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Court of Appeals  
Division II  
State of Washington  
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NO. 52357-4-II

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

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STATE OF WASHINGTON, Respondent

v.

A. K., Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-8-00452-4

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878  
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (564) 397-2261

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. A.K. is presumed to have capacity to commit the crime of rape of a child as the court found it was committed after A.K. turned 12 years old.**
- II. Sufficient evidence was presented to support the conviction for Rape of a Child in the First Degree**
- III. The trial court properly admitted the child victim's statements pursuant to RCW 9A.44.120.**

### STATEMENT OF THE CASE

The State agrees with the statement of the case as set forth by A.K. in his opening brief.

### ARGUMENT

- I. A.K. is presumed to have capacity to commit the crime of rape of a child as the trial court found it was committed after A.K. turned 12 years old**

A.K. claims the record below fails to show he had the capacity to commit the crime of rape of a child in the first degree. However, the crime A.K. was convicted of was committed on or after A.K.'s twelfth birthday and therefore the record does not need to support a clear showing of capacity as it was never challenged below. A.K. is simply attempting to repackage an insufficiency of the evidence claim by trying to allege the crime occurred before his twelfth birthday which would be outside the charging period for the crime he was convicted of committing. If the crime

occurred before his birthday, then the trial court would have lacked sufficient evidence to find he committed the offense. The true issue to be analyzed therefore is not capacity, but sufficiency of the evidence. Furthermore, A.K. did not raise the issue of capacity below and therefore the record is not complete on the subject of capacity. The remedy for any potential error involving such an incomplete record is not reversal, but rather would be remand to hold a capacity hearing.

RCW 9A.04.050 requires a determination of capacity be made when a crime is alleged to have been committed by a child who is younger than twelve years old. RCW 9A.04.050. Juvenile Court Rule 7.6(e) requires that a determination on capacity required by RCW 9A.04.050 be held within 14 days after the juvenile's first court appearance. JuCR 7.6(e). No such hearing was held in A.K.'s case as there was no claim that he committed the offense when he was younger than 12 years of age. Therefore, no hearing pursuant to RCW 9A.04.050 was held from which this Court could determine whether sufficient evidence of A.K.'s capacity was presented. Additionally, while JuCR 7.6(e) provides a two week time limit to hold a capacity hearing, there is no remedy provided for its violation. *State v. Gilman*, 105 Wn.App. 366, 369-70, 19 P.3d 1116 (2001). The remedy of dismissal is an extraordinary remedy and "should be granted only if other lesser sanctions will not remedy any prejudice to

the defendant.” *Id.* At 370 (citing to *State v. Garza*, 99 Wn.App. 291, 295, 994 P.2d 868, *rev. denied*, 141 Wn.2d 1014, 10 P.3d 1072 (2000)).

Reversal is akin to a dismissal and therefore is an extraordinary remedy that should be granted only if nothing else will remedy any prejudice to A.K. A.K. has suffered no prejudice here as the crime was committed when he was twelve years old, capacity is presumed and no capacity hearing pursuant to RCW 9A.04.050 needed to be held. The trial court did not err in failing to hold a capacity hearing. Additionally, A.K. should not benefit from failing to raise an issue at the trial court level below, one which could have been resolved in fairness to all parties had he raised it then instead of taking advantage and waiting to raise it with a lacking record below.

A.K.’s true argument is one of sufficiency of the evidence. His true claim is that he was convicted of a crime committed prior to the charging date range provided in the information. However, the evidence at trial could have led, and did lead, a reasonable fact finder, taking the evidence in the light most favorable to the State, to conclude the crime occurred after A.K. was twelve years of age. There was sufficient evidence presented at trial that the visits with A.K.’s family were ongoing and occurred after A.K.’s birthday and that the abuse occurred on numerous occasions. While the first occasion may have been very near A.K.’s

twelfth birthday, the several other occasions were more likely much later than that. Considering the fact-finder's ability to consider all evidence, whether it be direct or circumstantial, and taking all inferences in the light most favorable to the state, it is clear that the trial court was within its right as fact-finder to determine that A.K. committed this crime after his twelfth birthday. A.K.'s claim of error based on lack of capacity or lack of evidence fails.

**II. There is sufficient evidence to support A.K.'s conviction for rape of a child in the first degree**

A.K. claims there was insufficient evidence presented at trial to support his conviction for rape of a child in the first degree. When the evidence is considered in the light most favorable to the State, it is clear that there is sufficient evidence to support the conviction for rape of a child in the first degree. A.K.'s claim fails.

In determining the sufficiency of the evidence, this Court views the evidence presented at trial in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). In reviewing the evidence, all reasonable inferences are drawn in favor of the State and are interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201,

829 P.2d 1068 (1992). Additionally, the defendant admits the truth of the State's evidence in an insufficiency claim. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). Evidence may be direct, circumstantial, or a combination of the two. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

To convict a defendant of the crime of attempted rape of a child in the first degree, the State must prove that the defendant took a substantial step toward having "sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). A person is guilty of attempting to commit a crime if, "with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). "[T]he intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." *State v. Chhom*, 128 Wn.2d 739, 743, 911 P.2d 1014 (1996); *see also Townsend*, 147 Wn.2d at 679. Therefore, attempted rape of a child has two elements: intent to have sexual intercourse and the taking of a substantial step toward the commission of that crime. *State v. Wilson*, 158 Wn.App. 305, 317, 242 P.3d 19 (2010).

A.K. claims there was insufficient evidence to support his conviction because there was no evidence of his knowledge of what age

the victim was, however, knowledge of age of the victim is not an element of completed rape of a child and is therefore not an element of attempted rape of a child. As rape of a child is partially a status offense, not based on what the defendant believed or thought the victim's age was, but on what the victim's age actually was at the time of the offense, the intent to commit the crime is also not based on the defendant's subjective beliefs about the victim's age. A.K.'s claim to this effect is without any merit.

**III. The trial court properly admitted statements pursuant to RCW 9A.44.120**

A.K. argues the trial court improperly admitted statements that E.H. made concerning the abuse pursuant to RCW 9A.44.120. The trial court properly considered the statements, the reliability of the statements, and pertinent case law in coming to its conclusion. The trial court properly admitted the statements and its decision should be affirmed.

RCW 9A.44.120 provides that,

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined in RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including

juvenile offense adjudications, 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: PROVIDED, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

....

RCW 9A.44.120.

This Court reviews a trial court's decision to admit child hearsay statements pursuant to RCW 9A.44.120 for an abuse of discretion. *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011). A trial court abuses its discretion only "when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006) (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)).

The trial court in A.K.'s case held a hearing pursuant to RCW 9A.44.120 and considered the factors from *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). The trial court considered the factors as set forth in *Ryan* and applied them to this case. While there was a contentious divorce between E.H.'s parents, it is clear from a full reading of E.H.'s testimony

that he was not coerced by either parent and was not subject to one parent forcing him to lie. The trial court was within its discretion to find that E.H. loved both of his parents and that he would not want to do anything to keep himself away from his mother. Additionally, there was no true reason for E.H. to fabricate anything against A.K. and there was no animosity between the two of them and E.H.'s father's animosity towards E.H.'s mother was not shared by E.H. The trial court was the one present to observe the witnesses and hear all the testimony. It was in the best position to consider and determine whether the statements E.H. made to his father, his aunt, and the forensic interviewer were reliable and that term is meant in RCW 9A.44.120. The trial court thoughtfully considered all the evidence, the *Ryan* factors and the case law. The trial court did not abuse its discretion and properly admitted and considered the statements E.H. made concerning the abuse. The trial court's decision to admit the statements should be affirmed.

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**CONCLUSION**

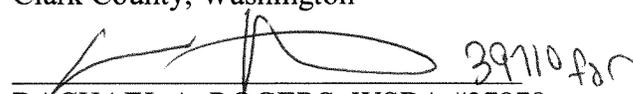
A.K. was properly found to have committed attempted rape of a child in the first degree after a fair trial. The trial court safeguarded his rights and ensured that sufficient proof beyond a reasonable doubt supported the charge. The trial court should be affirmed in all respects.

DATED this 19<sup>th</sup> day of March, 2019.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
RACHAEL A. ROGERS, WSBA #37878  
Senior Deputy Prosecuting Attorney  
OID# 91127

**CLARK COUNTY PROSECUTING ATTORNEY**

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