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NO. 52001-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KYLA TILL,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Ms. Till of Assault in the Second Degree because it failed to prove that Ms. Till inflicted substantial bodily harm or intended to strangle S.W.
2. The trial court abused its discretion by admitting child hearsay statements into evidence when the acts described in the statement did not result in substantial bodily harm as required under RCW 9A.44.120.
3. The trial court abused its discretion by allowing S.W. to testify at trial when he did not demonstrate the necessary competency to testify.

Issues Presented on Appeal

1. Did the State present sufficient evidence for the trial court to find Ms. Till guilty of Assault in the Second Degree when the record shows she did not intend to strangle S.W. and S.W. did not suffer any fracture, loss of bodily function, substantial disfigurement, or restriction in breathing?
2. Did the trial court abuse its discretion when it admitted child hearsay statements into evidence and the acts

described in those statements did not result in substantial bodily harm?

3. Did the trial court abuse its discretion when it permitted S.W. to testify at trial where he did not demonstrate the necessary competency to testify?

## B. STATEMENT OF THE CASE

### 1. Substantive Facts

Kyla Till is the mother of three children, all of whom suffer from developmental delays. RP 6. Ms. Till suffers from developmental delays herself as the result of a genetic condition. RP 77. Ms. Till's oldest child, S.W., is a six year old boy who attended daycare at Wonderland Daycare Center in Aberdeen, Washington. RP 22. S.W. has been diagnosed with craniosynostosis. RP 71. This condition affects the growth of the brain. RP 68. S.W. had surgery to correct his brain development in January 2015 which alleviated some of the symptoms of his condition but caused him to be sensitive about others touching his head. RP 54; 71.

On August 14, 2017, S.W. was scheduled to attend daycare at Wonderland. RP 22. That morning, Ms. Till called Wonderland to

alert the staff that S.W. would be arriving with a severe bruise to his face that he suffered as a result of being accidentally hit by a car door in a parking lot. RP 24-25. When S.W. arrived that day, a daycare employee, later identified as Melissa Stevenson, noticed bruising and makeup on S.W.'s face. RP 22. Stevenson took photographs of S.W.'s face with the makeup on and again after she had wiped it off. RP 22-23. Stevenson sent the photographs to Wonderland's owner who instructed her to report the incident to Child Protective Services (CPS). RP 23.

Aberdeen police officers were dispatched to Wonderland for a welfare check based on Stevenson's report. RP 30-31. When the officers arrived, they contacted S.W. RP 37. S.W. initially claimed that his father had either hit him or thrown him across the floor. RP 37. The officers attempted to speak with Ms. Till but she was not home. RP 39. The next day, the police received a notification from CPS that Ms. Till wanted to provide a statement related to S.W.'s injuries. RP 39-40.

The police took Ms. Till's statement at the CPS offices. RP 39. In the statement, Ms. Till described how she had been trying to give S.W. a haircut and he was making it difficult by moving around.

RP 41. She claimed that she got frustrated and slapped S.W. three or four times. RP 41. She also claimed she had grabbed him by the chin and used her arm to hold his head in place while giving him the haircut. RP 42. Ms. Till's statement was admitted as evidence at trial. RP 41-42; CP 4. Ms. Till was not arrested after she provided her statement. RP 42.

2. Procedural Facts

The State originally charged Ms. Till with Assault of a Child in the Second Degree as a domestic violence offense based on strangulation. CP 1. The State later filed an amended information charging her with the same offense under both the strangulation and "recklessly cause substantial bodily harm" prongs. CP 27-28. The State also alleged the aggravating factor that S.W. was a particularly vulnerable victim under RCW 9.94A.535(3)(b) due to his surgery for craniosynostosis. CP 27. Ms. Till waived her right to a jury and proceeded to a bench trial. CP 5.

3. Child Hearsay

Prior to trial, the court held a hearing to determine the admissibility of S.W.'s child hearsay statements. CP 29.

The first child hearsay statement came during the testimony of Melissa Stevenson, an employee at Wonderland Daycare Center. The State questioned Stevenson regarding what she did after she noticed S.W.'s injuries. RP 23. Stevenson described a conversation she had with S.W. and testified over objection that S.W. told her "[n]ow don't go getting mom in trouble, she said dad hit me real strong." RP 23; CP 39. This hearsay statement was offered as substantive evidence to prove that Ms. Till would get in trouble if S.W. said what happened and that Ms. Till had told him to say his dad had hit him.

An additional hearsay statement from S.W. was admitted through the testimony of Officer Pearsall of the Aberdeen Police Department. Officer Pearsall who discussed his interactions with S.W. at Wonderland, described how S.W. initially blamed his injuries on his father. RP 37. However, Officer Pearsall testified that he did not believe S.W. and continued to push for more information. RP 37-38. When S.W. mentioned a toy, Officer Pearsall asked if he had been promised a toy in return for lying about what happened to him. RP 37-38. Officer Pearsall testified that S.W. "kind of said yes." RP 38; CP 40.

Additionally, during the video-taped forensic interview, S.W. alleged that Ms. Till hit him on the lips and cheek and choked him. CP 48; Ex. 4. He also stated that Ms. Till had “been mean” to him and his sisters. CP 48; Ex.4.

The trial court found the statements admissible and entered findings of fact and conclusions of law. CP 38-45.

4. Competency

Ms. Till challenged S.W.’s competency to testify under RCW 5.60.050. RP 11. The trial court’s examination of S.W.’s competency consisted of a voir dire performed at the start of the bench trial. RP 8-14. During the voir dire, S.W. showed he was able to match pictures of objects such as an apple, cake, and teddy bear. RP 9-10. He also testified that he considered stories involving monsters “true” and that stories about the tooth fairy are “a little true.” RP 12. The trial court found S.W. competent to testify following the voir dire. RP 14; CP 42.

5. Injuries

A forensic interviewer testified that he could not recall any bruising to S.W.’s face within a month of the alleged assault. RP 50. Testimony during the State’s case-in-chief revealed that an

emergency room physician had taken scans of S.W.'s head to check for further injury but there was no evidence of any harm beyond the superficial bruising described by other witnesses. RP 68.

The same physician indicated that the injuries seen to S.W.'s face and head were consistent with being slapped and being held in the crook in someone's arm. RP 62-63. S.W. stated during trial that he was hit and kicked, not strangled or choked. RP 16. S.W. also stated that he was yelling while Ms. Till was trying to hold his head in place for the haircut. RP 18.

6. Bench Trial Findings Judgment and Sentence

Following the bench trial, the trial court found Ms. Till guilty of Assault of a Child in the Second Degree under both the strangulation and substantial bodily harm prongs. CP 50-51. The court also found that the offense was domestic violence related and that S.W. was a particularly vulnerable victim. CP 50. The trial court imposed an exceptional sentence based on the aggravator that S.W. was a particularly vulnerable victim, and sentenced Ms. Till to 60 months in prison with additional conditions upon release. CP 54. Ms. Till filed a timely notice of appeal. CP 73-74.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE OF BOTH “SUBSTANTIAL BODILY HARM” AND STRANGULATION FOR A TRIER OF FACT TO FIND MS. TILL GUILTY OF ASSAULT IN THE SECOND DEGREE

In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). “Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *Homan*, 181 Wn.2d at 105-06 (quoting *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)).

Substantial evidence is evidence sufficient to “persuade a fair-minded person of the truth of the asserted premise.” *Homan*, 181 Wn.2d at 106 (citing *Stevenson*, 128 Wn. App. at 193). Challenges to a trial court’s conclusions of law are reviewed de novo. *Homan*, 181 Wn.2d at 106 (citing *State v. Gatewood*, 163

Wn.2d 534, 539, 182 P.3d 426 (2008)).

A person is guilty of Assault of a Child in the Second Degree if they are eighteen years of age or older and commit the crime of Assault in the Second Degree against a child under the age of thirteen. RCW 9A.36.130(1).

- a. The State presented insufficient evidence of “substantial bodily harm.”

A person commits Assault in the Second Degree if he or she “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a). “Substantial bodily harm” is defined as “a bodily injury involving a temporary but substantial disfigurement, a temporary but substantial loss or impairment of the function of any body part or organ, or a fracture of any body part.” RCW 9A.04.110(4)(b). The degree of harm required to satisfy the “substantial bodily harm” element of Assault in the Second Degree is “considerable and necessarily requires a showing greater than an injury merely having some existence.” *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

The evidence in this case did not rise to the level of “substantial bodily harm” as is required for the trial court to find Ms.

Till guilty of Assault of a Child in the Second Degree. S.W.'s injuries were described throughout the trial as "bruising," "markings," or "redness." RP 22; 38; 53. There was no bruising to S.W.'s face within a month of the alleged assault, and the emergency room doctor found no evidence of any internal injuries beyond the bruising described by other witnesses. RP 50, 68.

Courts reviewing cases for the presence of "substantial bodily harm" have historically required harm greater than what was presented to the trial court in Ms. Till's case. In *McKague*, the court found that the State had presented sufficient evidence of "substantial bodily harm" where the victim suffered a concussion and possible fracture of his facial bones as a result of having his head slammed into pavement during the assault. *McKague*, 172 Wn.2d at 804. As a result of these injuries, the victim was not able to stand upright for a time and experienced residual pain for two months after the assault. *McKague*, 172 Wn.2d at 804.

The harm in this case does not rise to the level of "substantial bodily harm" as it is defined in RCW 9A.04.110(4)(b) and *McKague*. The record contains no evidence that S.W. suffered any sort of fracture or loss of bodily function as a result of this

incident. Evidence regarding S.W.'s injuries is limited to testimony and photographs related to bruising and redness to his face. While unfortunate, these injuries do not constitute the "substantial bodily harm" that distinguishes Assault in the Second Degree from lesser degrees of assault.

Despite the lack of evidence establishing any harm more serious than bruising, the trial court entered a finding of fact declaring the bruising "substantial bodily harm." CP 49. Based on this finding of fact, the trial court concluded that Ms. Till had "recklessly inflicted substantial bodily harm" on S.W. and was guilty of Assault of a Child in the Second Degree. CP 50-51. The trial court's finding of fact regarding substantial bodily harm is not supported by substantial evidence. The State presented insufficient evidence of substantial bodily harm and the trial court erred by using that element as a basis to find Ms. Till guilty as charged.

b. The State presented insufficient evidence of strangulation

A person is also guilty of Assault in the Second Degree if they assault another person by strangulation. RCW 9A.36.021(1)(g). "Strangulation" is defined as "to compress a

person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26).

The record in this case contains insufficient evidence for a trier of fact to find that Ms. Till either strangled or intended to strangle S.W. The only medical testimony indicated a slap and being held in the crook of the neck by someone's arm but there was no testimony specifying that the injuries were consistent with obstruction of blood flow or the ability to breathe. RP 62-63.

Furthermore, S.W. did not indicate that he could not breathe or felt light headed from lack of air, but rather confirmed that he yelled while Ms. Till was trying to hold his head in place for the haircut, an act that indicates air was able to pass through his throat. RP 16, 18. This is contrary to S.W.'s videotaped interview statement that he was choked. The record contains insufficient evidence to find beyond a reasonable doubt that S.W. was strangled.

Because S.W. was not actually strangled, the only way Ms. Till could be found guilty of Assault of a Child in the Second Degree under the strangulation prong is if she compressed his neck with

the intent of obstructing blood flow or the ability to breathe. RCW 9A.04.110(26). The record contains no evidence that Ms. Till ever intended to strangle S.W. In Ms. Till's testimony at trial and in her written statement provided to police before her arrest she consistently asserted that she was only attempting to hold S.W.'s head in place to give him a haircut when he suffered the injuries giving rise to this allegation. RP 40-41; 72. There is no testimony in the record showing any intent to obstruct S.W.'s ability to breathe by holding him in that position.

The trial court found that Ms. Till "put S.W.'s head in the crease of her elbow in a chokehold fashion to keep him from moving." CP 48. Based on this finding of fact, the trial court concluded that Ms. Till assaulted S.W. by strangulation. CP 50. The trial court's finding of fact is not supported by substantial evidence. The act of holding S.W.'s head in place during a haircut does not establish beyond a reasonable doubt, "strangulation" as it is defined by statute. The evidence in the record does not prove any obstruction of S.W.'s ability to breathe and the consistent evidence from the time of investigation through trial shows that Ms. Till never intended to strangle S.W. while giving him the haircut. The State

presented insufficient evidence of strangulation and the trial court erred by finding her guilty based on that prong of the charged offense. The charge must be reversed and remanded for dismissal with prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING CHILD HEARSAY STATEMENTS WHEN THE ACTS ALLEGED IN THOSE STATEMENTS DID NOT RESULT IN SUBSTANTIAL BODILY HARM

- a. The trial court abused its discretion by admitting child hearsay statements in the absence of “substantial bodily harm”

Appellate courts review a trial court’s decision to admit child hearsay statements for an abuse of discretion. *State v. Kennealy*, 151 Wn. App. 861, 879, 214 P.3d 200 (2009). “A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or is based on untenable grounds of reasons.” *Kennealy*, 151 Wn. App. at 879. RCW 9A.44.120 reads:

A statement made by a child under the age of ten . . . describing any act of physical abuse of the child by another *that results in substantial bodily harm as defined by RCW 9A.04.110*, not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . in the courts of the State of Washington 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 . . .

RCW 9A.44.120 (emphasis added). The inclusion of language specifying that this statute only applies to statements alleging “substantial bodily harm” suggests that child hearsay is not to be admitted in cases alleging a lower degree of harm.

As outlined above, the injuries alleged in S.W.’s hearsay statements admitted at trial do not rise to the level of “substantial bodily harm.” S.W. suffered no fracture or loss of bodily function and was not substantially disfigured. Superficial bruising without additional injury does not fall into the category of “substantial bodily harm” as that term is defined in RCW 9A.04.110.

“Substantial bodily injury “signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. *McKague*, 172 Wn.2d at 806. The child hearsay statute is inapplicable to S.W.’s statements because unlike in *McKague*, S.W. did not experience a concussion,

possible fracture, or an inability to stand any residual pain for two months after the assault. *McKague*, 172 Wn.2d at 804. Here, the alleged harm and evidence presented does not rise to the level of substantial bodily harm.

- b. The admission of S.W.'s child hearsay statements likely affected the outcome of the trial

A trial court's erroneous decision to admit hearsay at trial is subject to a harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). An error is not harmless if there is a reasonable probability that it affected the outcome of the trial. *State v. Goggin*, 185 Wn. App. 59, 69, 339 P.3d 983 (2014). The trial court relied on S.W.'s hearsay statements as substantive evidence of Ms. Till's guilt and to tarnish her credibility as a witness. These statements, again offered for the sole purpose of suggesting Ms. Till instructed S.W. to lie about his injuries, impugned Ms. Till's credibility as a witness and further incriminated her regarding the assault charge. RP 79.

Finally, S.W. made numerous statements during a forensic interview that were erroneously admitted at trial through a video recording of the interview. RP 49; Ex. 4. During this interview, S.W.

alleged that Ms. Till hit him on the lips and cheek and choked him. CP 48; Ex. 4. These statements are particularly damaging to Ms. Till's defense against the allegation of strangulation because S.W. never claimed to have been choked or strangled by Ms. Till aside from during the recorded interview. Nevertheless, the trial court admitted the recording into evidence which insulated S.W.'s statements from cross-examination which denied Ms. Till the opportunity to test the inconsistencies in the allegations. There is a reasonable probability that the admission of these hearsay statements affected the outcome of the trial. *Goggin*, 185 Wn. App. at 69.

c. Remedy

"If the evidence, including that erroneously admitted . . . was insufficient as a matter of law, the double jeopardy clause entitles [the defendant] to dismissal with prejudice . . . Otherwise, he is entitled only to a new trial." *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993) (citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

The collection of statements admitted as child hearsay under RCW 9A.44.120 were highly prejudicial to Ms. Till in the context of

this case and were improperly admitted as child hearsay because the acts described in the statements did not result in “substantial bodily harm”; S.W.’s injuries were limited to bruising.

The statements are incriminating in the sense they identify Ms. Till as the perpetrator of the assault. The statements occurring during the recorded interview represent the only time S.W. accused Ms. Till of “choking” him. The trial court concluded that Ms. Till strangled S.W. and included it as a basis for finding her guilty. CP 50-51. There is a reasonable likelihood the outcome of Ms. Till’s trial would have been different without the admission of these child hearsay statements because the evidence admitted against Ms. Till, without the erroneously admitted child hearsay, is insufficient to find her guilty of Assault of a Child in the Second Degree. Accordingly, under *Stanton*, this Court must dismiss the charge with prejudice and remand for a new trial based on the erroneous admission of child hearsay. *Stanton*, 68 Wn. App. at 867.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND S.W. COMPETENT TO TESTIFY IN VIOLATION OF MS. TILL'S RIGHT TO DUE PROCESS

Individuals found to be incompetent may not testify at a criminal trial. RCW 5.60.050. Incompetent individuals include those “who are of unsound mind, or intoxicated at the time of their production for examination” and “those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating to them truly.” RCW 5.60.050. The test for determining whether a child witness is competent to testify involves several factors:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express his memory of the occurrence; and
- (5) the capacity to understand simple questions about it.

*State v. Brousseau*, 172 Wn.2d 331, 337, 259 P.3d 209 (2011) (citing *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)). In reviewing competency, appellate courts may examine the entire

record. *Brousseau*, 172 Wn.2d at 340. A party challenging the competency of a witness must show incompetence by a preponderance of the evidence. *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010). A trial court's determination of competency is reviewed for an abuse of discretion. *Brousseau*, 172 Wn.2d at 340 (citing *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1988)).

The record casts doubt on S.W.'s competency to testify, because he was unable to distinguish fact from fiction and S.W.'s recollection of the incident changed throughout the various leading question interviews. RP 9-12, 23, 37-38. When questioned, S.W. originally claimed his father had hit him. RP 23, 37. S.W. only deviated from that claim when pressured by police officers. RP 37-38. The adults interviewing S.W. refused to accept his original explanation for his injuries and instead continued to question him and suggest that there must be some other explanation than what he was originally claiming. The record does not establish that S.W. was competent or that he had an independent recollection of the incident.

During the voir dire, S.W. testified unequivocally that he liked to tell stories, including stories involving mythical creatures such as monsters and the tooth fairy. RP 12-13. S.W. also asserted that he believed some of these stories to be true. RP 12-13. Fantastical beliefs such have traditionally been cited as evidence the witness is not competent to testify. See *State v. Karpenski*, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), *abrogated on other grounds by State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003) (citing the child witness's belief that he and his non-twin brother were born at the same time as evidence that he was not competent to testify). S.W.'s demonstration of his ability to distinguish a lie from the truth consisted solely of him matching pictures of several objects. RP 9-10. This exercise did nothing to actually examine S.W.'s ability to understand the nuances of distinguishing the truth from an outright lie or exaggeration.

The lack of evidence establishing S.W.'s independent recollection of the incident, when combined with his sincere belief in imaginary creatures and forces, casts doubt on his competency to testify. *Karpenski*, 94 Wn. App. at 122 (child hearsay statements unreliable when "accompanied by highly inconsistent responses

demonstrating an extremely confused state of mind.”). As it is more likely than not S.W. was not competent to testify at the time of trial, admission of his testimony violates Ms. Till’s right to a fair trial and requires reversal of her conviction. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (improperly admitting prejudicial evidence is reversible error).

#### D. CONCLUSION

The trial court erred in finding Ms. Till guilty of Assault of a Child in the Second Degree because the state failed to prove beyond a reasonable doubt that S.W. suffered “substantial bodily harm” as that term is defined in RCW 9A.04.110(4)(b), or that Ms. Till committed a strangulation or an intent to strangle. As the incident alleged in this case did not result in “substantial bodily harm,” it was an abuse of discretion to admit child hearsay statements into evidence when the statute expressly requires that level of harm as a condition precedent to admission. Finally, the trial court abused its discretion when it allowed S.W. to testify despite him being an incompetent witness in violation of Ms. Till’s right to a fair trial. For these reasons, Ms. Till’s conviction should be reversed and the charge dismissed for insufficient evidence. In the alternative,

the case should be remanded to the trial court for a new trial with instructions to exclude the erroneously admitted evidence.

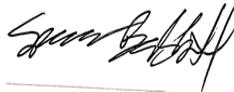
DATED this 29<sup>th</sup> day of August 2018.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office [appeals@co.grays-harbor.wa.us](mailto:appeals@co.grays-harbor.wa.us) and Kyla Till/DOC#406055, Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332 a true copy of the document to which this certificate is affixed on August 29, 2018. Service was made by electronically to the prosecutor and Kyla Till by depositing in the mails of the United States of America, properly stamped and addressed.



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