

67561-3

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NO. 67561-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

Antonio C.-M.,

Appellant.

2017 JUN 29 PM 4:56
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State concedes its evidence was insufficient to prove Antonio had sexual intercourse with K.F., requiring reversal of the adjudication and dismissal of the charges.

Among other elements, the State was required to prove Antonio and K.F. had sexual intercourse. RCW 9A.44.073(1). Antonio argued in his opening brief that there was no witness to the alleged rape and no direct evidence proving sexual intercourse occurred. Op. Br. at 30. In light of the evidence, no rational trier of fact could find Antonio had sexual intercourse with K.F. in 2007. Notably, the State does not contest Antonio's argument that in light of the evidence, no rational trier of fact could find Antonio had sexual intercourse with K.F. in 2007. Compare Op. Br. at 30-32 with Resp. Br. at 1-19. Accordingly, the State concedes the issue. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005). The adjudication should be reversed and the charges dismissed with prejudice. See, eg., *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State's case hinged on K.F.'s three-year-delayed report of sexual contact. But circumstantial evidence discredited K.F.'s statements. First, K.F. had both the reason and opportunity to fabricate

an account of rape. When she reported the incident, she was ten years old and had recently been told about false accusations of rape against her step-brother. Though K.F. was close with and adored her brother, he was sent to live far away from her. K.F.'s emotions about her brother and his troubled relationship with their mother were likely conflicted.

Further, K.F. did not demonstrate any immediate change around the time of the alleged incident. Her parents testified that her demeanor changed generally over a several year period. Both parents thought the changes were a result of her maturing state. K.F. first demonstrated extreme behavior in 2009 when she reported the allegation to her mother for the first time.

Moreover, though K.F. told Officer Thompson her brother had sex with her in September or October, the children were not left alone except for a few instances of short duration during the summer. The incident, therefore, could not have occurred in September or October 2007.

Finally, K.F.'s mother's statements at sentencing further corroborate that K.F.'s allegations were untrue. At sentencing, Ms. Forward told the court that "since I found out what was said in the

courtroom, [I now know that] my daughter lied.” 2RP 138-39. Ms. Forward elaborated that K.F. testified falsely in court about statements K.F. made to her. 2RP 140.

In sum, Antonio’s conviction should be reversed because the State concedes no rational trier of fact could find Antonio had sexual intercourse with K.F. in 2007.

2. Because the juvenile court did not find K.F. had the capacity at the time of the alleged incident to accurately perceive it and because the evidence does not support such a determination, the juvenile court erred in finding her competent to testify.

As argued in Antonio’s opening brief, the trial court erred in finding K.F. competent to testify because the trial court did not find she had the capacity at the time of the alleged incident to accurately perceive it and the evidence does not support such a determination. Op. Br. at 17-20. The State’s responsive arguments are unavailing. The adjudication should be reversed.

In response, the State does not dispute that to find a child competent to testify, a court must find the child had the mental capacity at the time of the alleged event to receive an accurate impression of it. *See* Resp. Br. at 1. Instead, the State argues that Antonio’s argument ignores evidence that supports the trial court’s determination that K.F.

was competent and this conclusion must be accorded great deference because it cannot be said that the trial court manifestly abused its discretion in this case. *See* Resp. Br. at 6-10. However, the State fails to respond to the heart of Antonio’s argument. The State does not provide any relevant citation to the record or ruling in support of a finding that K.F. had the mental capacity at the time of the alleged incident or that the trial court considered this element. *See* Resp. Br. at 6-10. If the trial court did not find K.F. to be competent at the time of the alleged incident, there is nothing to accord great deference to the trial court.

Under *In re Dependency of A.E.P.*, 135 Wn.2d 208, 956 P.2d 297 (1998), such an omission precludes a finding that K.F. was competent to testify. In *A.E.P.*, as here, the alleged child victim was unable to testify about when the alleged touching occurred. The Supreme Court observed, “If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it.” *Id.* at 225. The court stressed “[t]o be competent to testify, A.E.P. must have had the mental capacity at the time of the alleged abuse to receive an accurate impression of it.”

Id. at 224 (emphasis in original). A child's inability to recollect when an incident forming the basis of criminal charges occurred undermines the trial court's capability to determine the child's competency at the time of trial: "Without any concrete reference, there is no way to guarantee the child's recall of details is based on fact, as opposed to fantasy." *Id.* at 225. In its oral findings, the trial court neglected to consider K.F.'s mental capacity at the time of the alleged incident. 2RP 102. The omission is particularly significant here, where the event was alleged to have occurred years before K.F.'s trial testimony. A finding that K.F. was competent when she appeared in court, at ten years of age, does not necessitate a finding that she was competent three or more years earlier.

The State focuses its argument on the sufficiency of the evidence. *See* Resp. Br. at 6. However, substantial evidence does not support the absence of a determination that K.F. had the mental ability at the time of the alleged incident and, therefore, the trial court erred in concluding that K.F. was competent to testify. The State erroneously cites to cases in which children younger than K.F. at the time she was allegedly raped have been found competent. *See* Resp. Br. at 8. A child's particular capacity and intelligence, not age, is the proper

criteria to be used in determining competency. *State v. Pham*, 75 Wn. App. 626, 630, 879 P.2d 321 (1994). Citations to cases that demonstrate Washington courts have found other children to be competent is inapposite to uphold a finding of K.F.'s mental capacity at the time of the alleged incident.

The State also argues that K.F. had the mental ability at the time of the alleged incident to accurately perceive the events alleged to have occurred because, on the witness stand, K.F. was able to describe where she attended school while living in Renton, who she lived with during that time frame, and an accurate layout of her Renton home. *See* Resp. Br. at 8-9. However, K.F.'s ability to perceive her life in Renton has no bearing on whether she had the requisite mental capacity at the time of the alleged incident. K.F. lived in Renton for three years—from 2006 to 2009. 1RP 61. The court's findings neither specify a period of time nor a subject area. K.F.'s ability to recall the layout of the Renton house as of the time she moved out in 2009 at nine years of age does not speak to her ability to accurately perceive in 2007. *See* Competency Finding Fact 9. In fact, K.F.'s initial report and subsequent recounting lacked detail that would indicate her capacity to accurately perceive the specific incident in question.

The State continues to mix testimony of the older K.F. with the younger K.F. in an attempt to establish that K.F. had the mental capacity to receive an accurate impression of the alleged incident. The State argues that K.F. was able to confirm with veracity what she told Officer Thompson in 2010, she explained that she told the truth about the alleged incident to her mother, and that K.F.'s mother and father both corroborated K.F.'s memory of her home life in Renton and gave no indication that K.F. lacked the ability to accurately perceive the world around her at the time that Antonio lived with them. Resp. Br. at 9. However, again, this testimony does not indicate whether K.F. had the requisite mental capacity at the time of the alleged incident. It only indicates that K.F. was competent to testify at the time of the hearing.

The trial court's failure to engage in any inquiry regarding whether K.F. was competent at the time of the alleged events requires the competency determination to be reversed. Therefore, because the evidence is insufficient to show K.F. had capacity to accurately perceive and relay the incident at the time it allegedly occurred, the trial court abused its discretion in finding K.F. competent to testify. Absent K.F.'s testimony, the adjudication cannot stand. Because Antonio's due process right to a fair trial was violated by the admission of

incompetent evidence and because the error was not harmless, the adjudication should be reversed.

3. In violation of due process, the trial court erroneously admitted K.F.'s unreliable statements under the statutory child hearsay exception.

In his opening brief, Antonio argued that the hearsay statements were improperly admitted because (a) there were insufficient indicia of reliability and (b) corroborative evidence does not support the incident occurred, requiring exclusion of the statements if K.F. was unavailable to testify under the competency analysis above. Op. Br. at 22. In response, the State argues that an examination of each of the relevant *Ryan* factors demonstrates that the court reasonably exercised its discretion in admitting K.F.'s statements to her mother and Officer Thompson. Resp. Br. at 12. The State's argument is wrong for the following reasons.

1. Motive to lie: The State argues that there is no reason to believe that K.F. concocted a story in 2010 about the alleged incident because K.F. would seem to have far more to gain at home by denying Antonio's alleged assault than by confirming it. Resp. Br. at 13. However, K.F. had a motive to lie because she was upset when Antonio moved out of the family home in 2007 due to his disagreements with

their mother. 1 RP 62, 71-72, 134. K.F. visited Antonio on several occasions after he moved away, and yet did not report any mistreatment or fear of being harmed. *See* 1RP 73, 122-23; 2RP 55. Antonio and K.F. were very close with each other until Antonio moved out of the house. It was only after her mother's explanation of Antonio's unrelated rape charges, which likely planted the idea in K.F.'s head, that K.F. came forward with the false allegations. *Contra* Competency Findings of Fact 14 ("There is no evidence that Ms Forward planted the idea of sexual assault in K F's head.").

2. Declarant's character: The State argues that Antonio "desperately seizes upon a single incident," in which K.F. falsely accused a teacher of physically harming her, and that a single incident does not establish a reputation for dishonesty. Resp. Br. at 15. The State's reading of Antonio's argument omits the multiple incidents cited by Antonio that establish K.F.'s dishonest reputation. In addition to K.F.'s false accusation that a teacher physically harmed her, K.F. did not accurately testify as to her mother's presence during her statement to Officer Thompson. *Compare* 1RP 107-08 (K.F.'s testimony) *with* 1RP 132 (mother's testimony she was not present for duration of interview); 1RP 45-46, 48 (officer's testimony mother was present for

only part of the interview). Further, though K.F. told her mother and Officer Thompson about only one incident, at trial, K.F. claimed she was raped at least three times. *See* 2RP 38.

3. Repetition of statement to multiple listeners: The State argues that it was reasonable for the trial court to conclude that K.F.'s statements to her mother, Officer Thompson, and the King County Prosecutor's Office child interviewer Michelle Neeb sufficiently meet this factor. However, Ms. Forward was the only person to hear K.F.'s *initial* report of the incident. As K.F.'s mother, her objectivity is questionable. *E.g., State v. Ryan*, 103 Wn.2d 165, 176, 691 P.2d 197 (1984).

4. Spontaneity of statements: The State argues that Antonio provides almost no argument or relevant citation to the record in support of his contention regarding Officer Thompson and this *Ryan* factor. Resp. Br. at 16. But the record plainly illustrates that Officer Thompson's questions were not open ended. For example, Officer Thompson asked K.F., "how long the sex happened, ... about the pain, ... [and] if she knew what sex was." 1RP 54.

5. Timing of statements and relationship between child-declarant and witnesses: In his opening brief, Antonio challenged the

trial court's finding that K.F.'s disclosures were timely. Op. Br. at 25. K.F.'s disclosures came three years after the alleged incident. 1RP 133. Not coincidentally, her revelation followed a visit to her brother upon his release from a false charge of rape, of which K.F. was aware. 2RP 13. The State concedes the timing of K.F.'s disclosure of the alleged incidents was three years later, but argues that to adopt Antonio's argument about the objectivity of the mother would require the exclusion of child hearsay statements whenever a child reports sexual abuse to members of her immediate family, stripping RCW 9A.44.120 of nearly all its utility. See Resp. Br. at 17. However, it is not solely the mother's relationship status to K.F. that renders K.F.'s initial disclosure of her alleged victimization unreliable. It is also the timing of the statements and the coincidence that K.F.'s revelation followed a visit to her brother upon his release from a false charge of rape, of which K.F. was aware. 2RP 13.¹

¹ As addressed in Antonio's opening brief, the remaining *Ryan* factors are not particularly useful in this case. Op. Br. at 26-27.

B. CONCLUSION

For the reasons set forth above and in Antonio's opening brief,
his adjudication should be reversed.

DATED this 26th day of June, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MZ', written over a horizontal line.

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Attorney for Appellant

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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JUNE, 2012.

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