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NO. 52357-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

A. K.,

Appellant.

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

The Honorable John Fairgrieve, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant A.K.¹ was 11 years old when his father's girlfriend moved in with his family. Her two children began to spend significant time there as well. The children's father began filing petitions to prevent his children from spending time with A.K. and his family. These were all unsuccessful. Then, one of the children, E.H., allegedly told his father and aunt about sexual contact with A.K. E.H.'s father then successfully obtained full custody, and the family court cut off visitation with the mother. A.K. was charged with attempted rape of a child in the first degree. The charging period began on his 12th birthday.

In this appeal, A.K. argues his adjudication of guilt must be reversed for three reasons. First, the record fails to establish A.K.'s capacity to commit a criminal act because no evidence established that the alleged act occurred after A.K.'s 12th birthday or rebutted the presumption of incapacity. Second, the State did not prove A.K. knew that nine-year-old E.H. was more than 24 months younger than he and, therefore, did not prove that he intended to commit first-degree rape of a child, as required for a criminal attempt. Finally, the court erred in admitting child hearsay statements that were highly suspect in light of the bitter divorce and custody dispute between E.H.'s parents.

¹ This brief uses initials to refer to the child in this juvenile offender proceeding pursuant to RAP 3.4.

B. ASSIGNMENTS OF ERROR

1. The court erred in finding A.K. guilty in the absence of evidence that he had the capacity to commit a criminal act.

2. In the absence of substantial evidence in the record, the court erred in finding beyond a reasonable doubt that “about September 1, 2016 to March 3, 2017 the respondent did an act that was a substantial step toward having sexual intercourse with E.A.H.” CP 52 (Finding of Fact 1).

3. The evidence is insufficient to find A.K. guilty of attempted rape of a child in the first degree.

4. In the absence of substantial evidence in the record, the court erred in finding “that the act in Finding of Fact number 1 was done with the intent to commit Rape of a Child in the First Degree.” CP 52 (Finding of Fact 4).

5. The court erred in finding the complaining witness’ statements admissible under RCW 9A.44.120 and the Ryan² factors.

Issues Pertaining to Assignments of Error

1. A child under the age of 12 is presumed to lack the capacity to commit a criminal act. Must the adjudication of guilt be reversed when the State neither proved that the acts in question were committed after

² State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

A.K.'s 12th birthday nor rebutted the presumption of incapacity by the requisite clear, cogent, and convincing evidence?

2. The offense of attempted rape of a child in the first degree requires the State to prove the intent to commit that specific crime. Rape of a child in the first degree can only be committed against a person who is more than 24 months younger than the accused. Is the evidence insufficient to sustain the verdict when there is no evidence A.K. was aware of the age difference between himself and E.H.?

3. Out-of-court statements by children relating to abuse are not admissible unless the circumstances show the statements are reliable and the reliability factors listed in State v. Ryan are substantially met. Did the court err in admitting out-of-court statements that were made by the young child of a man who bore a grudge against A.K.'s father and that were used by that man to obtain sole custody of his children?

B. STATEMENT OF THE CASE

Alexander House and his wife broke up. In July 2016, the couple filed for legal separation. RP 123. She signed onto the legal separation that they filed together. RP 124. However, in August or September 2016, things became more acrimonious. RP 124. House claimed his wife was trying to take the children to Tacoma and not let him see them. RP 124. He filed a petition for divorce. RP 124.

House was upset because his wife had moved in with another man. RP 125. He objected to the sleeping arrangements; his young son, age nine at the time, was not allowed to sleep with his mother because she was sleeping with another man. RP 125.

House repeatedly filed petitions for restraining orders against the other man. RP 127-30. All were all dismissed. RP 127-30. He sought sole custody of the children. RP 133-34. He accused his wife of doing drugs, yet she was still awarded visitation three times per week while the divorce was pending. RP 133-34. He filed motions to force his wife to be alone when she picked up and dropped off the children for her visits. RP 126-27.

His wife's relationship with House's extended family was similarly bitter. In 2014, an altercation with House's sister, Joanna House Rodriguez, led to a physical fight between the two women. RP 157. House Rodriguez was helping her brother with his divorce paperwork and proceedings. RP 158. In early March 2017, House Rodriguez called the police. RP 162.

Based on statements by House, his sister and House's son, nine-year-old E.H., the Clark County prosecutor filed charges of attempted rape of a child in the first degree and attempted child molestation in the first degree. CP 12. The defendant was other man's son A.K. CP 12. The charging period ran from September 1, 2016 to March 3, 2017. CP 12. March 3, 2017 was

the day House Rodriguez notified the police. CP 12. September 1, 2016 was A.K.'s twelfth birthday. CP 37.

House told the family court about the allegations, and successfully persuaded that court to give him sole custody of his children. RP 132-33. House claimed this was because of the mother's drug issues, but he admitted he had told the judge about that many times before. The court only stopped her access to the children after the accusations in this case. RP 132-34.

Before trial, A.K. was held in juvenile detention for nearly six months. CP 41 (credit awarded for 159 days served). He was not released to await trial because his father was so frightened of House's harassment that he refused to give the probation officer his address. RP 4-11, 20, 33. A.K.'s father told the court his son might be safer in detention. RP 11.

The story unfolded at trial that E.H. had tried to pull his aunt's pants down while she was babysitting. RP 146-47. E.H. was so frightened of being punished for this, that he would not even discuss what he had done when asked about it at trial. RP 98-100. When his father asked why he would do such a thing, E.H. said A.K. had done it to him and had put his "pee-pee" in his butt. RP 118. House and his sister (who overheard the conversation) testified to E.H.'s statements. RP 118, 149. The video recording of his forensic child interview was admitted into evidence and played for the court. Ex. 3. At trial, E.H. said he did not know when this happened except to say

that it was when they would visit his mother. RP 92. In the forensic interview, he said it happened before his birthday in August. Ex. 3. His birthday is August 26. RP 112.

After the breakup of her marriage, House's wife lived for a time with her mother, E.H.'s grandmother. She brought A.K., his father, and his sister with her. RP 197-98. During one of E.H.'s visits to see his mother, the grandmother asked E.H., "Has anybody in this house hurt you?" RP 203. He told her, "No." RP 203. He added, "But that's not what my dad wants me to say." RP 203. The grandmother testified E.H. was terrified of his father. RP 200. A.K.'s 18-year-old sister testified E.H. always acted frightened when it was time to return to his father's house. RP 211. He referred to his father as a monster and would try to hide. RP 212.

When the grandmother asked A.K. about the allegations, he began to cry. RP 205. He said he did not do it. RP 205. He did not know why this was happening. RP 205.

In a combined proceeding, the trial judge first found E.H. competent to testify, then found his statements to his father, his aunt, and the forensic interviewer were admissible under RCW 9A.44.120 regarding admission of child hearsay. RP 233, 239-40, 243. In its oral ruling,³ the court declared that E.H. was unlikely to make up an accusation that would lead to his being

³ As of the writing of this brief, no written findings or conclusions have been entered regarding the child hearsay issue.

separated from his mother, who he loved and clearly wanted to be with. RP 234-35. The court found that E.H.'s father's animosity did not give E.H. a motive to lie. RP 235. The court found no evidence that the father had tried to tamper with E.H.'s statements and no evidence that E.H. was a liar. RP 235-36. The court found that, although E.H. was questioned about the pants incident, his statements about the pee-pee in his butt were spontaneous. RP 237. The court found the timing and relationship indicated trustworthiness because the disclosures occurred in the aftermath of E.H.'s attempt to pull down his aunt's pants. RP 238. The court concluded that the first five Ryan factors showed reliability and admitted the statements. RP 239-40. The court also admitted the statements to the forensic interviewer on largely the same rationale, noting her questions were not leading or suggestive and the relationship suggested trustworthiness because she was a trained forensic interviewer. RP 241-43.

The court then considered whether A.K. could be found guilty of the charged offenses. In the oral ruling, the judge found E.A.H.'s aunt and father credible. RP 261. Nevertheless, the judge acquitted A.K. of first-degree child molestation. RP 263-64. This was because A.K. was not even 36 months older than E.H., and that age difference is an essential element of the offense. RP 263-64. However, the judge then found A.K. guilty of attempted rape of a child in the first degree. RP 262-63.

At the dispositional hearing the State requested the special sex offender disposition alternative (SSODA), wherein A.K. would receive a suspended sentence and would engage in sex offender treatment. RP 279-80. The defense opposed this option. RP 282-91. A SSODA would only work if A.K. could return home, follow conditions, and engage in treatment. But his father was still refusing to take him home if he had to provide an address for sex offender registration. RP 284, 289-90. A.K. requested instead a sentence of 23 weeks, which he had already served. RP 291.

The court imposed the SSODA. RP 295. A.K. was given a disposition of 36 weeks in detention, suspended on the condition that he engage in treatment. CP 40-41. Notice of appeal was timely filed. CP 45.

C. ARGUMENT

1. THE RECORD FAILS TO SHOW A.K. HAD CAPACITY TO COMMIT THIS OFFENSE.

Washington law protects children “of tender years,” who are less able than adults to appreciate the wrongfulness of their behavior. State v. Ramer, 151 Wn.2d 106, 118, 86 P.3d 132 (2004) (quoting State v. Q.D., 102 Wn.2d 19, 21, 23, 685 P.2d 557 (1984)). A child under 12 is presumed incapable of committing a crime. RCW 9A.04.050. The State must rebut the presumption of incapacity by clear and convincing evidence. Ramer, 151 Wn.2d at 112-13. If the child lacks capacity, “he or she is legally incapable

of committing the crime and for that reason is relieved of all criminal responsibility.” State v. Linares, 75 Wn. App. 404, 412-13, 880 P.2d 550 (1994).

The State charged A.K. with committing this offense after September 1, 2016, his 12th birthday. CP 12. But the State did not offer any evidence to support that timing. The evidence shows only that it must have been after July 2016, when E.H.’s mother left his father, and before March 3, 2017 when E.H.’s aunt called the police. The only evidence of when, during that period, that it may have occurred was E.H.’s statement that it was in August. Ex. 3. If that statement is correct, then it was before September 1, 2016, and A.K. cannot be held responsible. Up until that date, he was presumed to lack criminal capacity because of his young age. RCW 9A.04.050.

Capacity could potentially have been established in two ways. First, the State could have proved A.K. understood the nature of the act and that it was wrong. Ramer, 151 Wn.2d at 114. Or, alternatively, it could have shown A.K. was over 12 at the time. RCW 9A.04.050. Because the State did neither, the adjudication of guilt must be reversed.

- a. A child’s capacity to commit a criminal act must be proved by clear, cogent, and convincing evidence.

When a child is under the age of 12, the child is presumed to lack criminal capacity unless the State rebuts that presumption with clear and

convincing evidence. Ramer, 151 Wn.2d at 114; RCW 9A.04.050. When a superior court has found criminal capacity in a child under 12, that decision is reviewed for substantial evidence that the state met its burden to overcome the presumption of incapacity by clear and convincing evidence. Ramer, 151 Wn.2d at 112-13. Substantial evidence is evidence sufficient to persuade a rational trier of fact of the truth of the proposition in light of the specific burden of proof. In re Welfare of C.B., 134 Wn. App. 942, 953, 143 P.3d 846 (2006). When the burden of proof is by clear and convincing evidence, the evidence must show that the proposition is “highly probable.” Id. at 952.

It is by design that the burden of proof to show capacity is lower than that required for the elements of the crime. The Washington Supreme Court determined that proof of capacity overlaps to a large degree with proof of the mental element of the charged crime. Q.D., 102 Wn.2d at 25. The court found it “unnecessarily duplicative” to require the State to prove capacity beyond a reasonable doubt when it must already meet that burden with regards to the specific mental state required for the crime. Id. Because of the large degree of factual overlap, the child’s liberty interest is “fully protected by the requirement of proof beyond a reasonable doubt of the specific mental element.” Id. at 26.

But this overlap does not exist for a strict liability offense. The Q.D. court’s rationale regarding the lower burden of proof for capacity therefore

suggests courts should be more careful about evidence of capacity when the State will not otherwise be required to prove mens rea beyond a reasonable doubt. In such cases, the juvenile's liberty interest is *not* otherwise protected by the higher burden of proof on similar facts. In this case, the trial court required no evidence that A.K. even was aware of, let alone intended, the specific harm of first-degree rape of a child. Thus, the failure to ensure A.K. had criminal capacity before prosecuting him is even more troubling. A sufficiently culpable mental state was not otherwise proved beyond a reasonable doubt at trial.

Additionally, the State has a higher burden to prove capacity when the crime involved is of a sexual nature. Ramer, 151 Wn.2d at 115 (citing State v. J.P.S., 135 Wn.2d 34, 38, 954 P.2d 894 (1998)). “[W]ith sexual crimes it is very difficult to tell if a child understands the prohibitions on sexual behavior with other children.” Ramer, 151 Wn.2d at 115-16 (citing J.P.S., 135 Wn.2d at 38). It is highly likely that a young child may not appreciate the nature or the wrongfulness of the act. Ramer, 151 Wn.2d at 115.

When a child is under 12, the law requires proof by clear and convincing evidence that the child has sufficient understanding of the act and its moral implications to be held criminally responsible. Id. at 114. The clear-and-convincing-evidence standard is the highest burden of proof available in

a civil case, exceeded only by the burden of proof of the elements of a crime beyond a reasonable doubt. In re Salary of Juvenile Dir., 87 Wn. 2d 232, 251, 552 P.2d 163 (1976). When a child is accused of a crime that could have occurred before his 12th birthday, this Court should strike down an adjudication of guilt without clear and convincing proof that the child was over 12 or that the presumption of incapacity was rebutted. That proof does not exist in this case.

b. The record does not contain substantial evidence of criminal capacity.

The evidence presented at trial fails to establish the criminal act occurred at a time when the statutory presumption of incapacity no longer applied. It also fails to rebut that presumption.

First, the court did not expressly find that the offense occurred after September 1, 2016, A.K.'s 12th birthday. CP 53. On the contrary, like the charging document, the court's findings of fact express the date as an approximation: "about September 1, 2016 to March 3, 2017." CP 53 (emphasis added). Thus, the court's findings of fact do not amount to a specific finding that the crime was proved to have occurred after A.K.'s 12 birthday. The approximate language leaves open the possibility that it occurred before that date.

Moreover, even if the court had made a specific finding regarding the date, such a finding is not supported by the evidence. No evidence at trial established clearly the date of the offense. The evidence showed that E.H. began to have contact with A.K. when E.H.'s parents broke up in July 2016. RP 123. The allegations were revealed to E.H.'s aunt and father in March 2017. RP 112-13. Thus, the evidence would support only a finding that the act occurred sometime between July 2016 and March 2017. At trial, E.H. did not know when it occurred. RP 92, 94. He only knew it happened at his mother's house. RP 95. During his forensic interview, he said it was in August, which would have been *before* A.K.'s 12th birthday. Ex. 3. This evidence does not justify a rational belief that this incident occurred after A.K. turned 12 on September 1, 2016.

Nor does the evidence justify a rational belief that A.K. possessed criminal capacity despite the presumption of incapacity. The capacity to commit a criminal act is specific both to the nature of the offense and to the time that it occurred. State v. Erika D.W., 85 Wn. App. 601, 606-07, 934 P.2d 704 (1997); State v. K.R.L., 67 Wn. App. 721, 725, 840 P.2d 210 (1992). Capacity requires proof that the child understood both the nature of the act and that it was wrong. Ramer, 151 Wn.2d at 114.

As mentioned above, this is more difficult to establish when sexual offenses are involved. For example, the court held the State failed to rebut

the presumption of incapacity in Erika D.W., 85 Wn. App. at 607. The court noted, “There was no testimony that she had learned anything about sexual desire—a sophisticated concept for a preadolescent. Without such testimony, the evidence is not clear or convincing that Erika understood the nature of the act.” Id. at 606. Similarly, there was no testimony here about whether A.K. had the education or experience to understand anything about the concepts of sexual desire or rape. As in Erika D.W., the record does not show he understood the nature of the act.

The Erika D.W. court also found the evidence failed on the second prong because it did not show the child understood that her conduct was wrong. Id. Evidence of guilt after the fact is insufficient to show that the child understood at the time that her conduct was wrong. Id. The relevant question is whether the child “understood the gravity of her conduct.” Id. As with Erika D.W., there is no indication in this record that A.K. understood the gravity of his conduct.

A similar result occurred in J.P.S., 135 Wn.2d at 34. In that case, the Court held the State failed to rebut the presumption of incapacity for an 11-year-old charged with child rape. Id. at 36, 44. The evidence showed the child did not understand what rape meant. Id. at 41. Although the reproductive process and inappropriate touching were taught at school, the

State did not prove the child had attended these lessons. Id. at 42. As in J.P.S., the evidence does not show capacity here.

Courts consider seven non-exclusive factors in determining whether the presumption of incapacity has been overcome:

- (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention.

Ramer, 151 Wn.2d at 114-15 (citing J.P.S., 135 Wn.2d at 38-39). Here, the crime was of a sexual nature that a young child is likely not to understand. Erika D.W., 85 Wn. App. at 606; J.P.S., 135 Wn.2d. at 43. A.K. was nearly 12 years old but no evidence was presented about his maturity level (either physical or emotional) relative to other children his age. No evidence was presented regarding a desire for secrecy. No evidence indicated he told E.H. not to tell. No evidence showed any prior similar conduct or any resultant consequences. No evidence showed any acknowledgment of wrongdoing. The evidence presented does not warrant a rational person in believing there was clear, cogent, and convincing evidence of criminal capacity at the time of the act.

The record fails to establish either that A.K. was over 12 at the time of this incident or that he otherwise had the requisite maturity and

understanding to be held criminally culpable under Washington law. His adjudication of guilt should be reversed.

- c. The failure to establish criminal capacity requires reversal of the adjudication of guilt.

Without evidence of capacity, A.K.'s adjudication of guilt should be reversed as both void and unconstitutional. Courts have "repeatedly and consistently" held that constitutional due process is violated when an adult who lacks competency is tried and found guilty of a crime. Ryan v. Gonzales, 568 U.S. 57, 65, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013). By analogy, constitutional due process is also violated when the court finds a juvenile guilty when he lacks the legal capacity to commit a crime. Additionally, without a capacity hearing, the court is without authority to find a child under 12 guilty of any crime. State v. Golden, 112 Wn. App. 68, 77, 47 P.3d 587 (2002); State v. Gilman, 105 Wn. App. 366, 369, 19 P.3d 1116 (2001). A.K.'s adjudication of guilt is unlawful and cannot stand.

This case is strikingly similar to facts considered in a recent unpublished decision by Division Three of this Court, State v. Ellison, 194 Wn. App. 1033, 2016 WL 3401993 (2016) (unpublished). Although the unpublished decision is not binding precedent, counsel discusses it here under the authority of GR 14(a) in light of its similarity to the facts of this

case and the persuasiveness of the Court's discussion of this issue that has yet to be addressed in any published Washington decision.

In Ellison, a young person, convicted of failure to register as a sex offender, argued for dismissal on the grounds that his predicate conviction was void. 2016 WL 3401993 at *1-2. He could have been under 12 at the time of the predicate offense, and no capacity hearing was held before he pled guilty. Id. The trial court dismissed the charge of failure to register, and the State appealed. Id. Division Three of this Court affirmed the dismissal "Because of the critical importance of conducting a capacity hearing before adjudging a child guilty of a crime and because of due process concerns over convicting one incapable of committing a crime." Id. at *1.

Ellison's 1995 conviction involved a charging period that encompassed his 12th birthday. Id. at *3. The State argued the predicate conviction was valid because Ellison had turned 12 by the end of the charging period. Id. at *4. This Court rejected that argument because the State "provided no proof. . . of any misconduct after the age of eleven." Id.

In his plea statement, Ellison wrote that the crimes occurred "on or about between [sic] July 1, 1993 and May 25, 1995." Id. The court noted that this plea statement did not expressly state the crime occurred after his 12th birthday, nor did the court so find. Id. The court reasoned, "Since all of the misconduct could have occurred at age eleven, the State should have

conducted a capacity hearing, shown some of the conduct occurred at age twelve, or amended the information to contain a charging period only after Ellison reached age twelve.” Id.

Here, the State charged only a period after A.K. reached age 12, CP 12, but this does not resolve the issue for two reasons. First, as discussed above, the State did not prove, nor did the court find, that the conduct occurred at that time. CP 53. Amending the information would have resolved the problem in Ellison because, by pleading guilty, Ellison would have admitted the facts alleged in the information, presumably including the specific dates. The Ellison opinion does not suggest that merely amending the information would resolve the issue when a case results in a trial, rather than a guilty plea.

Second, the information in this case alleges “on or about” September 1, 2016 to March 3, 2017. CP 1. The “on or about” language in a charging document includes any period before expiration of the statute of limitations unless a specific alibi defense is raised. State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). Thus, not even the information is truly specific to a time after A.K. could be presumed to have capacity. The court did not find, and the State did not present any evidence that the act, in fact, occurred after A.K.’s 12th birthday. On the contrary, E.H.’s forensic interview states it was in August, before A.K.’s birthday on September 1. Ex. 3. The due process

concerns for convicting a child who was too young to form the requisite culpable mental state, as discussed in Ellison, are no different here.

The Ellison court also considered whether the capacity issue was of sufficient magnitude to preclude use of the conviction as a predicate in the failure to register case. The State argued capacity was not a constitutional issue. Ellison, 2016 WL 3401993 at *5. The court rejected that argument as well. First, the court declared, “We question the importance of the difference between a constitutionally infirm predicate conviction and an illegitimate conviction of an eleven year old, who was not found capable of committing a crime and was presumably incapable.” Id. at *10. The court noted that whether capacity is a constitutional issue is an open question: “Although we find no decision that holds a child has a constitutional right not to be found guilty of a crime unless shown to be capable of guilt, we likewise find no decision that holds to the contrary.” Id.

The court went on to analogize the conviction of a child without criminal capacity to the conviction of an adult who is incompetent to stand trial, which clearly violates due process. Id. Additionally, the court pointed out that the conviction of a person who cannot form the requisite intent violates due process. Id. The purpose of a capacity hearing is to determine whether the child is capable of having a criminally culpable mental state. Id.

Constitutional due process is implicated because “The capacity of the child goes to the essence of guilt.” Id. at 11.

The court affirmed the trial court’s dismissal of the charge because, due to the lack of a capacity hearing, the 1995 conviction was erroneous. Id. at *5. The same is true here. As in Ellison, the offense may have occurred when A.K. was 11, and no capacity determination was made. The adjudication of guilt was, therefore, unlawfully obtained and should be reversed.

In addition to the rationale of Ellison, an apt analogy can be made to cases in which the jury instructions permitted the jury to find a defendant guilty of two offenses based on the same crime in violation of double jeopardy. See, e.g., State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). In such cases, reversal is required unless it was “manifestly apparent” that the State was not seeking to punish the person twice for the same offense. Id. In making this determination, the court can review the entire record, including the specific evidence presented and the closing arguments. Id.

The same standard should apply when the record shows the court may have convicted a child who cannot lawfully be held criminally responsible for his conduct. The adjudication of guilt should be reversed unless the record shows that, despite the lack of a hearing or a finding, the

child did in fact have criminal capacity at the time of the act. Here, a review of the entire record on appeal reveals no basis for a finding that A.K. was possessed of the requisite understanding to be held criminally responsible. His adjudication of guilt should be reversed.

d. Lack of criminal capacity may be considered even if raised for the first time on appeal.

Although A.K.'s capacity appears not to have been discussed below, this Court should nonetheless reach the issue and reverse under RAP 2.5(a). First, under RAP 2.5(a)(2), the failure to show criminal capacity means that the State has failed to "establish facts upon which relief can be granted." The relief the State sought in the trial court was to impose criminal liability on a child. Because such liability cannot be imposed unless the child has capacity, and the State failed to establish his capacity, the adjudication of guilt must be reversed.

Second, this case presents manifest constitutional error that should be considered for the first time on appeal under RAP 2.5(a)(3). As discussed above and in Ellison, the conviction of a young child who may lack capacity to be held criminally culpable implicates constitutional due process concerns. Ellison, 2016 WL 3401993 at *10-11. The right to be relieved of criminal responsibility when a child lacks capacity to commit a crime is not

waived, even when the child pleads guilty. State v. J.F., 87 Wn. App. 787, 793 n. 8, 943 P.2d 303 (1997).

The facts in this case show this incident likely occurred before A.K. turned 12 years old. Ex. 3. No evidence shows otherwise. There is also no evidence or finding rebutting the presumption of lack of capacity for a child under 12. Because the record shows the court has likely convicted a child who cannot lawfully be held criminally responsible, the adjudication of guilt should be reversed.

2. THE EVIDENCE IS INSUFFICIENT TO FIND THAT 12-YEAR-OLD A.K. INTENDED TO COMMIT FIRST DEGREE RAPE OF A CHILD.

Attempted rape of a child is not a strict liability crime. It requires the intent to bring about the criminal result of sexual intercourse with a child under the age of 12 by someone more than 24 months older. Without knowledge of the age difference, a person cannot intend to cause that harm. A.K.'s adjudication of guilt must be reversed because the evidence is insufficient to support a finding that he was aware of the age difference between himself and E.H.

The meaning of a statute is a question of law reviewed de novo. State v. Johnson, 173 Wn.2d 895, 898, 270 P.3d 591 (2012). In assessing whether the evidence was insufficient, the court views the evidence in the light most

favorable to the State and asks whether any rational person could find the essential elements were met beyond a reasonable doubt. Id.

The offense of rape of a child in the first degree can only be committed by a person who is at least 24 months older than the child. RCW 9A.44.073. Generally speaking, lack of knowledge of the other person's age is not a defense. RCW 9A.44.030. But A.K. was not convicted of rape of a child. He was convicted of *attempted* rape of a child. CP 40. Attempt is not a strict liability crime.

Attempt requires both a substantial step toward committing the crime and the intent to commit the crime. RCW 9A.28.0201); Johnson, 173 Wn.2d at 908. To be guilty of attempt, the person must intend the specific criminal result of the base crime. Johnson, 173 Wn.2d at 899.

The criminal result of rape of a child in the first degree is sexual intercourse with a person who is both under 12 and more than 24 months younger than the defendant. RCW 9A.44.073. Sexual intercourse alone is not a criminal result. Johnson, 173 Wn.2d at 907. Even sexual intercourse with a person under the age of 12 is not a criminal result unless there is an age difference of at least 24 months. Id.; RCW 9A.44.073. A person cannot intend that criminal result without having some idea that the person is, in fact, that much younger. See Johnson, 173 Wn.2d at 907-08.

The Johnson case illustrates this point. Johnson was convicted of attempted commercial sexual abuse of a minor based on his interaction with two undercover police officers posing as 17-year-old girls. 173 Wn.2d at 896-97. On appeal, Johnson argued, based on language from State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991), that one cannot attempt a strict liability crime that requires no intent. Johnson, 173 Wn.2d at 904. The court rejected the language from Dunbar, explaining that the mental state for attempt need not match the mental state required for the base crime. Johnson, 173 Wn.2d at 905. On the contrary, it is by design that the crime of attempt requires proof of the most culpable of all the mental states recognized by law. Id. An attempted crime “focuses on the dangerousness of the actor, not the act.” Id.

The Johnson court explained that, the crime of attempt to promote commercial exploitation of a minor is similar to attempted rape of a child in that the victim’s age is relevant to the accused’s intent to accomplish the specific criminal result. 173 Wn.2d at 909. The court held that the State was required to prove Johnson believed the undercover officers were minors in order to prove a criminal attempt. Id.

Under Johnson, A.K.’s adjudication of guilt must be reversed. The State failed to present any evidence and the court failed to find whether or not A.K. believed or knew E.H. to be at least 24 months younger than he.

In response, the State will likely point out the Johnson court's statement that, in the case of an actual, rather than a fictitious victim, intent can be established by proving the actual age of the intended victim. Id. at 908. Any argument to this effect should be rejected for two reasons. First, the rationale that led the Johnson court to require proof of his belief regarding the ages of the undercover officers applies equally to cases such as this one, where a child is accused of a sex crime against another child. The intent necessary for a criminal attempt is the intent to commit the specific crime and bring about the criminal harm. Id. at 907-08. Without knowledge, there can be no intent to bring about that harm.

An additional similarity is the likelihood that the requisite knowledge or intent was absent under the circumstances. Implicit in the Johnson court's opinion is the idea that the officers were not, in fact, minors, and, therefore, without proof to the contrary, it is reasonably plausible Johnson correctly assessed their ages and did not intend to exploit a minor. Here, when the accused person is a child, himself only 11 or 12 at the time, it is also reasonably plausible he was not aware of just how much younger E.H. was and did not intend the harm of sexually exploiting a much younger child. In such a case, the logic of Johnson requires proof of knowledge of the age difference.

This Court should also not rely on the language from Johnson about proof in cases of an actual, rather than a fictitious, victim because that language is dicta. Johnson involved a fictitious underage victim created by police. Id. at 896-97. Any reasoning relating to actual minors is unnecessary to the holding in that case. As the Johnson court recognized, statements unnecessary to the resolution of a case are “nonbinding dictum.” Id. at 904. (citing Ass’n of Wash. Bus. v. Dep’t of Revenue, 155 Wn.2d 430, 442 n. 11, 120 P.3d 46 (2005)). “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.” DCR, Inc. v. Pierce County, 92 Wn. App. 660, 683, 964 P.2d 380 (1998) (quoting State v. Potter, 68 Wn. App. 134, 150, 842 P.2d 481 (1992)). “Dicta is not controlling precedent.” DCR, Inc., 92 Wn. App. at 683.

Requiring proof of knowledge, under the rationale of Johnson, will not be an insurmountable hurdle in the vast majority of attempted sex offense cases. Knowledge of any fact can be shown by circumstances under which a reasonable person would be aware of that fact. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Thus, an adult or older teen committing this offense could be easily shown to have knowledge of the requisite age difference. In many, if not most, cases, the age differential would be so obvious that any argument of lack of awareness would be

laughable. But that is not so when the charging period began on the accused rapist's 12th birthday, and the alleged victim is less than three years his junior.

“[C]riminal attempt is not a strict liability offense.” Johnson, 173 Wn.2d at 907. An attempted crime cannot be committed without the intent to bring about the specific criminal result of that crime. Id. at 899. Here, the State presented no evidence that A.K. knew how old E.H. was or that he was more than 24 months younger. Without any evidence A.K. knew of the age difference, the State failed to prove he intended to bring about the harm of first-degree rape of a child. The adjudication of guilt must be reversed.

3. THE COURT ERRED IN ADMITTING UNRELIABLE CHILD HEARSAY THAT AROSE IN THE CONTEXT OF A BITTERLY CONTESTED DIVORCE.

The prosecution of A.K. rests entirely on statements by E.H. made in the context of a bitter divorce between his parents and used by his father to obtain sole custody. A.K.'s adjudication of guilt should also be reversed because the court misapplied the factors from State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), and improperly admitted child hearsay.

The child hearsay statute provides that out-of-court statements by a child under the age of ten who testifies at trial may be admitted if the court finds sufficient indicia of reliability. RCW 9A.44.120 (1), (2)(a). Ryan, 103 Wn.2d at 172; In re Dependency of A.E.P., 135 Wn.2d 208, 226-27, 956

P.2d 857 (1998). To be admissible, child hearsay must manifest “particularized guarantees of trustworthiness.” Ryan, 103 Wn.2d at 170. The circumstances surrounding the making of the statements must render them inherently trustworthy. State v. C.J., 148 Wn.2d 672, 684, 63 P.3d 765, 771 (2003); Ryan, 103 Wn.2d at 173. The statements must be characterized by such a degree of inherent trustworthiness as will serve as a substitute for cross-examination. Ryan, at 175. In assessing trustworthiness, courts consider most of the factors set forth in Ryan.

In Ryan, the Supreme Court set forth nine separate factors for determining the admissibility of a child’s statements under RCW 9A.44.120:

- (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) whether the statement contained assertions about past fact;
- (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement;
- (8) how likely is it that the statement was founded on faulty recollection; and
- (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant’s involvement.

103 Wn.2d at 175-76. Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially satisfied. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).⁴

A court's decision to admit child hearsay statements must be reversed when the court abuses its discretion in weighing the Ryan factors. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994). A court abuses its discretion when its decision is manifestly unreasonable, or when discretion is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). The court erred in its assessment of several key Ryan factors here.

The most salient of the nine factors in this case is the last one: "whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement." Ryan, 103 Wn.2d at 176. Here, the circumstances indicate good reason to suppose E.H. misrepresented A.K.'s involvement.

⁴ At least three of the factors have been deemed irrelevant or duplicative. For example, the seventh factor, the possibility that cross-examination would show lack of knowledge, is irrelevant if the child testifies. State v. Keneally, 151 Wn. App. 861, 880, 214 P.3d 200 (2009); State v. Woods, 154 Wn.2d 613, 624, 114 P.3d 1174 (2005). Factor nine (no reason to suppose that the declarant misrepresented the defendant's involvement) may be redundant of issues contained in the first five factors. In re Dependency of S.S., 61 Wn. App. 488, 499, 814 P.2d 204 (1991). Factor six, whether the statement is an assertion of past facts, has been found unhelpful and can be ignored "so long as other factors indicating reliability are considered." State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991). **Error! Bookmark not defined.**

E.H.'s mother had left his father and moved in with another man. RP 125. His father was enraged by this and commenced filing legal petitions to try to restrict his wife's access to the children and harass the other man. RP 125, 127. These efforts were unsuccessful until the aunt brought these allegations to light. RP 132-34. The aunt had been helping him with the divorce proceedings and had been involved in a physical fight with his soon-to-be former wife. RP 157-58. As a result of these allegations, he successfully gained sole custody of the children. RP 132-24. The fact that these allegations arose within the context of, and were specifically used as legal ammunition in, a bitterly disputed divorce proceeding casts grave doubt on the question of reliability.

These same circumstances are also linked to E.H.'s motive to lie. The court's oral finding that he had no such motive is manifestly unreasonable under the circumstances. The court reasoned that E.H. would not have lied because he wanted to be with his mother, and his allegations were used to separate him from his mother. RP 234-35. But this rationale only holds if E.H. understood the use his father was making of his statements. There is no indication E.H. was aware his statements would likely result in an end to his contact with his mother. He was a child whose understanding appeared intellectually even younger than his nine years and who was in trouble with his aunt and afraid of more trouble with his father.

RP 99-100, 135-36. Under these circumstances, the father's motive to lie should be imputed to the child.

The "motive to lie" factor also encompasses the diminished reliability that occurs when a child has made different, and inconsistent statements. Ryan, 103 Wn.2d at 176. Here, for example, E.H. told the forensic interviewer that this happened in the hallway. Ex. 3. However, when asked at trial whether he was ever in the hallway with A.K., E.H. answered "well maybe or maybe not." RP 90. At trial he said this happened four times, whereas he told the interviewer it happened seven times. RP 94; Ex. 3. These inconsistent statements weigh against admission of child hearsay.

The record also does not support a finding on the second factor, general character. This factor refers to the child's reputation for truthfulness or lack thereof. State v. Keneally, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). There was no testimony on whether E.H. has a reputation for truthfulness. Neither E.H.'s father nor his aunt was asked about whether he had a propensity to lie. With no evidence before the court about the child's reputation for truthfulness or deceit, the court's conclusion that he had a generally truthful character, RP 236, is based on untenable grounds.

If E.H.'s father is to be believed, E.H.'s initial disclosure was spontaneous, and this factor is satisfied as to the statement to his father, overheard by his aunt. However, the same cannot be said for E.H.'s

statements to the forensic interviewer. A statement is spontaneous for purposes of the Ryan factors only if the questioning that elicited the statement was not leading or suggestive. Keneally, 151 Wn. App. at 883. From his initial disclosure, the interviewer's subsequent questions assumed the truth of E.H.'s initial statement. Ex. 3. Rather than ask open-ended, non-leading questions, she foreclosed any possibility that E.H. would admit the allegations were not true. Ex. 3.

The timing and relationship factors are, at most, neutral towards reliability of E.H.'s statements. A relationship of trust increases reliability. Keneally, 151 Wn. App. at 884. Statements made closer in time to the events are also less likely to be the result of faulty recollection. Id. But there is no clear indication in the record how long after the events these statements occurred. According to E.H., the incident was in August, and he did not talk about it until March, at least six months later. Ex. 3. Six months is a very long time in the life of a small child. The remaining evidence only shows this could have happened any time after his parents broke up in July 2016 until the police were called in March of 2017. The timing reveals little about reliability except the circumstance that this occurred in the context of the divorce. Because of that divorce, a trusting relationship between E.H. and his father and aunt also does not show reliability. On the contrary, it increases

the likelihood that he would be susceptible to their influence and, consciously or unconsciously, adopt their motives.

The only Ryan factor that clearly supports admissibility for the initial disclosure is that more than one person heard the statement. This is insufficient when the Ryan factors must be “substantially met.” Swan, 114 Wn.2d at 652. The court abused its discretion in admitting E.H.’s statements.

Any evidentiary error that “within reasonable probabilities” would materially affect the outcome of the proceedings is prejudicial and warrants reversal. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Erroneous admission of hearsay may not be prejudicial if the inadmissible evidence is “of minor significance in reference to the overall, overwhelming evidence as a whole.” State v. Sanford, 128 Wn. App. 280, 287-88, 115 P.3d 368 (2005) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

It cannot be said that E.H.’s out-of-court statements to his aunt, his father, and the forensic interviewer were of minor significance. Those statements together with his in-court testimony provided the only evidence that any crime occurred. In the oral ruling, the court specifically found the aunt and father’s testimony about those statements credible. RP 261. Therefore, it appears those statements played a significant role in the court’s

finding of guilt. Improper admission of the child hearsay statements also requires reversal.

D. CONCLUSION

For the foregoing reasons, A.K. asks this Court to reverse his adjudication of guilt.

DATED this 30th day of November, 2018.

Respectfully submitted,

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