

FILED
Court of Appeals
Division II
State of Washington
4/18/2019 12:17 PM

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. SPECULATION THAT THIS OFFENSE OCCURRED AFTER A.K.'S 12TH BIRTHDAY IS INSUFFICIENT.

The State claims there was sufficient evidence from which the court could find the alleged sex offenses occurred after A.K.'s 12th birthday based on the idea that the offenses were ongoing. Brief of Respondent at 3. This argument is a bridge too far. The State fails to support this claim with any citation to the record. The only mentions of timing in E.H.'s testimony were that this occurred when they would visit his mother and that it happened before his birthday in August. Ex. 3; RP 92. The State points to no other evidence of the timing of events. Presumably, if there were other evidence, the State would have pointed it out. E.H. did testify that it happened more than once, but he could not say how many times, possibly four. RP 94, 106. He did not explain whether these four times occurred within a matter of minutes or a matter of months. To say that it occurred over a matter of months is pure speculation.

Before E.H.'s birthday in August, A.K. would have been only 11 years old. The mere mention that it happened when they would visit his mother, and that the visitation with his mother extended after A.K.'s 12th birthday is insufficient to sustain a finding that this occurred after that date.

A conviction rests on insufficient evidence whenever, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact “could have found the essential elements of the crime beyond a reasonable doubt.” In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (quoting State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). No reasonable trier of fact could have found beyond a reasonable doubt that this offense occurred after A.K.’s 12th birthday because anything other than the vague time frames contained in E.H.’s testimony is mere speculation.

Martinez illustrates the proposition that inferences based on circumstantial evidence must be reasonable and “cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The issue in Martinez was whether the State presented sufficient evidence that Martinez attempted to use a deadly weapon as he fled the scene of a burglary. 171 Wn.2d at 368. The deputy chased Martinez on foot and eventually caught him. Id. at 369. A struggle ensued and Martinez was arrested. Id. However, the knife was found along the path the two had traversed during the chase. Id. The only evidence Martinez attempted to use the knife was that the sheath on his belt was unbuttoned when the deputy arrested him. Id. Although the State argued this was evidence that Martinez had been trying to pull out the knife to use it against the deputy, the

Washington Supreme Court rejected this argument. Id. The court held that no rational trier of fact could have inferred an intent to use the knife from the mere fact that the sheath was unfastened. Id. The court granted Martinez' personal restraint petition and vacated his first-degree burglary conviction. Id.

The result here should be the same as in Martinez. The State has presented nothing more than speculation on the question of whether this offense occurred after or before A.K.'s 12th birthday. Thus, he was not shown to have capacity to commit a criminal offense.

Even under the standard that would apply at a capacity hearing, the evidence is insufficient. For a child under 12, the State must rebut the presumption of incapacity by clear and convincing evidence. State v. Ramer, 151 Wn.2d 106, 118, 86 P.3d 132 (2004). Clear and convincing evidence exists when the evidence indicates the fact at issue is "highly probable." In re Welfare of C.B., 134 Wn. App. 942, 952-53, 143 P.3d 846 (2006). E.H.'s testimony in this case makes it possible this offense occurred after A.K.'s birthday. But it does not make it "highly probable." Without at a minimum clear and convincing evidence of capacity, A.K.'s conviction cannot stand.

2. THE CAPACITY ISSUE IS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

The State's failure to prove facts upon which relief can be granted is a basis for reviewing an issue raised for the first time on appeal. RAP 2.5(a)(2). Moreover, it is well-established that sufficiency of the evidence is an issue that may be raised for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995). A.K. agrees with the State that this issue is entangled with the sufficiency of the evidence. It should therefore be addressed for the first time on appeal. RAP 2.5(a)(2).

The State appears to suggest that A.K. should not be permitted to benefit from an issue that was not raised below. Brief of Respondent at 3. But the party who should not be permitted a windfall in this case is the State. The State should not be permitted to benefit from its decision to charge only conduct after A.K.'s 12th birthday without actually proving that the offense occurred after that date.

It is patently clear from the record that the State was aware of the potential capacity issue. There was no other reason for the decision to begin the charging period on September 1, 2017. That date is unmoored from any connection to the evidence regarding when this offense allegedly occurred. For the State to claim now that it was deprived of the opportunity to address this issue is disingenuous.

The State also claims that the court was “within its right as fact-finder to determine that A.K. committed this crime after his 12th birthday.” Brief of Respondent at 4. This is incorrect because of the wholly speculative nature of the evidence regarding any offense actually occurring after A.K.’s birthday. But it is also incorrect for an additional reason: the court did not enter such a finding. As noted in the opening brief of appellant, the court found this offense occurred “about” September 1 through March 3. CP 53. “About” is not good enough when the capacity to commit a criminal act hinges on the specific date.

The State cites State v. Gilman, 105 Wn. App. 366, 369-70, 19 P.3d 1116 (2001), for the proposition that the juvenile court rules setting a two-week limit for a capacity hearing do not expressly provide for a remedy. Brief of Respondent at 2. Gilman has no bearing on this case. If this offense had, in fact, occurred after A.K.’s 12th birthday, no capacity hearing would be required. RCW 9A.04.050. But in opting to choose that route, the State bound itself to establish the premise, that the offense did, in fact, occur after that date.

Moreover, to the extent there is a question of prejudice, A.K. was clearly prejudiced. He is a child who stands convicted of a sex offense that is a class A felony if committed as an adult. CP 40; RCW 9A.28.020. He is

required to register as a sex offender. CP 68.¹ He is required to engage in sex offender treatment. CP 41. And all this without the State ever having established that he even had the capacity to commit a crime. This conviction should be reversed.

3. A CHILD CANNOT INTEND TO CAUSE THE SPECIFIC HARM OF RAPE OF A CHILD WITHOUT AWARENESS OF THE AGE DIFFERENCE.

Regarding A.K.'s sufficiency claim, the State cites to no legal authority for its claim that there is no intent requirement for the offense of attempted rape of a child. Brief of Respondent at 5-6. To be guilty of attempt, the person must intend the specific criminal result of the base crime. State v. Johnson, 173 Wn.2d 895, 898, 270 P.3d 591 (2012). The State does not explain how a child can intend to commit rape of another child if he is unaware of the age differential between them.

The specific harm resulting from the rape of a child only results when there is a significant age difference between the victim and the perpetrator. RCW 9A.44.073. Without that age difference, there is no victim and no perpetrator because there is no crime. There are only children. Therefore, a person cannot intend to cause that type of harm or criminal result when that person is also a child and there is no evidence he was

¹ A supplemental designation of clerk's papers was filed on April 17, 2019, designating sub number 92, filed on May 17, 2018. This citation is to the anticipated page number based on the index of clerk's papers so far.

actually aware of the age differential. The absence of such evidence in this case provides a second reason A.K.'s conviction must be reversed.

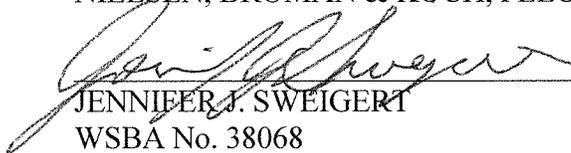
B. CONCLUSION

For the third issue in this case, the improper admission of child hearsay statements, A.K. rests on the arguments made in the opening Brief of Appellant. For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, A.K. asks this Court to reverse the juvenile court's adjudication.

DATED this 18th day of April, 2019.

Respectfully submitted,

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April 18, 2019 - 12:17 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52357-4
Appellate Court Case Title: State of Washington, Respondent v. Alexzander X. Knapp, Appellant
Superior Court Case Number: 17-8-00452-4

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