

65268-1

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NO. 65268-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

C.A.H.,

Appellant.

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BRIEF OF RESPONDENT

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COURT OF APPEALS  
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## **I. ISSUES**

1. Could a rational trier of fact have concluded C.H. had the capacity to commit Rape of a Child First Degree based on the evidence presented at a capacity hearing?

## **II. STATEMENT OF THE CASE**

C.H., born November 14, 1997, was charged by Information with one count of Rape of a Child First Degree on November 4, 2009. 1 CP 53-54. The crime was alleged to have been committed on August 29, 2009. Id. The charge arose out of a report from 3 year old D.M. to his mother that the respondent “stuck his pee pee in my butt” after the two had been playing in an upstairs bedroom at the respondent’s home. 1 CP 52.

Prior to trial the court held a capacity hearing. The State produced one witness, Detective Aaron Defolo. Detective Defolo testified that he contacted the respondent at his home on September 1, 2009. The respondent was told that he was not under arrest and that he did not have to answer any questions. The respondent’s parents were present during the interview. The respondent agreed to talk to the detective. The respondent told Detective Defolo that he put his penis in D.M.’s rectum but he stopped because he knew it was wrong. The respondent began to

cry during the portion of the interview in which he related what he had done to D.M. The respondent gave Detective Defolo the impression that he was sorry for what he had done.1 RP 3-4.

Detective Defolo also testified that he learned during the interview that the respondent's parents had talked to him after the reported rape. The respondent's parents had arranged for the respondent to go into counseling and that he was going to be seeing a counselor soon. 1 RP 5.

At the conclusion of the capacity hearing the trial court determined the State had met its burden to prove the respondent had the capacity to commit the crime. The trial court based its decision on two factors. First the respondent was almost 12 at the time of the crime. Second, he stopped committing the crime because he knew it was wrong. In addition the respondent's remorsefulness underscored his knowledge that the act of anal intercourse with a three year old was wrong. The court noted that although the respondent's parents had talked to him after the crime was committed and he had been put in counseling that alone did not undermine its conclusion because there was no evidence that what he was told after the fact colored what he told the officer during the interview. 1 RP 10-11.

The respondent then went to trial on a stipulated record. The trial court found the respondent had committed the offense. It then entered written findings of fact and conclusions of law on the capacity hearing, CrR 3.5 hearing, and trial. 1 CP 1-2; 2 RP 4-5.

### III. ARGUMENT

#### A. THE RECORD IS SUFFICIENT FOR A RATIONAL TRIER OF FACT TO FIND C.H. HAD THE CAPACITY TO COMMIT THE CRIME.

Children between the ages of eight and twelve are presumed incapable of committing a crime, but the presumption may be overcome by proof that they have sufficient capacity to understand the act, and to know that it is wrong. RCW 9A.04.050. The child need not understand that the act is punishable under the law. State v. Ramer, 151 Wn.2d 106, 114, 86 P.3d 132 (2004). Rather the focus of the inquiry is “whether the child appreciated the quality of his or her acts at the time the act was committed.” Id. quoting State v. T.E.H., 91 Wn. App. 908, 913, 960 P.2d 441 (1998). The presumption of incapacity must be overcome by clear and convincing evidence. State v. Q.D., 102 Wn.2d 19, 26, 685 P.2d 557 (1984).

Capacity determinations are made on a case by case basis. State v. Linares, 75 Wn. App. 404, 415, 880 P.2d 550 (1994). One

factor that is relevant to the capacity determination is the nature of the crime. Id. at 414. Other factors include (1) the child's age and maturity, (2) whether the child showed a desire for secrecy, (3) whether the child admonished the victim not to tell, (4) prior conduct similar to that charged, (5) any consequences that attached to the conduct, and (6) acknowledgement that the behavior was wrong and could lead to detention. State v. J.P.S., 135 Wn.2d 34, 38-39, 954 P.2d 894 (1998). The standard on review is whether there was evidence from which a rational trier of fact could find capacity by clear and convincing evidence. Id. at 37.

The evidence here was sufficient for a rational trier of fact to find C.H. had the capacity to commit rape of a child in the first degree. C.H. was 11 years and 10 months old when he committed the crime. A finding that the child had the capacity to commit a crime is supported when the child is on the upper end of the age range in which a child is presumed incapable of committing a crime. Linares, 75 Wn. App. at 415-16, Q.D., 102 Wn.2d at 27.

In addition to C.H.'s age, C.H. admitted that he stopped putting his penis in D.M.'s rectum because he recognized that it was wrong to do so. This statement clearly demonstrates that C.H.

knew at the time he was committing the crime that his conduct was wrongful.

The facts in this case are similar to those in Linares where the court found the record supported a finding the respondent had the capacity to commit the crime. There Linares told a witness that he knew what he had done was wrong although he did not necessarily understand what the consequences of doing so were. Although there was contradictory testimony that Linares did not have the capacity to understand the crimes that he was charged with, this Court nevertheless upheld the determination by the trial court that Linares had the capacity to commit the crime. In addition to his age, this Court relied on Linares' statement to police, and the absence of evidence that Linares did not understand his conduct was wrong. Linares, 75 Wn. App. at 415.

C.H.'s statement is different from other admissions of wrongfulness that the Court found were not probative of the juvenile's capacity. Here the statement relates to the time the act was committed. In other cases there were intervening events which neutralized the probative value of such statements.

The court found an 11 year old developmentally delayed boy's admission that his sexual contact with a younger child was

wrong had no probative value in J.P.S. The admission came after J.P.S. had been repeatedly interrogated by police and given his Miranda warnings and been shunned by neighbors and schoolmates. “The recognition of wrongful conduct made by a child after the child has been taught that his or her conduct was wrong” was not probative of the child’s capacity to commit the crime. J.P.S., 135 Wn.2d at 44.

Here a single police officer on a single occasion spoke to C.H. soon after the event. He was told that he was not under arrest and the he did not have to talk to the police officer if he did not want to. The circumstances suggest a fairly low key interview. There is no evidence that C.H. was of below normal intelligence. As noted, C.H. said he took specific action in response to his understanding that what he was doing to D.M. was wrong. Under these circumstances it is reasonable to conclude that the interview was not the event that educated C.H. about the wrongfulness of his conduct. Likewise, as the trial court observed, there was no evidence that C.H.’s post offense discussion with his parents or a counselor was the reason he knew the offense was wrong.

The respondent argues the State failed to meet its burden of proof because it did not present evidence of five of the relevant

factors set out in J.P.S. He cites no authority which states that there must be evidence of all seven factors before the court can find the juvenile had the capacity to commit the crime. In J.P.S. the Court did not say each factor must be present. It said the factors may be relevant to a capacity determination. It left open the possibility that other circumstances unique to the case before the court may also be relevant to capacity.

Where the Court has found sufficient evidence of capacity to commit a crime it has not necessarily found each of the factors was met. In J.F. this Court upheld a capacity finding even though it found the respondent's age and after the fact acknowledgement did not support that finding. State v. J.F., 87 Wn. App. 787, 791-93, 943 P.2d 303 (1997), review denied, 135 Wn.2d 1009, 960 P.2d 973 (1998). Similarly in Linares this Court upheld a finding that Lineras had the capacity to commit the crime he was charged with based on some of the factors. These holdings suggest that the court is permitted to weigh the factors. Even in the face of conflicting evidence, there may be sufficient evidence in the record to sustain the burden of proof based on the nature of the persuasive evidence.

The respondent also argues the State did not meet its burden because there was no evidence that C.H. understood that he could serve detention time for the crime. However, the State need not show that the juvenile understood the offense was legally wrong, only that it was wrong. Ramer, 151 Wn.2d at 114.

The respondent argues the nature of the offense cuts against a finding of capacity citing J.P.S., 135 Wn.2d at 38, 43. J.P.S. stated in the context of a sexual assault it may be more difficult to prove a understood a sexual offense than another kind of offense. J.P.S. 135 Wn.2d at 43. It did not state that was true in all cases. The facts in those sexual offense cases where the Court has found a capacity finding was not supported by the record are much different than the facts here.

In Ramer the trial court found a juvenile who was charged with two counts of rape of a child in the first degree did not have the capacity to commit those offenses. Evidence at the capacity hearing showed the respondent did not understand that even if the other child liked it, sexual contact with that child was wrong. There was testimony from the investigating officer that the respondent said it was not wrong "because he was into it too." The respondent called two expert witnesses who agreed the respondent did not

understand the act was wrong when the other child enjoyed and voluntarily participated in the act. Only one witness testified the respondent did understand the nature of the act. Under these circumstances the Court concluded that a rational trier of fact could find the State failed to meet its burden of proof. Ramer, 151 Wn.2d at 116-117.

In J.P.S. the Court reversed a trial court's determination that the respondent had the capacity to commit rape of a child in the first degree. J.P.S. was developmentally delayed who had limited cognitive skills and tested at the level of a first grader. A probation officer who interviewed the respondent testified that she did not think that at the time of the act the respondent knew what he did was wrong, and only gained that understanding after the child's father arrived and told the respondent to go home. The probation officer's testimony was echoed by the respondent's mother. J.P.S., 135 Wn.2d at 39, 41-42. Based on this evidence and the evidence the respondent had no prior sexuality training in school the Court found insufficient evidence to support the trial court's capacity finding. Id. at 44.

Unlike either Ramer or J.P.S. there is no evidence that C.H. was developmentally delayed or that he ever thought it was

permissible to engage in sexual intercourse with a three year old. What he said about what he did supports the conclusion that C.H. knew what he was doing was wrong at the time he was doing it, and not at some later time after receiving some education on the wrongfulness of his act. Under the facts of this case the nature of the offense is not a reason to find the nearly 12 year old respondent did not know that the offense was wrong at the time he committed it.

C.H. also argues the Court's decision in Linares supports the conclusion that there was insufficient evidence to support the trial court's conclusion. There the defendant was charged with malicious mischief for throwing rocks at a building and breaking windows. Police were called to the scene where the defendant was separated from two companions and read his Miranda rights. The defendant then admitted he threw rocks at the building, and he knew it was wrong. This Court concluded that this evidence was insufficient to establish capacity because "once the children were separated and given Miranda warnings it must have been obvious to the defendant that he had done something wrong." Linares, 75 Wn. App. at 417.

The evidence in Linares apparently did not address what the defendant knew at the time he was throwing rocks at the building. Unlike Linares the evidence here did reveal what C.H. knew at the time. C.H. took action to stop the rape because he knew it was wrong. His demeanor at the time of the interview indicated he was ashamed, further evidence from which a rational trier of fact could find C.H. had the capacity to commit the crime at the time of the offense.

#### IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the trial court's determination that C.H. had the capacity to commit the crime.

Respectfully submitted on November 17, 2010.

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