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NO. 61753-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

S.J.W.,

Appellant.

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

The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erred in ruling at the competency hearing that the complaining witness was not incompetent.

2. The juvenile court erred in failing to strike the complaining witness's testimony when his incompetence became apparent at the adjudicatory hearing.

3. The juvenile court erred in admitting appellant's statements to police.

4. The juvenile court erred in entering Findings of Fact Nos. 6, 7, 8, and 9. CP 1-2.

5. The juvenile court erred in finding lack of consent beyond a reasonable doubt. CP 3 (Conclusion of Law 5).

6. The juvenile court erred in finding appellant guilty of third degree rape. CP 3.

Issues Pertaining to Assignments of Error

1. Is a fourteen-year-old incompetent to testify when his parents as well as his life-long physician testified his mental disability renders him unable to distinguish fact from fiction?

2. When a witness demonstrates an inability to truly relate past events by answering both yes and no to identical propositions, should the witness's testimony be stricken as incompetent?

3. When a police officer questions a fourteen-year-old rape suspect while standing between the suspect and the only exit and repeatedly places his hand on the butt of his gun, is there a custodial interrogation requiring Miranda¹ warnings?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor charged S.J.W. (hereinafter "S.")² with third degree rape under RCW 9A.44.060(1)(a). CP 81. He was found guilty after an adjudicatory hearing in juvenile court. CP 26. The trial court found that a standard range disposition would create a manifest injustice and sentenced S. to 39-52 weeks confinement. CP 27-28, 30. S. timely filed notice of appeal. CP 4.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² Both appellant and the complaining witness are minors. This brief therefore refers them by their initials. See RCW 10.52.090. To avoid confusion, the appellant, S.J.W., will be referred to as "S." and the complaining witness, W.M.M., will be referred to as "W."

2. Substantive Facts

S. was fourteen years old when he was charged with third degree rape. CP 81. He admitted having consensual sexual intercourse with his lifelong friend, W.W.M. (hereinafter "W."),³ who was also fourteen. CP 36; 2RP⁴ 27. W. is developmentally delayed due to a seizure disorder, and S. was being paid to watch him for approximately 45 minutes until W.'s father returned from work. 3RP 9-10, 12. After hearing from both children, W.'s father and S.'s mother together decided to call the police to make a report, but did not want any further action taken. 1RP 16.

3. CrR 3.5 Hearing

Oak Harbor Police Officer Patrick Horn questioned S. in the bedroom of W.'s parents shortly after the incident. 1RP 6. After S.'s mother closed the bedroom door, Officer Horn returned to make sure that it was closed. 1RP 20. During this interview, S. sat on the bed. 1RP 7, 20. Horn stood between him and the door. 1RP 7, 20. Horn repeatedly rested his hand on the butt of his gun. 1RP 22.

³ See note 2, supra.

⁴ There are four volumes of verbatim report of proceedings referenced as follows: 1RP - May 2, 2008 (3.5 hearing); 2RP - May 6, 2008 (competency hearing); 3RP - May 7, 2008 (bench trial); 4RP - May 21, 2008 (dispositional hearing).

Both S. and his mother testified S. made no statements. 1RP 12, 23. Horn asked leading questions and attempted to get S. to agree with Horn's version of events. 1RP 12, 23. S. stared at his shoes and was largely unresponsive. 1RP 12, 23. Horn claimed he read S. the Miranda rights before the interview, but the court did not believe him. 1RP 7, 38-39. S., S.'s mother, and W.'s father all testified Horn only gave Miranda advisements after the interview was over, and the court expressly found them credible. 1RP 13, 16-17, 22, 38-39.

The questioning ended only when Horn attempted to obtain a written statement and S.'s mother became very upset. 1RP 13; 3RP 44. Only after the questioning was over did Horn announce that S. was not being arrested. 1RP 26. The juvenile court admitted Horn's testimony that S. told him "he knew he could take advantage of [W.] because he was retarded," despite finding that S. had not been advised of his right to remain silent or his right to an attorney. 1RP 39;⁵ 3RP 41-42. The court concluded no Miranda warnings were required because S. was not in custody. 1RP 39.

⁵ This citation is to the Verbatim Report of Proceedings from the CrR 3.5 hearing. It appears the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5.

4. Witness Competency Hearing

W.'s ability to relate events is most similar to that of a four to six-year-old child. 2RP 11, 18. Both his parents and his lifelong pediatrician, Dr. Sidney Sparks, testified he has difficulty distinguishing fact from fiction and tries to please the questioner by giving whatever answer is expected. 2RP 12, 28-30, 35-38. The pediatrician testified W. was able to answer direct questions but he "can often be found to change his mind depending on how the question is asked." 2RP 11. He also testified W. has "trouble retaining and relating information that I know happened in previous visits." 2RP 12. He testified it was unclear whether W.'s memory problems were due to his seizures, his seizure medications or his cognitive defects. 2RP 13. He testified that although W. can relate specific facts, "His ability to relate information completely accurate is impaired. Not only timing, but other accuracies." 2RP 17. In his affidavit, Dr. Sparks stated W. was "Incapable of understanding and relating true facts in a meaningful fashion when questioned." CP 53.

Both of W.'s parents signed affidavits stating their son regularly mixes fact and fiction and cannot tell them apart. CP 46, 47. He is easily influenced and comes to believe whatever he thinks the questioner wants

to hear. CP 46, 47. Officer Horn asked leading questions and introduced the concept of being hurt by the incident and of telling S. no. CP 46, 47.

At the competency hearing, W.'s father provided examples. On one occasion the two had been in a park in the morning, but W. said they had been in a parking lot. 2RP 28-29. After going to a football game, W. said someone was there who had not been there. 2RP 29-30. He said "I've had him tell me stories of him flying back to Milwaukee with me, when we haven't. And that's an airplane ride and we didn't go." 2RP 30.

W.'s mother testified:

The other night we were watching the Mariner game. . . New York was winning 5 to 1. . . and I said, 'What was the score?' He said, '5 to 1.' And I said 'Who won?' and he said, 'the Mariners.' Because he has no concept on who wins or who loses. He always thinks it's the Mariners. Very seldom does he relate that they actually lost because he wants them to win.

2RP 35. She also said W. had told Child Protective Services a specific neighbor had watched him (W. requires constant supervision like a small child and often has a "babysitter"), but that was not true, and in fact that particular neighbor had never even been in the family's home. 2RP 36; 3RP 12-13. Additionally, at some point after this case began and S. was prohibited from contacting W., W. told his teacher he had contact with S. when that was not true. 2RP 37. Later, he could not remember what he

had told his teacher about S. 2RP 37. On another occasion, W. called 911 and said there was a specific person outside, but that person was not there. 2RP 38. He often does not remember what he had for lunch. 2RP 41. She also testified there were aspects of this case that W. has only mentioned to her after being questioned by police or Child Protective Services. 2RP 44.

The State presented no evidence, but argued the court could not find W. incompetent because it was unclear when these examples of his inability to recount facts took place, because these examples showed only that on some occasions he had not told the truth, not that he was incapable of doing so, and because no finding of incompetence could be made without examining W. himself. 2RP 51-53.

Trial counsel replied, "I didn't call a severely handicapped child where he might have to go through it today and tomorrow. I wouldn't do that to him even if it harms this case." 2RP 54. The court responded, "Who are you representing?" 2RP 54. Counsel replied, "I'm representing [S.]. And I am not going to put this particular fragile witness through cross-examination, possibly twice, two days in a row. He has seizures. He's fragile. I'm not going to do it. And if that means there's a risk to the case, then there's a risk to the case." 2RP 54-55.

The court cited State v. Wyse,⁶ and reasoned that the issue is the child's ability to remember and relate "the events in question" rather than ability to remember and relate events generally. 2RP 55. Because there was no testimony relating to W.'s ability to recall and relate the events of this case, the court found defense counsel had not overcome the presumption W. was competent.⁷ 2RP 56-57.

5. Adjudicatory Hearing

At the adjudicatory hearing, W. testified Officer Horn had come to his house that day in October, 2007 "because [S.] put his peanuts in my butt." 3RP 59-60. When asked to clarify "peanuts," he pointed to his groin. 3RP 61. He said he told S. "Stop. Stop doing that." 3RP 61. When asked why he had told S. to stop, W. said "because he was doing something to me." 3RP 62. He answered "No," when asked whether he wanted S. to do those things to him. 3RP 62. He said afterward, "I cried." 3RP 8 62.

However, on cross-examination, counsel asked W., "What were you doing when you asked [S.] to stop?" 3RP 65. He replied, "We were playing playstation." 3RP 65. She then asked, "What were you playing

⁶ State v. Wyse, 71 Wn.2d 434, 429 P.2d 121 (1967).

⁷ The court's oral ruling is quoted at length in argument section C.2, infra.

when you told him to stop?" and he replied, "We were playing, uh, basketball." 3RP 65.

Finally, on redirect, the prosecutor asked W., "Did [S.] put your pee-pee in his mouth?" and "Did you put [S.]'s pee-pee in your mouth?" W. answered yes to both questions. 3RP 66. Then W. parroted back the question, asking the prosecutor, "Did you put [S.]'s pee-pee in your mouth?" 3RP 66. On re-cross, defense counsel phrased the same questions in the negative, asking first, "You never put your pee-pee in [S.]'s mouth, right?" 3RP 67. W. replied, "Right." 3RP 67. She continued, "And he never put his pee-pee in your mouth, right?" 3RP 67. "Right," he answered. 3RP 67.

W.'s father testified W. never told Horn he did not consent to intercourse with S. 3RP 27. Noting that the question was asked for impeachment purposes only, the prosecutor asked Horn about this conversation. 3RP 45. Horn testified when he questioned W., W. told him he did not consent. 3RP 45.

The court found W.'s testimony established a clearly expressed lack of consent and found S. guilty of third degree rape. CP 1-3. The court further found aggravating factors existed because W. was particularly vulnerable and the crime was an abuse of trust. CP 27-28. After a

dispositional hearing, S. was sentenced to 39 to 52 weeks commitment at a Juvenile Rehabilitation Administration facility. CP 30. He is also required to register as a sex offender. CP 33.

C. ARGUMENT

1. THE JUVENILE COURT ERRED IN ADMITTING W'S TESTIMONY BECAUSE THE STATE FAILED TO SHOW HIM CAPABLE OF CORRECTLY RELATING PAST EVENTS.

Competence turns on whether the witness was able to accurately perceive the events at the time and remember and relate them when called to testify. State v. Karpenski, 94 Wn. App. 80, 100-01, 971 P.2d 553 (1999). At a competency hearing, the trial court determines competency by a preponderance of the evidence. Id. at 103-04.

Generally, a trial court's ruling on competence is reviewed for abuse of discretion. However, this deference is grounded in the fact that nearly always, the court has met the witness face to face, has examined the witness personally, and has been able to assess demeanor. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) ("[W]e must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence."); Karpenski, 94 Wn. App. at 103 (citing State v. Borland, 57 Wn. App. 7, 786 P.2d 810 (1990)). Here, however, the court determined W. was not incompetent without having met him.

2RP 52-53. Under these circumstances, the trial court's ruling does not deserve the same deference.

Even so, the trial court's ruling was an abuse of discretion. 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)). Here, the juvenile court abused its discretion in permitting W.'s testimony for several reasons. 2RP 56-57. First, the court mistakenly reasoned incompetence must be based on an inability to remember or relate the facts of the specific case at issue instead of an inability to relate facts generally. Second, the court applied the wrong burden of proof. When a child witness's competency is questioned, the burden of proof is on the proponent of the testimony to establish that the child is competent. Third, based on a misapprehension of the law, the court believed it could not consider evidence that W.'s testimony was irreparably tainted by suggestive pre-trial questioning. 2RP 8. Finally, the uncontradicted evidence, both testimony and affidavits, at the competency hearing showed W. was incapable of correctly relating facts.

a. The Competency Ruling Was an Abuse of Discretion Because A Witness Is Incompetent When the Witness Is Unable to Correctly Relate Facts Generally.

By statute, a person is incompetent if the person, of any age, (1) is of unsound mind or (2) appears unable to receive just impressions of the facts and relate them truly. RCW 5.60.050.⁸ When testimony shows the witness is generally incapable of correctly relating facts, specific testimony relating to the facts at issue is not required. State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). The juvenile court abused its discretion in permitting W. to testify on the untenable grounds that the testimony at the competency hearing did not relate to the facts of the case.

The witnesses at the competency hearing were unanimous in their assertions that W. lacked the ability to correctly relate past events. 2RP 12, 28-30, 35-38; CP 46-47, 53. However, the juvenile court remarkably admitted W.'s testimony because the examples showed an inability to relate

⁸ RCW 5.60.050 reads in full:

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.

RCW 5.60.050.

other events, not the specific events of this case. The court explained the ruling saying:

I think there's some misunderstanding as to the test. I noticed that the case that you have says "recollection of events." However, it's more accurate to say "**recollection of the events in question.**" *State v. Wyse* (1967) case indicates that it's the child's understanding of the obligation to speak the truth on the witness stand -- on the witness stand -- the child's mental -- mental capacity at the time of the events in question to receive an accurate impression of events. **The events that are in question.**

Whether the child's memory is sufficient to retain an independent recollection of the events. **Not any event in particular, but the events that are the subject of the trial.** And whether the child has the capacity to express in words his or her memory of the events. Again, I put in there, **the events in issue** -- at issue.

And whether or not the child has the capacity to understand simple questions about the events. Again, **what I've heard is the child's accuracy in other events, but not these events in question.**

You have not met that preponderance of the evidence to show -- to overcome the presumption -- When a child is over 14, there is a presumption that that child is competent. So there has to be the burden on the person who is saying that person is not competent to show by a preponderance of the evidence. **But, again, it's not just over all. It's over the events in question.**

2RP 55-56 (emphasis added).

This is an erroneous view of the law. In Przybylski, the court upheld the trial court's finding that the child witness was competent. 48 Wn. App. at 665. The court noted that nothing required examining the

witness about the facts of the case before making a competency determination. Id. The court noted that:

No case cited to this court nor any case revealed by our research indicates that the trial court must necessarily examine a child witness regarding the particular issues and facts of the case to determine competency. In fact, we are persuaded that a witness's memory and perception might be better tested against objective facts known to the court, rather than disputed facts and events in the case itself.

48 Wn. App. at 665; see also State v. Swan, 114 Wn.2d 613, 646-47, 790 P.2d 610 (1991) (unnecessary to ask about sexual abuse in competency hearing when child did not know the day of the week or the color of her dress or recognize her father or the defendant); accord State v. Maule, 112 Wn. App. 887, 894-95, 51 P.3d 811 (2002) (defendant has no absolute right to cross examine the witness at the competency hearing, so long as the prosecutor's questions are not leading and do not refer to the facts of the case). Additionally, a witness's competence cannot be tested against the facts of the crime at issue because those facts are to be determined by the jury. E.g., State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267, 2008 Wash. LEXIS 474 at *10 (2008). The court erred in concluding the testimony about W.'s abilities must relate to the facts of this case.

A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, ____ Wn.2d ____, _____

P.3d _____, 2008 Wash. LEXIS 938 at *7 (No. 80195-9, Sept. 11, 2008) (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). The competency ruling was based on its view that the testimony at the hearing must relate to W.'s ability to accurately relate the specific facts of this case. Przybylski, 48 Wn. App. at 665. The juvenile court abused its discretion in permitting W.'s testimony based on this erroneous view of the law.

b. The Juvenile Court Applied the Wrong Burden of Proof at the Competency Hearing.

Witness competency is a preliminary fact upon which admissibility rests. ER 104(a); Karpenski, 94 Wn. App. at 102. In ruling on such a preliminary question, the trial court is to determine whether the evidence predominates in favor of that fact, in this case competency. Karpenski, 94 Wn. App. at 102. Every person is competent to be a witness except as otherwise provided by statute or court rule. ER 601. By statute, a person is incompetent if the person, of any age, (1) is of unsound mind or (2) appears unable to receive just impressions of facts and relate them truly. RCW 5.60.050. Prior versions of the statute limited the second prong to children under ten. State v. Allen, 70 Wn.2d 690, 691, 424 P.2d 1021 (1967). But currently, age is not determinative of competence. Woods, 154 Wn.2d at 617.

The juvenile court's competency ruling was an abuse of discretion because the ruling was based on an erroneous view of the burden of proof. The court erroneously placed the burden on S. to establish that W. was incompetent, saying, "When a child is over fourteen there is a presumption that the child is competent. So there has to be the burden on the person is saying that person is not competent to show by a preponderance of the evidence." 2RP at 56. When a child witness's competency is challenged, the burden of proof is on the State to establish competency by a preponderance of the evidence. In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998). Even when an adult's competency is challenged under the second prong of the incompetency statute, RCW 5.60.050, the burden is on the proponent of the evidence to show the witness is competent. See State v. Froelich, 96 Wn.2d 301, 307, 635 P.2d 127 (1981). And there is no authority for the court's erroneous assertion that the burden shifts on the witness's fourteenth birthday.

When a child's competency is challenged, the burden is on the proponent of the testimony to show the child is competent. A.E.P., 135 Wn.2d at 223; see also Karl B. Tegland, 5A Washington Practice: Evidence

Law and Practice 299 (5th ed. 2007). The five so-called Allen factors⁹ must be found before a child can be declared competent. Id. The court in A.E.P. explained that the child was not competent to testify because the record does not show the second Allen factor was met. A.E.P., 135 Wn.2d at 223; see also Wyse, 71 Wn.2d at 437 (testimony and cross examination of witness met the test from Allen). There was no evidence showing her mental capacity, at the time of the events, to receive an accurate impression of those events. A.E.P., 135 Wn.2d at 223. The court reversed, stating, "Absent this critical information, and despite the high level of deference accorded to the trial court's competency findings, we are compelled to hold the trial court abused its discretion in finding A.E.P. competent to testify." Id. at 226. Here, a child witness's competency was similarly challenged.

⁹ Under the oft-cited test from State v. Allen, the child must have:

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

A.E.P., 135 Wn.2d at 223. This test largely encapsulates the elements of incompetence from RCW 5.60.050, that the witness is incompetent if unable to receive accurate impressions of events and relate them truly. RCW 5.60.050.

The trial court abused its discretion in placing the burden of proof on S. to prove W.'s incompetence. See id.

The court should have applied the burden of proof from A.E.P. and Allen because W. is a child. The court implicitly treated W. as a child because it discussed the Allen factors, which apply to child witnesses. 2RP at 54; A.E.P., 135 Wn.2d at 223. The court also explicitly referred to W. as a child. 2RP at 56. There is no statutory definition of child relating to witness competency. In terms of the substantive offense at issue, rape of "a child" in the third degree includes victims up to age sixteen. RCW 9A.44.079. The Juvenile Justice Act defines "juvenile," "youth" or "child" as "individual who is under the chronological age of eighteen years." RCW 13.34.020(14). W. was just fourteen, and the undisputed testimony was that he functioned most like a four-to-six-year-old child. He is, therefore, a child.

But age is not determinative of competency. Woods, 154 Wn.2d at 617 (citing State v. Pham, 75 Wn. App. 626, 630, 879 P.2d 321 (1994)); Allen, 70 Wn.2d at 692; see also RCW 5.60.050 (containing no age limitation) and CrR 6.12 (also containing no age limitation). Undersigned counsel has found no authority to support the juvenile court's

assumption that the burden of proof shifts at a child's fourteenth birthday. 2RP 51-53, 56.

Even when an adult is alleged to be incompetent due to inability to recall or relate facts, the trial judge must first find the person is competent before permitting the person to testify. See Froelich, 96 Wn.2d at 307. In Froelich, the court held that the jury could hear evidence regarding a witness's mental disability if the witness had been deemed competent. Id. It summarized the court's process saying such evidence could be admitted, "Once a trial judge determines a person with mental defects is competent." Id. Similarly, the juvenile court here should have determined W. was competent before admitting his testimony.

The only authority mentioning an age fourteen limit is Washington's so-called dead man's statute, which prohibits testimony by interested parties relating to transactions or conversations with a deceased person, an incompetent person, or a minor under age fourteen. RCW 5.60.030. The purpose of this statute is to prevent testimony regarding transactions or conversations with persons who are either deceased or incompetent to testify. Lasher v. University of Washington, 91 Wn. App. 165, 169, 957 P.2d 229 (1998). It does not apply in criminal cases. State v. Hamilton, 58 Wn. App. 229, 232-33, 792 P.2d 176 (1990). This statute neither

explicitly nor implicitly establishes a burden of proof for competency hearings regarding child witnesses in sexual assault cases. To rely on this statute to shift the burden of proof in competency hearings at age fourteen would be to stretch the plain language and the purpose of the statute beyond all recognition.

Even if the burden of proof were shifted at a child's fourteenth birthday, it would elevate form over substance to apply that burden in this case. Intelligence, not age, determines competency, and it is undisputed that W. functions at the level of a four-to-six year old child. See Allen, 70 Wn.2d at 692; 2RP 11, 18.

The juvenile court may have mistakenly applied the burden of proof from the first subsection of RCW 5.60.050. When it is alleged, under the first prong of the statute, that a witness is of unsound mind, the burden of proof is on the party challenging the witness. State v. Smith, 97 Wn.2d 801, 803, 650 P.2d 201 (1982); see also Wyse, 71 Wn.2d at 436 ("We find nothing in the record to support the conclusion that the complaining witness was of unsound mind."). But unsound mind refers only to witnesses alleged to be "insane," i.e., unable to distinguish right from wrong or lacking all comprehension. Wyse, 71 Wn.2d at 436 (quoting State v. Hardung, 161

Wash. 379, 381, 297 Pac. 167 (1931)). That is not the prong of incompetence at issue in this case.

A court abuses its discretion if its decision is based on untenable grounds such as application of the wrong legal standard. Dixon, 159 Wn.2d at 75-76. Here, the court abused its discretion because it applied the wrong burden of proof. When a child's competence is challenged, the burden of proof is on the State to establish that the witness is competent. A.E.P., 135 Wn.2d at 223; Allen, 70 Wn.2d at 692. The court erroneously assumed without authority that this burden should be shifted when the child turns fourteen. Because the juvenile court based its ruling on an erroneous view of the burden of proof, the court abused its discretion in permitting W. to testify. See, e.g., Fisons, 122 Wn.2d at 339.

c. Evidence of Memory Taint May Be Considered at a Competency Hearing.

The ruling was also based on untenable grounds because the court wrongly declined to hear or consider evidence of prior suggestive questioning that likely tainted W.'s testimony. Counsel attempted to present evidence at the competency hearing that Officer Horn used suggestive and leading questions and that W. has a tendency to answer such questions in the manner expected by the questioner. 2RP 8. The court stated, "I'm not so concerned about how he was questioned," and ruled that the

testimony could only go to the five elements of child competency.¹⁰ This ruling flatly disregards binding precedent that evidence of tainted memory is properly considered at a witness competency hearing because it may show insufficient memory (element 3). See A.E.P., 135 Wn.2d at 230.

Suggestive pre-trial questioning can improperly influence children's memories and irreparably taint their testimony. See State v. Carol M.D., 89 Wn. App. 77, 948 P.2d 837 (1997), partially withdrawn on other grounds as stated in 97 Wn. App. 355, 358, 983 P.2d 1165 (1999). When a defendant has shown a child witness was improperly influenced, this may be sufficient to show that the child has no independent recollection of the facts in question. A.E.P., 135 Wn.2d at 230 (citing Allen, 70 Wn.2d at 692). A separate "taint" hearing is not required; a defendant may argue memory taint at the competency hearing. Id.

While the case law on taint relates to the testimony of younger children, the court erred in preventing evidence of tainted memory in this

¹⁰ As previously discussed, the Allen factors for testing the competency of a child witness are: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; or (5) the capacity to understand simple questions about it. 2RP 8-9; Karpenski, 94 Wn. App. at 100 (citing State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

case. First, although W. was fourteen at the time of the hearing, the un rebutted testimony established he had the mental age of a four-to-six-year-old child. 2RP 11. His parents and life-long physician testified he was highly susceptible to the influence of questioners. 2RP 11, 44. Even non-disabled adults have a recognized tendency to answer questions in the manner desired by the person asking the question. See Clayton Gillette, Comment: Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: a Simple Solution to a Complex Problem, 49 St. Louis L.J. 499, 500-01 (2005) (discussing design of psychological studies so that the subjects of the research can not learn the researcher's hypothesis). The juvenile court's ruling at the competency hearing is further undermined because it was based on the court's misapprehension that such taint could not be considered.

d. The Competency Ruling Was an Abuse of Discretion Because All the Evidence at the Hearing Showed W. Was Incompetent.

Even assuming, without conceding, the burden of proof were on S. to show that W. was incompetent by a preponderance of the evidence, that burden was met. Witnesses are incompetent to testify if they appear "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2). A child

witness is incompetent if the child lacks (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; or (5) the capacity to understand simple questions about it. Karpenski, 94 Wn. App. at 100 (citing Allen, 70 Wn. 2d at 692). Age is not determinative of competence. Woods, 154 Wn.2d at 617 (citing State v. Pham, 75 Wn. App. 626, 630, 879 P.2d 321 (1994)). Paraphrased, any witness, regardless of age is incompetent to testify if that person is unable to accurately relate past events.

Under the statutory test, W. was unable to receive just impressions of the facts or relate them truly. RCW 5.60.050. Both of W.'s parents as well as his life-long pediatrician testified at length and presented affidavits about his inability to correctly relate past events. See 2RP 10-14, 28-30, 35-38; CP 46, 47, 53. For example, his pediatrician testified W. "can often be found to change his mind depending on how the question is asked." 2RP 11. He also said W.'s "ability to relate information completely accurate is impaired. Not only timing, but other accuracies." 2RP 17. Their testimony showed W. adapts his answers to factual questions

according to what he believes the questioner wants to hear or to his own desires. See 2RP 11, 35; CP at 46-47. He also takes seizure medication known to affect memory. 2RP 13. The State presented no evidence to rebut any of this testimony. W.'s inability to accurately recall and relate events renders him incompetent. RCW 5.60.050(2); Karpenski, 94 Wn. App. at 100-01.

A trial court abuses its discretion if its decision is based on untenable grounds such as facts unsupported in the record. Dixon, 159 Wn.2d at 75-76. Here, not just a preponderance, but all the evidence at the hearing rebutted the presumption of competence and showed W. was incompetent to testify. Despite this undisputed testimony, the court concluded there was not a preponderance of evidence and relied solely on the presumption of competence to admit W.'s testimony. 1RP at 56-57. The court's conclusion is an abuse of discretion because it is unsupported by the facts in the record.

The mere presumption of competency, based on an erroneous understanding of the law, is too uncertain a basis for admitting a witness's testimony when abundant evidence shows his incompetence. The juvenile court wrongly dismissed the evidence merely because it did not relate to the facts of this case. Przybylski, 48 Wn. App. at 665. It also applied the

wrong burden of proof. A.E.P., 135 Wn.2d at 223. S. should also have been allowed to argue W.'s memories were tainted. Id. at 230. Moreover, every witness at the competency hearing gave specific examples showing W. was unable to accurately relate past events. The court abused its discretion in allowing W. to testify when the evidence of incompetence was clear, consistent, abundant, and uncontroverted.

2. W.'S TESTIMONY SHOULD HAVE BEEN STRICKEN AFTER HE TESTIFIED UNDER OATH THAT ESSENTIAL ELEMENTS OF THE CRIME BOTH DID AND DID NOT OCCUR.

Even when a trial court determines pre-trial that a witness is competent, the court may later order the testimony stricken if the witness's conduct during trial shows the witness was in fact incompetent. State v. Moorison, 43 Wn.2d 23, 33, 259 P.2d 1105 (1953). Here, the juvenile court should have stricken W.'s testimony when his incompetence became clear during the adjudicatory hearing itself.

In State v. Karpenski, the court held the trial court had abused its discretion in permitting a child to testify when the child was clearly incompetent. 94 Wn. App. at 83. In that case, the seven-year-old witness promised to tell the truth, but then proceeded to tell a story about being born at the same time as his two-year-old brother. Id. at 106. See also State v. Kinney, 35 Ohio App. 3d 84, 86, 519 N.E.2d 1386 (1987)

(competency was clearly in question when testimony showed severely mentally disabled child sometimes made things up).

Similarly to the child in Karpenski, W. testified under oath to impossible propositions. W. testified that S. both had and had not put his "pee-pee" in W.'s mouth. 3RP 66-67. He also testified that he both had and had not put his "pee-pee" in S.'s mouth. Id. Just as his parents and physician had testified in the competency hearing, W.'s answer to questions changed depending on the expectation of the questioner. Id. W.'s testimony was not merely inconsistent because his answers to material questions were mutually exclusive. This was even more problematic than the testimony in Karpenski because here the impossible testimony actually related to the facts of the crime. Despite W.'s obvious incompetence, the juvenile court relied solely on W.'s testimony to conclude W. had not consented and S. was guilty of third degree rape. CP 1-3.

W.'s testimony shows he is unable to relate facts truly instead of in the manner the questioner desires. That inability renders him incompetent to testify, and the court erred in not striking his testimony when this became apparent during the adjudicatory hearing. See RCW 5.60.050. As in Karpenski, this court should hold the trial court abused its discretion in allowing an incompetent witness to testify. 94 Wn. App. at 105-07.

3. THE COURT ERRED IN ADMITTING S.'S STATEMENTS MADE WITHOUT BENEFIT OF MIRANDA WARNINGS WHILE HE WAS IN CUSTODY.

Juveniles have a right to be warned that statements made under police interrogation may be used against them in a court of law. In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967) ("Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.") (citing Haley v. Ohio, 332 U.S. 596, 601 (1948)); In re Forest, 76 Wn.2d 84, 86-87, 455 P.2d 368 (1969). See also RCW 13.40.140(8). "Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation." State v. D.R., 84 Wn. App. 832, 835, 930 P.2d 350 (1997) (citing State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986)). Pre-Miranda statements made during custodial interrogation are presumed involuntary and inadmissible. Miranda, 384 U.S. 436. The juvenile court expressly found Officer Horn did not advise S. of his Miranda rights before questioning him. 1RP 38. However, the court also concluded S. was not in custody at the time. 1RP 39. This conclusion is untenable based on the testimony.

Whether there has been a custodial interrogation is a mixed question of law and fact this Court reviews de novo. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (defendant was not in custody while her trailer was being searched because she was not told she could not leave). Substantial evidence must support the factual findings and the findings must support the legal conclusions. State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997).

Custodial interrogation is not limited to any specific location and occurs whenever a person is " taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. The test is whether, looking at the totality of the circumstances, a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest. Lorenz, 152 Wn.2d at 36-37 (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). The interrogation is custodial if the defendant reasonably believed he was not free to leave or his movement during questioning was restricted. Lorenz, 152 Wn.2d at 36; State v. Sargent, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). Here, the facts do not support the court's conclusion that S. was free to leave at any time.

The court remarkably reasoned S. was free to leave because his mother was permitted to leave the room. 1RP 38. Since his mother was not the one being questioned on suspicion of a felony, this fact does not support the court's conclusion. Other facts mentioned by the court similarly fail to support the conclusion. The court also found S. knew he did not have to answer the officer's questions because he spent much of the interview looking at his shoes and not really answering. 1RP 38. The court reasoned S.'s movement was not restricted because he did not try to leave. 1RP 38.

The juvenile court's analysis simply does not take into consideration the reality of the circumstances. 14-year-old S. was in the back bedroom of a house not his own with Officer Horn and his mother. 1RP 20. He was sitting on a bed, with the officer standing between him and the door asking questions. 1RP 20. Horn frequently rested his hand on the butt of his gun. 1RP 20. S. was not told he could leave or refuse to answer questions. 1RP 27. Only after the questioning was over did Horn inform S. and his family S. was not being arrested. 1RP 26. Although S. often looked down at his shoes and said nothing in response to the questions, he did not feel he could leave or refuse to answer Horn's questions. 1RP 23-24. This perception was reasonable.

In State v. D.R., the court held a 14-year-old boy was in custody because a 14-year-old in his position would have "'reasonably supposed his freedom of action was curtailed.'" 84 Wn. App. at 836 (quoting State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)). The court held the child was in custody for purposes of Miranda based on the child's age, the "naturally coercive" nature of the principal's office where the interview occurred, and the obviously accusatory nature of the interrogation. 84 Wn. App. 838. The detective had shown D.R. his badge and had told him he did not have to answer his questions. Id. at 834. In distinguishing a similar Oregon case, the court stated, "The most significant difference is that D.R. was not told he was free to leave." Id. at 838.

The same result is required here. S. was also fourteen years old and was also not told he could leave. 1RP 27. As in D.R., the questioning was accusatory in the sense that the officer had been dispatched on suspicion of sexual assault. 1RP 5. Officer Horn's gesture of placing his hand upon the butt of his gun likely had the predictable effect of intimidating S., much like the display of the officer's badge in D.R. 1RP 20; 84 Wn. App. at 834. The posture of the scene with Officer Horn standing between a seated S. and the only exit was also "naturally coercive." 1RP 7, 20; D.R., 84 Wn. App. at 838. A finding of custodial interrogation is even more

justified here because, unlike the detective in D.R., Officer Horn never told S. he did not have to answer his questions. 84 Wn. App. at 834; 1RP 27.

A reasonable person in S.'s position would have felt he was not free to leave and his freedom of movement was restricted. That is the very definition of "custodial" and Miranda warnings were required. See, e.g., Sargent, 111 Wn.2d at 649-50; D.R., 84 Wn. App. at 838. For purposes of Miranda, S. was in custody and the court erred in concluding otherwise.

The court's error in admitting S.'s statement in violation of Miranda can not be harmless because the untainted evidence alone does not lead to a finding of guilt. See D.R., 84 Wn. App. at 838 (quoting State v. Ng, 110 Wn.2d 32, 38, 750 P.2d 632 (1988)). If S.'s statements to Officer Horn are not admissible, the only other substantive evidence of a crime is W.'s testimony, which was incompetent as described above. The adjudication of guilt should be reversed.

D. CONCLUSION

S.J.W. did not receive a fair trial because the juvenile court erred in admitting W.'s incompetent testimony and S.'s statements elicited in violation of Miranda. Without the improper testimony, there is insufficient evidence of a crime and this court should reverse the adjudication of guilt.

Alternatively, the court should remand for a new competency hearing and trial.

DATED this 22^d day of September, 2008.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent~~ ~~petitioner/plaintiff~~ containing a copy of the document to which this declaration is attached.

ISLAND COUNTY, WA
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 9-22-08
Name Done in Seattle, WA Date