

05268-1

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NO. 65268-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

C.H.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY,
JUVENILE DIVISION

The Honorable George Bowden, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
SNOHOMISH COUNTY
JUVENILE DIVISION

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found appellant had the capacity to commit the charged offense.

2. The trial court erred in its written findings and conclusions when it entered conclusion of law 3, which addresses appellant's capacity to commit the offense.

Issue Pertaining to Assignments of Error

A child under 12 is presumed incapable of committing a crime unless the State proves otherwise by clear and convincing evidence. A child's after-the-fact acknowledgement that he understood the conduct was wrong is insufficient, standing alone, to satisfy this burden. That is the only evidence presented by the State in appellant's case. Did the trial court err when it concluded the State had overcome the presumption of appellant's incapacity to commit a crime?

B. STATEMENT OF THE CASE

On November 4, 2009, the Snohomish County Prosecutor's Office charged 11-year-old C.H. with one count of child rape in the first degree, alleging sexual contact with three-year-old D.M. CP 53-54.

On November 30, 2009, the Honorable George Bowden conducted an evidentiary hearing to determine whether C.H. had the legal capacity to commit the offense. 1RP¹ 2. To say the hearing was brief is an enormous understatement. The prosecutor called a single witness – Everett Police Detective Aaron Defolo, whose testimony on direct requires less than three transcript pages. 1RP 2-4.

Defolo testified that in September 2009, he interviewed C.H., at C.H.'s home, in the presence of C.H.'s parents. He made it clear C.H. did not have to say anything and he would not be arrested. 1RP 3. According to Defolo, C.H. admitted putting his penis in D.M.'s rectum and indicated he stopped because he knew it was wrong. 1RP 4. C.H. was crying and Defolo testified it was his impression that C.H. was remorseful and knew what he had done was morally wrong. 1RP 4.

On cross-examination, Defolo testified that the alleged sexual contact occurred in August, and by the time he spoke to C.H., C.H.'s parents had already discussed the subject with C.H. and had enrolled him in counseling. 1RP 5-6. Defolo conceded that when C.H. indicated he stopped because he knew what he had done was

¹ This brief refers to the verbatim report of proceedings as

wrong, Defolo did not ask any follow-up questions to determine what C.H. meant. 1RP 6-7.

In light of the State's offering, defense counsel argued the prosecution had not met its burden to prove C.H.'s capacity. 1RP 7.

Counsel noted that under relevant case law, a child's statement that he knew the conduct was wrong is not sufficient, particularly where the charged offense is a sex crime. Rather, there are several factors the court must examine and the State had not presented evidence on any of them. 1RP 7-10. Counsel noted that when C.H. indicated he stopped because he "knew it was wrong," C.H. may have simply been referring to a belief that it is "wrong" for two males to have sexual relations or "wrong" because D.M. expressed discomfort, or "wrong" in the sense of a religious sin based on what he had learned at church. Without the detective exploring C.H.'s statement, it was impossible to accurately interpret the statement. 1RP 9.

Judge Bowden found C.H. had the capacity to appreciate the wrongfulness of his conduct, noting that C.H. said he had stopped because he knew it was wrong, he was crying during the interview, and Detective Defolo believed he was sincerely remorseful. 1RP 10.

Judge Bowden found that although C.H. was already in counseling

follows: 1RP – November 30, 2009; 2RP – March 24, 2010.

and had discussed the matter with his parents prior to speaking with Defolo, there was no evidence this colored his response to the detective. 1RP 10-11. Judge Bowden then entered a written order finding that C.H. had the capacity to commit first-degree rape based on his statement to Detective Defolo. CP 48-50.

On March 24, 2010, the defense agreed to a stipulated bench trial based on agreed documentary evidence. 2RP 1-4. Judge Bowden found C.H. guilty and imposed a SSODA. 2RP 5, 10-16; CP 26-47. Subsequently, Judge Bowden entered written findings of fact and conclusions of law memorializing his findings from the stipulated trial. CP 1-2. Moreover, conclusion of law 3 addresses the capacity finding:

This court finds by clear and convincing evidence that the respondent did have the capacity to appreciate the wrongfulness of his conduct. While making his statement, the respondent admitted he knew it was wrong to sexually assault D.M. The respondent also began to cry during the statement indicating that he was remorseful for having sexually assaulted D.M. Furthermore, by stopping his sexual assault of D.M. he demonstrated his ability to conform his conduct to the requirements of the law.

CP 2.

Defense counsel timely filed a Notice of Appeal on C.H.'s behalf. CP 3-25.

C. ARGUMENT

THE STATE FAILED TO PROVE C.H. HAD THE CAPACITY TO COMMIT RAPE OF A CHILD.

Children under 12 years old are presumed incapable of committing a crime. State v. Ramer, 151 Wn.2d 106, 114, 86 P.3d 132 (2004). RCW 9A.04.050 provides:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. . . .

This statute is intended “to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior.” State v. Q.D., 102 Wn.2d 19, 23, 685 P.2d 557 (1984).

At a capacity hearing, the inquiry is whether the child “had knowledge of the wrongfulness of the act at the time he committed the offense and not that he realized it was wrong after the fact.” State v. J.P.S., 135 Wn.2d 34, 37-38, 954 P.2d 894 (1998). The State bears the burden to rebut the presumption of incapacity and, on appeal, this Court determines whether there was evidence from which a rational trier of fact could find capacity proved by clear and convincing evidence. Id.

Notably, “[w]hen a child is accused of a crime which involves sexual misconduct, it is more difficult for the State to prove the child understood the conduct was wrong.” J.P.S., 135 Wn.2d at 38. “It is very difficult to tell if a young child . . . understands the prohibitions on sexual behavior with other children. . . . [Unlike other crimes,] often young children have little, if any, instruction regarding prohibitions on sexual contact.” Id. at 43.

Several factors are relevant in determining whether a child had the requisite knowledge:

- (1) the nature of the crime; (2) the child’s age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences attached to the [prior] conduct; and (7) acknowledgement that the behavior was wrong and could lead to detention. . . .

J.P.S., 135 Wn.2d at 38-39; see also State v. Erika D.W., 85 Wn. App. 601, 605, 934 P.2d 704 (1997) (discussing factors). “Also relevant is testimony from those acquainted with the child and the testimony of experts.” J.P.S., 135 Wn.2d at 39.

In C.H.’s case, the prosecutor’s lone witness was Detective Defolo, who spoke to C.H. on one occasion after C.H. had discussed the incident with his parents and enrolled in counseling. The prosecutor failed to call any other witnesses, expert or otherwise,

acquainted with C.H. As a result, the State presented no evidence concerning most of the relevant factors.² As to factor (2), C.H. was 11 years old when the crime was committed, but the State failed to present any evidence on his level of maturity. The State presented no evidence that C.H. showed a desire for secrecy (factor 3). Nor did the State present evidence that C.H. admonished D.M. not to tell (factor 4), or that C.H. had engaged in similar conduct before (factor 5) that resulted in adverse consequences (factor 6).

As to the two remaining factors (factors 1 and 7), what little can be determined from the scant record does not support a finding of capacity. The nature of the crime, factor (1), is child rape. C.H. admitted putting his penis in D.M.'s rectum. 1RP 4. However, as pointed out above, that this is a sex offense cuts against a finding of capacity, since children often have little or no guidance regarding prohibitions against sexual contact with other children. J.P.S., 135 Wn.2d at 38, 43.

That leaves factor 7 – acknowledgement that the behavior was wrong and could lead to detention. Judge Bowden relied

² The court's written trial findings, based on the stipulated evidence, contain details of the crime and additional information gained during Detective Defolo's interview with C.H. See CP 1-2. This evidence was not presented, argued, or considered at the pretrial capacity hearing.

exclusively on this factor in finding the State had proved C.H. had knowledge of the wrongfulness of his act at the time he committed the offense. Specifically, Judge Bowden focused on the fact C.H. said he knew it was wrong, cried during the interview, and stopped himself during the incident. CP 2.

The State did not establish that C.H. knew his behavior could lead to detention. The only evidence even remotely related to this factor is Detective Defolo's testimony that he told C.H. he would *not* be going to jail. 1RP 3. C.H. did say he stopped because he knew it was wrong. 1RP 4. But this was after C.H. had discussed the incident with his parents and after the initiation of counseling. 1RP 5-6. These intervening events certainly indicated to C.H. his behavior had been unacceptable and that a statement demonstrating he had known it was wrong now best served his interests. The Supreme Court has held:

The recognition of wrongful conduct made by a child after the child has been taught that his or her conduct was wrong is not particularly probative of whether the child understood conduct was wrong at the time it occurred. A child's after-the-fact acknowledgment that he or she understood the conduct was wrong is insufficient, standing alone, to overcome the presumption of incapacity by clear and convincing evidence. . . .

J.P.S., 135 Wn.2d at 44 (citations omitted). The most that can be

said regarding C.H. is that he knew what he had done was wrong by the time Detective Defolo spoke to him after the fact.

Moreover, as defense counsel emphasized below, Detective Defolo did not ask C.H. what he meant when he said he stopped because he knew it was wrong. C.H. may have been talking about “wrong” in the sense he was with a male instead of a female, because he recognized at the time he was causing D.M. pain, or because he felt it was a sin based on the teachings of his church. 1RP 9. It is impossible to know what C.H. meant because the proper follow-up questions were never asked.

Indeed, that is the problem with the State’s entire presentation below. The proper questions were never asked and the necessary witnesses never called. As a result, the State failed to rebut the presumption that C.H. was incapable of committing the charged offense.

The State’s evidence in this case falls far short of that deemed sufficient in other cases. In State v. T.E.H., 91 Wn. App. 908, 960 P.2d 441 (1998), for example, the prosecution demonstrated that the 11-year-old defendant sometimes supervised his young victims, mainly committed sexual acts when alone with the children (demonstrating planned secrecy), threatened to kill the

victims if they told, had been taught his conduct was wrong, and committed the acts over an extended period of time. This evidence was sufficient to clearly and convincingly rebut the presumption of incapacity. I.E.H., 91 Wn. App. at 914.

Similarly, in State v. Q.D., the State met its burden by demonstrating that the defendant was sufficiently mature to have been given the responsibility of babysitting the victim, the defendant waited until she and the victim were alone (demonstrating planned secrecy), and the defendant admonished the victim not to tell anyone what she had done. When combined with the defendant's age (she was about to turn 12), this evidence was sufficient to clearly and convincingly rebut the presumption of incapacity. Q.D., 102 Wn.2d at 27. There was no similar evidence in C.H.'s case.

A third case, State v. Linares, 75 Wn. App. 404, 880 P.2d 550 (1994), involved the consolidated appeals of two defendants and contrasts sufficient evidence from insufficient evidence of capacity. The first defendant, Linares, was charged with burglary and theft for breaking into an elementary school and stealing items inside. Linares, 75 Wn. App. at 406, 410. The State proved capacity where it introduced evidence that Linares dropped a stolen radio as soon as he saw police, admitted to police that he knew what he had done

was wrong, later lied to police and said that stolen items found on his person belonged to him, and the trial court assessed Linares' demeanor when he took the stand at the capacity hearing. *Id.* at 410, 415-416. The trial court found that even without consideration of Linares' after-the-fact acknowledgement of wrongdoing, the State had proved capacity. *Id.* at 411. This Court affirmed. *Id.* at 415-416.

However, this Court reversed a finding of capacity in the consolidated case. Isaac Pam was charged with malicious mischief for throwing rocks at an office building. Officer Scott Phipps responded to the scene and, after being read Miranda³ rights, Pam admitted throwing the rocks and indicated he had done it before, knew it was wrong, knew he would get in trouble with his parents, and knew it was against the law. Linares, 75 Wn. App. at 406-407, 412. Officer Phipps was the only witness called by the State at the capacity hearing. *Id.* at 412. This Court held:

The State did not meet its burden in Pam's case. Apart from the fact that Pam was 11 years old at the time of the incident, there was no other evidence presented at the hearing besides his custodial statement on which the court could have based its capacity finding. Pam did not testify at the hearing, and the court did not have an opportunity to observe

³ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

his demeanor. The court did not hear testimony from any other witness besides Officer Phipps. Although in his statement to Phipps following the incident Pam acknowledged that his actions were wrong, that is insufficient evidence from which a rational trier of fact could have concluded that Pam appreciated the wrongfulness of his act *at the time* it was committed.

Id. at 416 (citing State v. K.R.L., 67 Wn. App. 721, 725, 840 P.2d 210 (1992)).

Compared to the State's evidence regarding Pam, the State presented even *less* evidence of capacity for C.H. Unlike Pam, C.H. had already spoken to his parents and enrolled in counseling by the time an officer spoke to him. Since the evidence of capacity was insufficient for Pam, it was certainly insufficient for C.H.

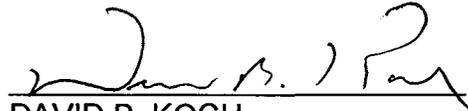
D. CONCLUSION

C.H.'s statement that he stopped sexual contact with D.M. because he knew it was wrong – made after the event, after he had discussed the matter with his parents, and after enrollment in counseling – was insufficient to prove capacity. C.H.'s conviction must be reversed.

DATED this 30th day of September, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65268-1-1
)	
C.H.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] C.H.
2426 CALLOW ROAD
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LAKE STEVENS, WA 98258

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER, 2010.

x *Patrick Mayovsky*

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SEATTLE, WASHINGTON