opportunity because it refused to allow for the pretrial testimony of a witness whose competency was *credibly* challenged. The majority digresses from the question presented and perilously extends this court's precedent to arrive at its conclusion that the trial court's refusal was not error and, regardless, was harmless. I cannot agree with the majority's reasoning or conclusions

on these points, so I must dissent.

I. The Trial Court Abused its Discretion and Disregarded Due Process Requirements by Excluding a Witness's Testimony at that Witness's Competency Hearing

Courts have established that, "[a]fter a defendant raises a colorable objection to the competency of a witness, the trial court must perform 'a reasonable exploration of all the facts and circumstances' concerning competency." *Walters v. McCormick*, 122 F.3d 1172, 1176 (9th Cir. 1997) (quoting *Sinclair v. Wainwright*, 814 F.2d 1516, 1523 (11th Cir. 1987)). A court's failure to perform an adequate competency hearing implicates a defendant's due process rights. *See id.*; *Sinclair*, 814 F.2d at 1522-23 ("if the challenged testimony is crucial, critical or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness" (citing *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir. 1976))). "[A] hearing into the competency of a defendant (or a witness) *must* be as careful and complete as reasonably feasible in order to insure a fair trial." *United States v. Crosby*, 149 U.S. App. D.C. 306, 462 F.2d 1201, 1203 (1972) (emphasis added) (footnote omitted).

Before William Brousseau's trial, upon his motion, the trial court held a competency hearing concerning J.R., the child victim witness. Brousseau's motion challenging J.R.'s competency was supported by expert opinion. Clerk's Papers at 61. The trial court's decision to hear the issue obligated it to hold a fair hearing that adequately explored the issue of competency. After expert testimony from Dr. Walter Scott Mabee, a psychologist, that J.R.'s competency was impaired, Brousseau, in line

with usual competency hearing practice, called J.R. as the next witness. The trial court refused to hear directly from J.R. but nonetheless found her to be competent. Brousseau argues that "J.R. was not competent to testify," Appellant's Br. at 10, and that "[t]he trial court's determination that J.R. was competent to testify is erroneous," *id*. at 1. I would hold that the trial court's finding of competency was an abuse of discretion. Refusal to evaluate a witness whose competency is credibly challenged is simply not a reasonable or adequate exploration of competency; it is error that contradicts due process of law.

The majority oversteps the due process question presented by this case when it argues that Brousseau did not make a sufficient threshold showing of J.R.'s incompetence to necessitate a hearing on the matter. Brousseau's challenge has to do with the sufficiency of the inquiry the court conducts, not its decision to conduct one. Here, because the trial court decided to hold a competency hearing, the relevant issue is only whether the hearing and the decisions made at the hearing were constitutionally firm.[1]

I accept the majority's choice to apply the *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), balancing test to the due process challenge

[1] Brousseau's trial predated our decision in *State v. S.J.W.*, 170 Wn.2d 92, 239 P.3d 568 (2010) (holding that all witnesses, even children, are presumed competent and that the party challenging competency bears the burden of proof). The question of what threshold showing is required to compel a competency hearing was not considered by the *Brousseau* trial court and is not properly before us.

in this case because the witness competency statute, RCW 5.60.050, is a general evidentiary law that is applicable in both civil and criminal cases.[2] However, I briefly note that even under a criminal due process analysis, considering historic or traditional practices and conceptions of fundamental fairness, I would reach the same conclusion: due process requires that a trial court conduct a full competency hearing that includes, if requested, testimony by the witness whose competency is challenged when a defendant raises a *credible* competency challenge. Historic cases indicate such practice.

In 1895, the United States Supreme Court upheld a child witness competency determination on the basis that the trial court judge evaluated the witness before trial. *Wheeler v. United States*, 159 U.S. 523, 525, 16 S. Ct. 93, 40 L. Ed. 244 (1895) ("[T]he trial judge . . . sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath."). The *Wheeler* Court looked to British common law, particularly quoting *The King v. Brasier*, 1 Thomas Leach, Cases in Crown Law 199 (4th ed. 1815), which stated that the admissibility of children's testimony "'depends upon the sense and reason they entertain of the danger and impiety of falsehood, *which is to be collected*

[2] *Mathews* is typically not applied to scrutinize due process challenges in criminal cases. *State v. Heddrick*, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009); *Medina v. California*, 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992).

from their answers to questions propounded to them by the Court.'" *Wheeler*, 159 U.S. at 525 (emphasis added) (quoting Leach, *supra* at 200). At that time, the states also followed a similar process, relying on trial courts to examine child witnesses to determine their competency to testify at trial. *See, e.g.*, *State v. Juneau*, 88 Wis. 180, 182-83, 59 N.W. 580 (1894); *McGuff v. State*, 88 Ala. 147, 151, 7 So. 35 (1889); *Commonwealth v. Mullins*, 84 Mass. (2 Allen) 295, 296 (1861); *State v. Jackson*, 9 Or. 457, 459 (1881) ("It is for the court, *by means of a preliminary examination*, to decide the question of their competency when they are offered as witnesses." (emphasis added)). Such practice is broadly accepted at present. *See, e.g.*, 18 U.S.C. § 3509(c)(7) ("Examination of a child related to competency shall normally be conducted by the court."); *State v. Ryan*, 103 Wn.2d 165, 172, 691 P.2d 197 (1984) ("Guidelines for the trial court in reaching its determination [of competency] presume that the court has examined the child, observed his manner, intelligence, and memory."). And, courts have described failure to provide an appropriate witness competency hearing as a matter of fundamental fairness. *Sinclair*, 814 F.2d at 1522-23.

Under *Mathews*, we balance three factors to determine whether the competency hearing violated Brousseau's due process rights: (1) the private interest at stake, (2) the risk that an individual will be wrongly deprived of that interest, and (3) the

government's interest. 424 U.S. at 335. While the majority accurately finds that Brousseau has a significant interest in his liberty, it skews the remainder of the analysis and confuses the question of whether there was error with whether it was harmless.

The State's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," *id*., is minimal. *See State v. Maule*, 112 Wn. App. 887, 893, 51 P.3d 811, 77 P.3d 362 (2002) ("the State's interest in testimony from a witness who is incompetent is nil"). Once a trial court has decided to conduct a competency hearing there is little additional burden in allowing for testimony by the witness whose competency is challenged. In fact, it is the usual procedure at such hearings. *See*, *e.g.*, *Ryan*, 103 Wn.2d at 172; 18 U.S.C. § 3509(c)(7).

The majority discusses the burden on the witness and the State's interest in protecting witnesses. However, at the point of a competency challenge, a witness has already agreed to participate in a trial. In the context of an investigation and trial, a witness is subject to multiple interviews, and, contrary to the majority's suggestion, elimination of a competency hearing does not bring the number of interviews to only one. While not nothing, the burden on the witness to testify is less than a defendant's liberty interest and is the necessary price we pay to assure a fair trial based on

competent testimonial evidence. Importantly, a trial court retains its authority to protect witnesses from harassment or embarrassment by refusing to allow harassing or unnecessarily embarrassing questions. This court has specifically allowed trial courts to use their discretion to accommodate the needs of a child witness but has done so premised on the fact that the child witness appeared before the judge. *See, e.g.*, *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1988) (finding no reversible error where the trial court judge allowed the child witness to whisper answers that were then repeated by a social worker during the child's competency hearing); *Maule*, 112 Wn. App. at 889 (holding that due process was not violated when the trial court refused to allow the defense to cross-examine the witness at the competency hearing after the State had asked questions before the trial court). Moreover, there is no evidence or suggestion in this case that J.R. would have been traumatized by giving testimony at the competency hearing.

Looking to the final due process consideration, the risk of error• that incompetent testimony will be admitted at trial and used as a basis for conviction• is unduly high when a trial court refuses to conduct a full pretrial exploration of a witness's competency when it is subject to a credible challenge. This court has repeatedly emphasized the significance of the trial court's direct observation of a child in a competency hearing, noting that "[t]he determination of competency rests

primarily with the trial judge who sees the witness, notices his or her manner and demeanor, and considers his or her capacity and intelligence." *State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2003) (citing *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990)); *see State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Also, in relevant part, RCW 5.60.050(2) provides that "[t]hose who *appear* incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" shall not be competent to testify. (Emphasis added.) The statute employs language that implies appearance before a judge since it is the judge who makes competency determinations. I would not abandon this court's consistent good sense about the role of a trial judge where witness competency is credibly challenged.

While observation of a witness at trial is an important backup safeguard against the admission of incompetent testimony, it is just that• a backup. Competency determinations should not be left until trial when there is a credible challenge made in advance. The purpose of a competency hearing is, after all, to determine whether certain testimony is admissible. Analogously, there is a reason that evidentiary suppression hearings are typically held, upon credible motion, in advance of trial: so inadmissible evidence is never introduced. There is great risk at trial that incompetent testimony will not be revealed as such. If the prosecuting attorney explored competency issues during direct examination of a witness, such questions might

violate the rule prohibiting the bolstering of a witness's credibility before any attempted impeachment. Cross-examination is limited by the scope of direct examination and to issues of credibility, creating a real chance that questions relating to competency may never survive objection. Where there is concern, as there was in this case, about whether the witness has independent recall of the alleged incident, an incompetent witness might fluidly testify, all the while appearing competent despite serious deficiencies.[3] This is especially true with child victim witnesses, for whom trial courts allow the broad use of leading questions on direct examination and common answers are simply "yes" or "no." Despite the *possibility* that questions relating to competency might be asked and that competency can be raised anew at trial, competency is significantly a question of law, not an issue of credibility for the jury. Accordingly, the trial court should be expected to fully scrutinize witness competency before trial, upon a credible challenge.

Brousseau's interest in his liberty is high, while the State's interest, even

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[3] In *Swan*, for example, we upheld a trial court's determination that a child witness was incompetent based on her answers to questions unique to a competency hearing:

> R.T. said that her birthday was in "higher June". She also said she had been in the courtroom 40 times (she had never been there before) and that it was Saturday, although it was not. . . . The court then asked R.T. if it would be the truth or a lie if she said she was wearing a pink dress. Though her dress was pink, R.T. said it would be a lie because her dress was long. R.T. then said her dress was "blue, sort of, but it's pink."

114 Wn.2d at 646. It is doubtful that questions eliciting these types of answers could be adequately explored in direct or cross-examination.

factoring in witness protection, is minimal. Absent an adequate pretrial hearing, the risk that incompetent testimony will be admitted at trial is too high, especially here, where a credible competency challenge included expert opinion that J.R.'s capacity to independently recall the incident about which she would be giving testimony was limited. As a result, the trial court denied Brousseau due process of law when it refused to hear testimony from J.R. at her competency hearing.

In reaching the opposite conclusion, the majority conflates this case with *State v. S.J.W.*, 170 Wn.2d 92, 239 P.3d 568 (2010). *S.J.W.* did not address what threshold showing a defendant must make in order to justify a competency hearing or whether, during such a hearing, the trial court must, at the request of the defense, hear from the witness whose competency is challenged.[4] Consideration of these issues now is misguided because it strays from the issues raised and argued by the parties in both cases.

The majority argues that our entire framework for adjudicating witness competency has changed in light of *S.J.W.* Certainly, we recognized the statutory presumption of competence and that the party challenging competency bears the

[4] In *S.J.W.*, the trial court held a competency hearing. 170 Wn.2d at 95. While the witness whose competency was challenged in *S.J.W.* did not testify, the facts differ from this case in that the defense in *S.J.W.* did not call that witness at the competency hearing, *id*., whereas Brousseau did. Nevertheless, this court did not consider whether failure to hear from that witness violated S.J.W.'s due process rights because the only question on review, raised by the State, was which party bears the burden at competency hearings. *Id*. at 94.

burden to prove otherwise. We did not, however, nor should we, disturb the expectation that a witness be able to perceive, remember, and truly relate the relevant details about which he or she is called to testify. *See Ryan*, 103 Wn.2d at 171 (holding a witness must be "'possessed of sufficient mind and memory to observe, recollect, and narrate the things he has seen or heard.'" (quoting *State v. Moorison*, 43 Wn.2d 23, 28-29, 259 P.2d 1105 (1953))). Nor did we disturb the rule that the trial court must fully scrutinize competency when a colorable challenge is raised. *S.J.W.*, 170 Wn.2d at 100 ("A child's competency is now determined by the trial judge within the framework of RCW 5.60.050, while the *Allen* factors serve to inform the judge's determination."); *see* 18 U.S.C. § 3509(c)(4) (providing for the direct examination of a child at a witness competency hearing upon a showing of compelling reasons). We cannot both leave the burden of proving incompetency with defendants and deprive them of a procedurally sound hearing, the means of meeting their burden.

While the question of what threshold showing is required to get a competency hearing is not properly before this court, I am nonetheless moved to comment on the matter because the majority's venture into this issue is not only extraneous but unsound. Brousseau presented the findings of a licensed psychologist, Dr. Walter Scott Mabee of Spokane, who has extensive experience in clinical and pediatric psychology. Verbatim Report of Proceedings (VRP) (Mar. 27, 2007) at 24-26. Dr.

Mabee concluded that "[J.R.'s] capacity for offering accurate testimony I believe is impaired." *Id*. at 48. In relevant part, Dr. Mabee found that J.R.'s "memory capacity is less than what you would expect for a seven-year-old," *id*. at 71, and that her capacity to *independently* recall the incident about which she would be giving testimony was limited, *id*. at 62.[5] These concerns directly implicate the statutory designation that a witness who "appear[s] incapable of receiving just impressions of the facts . . . or of relating them truly" is incompetent to testify. RCW 5.60.050(2). This simply is not a case involving a "bare assertion" of incompetence. *Cf. State v. China*, 312 S.C. 335, 339-40, 440 S.E.2d 382 (Ct. App. 1993) ("Lack of capacity may be evidenced by . . . the presentation to the court of the witness' psychological profile through expert testimony."). If testimony by an examining psychologist that indicates serious deficiencies in a seven-year-old child's competency is not a threshold showing of a witness's incompetence, what is?

I am not convinced that the majority's suggestion that a hearing was unnecessary in this case would withstand scrutiny by the federal courts. In *Crosby*, for example, the D.C. Circuit held that due process was violated, even where the trial court examined the witness whose competency was challenged, on the basis of his history of drug addiction, because the court did not *also* evaluate the witness's medical

[5] Dr. Mabee elaborated that J.R.'s description of the event was a "pneumonic device" or an "automatic phrase," indicating to him that how J.R.'s memory "got stored may not be based solely upon direct experience." VRP (Mar. 27, 2007) at 43.

records. 462 F.2d at 1203. The *Crosby* court specifically observed that the defendant "properly received, from the learned District Judge a voir dire examination, out of the presence of the jury, of the government's chief witness . . . for the purpose of ascertaining whether or not he was incompetent to testify." *Id*. at 1202; *see Sinclair*, 814 F.2d at 1523 ("Only by a reasonable exploration of all the facts and circumstances could the trial judge exercise sound discretion concerning the competency of the witness."); *Walters*, 122 F.3d at 1176 (finding that there was no due process violation because "the court conducted a lengthy hearing[,] . . . questioned [the witness], and *also* invoked the assistance of a child psychiatrist" (emphasis added)). Again, I would find that it was error for the trial court here to refuse to examine a child witness whose competency was credibly challenged on the basis of expert testimony.

II. The Trial Court's Error Was Not Harmless

The purpose of procedural due process in the context of a criminal trial is to assure "'the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Brousseau claims that J.R. was incompetent to testify. While it is true that Brousseau, or any party challenging a witness's competency, bears the burden to prove incompetence, at its core, Brousseau's claim is that the procedure in the pretrial competency hearing

was so lacking that we cannot rely on its results or conclude that it substantiated a fair trial. Such error is constitutional in nature. "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Here, there was constitutional error, and there is no certainty of outcome absent the error. If J.R. was *incompetent* to testify, the only evidence at trial would have been hearsay statements from four other witnesses that J.R. told them that Brousseau had abused her. There would be no physical evidence, no victim testimony, and no eyewitnesses to the incident. Under those circumstances, a jury clearly could have reasonably found Brousseau not guilty. To find harmless error, we therefore must be convinced beyond a reasonable doubt that J.R. was competent to testify. I am not so convinced. Moreover, I cannot find any argument in the majority that addresses or establishes that this high standard is met.

"'There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.'" *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (quoting *State v. Borland*, 57 Wn. App. 7, 11, 786 P.2d 810 (1990), *overruled on other ground by*

State v. Rohrich, 132 Wn.2d 472, 481 n.16, 939 P.2d 697 (1997)). The witness's manner, capacity, and intelligence "'are matters that are not reflected in the written record for appellate review.'" *Swan*, 114 Wn.2d at 645 (quoting *Allen*, 70 Wn.2d at 692); *cf. Borland*, 57 Wn. App. at 11 ("The trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation [of competency] but are not reflected in a written record."). It is therefore very difficult to be convinced of competency beyond a reasonable doubt merely by looking at a written record on appeal.

The majority points to *State v. Guerin*, 63 Wn. App. 117, 816 P.2d 1249 (1991), and *Woods*, 154 Wn.2d at 617, to argue that a reviewing court can look at the entire record, including J.R.'s testimony at trial, to review a competency determination. Both cases, however, importantly involved a pretrial competency hearing, during which time the trial court heard testimony from the child whose competency was challenged. *Guerin* involved a pretrial and trial challenge to the witness's competency. 63 Wn. App. at 121-22. The Court of Appeals reviewed the trial record only in the context of the defense's renewed challenge to the child's competency *at trial*. *Id*. (finding that "the trial court conducted the appropriate pretrial hearings" and limiting its review to whether the child had inadequate independent recollection "*at the time of trial*"). In *Woods*, we did state that we may look at the entire record in reviewing the competency

determination. 154 Wn.2d at 617. In our analysis, however, we focused entirely on the child witness's testimony at the pretrial hearing in deciding whether the trial court abused its discretion. *Id*. at 618-22. We did not look to the trial testimony to determine whether the child witness was competent. *Id*.

Even looking to J.R.'s trial testimony, it is virtually impossible to now evaluate her competency from the transcript. We could find cause for concern in J.R.'s testimony, *see* VRP (Sept. 11, 2007) at 103-44, including that she alternately recalls and denies speaking to certain people about the incident. Or, we could interpret that as a credit to her honest expression of only facts that she independently recalls at the moment of testimony. Either way, our assessment would be inadequate. Important questions related to her competency were not asked at trial. And, just as with the written record of competency hearings, we cannot tell from a trial transcript how intelligent she was, whether she paused between questions, whether she looked to someone else before she answered, whether she was giggling as she answered questions, or whether she appeared to be making up the answers. Moreover, we cannot read anything into the fact that Brousseau did not reassert his objection to J.R.'s competency during trial, as his objection would be redundant of the trial court's previous decision unless a new competency concern arose. Here the concern remained the same• that J.R. could not independently recall the details of the incident about

which she offered testimony. While there may be certain circumstances like in *Guerin* where we can look at trial testimony to supplement or confirm specific facts from pretrial hearing testimony, it is impossible to evaluate whether the error here was harmless when J.R. did not testify at the pretrial hearing at all.

The record is inadequate to satisfy the necessary standard that we be convinced beyond a reasonable doubt that either the jury would have reached the same result, absent error, or that J.R. was competent. We must therefore find that the error was not harmless and reverse the convictions and remand for a new trial.

CONCLUSION

The trial court erred when it refused to hear from J.R. at a hearing regarding her competency. Because trial judges are uniquely positioned to perceive a witness's mannerisms, hesitations, apparent thoughtfulness, and many more details that cannot be transcribed and that are crucial to determining competency, a judge cannot completely forgo observation or examination of a witness whose competency is subject to a credible challenge. Beyond that, looking only at a written transcript, I cannot agree that J.R. was competent to testify *beyond a reasonable doubt*. With no eyewitnesses and no physical evidence to corroborate J.R.'s testimony, I cannot say• nor do I believe the majority can credibly say• that the jury positively would have found Brousseau guilty in the absence of the trial court's error. The trial court

erred; its error was not harmless. I therefore dissent.

AUTHOR:
Justice Susan Owens

WE CONCUR:

Justice Gerry L. Alexander

Justice Tom Chambers

Richard B. Sanders, Justice Pro Tem.