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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.

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

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 07-8-00180-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE ISSUES 1

A. Did the juvenile court abuse its discretion in ruling the 14-year-old developmentally-delayed victim competent to testify? 1

B. Did the juvenile court properly hold Mr. Webb to his burden to show the victim incompetent? 1

C. Did the juvenile court abuse its discretion in admitting at trial Mr. Webb's statements to the investigating officer when Mr. Webb was accompanied by his mother and was in known surroundings at the home of the victim? 1

II. STATEMENT OF THE CASE 1

A. Statement of procedural facts. 1

B. Statement of substantive facts. 1

III. ARGUMENT 10

A. THE JUVENILE COURT DID NOT ERR WHEN IT HELD THAT MR. WEBB HAD THE BURDEN TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE VICTIM WAS INCOMPETENT TO TESTIFY 10

B. THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT MR. WEBB FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE VICTIM WAS NOT COMPETENT TO TESTIFY. 12

C. THE JUVENILE COURT PROPERLY HELD THAT THE QUESTIONING OF MR. WEBB BY THE INVESTIGATING OFFICER WAS NONCUSTODIAL 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT DECISIONS

Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 1602, 82 L.Ed. 317 (1987) 16
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 16, 17

WASHINGTON SUPREME COURT DECISIONS

Dependency of A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998) 11, 14
State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003) 11
State v. Froelich, 96 Wn.2d 301, 635 P.2d 127 (1981) 10
State v. Moorison, 43 Wn.2d 23, 259 P.2d 1105 (1953) 10, 15
State v. Smith, 97 Wn.2d 801, 650 P.2d 201 (1982) 10
State v. Woods, 154 Wn.2d 613, 114 P3d. 1174 (2005) 12, 13

WASHINGTON COURT OF APPEALS DECISIONS

State v. Avila, 78 Wn.App. 731, 899 P.2d 11 (1995) 13
State v. C.M.B., 130 Wn. App. 841, 125 P.3d 211 (2005) 10
State v. D.R., 84 Wn. App. 832, 930 P.2d 350 (1997) 16, 17
State v. Karpenski, 94 Wn.App. 80, 971 P.2d 553 (1999) abrogated by *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003) 11

WASHINGTON STATUTES

RCW 9A.44.060 18
RCW 9A.44.120 11

COURT RULES

CrR 6.13(c) 10
ER 601 10

OTHER AUTHORITIES

Courtroom Handbook on Washington Evidence (Karl B. Tegland, Courtroom Handbook on Washington Evidence, (2008-2009 ed. 2008)) 11

I. STATEMENT OF THE ISSUES

A. Did the juvenile court abuse its discretion in ruling the 14-year-old developmentally-delayed victim competent to testify?

B. Did the juvenile court properly hold Mr. Webb to his burden to show the victim incompetent?

C. Did the juvenile court abuse its discretion in admitting at trial Mr. Webb's statements to the investigating officer when Mr. Webb was accompanied by his mother and was in known surroundings at the home of the victim?

II. STATEMENT OF THE CASE

A. Statement of procedural facts.

The State agrees with Mr. Webb's recitation of the procedural facts.

B. Statement of substantive facts.

The State disagrees with Mr. Webb's recitation of the substantive facts, so provides the following statement. For clarity, the State adopts Mr. Webb's format for recitation of the substantive facts.

1. Confession hearing.

The juvenile court made the following findings of fact at the confession hearing. Officer Horn received a dispatch on October 3, 2007 to a possible sexual assault. He spoke with Wayne Musha, father of the victim, on the telephone prior to arrival at the Musha residence. 1RP 38.[1] He also spoke with Mr. Webb on the telephone prior to arrival at the Musha residence. *Id.* He went to the Musha residence because Mr. Webb was there. *Id.* "Mr. Musha, Ms. Garon, the Mr. Webb's mother, and Officer Horn had a discussion in the kitchen. Officer Horn asked to speak with Mr. Webb in private. Ms. Garon and Mr. Webb went to the Mushas' bedroom. Ms. Garon . . . closed the door according to Mr. Webb. The officer was standing . . . four feet away from Mr. Webb, who was sitting [on] the bed in the bedroom at that time. Ms. Garon was standing . . . away from the two by the . . . bathroom door." *Id.* Officer Horn then began questioning Mr. Webb. *Id.*

The juvenile court ruled that the interrogation was noncustodial and Mr. Webb's statements were voluntary, based on the following facts: Mr. Webb was in a private residence; his mother closed the door; his

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[1] 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); 4RRP – May 21, 2008 (dispositional hearing).

mother was present with Mr. Webb and terminated the interview; Mr. Musha, at Ms. Garon's invitation, was able to enter the room; both Ms. Garon and Mr. Webb could have terminated the interview at any time; and, Mr. Webb chose not to answer some of the questions. 1RP 39.

2. Competency Hearing.

The defense moved the juvenile court for an order declaring the victim incompetent to testify. At the competency hearing, defense called four witnesses, Dr. Sidney Sparks, the victim's physician (2RP 5), Marjorie Forbes, supervisor with Department of Social and Health Services (2RP 19), the victim's father (2RP 26), and the victim's mother (2RP 33). The victim was not called.

Dr. Sparks' testimony was allowed over objection by the State. 2RP 3. Dr. Sparks testified that her primary purpose in testifying was to comment upon the reliability of the victim's statements (2RP 15), that the victim was able to answer direct questions (2RP 11), that the victim can relate specific facts (2RP 16), and that her "best guess of his ability to talk about what happened to him is in [the four- to six-year-old] age group." 2RP 18.

The Department of Social and Health Services had previously objected in writing to the testimony of Marjorie Forbes, based on the

failure to obtain releases to permit such testimony. The juvenile court granted the objection. 2RP 25.

Wayne Musha testified that his son is "not up to speed. . . ." 2RP 27. His son is 14. *Id.* In one instance, his son's version of an incident "that happened in the park at night, or in the evening," was that the incident happened during the day in a parking lot. 2RP 29-30. His son was at a football game and said he was with certain people, but he was not. 2RP 30. His son told him a story of an airplane ride to Milwaukee that they didn't take. *Id.* His son couldn't tell a police officer his last name after a bike crash. *Id.* It "generally takes a while to get a true, accurate story out of [his son]. . . but you're still going to have to plug the holes yourself." 2RP 31-32. In court, his son would be focusing on something else, would be ignoring [the questioner] and would not focus on the question at hand. 2RP 32-33.

Elizabeth Musha testified that her son has a seizure disorder. 2RP 34. "The other day" he was able to tell her the baseball score but he told her the Mariners won (even though they lost) "because he wants them to win." *Id.* She testified to two instances when her son told falsehoods. 2RP 37-38. Her son was unable to repeat something to a doctor immediately after being given the information by the doctor, but remembered it "perfectly" the next day. 2RP 40-41. Her son cannot

remember what he had for lunch. 2RP 41. Ms. Musha testified that "he's like any kid. Certain things stick out in their memory, like a ball game. He doesn't usually give details." 2RP 42. She and her husband ask their son "simple, direct questions." *Id.* She testified that whether her son is able to answer accurately "depends what the question is." *Id.*

The juvenile court denied the motion disputing competency and stated, "there just has not been that finding by a preponderance of the evidence that the child is unable to recollect the events in question." 2RP 57. As well, the court stated that "[defense] has not met that preponderance of the evidence to show – to overcome the presumption -- . . . that the child is competent." 2RP 56.

3. Adjudicatory Hearing.

At the bench trial, the State called four witnesses, Wayne Musha (3RP 8), Officer Horn (3RP 31), the victim (3RP 56), and Detective Seim (3RP 68).

Wayne Musha testified that Mr. Webb was employed by him in the capacity of child sitter for his son, the victim, once per week for at least two months. 3RP 9-10. Mr. Musha had arrived home from work at 5:50 on October 3, 2007, and Mr. Webb and the victim were in the house when he arrived, playing a videogame in the victim's room. 3RP 10-11. He heard Mr. Webb leave the home, and very shortly thereafter, heard

"flailing" in the bathroom. 3RP 12. His son was getting dressed, and he asked his son what he (the son) was doing, to which the victim replied, "I'm getting dressed. Like Sam. . . . He said that he was – he was doing just like Sam did, getting dressed in the bath – bathroom." 3RP 13-14. In response to the question, why was he getting dressed in the bathroom, the victim said that Mr. Webb stuck his pee-pee in his butt. 3RP 14. When asked by his father what he meant by that, the victim repeated the same statement again. *Id.*

Mr. Musha elected to phone the police at 7:30 that evening, and Officer Horn responded at "7:45-ish." 3RP 15. Prior to his arrival, Officer Horn spoke with Mr. Musha and Mr. Webb on the telephone. 3RP 16. Officer Horn spoke alone with Mr. Webb and his mother, Ms. Garon, and then alone with the victim and both his parents. 3RP 19-20. Neither parent took the victim to the doctor. 3RP 30.

Officer Horn testified that he initially spoke with Mr. Webb on the phone, and then met him at the Musha residence. 3RP 33. On the telephone, Mr. Webb admitted to oral-genital and anal-genital intercourse with the victim. 3RP 35. Mr. Webb told the officer that he (Mr. Webb) knew he could take advantage of the victim because he was retarded. 3RP 42. The victim was able to tell Officer Horn that he knew why the officer was there – because Mr. Webb made the victim lick his penis. 3RP 45.

And then he told the officer that Mr. Webb "put his penis in my butt." *Id.* Those were the victim's exact words. *Id.* at 45-46. Officer Horn explained that he asked as few questions of the victim as possible, conforming to standard protocol, in order not "to lead him in any direction." 3RP 47. The victim was able to tell Officer Horn that the "licking" happened and then he told Mr. Webb he didn't want Mr. Webb to continue, and then Mr. Webb told the victim, "Just be quiet and do it." 3RP 54-55.

The victim promised to tell the truth, told the court his name, spelled his last name correctly, gave the name of the street on which he lives, the name of the city in which he lives, the name of his school, his grade in school, his age, those persons (his parents) with whom he lives, and his parents' names. 3RP 57. He accurately identified Mr. Webb by pointing, and was able to describe the Mr. Webb's shirt as "blue." *Id.* He was able to remember when the police officer came to his house, who was there when the officer came, what color the officer's uniform was, the officer's name, and why the officer came to his house that day: "Because [Mr. Webb] put his peanuts in my butt." 3RP 59-60. He was able to point to his groin to show where the "peanuts" were. 3RP 60.

The victim was able to describe where this happened – in his room -- and that he told Mr. Webb, "Stop. Stop doing that." 3RP 60.

He was able to recognize defense counsel as "Debbie," (3RP 63) and it was defense counsel who indicated to him when he completed his testimony that his parents were right outside the door. 3RP 67.

Detective Seim testified that he was the detective assigned to the case, and that his initial steps were to review the case and to contact the Mushas. 3RP 69. He had been unable to contact Ms. Musha, so he contacted Child Protective Services, who assisted him in arranging an interview with the victim. This interview was completed within two weeks of the event. 3RP 69-70. The detective explained that he had been trained in forensic child interviewing, and had performed about ten forensic child interviews. 3RP 74. His interview with the victim lasted about 45 minutes 3RP 71. The victim was able to answer questions about the specific allegations in a way that the detective was able to understand 3RP 73. The victim was able to demonstrate that he could recall events that took place in the past. 3RP 72.

The defense called two witnesses, Mr. Musha and Ms. Musha. 3RP 81 and 83. Mr. Musha testified that he wrote a statement for the police. 3RP 81.

Ms. Musha testified she physically examined her son's "behind" and found no sign of trauma, the skin was intact, there was no redness. 3RP 85. She testified that she has been a licensed practical nurse for ten

years, that she did not know what a SANE nurse is, that she was unaware of what a forensic examination was, and that she thought a forensic examination had to do with a gun. 3RP 85 and 86. She testified that she had no special training in examination of rape trauma victims. Further, she testified that she was unaware that physical evidence can be entirely absent even after sodomy. *Id.*

The juvenile court found Mr. Webb guilty of rape in the third degree.

4. Disposition Hearing.

At the disposition hearing, the juvenile court found that two aggravating factors existed to support a manifest injustice sentence outside the standard range. First, the juvenile court found that the victim was particularly vulnerable. Secondly, the juvenile court found that the crime was an abuse of trust.

III. ARGUMENT

A. THE JUVENILE COURT DID NOT ERR WHEN IT HELD THAT MR. WEBB HAD THE BURDEN TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE VICTIM WAS INCOMPETENT TO TESTIFY.

It is for the trial court to determine competency, *State v. Froelich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981), and the fact-finder to determine credibility. *State v. Moorison*, 43 Wn.2d 23, 34, 259 P.2d 1105 (1953).

"A witness of any age is presumed competent absent a determination by the court that the witness is incompetent." *State v. C.M.B.*, 130 Wn. App. 841, 843, 125 P.3d 211 (2005). In Washington, there no longer is a statute that defines a specific age at which witnesses are presumed competent; rather, the statute "treat[s] all 'persons' the same for purposes of competency." *Id.* at 844. A person adjudicated insane is presumed incompetent to testify, and that presumption may be rebutted by the party offering the witness. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982). "Where there has been no such adjudication, the burden is on the party opposing the witness to prove incompetence." Therefore, because any witness, under CrR 6.13(c) and ER 601, is presumed competent, the burden to show incompetence is properly on the party opposing the witness.

Mr. Webb argues that *Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998) stands for the proposition that, where the witness is a child, the burden somehow shifts to the proponent to show competency. That proposition appears nowhere in that court opinion. In fact, no other court opinion in this state supports that claim.

Professor Tegland makes the same assertion in Courtroom Handbook on Washington Evidence (Karl B. Tegland, Courtroom Handbook on Washington Evidence, (2008-2009 ed. 2008)) at page 297, citing *State v. Karpenski*, 94 Wn.App. 80, 971 P.2d 553 (1999), abrogated by *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). That proposition appears nowhere in that court opinion. That court opinion simply does not stand for the proposition that the burden of showing competence shifts to the proponent of a child witness.

Tegland goes on to explain, "Normally the party calling the child as a witness will take the leading role in establishing the child's competency to testify." *Id.* Presumably, this is because it is the State who is required to comply with RCW 9A.44.120 before child hearsay statements can be introduced at trial, and some of the issues with child competency are similar to issues with child hearsay.

So the question remains, what authority is there for the proposition that the burden to show competency of a 14-year-old youth operating to

some degree as a 6-year-old rests with the proponent of the witness, but the competency of an 18-year-old youth operating to some degree as a 6-year-old rests with the opponent of the witness, where both such youths are presumed competent? The State submits that there is no authority for that proposition.

There being no authority for such proposition, the next question for this Court is whether Mr. Webb had proved by a preponderance of the evidence that the victim was not competent to testify.

B. THE JUVENILE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT MR. WEBB FAILED TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT THE VICTIM WAS NOT COMPETENT TO TESTIFY.

In *State v. Woods*, 154 Wn.2d 613, 114 P3d. 1174 (2005), the Washington Supreme Court succinctly outlined the law surrounding competency of a witness:

> The determination of competency is within the sound discretion of the trial court, and it will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion. There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness. The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence.

Id. at 617, citations omitted.

Mr. Webb chose not to call the victim at the competency hearing, so the juvenile court properly found that Mr. Webb had not carried his burden to show the victim incompetent because there was nothing in the record about the witness's recollection of the events. As well, the court, because of the absence of the victim, could not "[see] the witness, [notice] the witness's manner, and [consider] his . . . capacity and intelligence" to ascertain that the presumed-competent witness was in fact not competent.

However, the juvenile court was able to "[see] the witness, [notice] the witness's manner, and [consider] his . . . capacity and intelligence" at the bench trial. This Court, also, benefits from a review of the witness's testimony at trial. "On appeal, [the appellate court] may examine the entire record in reviewing a competency determination." *Woods* at 617, citing *State v. Avila*, 78 Wn.App. 731, 737, 899 P.2d 11 (1995). A review of that record shows that the victim promised to tell the truth, was able to recall the events from eight months before, was able to answer simple questions about the events in question, and did not ignore the questioners or refuse to "focus in on the question at hand," (2RP 33), as predicted by his father. In fact, he was even able to recall accurately the name of the law enforcement officer involved with the case, Officer Horn (2RP 59).

Mr. Webb argues that the juvenile court abused its discretion by declining to consider evidence of memory taint at the competency hearing (Brief of Mr. Webb at 21), and cites to *A.E.P.*, 135 Wn.2d at 230. Mr. Webb is mistaken. That portion of the opinion that Mr. Webb relies on is concerned with the reliability of a young child's hearsay statements to others and whether those hearsay statements should be allowed in evidence. Indeed, in *A.E.P.*, "[a]t oral argument Petitioner's counsel conceded his challenge of memory taint more strongly focuses on the admissibility of A.E.P.'s hearsay statement, rather than on her competency to testify." *Id.* at 222. In Mr. Webb's case, child hearsay statements were not admissible because, whether competent or not, whether disabled or not, the witness was older than ten years of age, so "taint" was not an issue at the competency hearing. Any "taint" would go to credibility and not to competency. *Id.*

The victim answered "Right" to two leading questions that defense counsel asked him on cross-examination, both questions posing opposite propositions, and both questions ending with the question, "Right?" The specific exchange is as follows:

> Q Just—But you never put your pee-pee in Sam's mouth; right?
>
> A Right.

> Q And he never put your pee – his pee-pee in your mouth; right?
>
> A Right.

Mr. Webb relies on *State v. Moorison* for the proposition that the court erred by not striking the victim's testimony at trial, Brief of Appellant at 26. But what *Moorison* says is:

> [I]f . . . a trial court were to determine, as a result of a voir dire hearing, that a witness was competent to testify, the court *could* later order all the testimony of the witness stricken and instruct the jury to disregard it, if the conduct of the witness during the course of his examination or cross-examination *convinced the court* that it had been mistaken in its initial ruling and that the witness was in fact incompetent.

Moorison, 43 Wn.2d at 33 (emphasis added).

It is clear that the *Moorison* court left this decision in the hands of the trial court. It was not an abuse of discretion for the juvenile court not to strike the entire testimony of the witness, based on the answers to what amount to two misleading questions.

C. THE JUVENILE COURT PROPERLY HELD THAT THE QUESTIONING OF MR. WEBB BY THE INVESTIGATING OFFICER WAS NONCUSTODIAL.

The protections afforded arrested persons by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), are triggered by an actual arrest.

The juvenile court found that Mr. Webb was not in custody during the face-to-face questioning by Officer Horn. Therefore, *Miranda* warnings were not necessary. The setting was a private residence. Mr. Webb's mother closed the door to the bedroom and stayed with him. People were able to come and go from the room. Mr. Webb's mother terminated the interview, and either he or his mother could have done so at any time. 1RP 38-39.

Mr. Webb relies on *State v. D.R.*, 84 Wn. App. 832, 930 P.2d 350 (1997) for the proposition that Mr. Webb was in custody at the time of the questioning. But the true test for "custody" is "whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed *to the degree associated with a formal arrest.*" *Berkemer v. McCarty,* 468 U.S. 420, 441-42, 104 S.Ct. 1602, 82 L.Ed. 317 (1987) (emphasis added).

Mr. Webb was not told he was under arrest. He was in the company of his mother at all times during questioning. He was not

handcuffed. He was not taken to the patrol car. He was not at the police station. He was in the home of his neighbor, whom he had known all his life. He was certainly not in the principal's office, as was the case in *State v. D.R.*, supra. As well, Mr. Webb is the step-son of a State Patrol officer and had the sophistication to use proper nomenclature for the parts of a gun. 1RP 22.

And, significantly, Mr. Webb chose not so answer some of the questions. He testified on cross-examination:

> Q Did you answer the officer's questions?
>
> A Yes. But there were a few that I did – did not answer. I would constantly look down at my feet and kind of get confused kind of, if you like. I just wouldn't answer the question.
>
> Q So you chose not to answer some questions?
>
> A Yes, ma'am.

1RP 23.

The juvenile court did not abuse its discretion by finding that Mr. Webb was not in custody during questioning for purposes of *Miranda*.

IV. CONCLUSION

For all the reasons argued above, the State respectfully requests this Court uphold Appellant's conviction for rape in the third degree, in violation of RCW 9A.44.060.

Respectfully submitted this 21 day of November, 2008.

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