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No. 36978-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON HANCOCK,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

In 2016 K.F. alleged Johnathon Hancock touched her inappropriately during her visits with her mother. He was charged with first degree rape of a child and first degree child molestation. There were no other witnesses and no physical evidence of abuse. Three years later, K.F. retained no independent recollection of the events and could not even identify Mr. Hancock. The trial court nevertheless found her competent to testify, opening the door to her hearsay statements made to her parents and forensic interviewers.

Additionally, the trial court failed to instruct the jury that it must rely on two separate and distinct acts to support convictions for both charged offenses. Because the trial court erred in making its child competency determination, erred in admitting K.F.'s hearsay statements, and failed to provide a "separate and distinct acts" instruction, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. Mr. Hancock's conviction for child molestation in the first degree violates both the federal and state prohibitions against double jeopardy.

2. The trial court failed to instruct the jury that convictions for both charges must be based on separate and distinct conduct.

3. The trial court applied the incorrect test to determine a child's competency to testify.

4. The trial court erroneously found K.F. competent to testify.

5. The trial court improperly shifted the burden to the defense to rebut the presumption K.F. was competent to testify.

5. The trial court erroneously admitted K.F.'s hearsay statements after incorrectly determining she was competent to testify.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury's verdict for one crime must rest upon its unanimous determination that the State proved a single act beyond a reasonable doubt, and that the act is separate and distinct from the act used to find the defendant guilty in another count for the same behavior. Mr. Hancock's jury was never instructed that its verdict for child molestation in the first degree must rest on a unanimous agreement as a single act separate and distinct from the act underlying a conviction for rape of a child in the first degree. Was Mr. Hancock's constitutional right to be free from double jeopardy violated where K.F. described

various acts of sexual misconduct, and the court did not properly instruct the jury on the need for separate and distinct acts?

2. A challenge to a child's competency to testify requires the court to apply the five-factor test enumerated in *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967). All five factors must be met. Here, the trial court failed to apply the *Allen* test, which K.F. could not have passed because she lacked any independent recollection of the occurrence she reported years earlier. Improperly shifting the burden to the defense, the trial court found Mr. Hancock had not rebutted the presumption K.F. was competent to testify. Is reversal required where the trial court applied the wrong test, shifted the burden of proof, and erroneously found K.F. competent to testify?

3. By statute, certain child hearsay statements are admissible as substantive evidence if the child either testifies at the proceeding or, where the child is unavailable, there is corroborative evidence of the events described in the statements. Here, the court erroneously permitted K.F. to testify, thus opening the door to her hearsay statements. Had she not testified, her statements could not have been admitted because there was no corroborative evidence of the events. Did the trial court err in admitting K.F.'s out-of-court statements when

she was not competent to testify and there was no corroboration of the events she described in those statements?

D. STATEMENT OF THE CASE

Mr. Hancock was friends with Victoria Forster, K.F.'s mother, in 2016.¹ RP 472. Since then, the two have entered a romantic relationship and share a son. RP 472. In 2016, K.F. lived primarily with her father in Montana and had occasional visits with her mother in Spokane. RP 287, 289. The visits were typically several days, and K.F. would either sleep at her mother's home or her maternal grandmother's home. RP 289, 475.

During the summer of 2016, K.F. reported to her father, Robert, and her former stepmother, Shyla Horowitz, that she did not want to visit her mother. RP 301. When asked why, K.F. indicated someone made her play games that sometimes hurt. RP 302. After Ms. Horowitz questioned her further, K.F. revealed her mother's friend, "Famous," sometimes "would touch her with things and it hurt." RP 304, 313. K.F. described a "pink" object that was "like her brother's" and was attached to a person. RP 306-07; 415-16. K.F. obtained her stepmother's

¹ K.F. and her mother do not share a last name. K.F. and her father Robert do share a last name, and to protect K.F.'s identity, Robert will be referred to by first name only.

vibrator, stating the object was similar, and Ms. Horowitz deduced K.F. was describing male genitalia. RP 307; 415-16. K.F. reported various acts of touching, including oral sex, being touched on the genitals, and being touched on her body. RP 307-08; 309; 416-17. She also described what Ms. Horowitz believed was semen. RP 417.

K.F.'s parents reported the incident to a local sheriff's deputy, who referred the incident to the Spokane Police Department. RP 282; 521; 540. Using Facebook photos, K.F. identified Mr. Hancock as "Famous." RP 525-26. As part of the investigation, K.F. completed a physical exam and forensic interview. RP 493. The interview was conducted by Val Widmer, videotaped, and played for the jury. RP 495. During the interview, K.F. made statements similar to those she made to her parents. Ex. P2. She described various instances of touching and sexual contact. Ex. P2.

A physical examination by Mary Vermillion, a nurse and forensic interviewer, revealed no injuries or evidence of sexual contact. RP 460. Ms. Vermillion found K.F. was "healthy and normal." RP 460. During the exam, K.F. stated her "bottom" had bled "white stuff" that came from "Famous." RP 461.

No witnesses or physical evidence corroborated K.F.'s reports. Her mother, Ms. Forrester, denied the allegations. According to Ms. Forster, Mr. Hancock had never spent the night in her home during any of K.F.'s visits. RP 473. Although the two later developed a romantic relationship, he did not live with her or spend the night during 2016. RP 474. K.F. met Mr. Hancock when Ms. Forster would run into him on the bus or while shopping. RP 474. During K.F.'s visits, Ms. Forster would often take her to the child's grandmother's home to visit with family and spend the night. RP 476. Mr. Hancock had never been alone with K.F. and had never helped babysit her. RP 474.

During pretrial hearings, the State moved to admit K.F.'s out-of-court statements under a statutory exception for child hearsay. RP 338-347. During the hearing, K.F. could not remember anything about the events she previously reported. RP 223-30. Mr. Hancock objected, arguing the State failed to establish the threshold matter of K.F.'s competency to testify. RP 347-48. Defense cited the *Allen* child witness competency test, and noted K.F.'s total lack of independent recollection of the events. RP 348-49.

The trial court analyzed K.F.'s competency under a "totality of the facts" analysis, finding she could remember some things that

happened around the events in question. RP 353. The court also found the defense had not rebutted the presumption that all witnesses were competent to testify, since there was no evidence K.F. was of unsound mind at the time of the occurrence. RP 352-53. Finding K.F. competent to testify, the court also found her hearsay statements were admissible under the child hearsay statute. RP 353-58.

E. ARGUMENT

1. The trial court's failure to insure the convictions for first degree child molestation and first degree rape of a child were based upon separate acts violated Mr. Hancock's constitutional right to be free from double jeopardy.

Mr. Hancock was convicted on one count of rape of a child in the first degree and one count of child molestation in the first degree as charged, both involving the same victim during the same time period. The court gave the jury a standard unanimity instruction but never stated the jury could not base its convictions for the two offenses on the same act. The evidence presented at trial, the arguments of counsel, and the jury instructions did not make it manifestly apparent to the jury that it could not base convictions for both charges on the same conduct. Mr. Hancock's constitutional right to be free from double jeopardy was thus violated.

a. The failure to properly instruct the jury may result in convictions that violate the constitutional protection against double jeopardy.

Both the federal and the state double jeopardy clauses provide that no person shall “be twice put in jeopardy” for the same offense. U.S. Const. amends. V, XIV; Const. art. I, sec. 9. The Washington provision is interpreted consistently with that of the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 102-03, 896 P.2d 1267 (1995). The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). A conviction and sentence violate double jeopardy if, under the “same evidence” test, the two crimes are the same in law and in fact. *State v. Tili*, 139 Wn.2d 107, 125, 985 P.2d 365 (1999). The violation may be raised for the first time on appeal. *Mutch*, 171 Wn.2d at 661.

Additionally, due process demands the State to prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, sec. 3, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The right to a

unanimous jury verdict requires the verdict reflect a unanimous finding of the act or acts underlying the charged offense. *See Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges must be proved “beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens”); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

In Washington, the state constitutional right to a trial by jury “provides greater protection for jury trials than the federal constitution.” *State v. William-Walker*, 167 Wn.2d 887, 895-96, 225 P.3d 913 (2010); Const. art. I, sec. 21, 22. Punishment sought by the state “must not only be alleged, it also must be authorized by the jury” in its verdict. *Id.*

In order to protect against multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007). “[I]n sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the trial court must instruct the jury that they are to find separate and distinct acts for each count.” *Borsheim*, 140 Wn. App. at

367 (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (internal quotation marks omitted). Where the jury is not instructed that it must find each count represents a separate and distinct act from all other counts, double jeopardy may be violated. *State v. Land*, 172 Wn. App. 593, 599-600, 295 P.3d 782, review denied, 177 Wn.2d 1016 (2013); *Borsheim*, 140 Wn. App. at 370-71.

b. The jury was not instructed that its verdict for rape of a child in the first degree must be based upon unanimous agreement of a specific act separate and distinct from the act constituting child molestation in the first degree.

To guard against a double jeopardy violation when the defendant is accused of several counts based on the same conduct, the jurors must be expressly instructed that each conviction must rest on a unanimous finding of a “separate and distinct act or event.” *State v. Carter*, 156 Wn. App. 561, 567-68, 234 P.3d 561 (2010); *State v. Berg*, 147 Wn. App. 923, 935, 198 P.3d 529 (2008); *Borsheim*, 140 Wn. App. at 368.

Jury instructions must make the requirement of unanimous separate and distinct act manifestly apparent to the average juror. *Carter*, 156 Wn. App. at 568. Unless the instructions unambiguously direct the jury that its verdict must rest on separate acts, the accused

person has been exposed to the possibility of multiple punishments for the same criminal conduct, contrary to the bar against double jeopardy.

Id.

The jury instructions in Mr. Hancock's case were similar to those found lacking in *Berg*, *Carter*, and *Borsheim*. In *Berg*, the defendant was charged with two counts of third degree child molestation, alleged during the same time period, and the court instructed the jury that its verdict must be unanimous as "to one particular act." 147 Wn. App. at 934. But the Court of Appeals held,

As in *Borsheim*, the trial court here did not give a "separate and distinct act" instruction or otherwise require the jury base each charged count on a "separate and distinct" underlying event. And as in *Borsheim*, the missing language potentially exposed Berg to multiple punishments for a single offense. Accordingly, we reverse and order the trial court to vacate one of the third degree molestation convictions.

Id. at 935.

In *Carter*, the complainant testified to 40 to 50 incidents of rape over a specific time period, and Carter was charged with four counts of rape of a child. 156 Wn. App. at 563-64. The court gave a standard unanimity instructions, but failed to instruct the jury on the requirement of separate and distinct acts. The Court of Appeals held the instructions

“exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts.” *Id.* 568.

In *Borsheim*, the defendant was charged with four counts of rape of a child in the first degree. 140 Wn. App. at 363. The trial court provided a standard unanimity instruction, a separate crime instruction, and a single “to convict” instructions for all four counts. *Id.* at 364-65. The Court of Appeals found the court’s instructions, when read together, “neither contained the ‘separate and distinct act’ instructions expressly required by the rule articulated in *Hayes*, nor made the need for a finding of ‘separate and distinct acts’ manifestly apparent to the average juror.” (citing *Hayes*, 81 Wn. App. at 431).

The court instructed Mr. Hancock’s jury that “a separate crime is charged in each count” and each count must be decided separately. CP 35 (Instruction 6). The jury was also given a standard unanimity instruction which did not include language instructing the jury that the acts supporting one count had to be separate and distinct from the acts relied upon for the other count. CP 43 (Instruction 14). The “to convict” instructions for both offenses were nearly identical, both involving K.F. and alleging violations during the same time period. CP

37, 41 (Instructions 8 and 12). The instructions differed only as to the required age difference between K.F. and Mr. Hancock, and one instruction required sexual intercourse while the other required sexual contact. *Id.*

Neither instruction informed the jury it must rely on two separate and distinct acts in order to convict Mr. Hancock of both offenses. No instruction explained the “separate and distinct” finding required by the constitutional prohibition against double jeopardy. The unanimity instructions explicitly provided, “To convict the defendant of Rape of a Child in the First Degree or Child Molestation in the First Degree, one particular act of Rape of a Child in the First Degree or Child Molestation in the First degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” CP 43 (Instruction 14). This instruction implied that “one particular act” could prove both offenses. Jury instructions lacking the “separate and distinct act” language are “flawed” and do not protect a defendant from double jeopardy violations. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 654-55, 667-68; *Berg*, 147 Wn. App. at 935.

c. K.F.'s statements and testimony, and counsel's arguments, did not protect against a double jeopardy violation by distinguishing between various acts that could be the basis for child molestation and rape of a child convictions.

The State charged Mr. Hancock with first degree rape of a child and first degree child molestation against K.F.. The charging period for both offenses was January 1, 2016 to September 1, 2016. CP 1. During this period, K.F. had several multi-day visits with her mother during which the alleged incidents may have occurred. RP 408-09.

K.F. made statements that Mr. Hancock touched her “down there” and put his “wiener” in her mouth. Ex. P2. She also stated to Mary Vermillion, a child forensic interviewer and nurse, that her “bottom” had bled “white stuff” that came from “Famous,” which was Mr. Hancock’s nickname. RP 461. She described being touched with an object akin to a vibrator that “moves” and “makes noise.” RP 414-15. Shyla Horowitz believed K.F. was describing a penis rather than a sex toy. *Id.* K.F. stated Mr. Hancock would “put his toy that was attached in her mouth and on her body.” RP 416.

In closing argument, neither the prosecutor nor Mr. Hancock’s attorney explained the jury had to unanimously find separate and distinct acts for each offenses. RP 585-623. The prosecutor did not

unambiguously elect specific acts as the factual predicates for each charge. The State attempted to distinguish the acts by arguing the touching “down there” comprised child molestation while other acts comprised rape of a child. However, even if the prosecutor tried to identify separate acts to support each conviction, the jury was instructed not to rely upon the parties’ arguments, and argument alone is not proof to support a general verdict. CP 29 (Instruction 1); *State v. Kier*, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008).

Rape can involve some form of penetration, however slight, but can also include “any act of sexual contact” that involves touching sexual organs with one’s mouth. CP 37-38 (Instructions 8 and 9). First degree child molestation broadly requires an act of “sexual contact,” defined by the jury instructions as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” CP 42 (Instruction 13). Child molestation thus includes the same acts that could constitute rape, although the two offenses have different mental elements. *See State v. French*, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). Several alleged acts could have potentially constituted the factual predicates for rape of a child and child molestation, yet the jury was never instructed that they must

unanimously agree upon separate and distinct acts to support verdicts in both counts.

d. Mr. Hancock's conviction for child molestation must be dismissed because the conviction violates double jeopardy.

A double jeopardy violation typically results in the dismissal of any conviction that violates the constitution. *See State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007). When the trial court fails to instruct the jury that separate convictions for sexual offenses against the same victim during the same time period must be based on separate and distinct acts, however, the reviewing court must engage in “rigorous” review of the record. *Mutch*, 171 Wn.2d at 664. Considering the evidence, arguments, and instructions, it must be “‘*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act” or else a double jeopardy occurs. *Id.* (quoting *Berg*, 147 Wn. App. at 931) (emphasis in original).

The Supreme Court found that *Mutch* presented the “rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found [Mutch] guilty of five separate acts of rape to support five separate convictions.” 171

Wn.2d at 665. In that case, Mutch was charged with five individual counts of rape based on allegations that constituted five separate units of prosecution. *Id.* Consistent with the number of charges, the complainant testified to five specific acts of rape, and the jury received five “to convict” instructions for each count. *Id.* The State argued all five acts in closing, and the defense did not challenge the complainant’s account of how many acts occurred. *Id.* Based on this record, the Court found beyond a reasonable doubt it was manifestly apparent to the jury that each count represented a separate act. *Id.*

The same cannot be said here, where it was not manifestly apparent to the jury that separate and distinct acts supported each conviction. K.F. described multiple acts, including being touched in her mouth, on her bottom, on her vagina, and on her body generally. *See* Ex. P2; RP 416, 461. Mr. Hancock was not charged with the same number of offenses as were described by K.F., and the jury instructions informed the jury the State alleged the acts had occurred on “multiple occasions.” CP 1, 43 (Instruction 14).

Given the incongruity between the number of acts potentially at issue, it is not manifestly apparent the jury found Mr. Hancock guilty of two separate and distinct acts to support his two convictions. This

failure results in a double jeopardy violation, and Mr. Hancock's conviction for child molestation must be dismissed. *See Womac*, 160 Wn.2d at 660.

2. The trial court failed to apply the *Allen* test to determine whether K.F. was a competent witness; because K.F. would have failed this test, her child hearsay statements should not have been admitted.

a. When challenged, the competency of a child witness must be assessed under the Allen test.

All people are presumed competent to testify by statute. RCW 5.60.020; *State v. S.J.W.*, 149 Wn. App. 912, 921, 206 P.3d 355 (2009), *aff'd on other grounds*, 170 Wn.2d 92, 239 P.3d 568 (2010). RCW 5.60.050 provides an exception to this general rule of competency:

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

When the competency of a child witness is challenged, the trial court applies the test for determining child competency set forth in *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Under this test, the child must demonstrate:

(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 the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it.

State v. S.J.W., 149 Wn. App. at 921–22 (citing *State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2003)) (emphasis added). Determining the child’s ability to meet these factors rests with the trial judge, “who must find that all five factors are met before the child can be declared competent.” *S.J.W.*, 149 Wn. App. at 922 (emphasis added). Although the court should address the *Allen* factors on the record, the failure to enter written findings does not preclude review where the record is sufficient for an appellate court to independently assess whether the factors have been met. *Id.* The trial court’s ruling is reviewed for abuse of discretion. *Id.* On appeal, a reviewing court may examine the entire record to review the trial court’s competency finding. *Id.* at 925.

When a child’s competency to testify is challenged, the burden of proof rests with the party calling the child. *S.J.W.*, 149 Wn. App. at 922. For example, in *In re Dependency of A.E.P.*, 135 Wn.2d 208, 956

P.2d 297 (1998), the trial court questioned a five-year-old witness about allegations of sexual abuse by her father. *Id.* at 221. The court did not ask the child when the incidents had occurred, but nevertheless found her competent to testify. *Id.* On appeal, the Supreme Court reversed, emphasizing the child “was unable to fix any particular point in time when the alleged touching occurred.” *Id.* at 224. As a result, the Court concluded A.E.P. was incompetent to testify because the State had not satisfied the second *Allen* factor. *Id.* at 225, 234. Specifically, the Court reasoned that the trial court “cannot possibly rule on a child’s ‘mental capacity at the time of the occurrence . . . , to receive an accurate impression of it’ when the court has never determined when in the past the alleged events occurred.” *Id.* at 225 (quoting *Allen*, 70 Wn.2d at 692). *A.E.P.* teaches that the *Allen* factors must be supported by affirmative evidence, and that the failure of the party calling the child witness to carry its burden of presenting critical information results in a finding of incompetency. *See S.J.W.*, 149 Wn. App. at 923.

b. The trial court failed to apply the Allen test to determine whether K.F. was competent to testify; the record as a whole indicates K.F. would have failed this test and reversal is required.

Defense counsel challenged K.F.’s competency as a witness as a threshold matter to the admissibility of K.F.’s child hearsay statements.

RP 347-49. Counsel cited the *Allen* factors, and specifically noted K.F.'s total lack of independent recollection about the alleged incidents. RP 348. Despite counsel's challenge to K.F.'s competency as a witness, the trial court failed to apply the *Allen* test to determine K.F.'s competence. RP 352-53.

Relying on the exception provided by RCW 5.60.050, the court found no reason to believe K.F. had been of unsound mind or intoxicated at the time of the incident. RP 352. The court applied a "totality of the facts" test, and found that K.F.'s ability to recall certain details about her life during the time of the allegations was sufficient to show she was competent to testify. RP 353. The court also shifted the burden to the defense to prove K.F. was incompetent and found the defense had not rebutted the general presumption that K.F. was competent to testify. RP 353. The trial court's child witness competency assessment was wholly inadequate.

First, the proper test for assessing a child's competency to testify is the *Allen* test. *S.J.W.*, 149 Wn. App. at 921-22. This test requires the trial court to find all five factors before declaring a child competent to testify, and the court may not substitute a balancing test or "totality of the facts" analysis in making this determination. *Id.* at 922.

Moreover, in *S.J.W.*, the court specifically rejected the assertion that the party challenging a child witness's competency bears the burden of rebutting the presumption of competency. 149 Wn. App. at 925. The court distinguished between a competency challenge raised against an adult under RCW 5.60.050 and a competency challenge to a child witness, and found it was error to place the burden on the challenging party to demonstrate a child witness's incompetence to testify. *Id.*

In contrast to the result in *S.J.W.*, reversal is required here because the record reviewed as a whole demonstrates K.F. lacked any independent recollection of the events leading to the charges against Mr. Hancock. Indeed, during the child competency and hearsay hearings, K.F. could not remember any details about her allegations. RP 223-30. She could not remember if Mr. Hancock did "things to [her] private parts," or if she saw his genitalia. RP 224-25. When asked what Mr. Hancock did that she did not like, K.F. only recalled that he had locked her in the bedroom. RP 227. She had no recollection of speaking to any forensic interviewers. RP 226. She testified similarly during trial. RP 398-403

K.F.'s testimony shows she did not meet all five *Allen* factors because she lacked any independent recollection of the occurrence

underlying the charged offenses. Because the trial court applied the wrong test to determine K.F.'s competency and improperly shifted the burden to defense, and because K.F.'s testimony fails to satisfy the *Allen* test, this Court must reverse.

c. K.F.'s hearsay statements were improperly admitted following the trial court's erroneous ruling she was competent to testify.

Because the trial court erred in finding K.F. competent to testify, her child hearsay statements were improperly admitted. Hearsay statements are inadmissible at trial absent an applicable exception. ER 802. By statute, child hearsay statements are admissible as substantive evidence in a criminal proceeding where:

(a)(i) It is 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 by RCW 9A.04.110; or

(ii) It is made by a child when under the age of sixteen describing any of the following acts or attempted acts performed with or on the child: Trafficking under RCW 9A.40.100; commercial sexual abuse of a minor under RCW 9.68A.100; promoting commercial sexual abuse of a minor under RCW 9.68A.101; or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102;

(b) 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

(c) The child either:

(i) Testifies at the proceedings; or

(ii) Is unavailable as a witness, except 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 (emphasis added).

Here, the trial court improperly ruled K.F. was competent to testify. Absent this erroneous finding, K.F. would not have testified at trial, rendering her out-of-court statements inadmissible under RCW 9A.44.120 (c)(i). Similarly, the statements would not have been admissible under RCW 9A.44.120(c)(ii) because there was no corroborative evidence of the acts alleged here.

Because the trial court incorrectly determined K.F. was a competent witness, and because the admissibility of her hearsay statements flows directly from the trial court's finding of competency, the admission of her child hearsay statements was also improper. Reversal is required.

F. CONCLUSION

For the reasons stated above, Mr. Hancock asks this Court to reverse his convictions for rape of a child in the first degree and child molestation in the first degree.

DATED this 6th day of March 2020.

Respectfully submitted,

/s Tiffinie B. Ma

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36978-1-III
)	
JOHNATHON HANCOCK,)	
)	
APPELLANT.)	

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