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Sep 21, 2015
Court of Appeals
Division I
State of Washington

No. 72523-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TANNER J.
(DOB 10/17/1999),

Appellant.

ON APPEAL FROM THE JUVENILE COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **Tanner’s child molestation conviction must be reversed because the State did not prove the elements of the crime beyond a reasonable doubt.**

At Tanner J.’s fact-finding hearing on the charge of first degree child molestation, M.A. testified that Tanner never touched him, hurt him, or told him to do anything. 9/8/14 RP 36, 38; Finding of Fact 10 (CP 236). M.A. further related that he and Tanner did not pull their pants down in Tanner’s room. 9/8/14 RP 33; Finding of Fact 10. First degree child molestation requires proof that the respondent had contact with a sexual part of a younger child’s body for the purposes of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1). Tanner argues his child molestation must be reversed because the State did not prove those elements beyond a reasonable doubt.

- a. *M.A.’s testimony that Tanner taught him a “sexing game” is not sufficient to support Tanner’s conviction when M.A. never described the sex game and denied that sexual abuse occurred.*

The State argues that the Tanner’s conviction should be affirmed because M.A. testified that “Tanner taught him the sex game.” Respondent’s Brief at 9 (hearing for Argument IV(A)(a)) (hereafter BOR). While M.A. testified that he heard about a “sexing” game from

Tanner, he also denied learned the game from Tanner and said he learned it from his friend Andrew.¹ 9/8/14 RP 31-32, 33-34, 47. M.A. never described the game for the court. 9/8/14 RP 32, 33, 34; Finding of Fact 13 (CP 13). Nor did M.A. describe what he meant by the “sexing game” to his mother, Ms. Cate, or the prosecutor’s forensic interviewer. Coupled with M.A.’s testimony that Tanner never hurt him or touched his body, M.A.’s testimony that he learned an undescribed game from Tanner does not establish that Tanner molested M.A.

The State supports its claim that M.A.’s testimony that he learned the game from Andrew is sufficient to support Tanner’s child molestation conviction by blaming deficits in M.A.’s testimony on the layout of the courtroom and the passage of time. BOR at 9-11. Legal arguments must be supported by appropriate references to the record, but this argument is not and therefore should be rejected by this Court. RAP 10.3(a)(6), (b); State v. Leach, 113 Wn.2d 679, 693, 782 P.2d 552 (1989).

¹ M.A. told his mother, her friend Ms. Cate, and the prosecutor’s forensic interviewer that Andrew showed him how to play “the sexing thing.” 9/8/14 RP 62; 9/9/14 RP 7-8.

The record does not contain a discussion of the size or configuration of the courtroom or any indication from the parties that M.A. found the courtroom intimidating.² Moreover, M.A. testified that he had been in that courtroom before, pointing out where he and his family and Tanner and his father had been sitting. 9/8/14 RP 9/8/14 RP 42-44. He was also looking forward to rewards for being good in court, including chocolate, and his adult friends from a group called Bikers Against Child Abuse were present in court to support M.A.³ *Id.* at 6-7, 39-40, 142-47. The State's assertion that M.A. was intimidated by the courtroom atmosphere is thus not supported by the appellate record.

The State also failed to provide authority for its assertion that M.A.'s inability to remember "details" of the alleged assault "is believable and the reality of what happens when time goes by and children learn to cope with what has happened to them." BOR at 10-11. The State did not call an expert to discuss children's memory or explain how children cope with traumatic events. This Court should reject the State's argument because it is unsupported by the record.

² Tanner's motion to strike this portion of the Brief of Respondent is pending in this Court. Motion to Strike Portion of State's Response Brief, 8/21/15.

³ The group had been involved in M.A.'s case for almost a year and accompanied him and his family to M.A.'s interview with defense counsel. 8/1/14 RP 31.

The State points out that M.A. answered many questions by stating that he did not know and argues that answer is “wholly different than[] ‘no’ or ‘that didn’t happen.’” BOR at 10. Testimony that M.A. did not know does not provide the proof of the elements of the crime beyond a reasonable doubt required by the Fourteenth Amendment. In re Winship, 397 U.S. 358, 365-66, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Given that M.A. testified Tanner did not commit the charged offense, the juvenile court supported its guilty finding on its hypothesis that M.A. was trying to answer the prosecutor’s questions quickly to avoid the subject matter. Finding of Fact 11 (CP 236). The State points out that the trial court judge was in a better position than this Court to determine M.A.’s credibility. BOR at 11. The juvenile court, however, made no finding about M.A.’s credibility or lack of credibility. CP 235-37. The court’s observation that M.A. appeared to be trying to quickly end discussion of the alleged offense does not make his testimony more or less credible.

The juvenile court provided no valid reason to choose M.A.’s hearsay statements over his sworn testimony. If M.A. was not to be believed because he was not open with the prosecutor, his hearsay

statements were suspect for the same reasons. The prosecutor's investigator, Deborah Ridgeway, related that M.A. was hard to interview and did not want to talk to her. 9/9/14 RP 173-74. During a second interview addressing suspected abuse by other boys, M.A. told Ms. Ridgeway that he did not even remember who Tanner was. *Id.* at 171-72; 9/9/14 RP 25, 27. M.A. was also reluctant to speak to his mother and Ms. Cate when Ms. Cate made M.A. and Andrew talk to them about their behavior. 9/8/14 RP 9. If the trial court believed that reluctance to talk was indicative of deceit, the court should logically discount all of M.A.'s hearsay answers.

b. *Several of the juvenile court's factual findings are not supported by the record or do not support the court's legal conclusions.*

Tanner challenges several of the juvenile court's factual findings. Brief of Appellant at 14-17 (hereafter AOB). Ms. Cate and Ms. Dellinger-Frye talked to M.A. and Andrew because Ms. Cate was concerned about their behavior. The trial court found that M.A. and Andrew had been acting out "for about three weeks sexually by pulling down their pants or doing the sexing game or having sex game. Findings of Fact 4 (CP 235). According to the court, M.A.'s mother described the "game" as "taking down their pants and playing leap

frog,” and it was also described as “taking down their pants and sitting on one another.” Finding of Fact 5 (CP 235). The State claims that both findings are supported by the evidence.

Ms. Cate, however, testified that for about two weeks M.S. and Andrew had pulled down their pants or encouraged her younger son Logan to pull down his pants. 9/8/14RP 60-61. On the day of the conversation, however, Ms. Cate did not observe what M.A. and Andrew were doing. Instead, she was relying upon her son’s Logan statement that they were pulling down their pants and kissing each other’s butts. *Id.* at 59; see 8/1/14 RP 24.

The trial court also relied upon Ms. Dellinger-Frye’s description of the game as playing leap frog while wearing no pants. Finding of Fact 5. While the court’s finding comports with Ms. Dellinger-Frye’s description, she did not observe her son and Andrew. 9/8/14 RP 96-97, 139-40. Her description was based upon hearsay from Ms. Cate, who heard it from her younger son. 9/8/14 RP 54.

The juvenile court also found that M.A. did not like to see Tanner because of what happened when they lived together, which made him sad. Finding of Fact 12 (CP 236). M.A. testified that he was sad to see Tanner because Tanner’s father stole his grandmother’s Wii

and Xbox or because Tanner took his Xbox. 9/8/14 RP 37, 48. M.A. was also sad because Tanner and his father sat in front of him at an earlier court hearing. Id. at 43, 45. And M.A. was sad that Tanner had a chair in his bedroom that belonged to M.A.'s family and should have been available to everyone. Id. at 45-47. Thus, the trial court's finding is inaccurate, as it implies that M.A. was sad because he had been sexually abused by Tanner. Moreover, even if the finding is correct, it does not support the court's guilty finding, because M.A. was not sad about the purported crime.

Finding of Fact 19 includes the court's conclusion that Tanner had contact with M.A. for the purposes of sexual gratification because he had M.A. sit with his penis in his butt. Finding of Fact 19 (CP 237). In response to Ms. Ridgeway's interrogation, M.A. said that his penis was "on" Tanner and that Tanner's penis was "in" his butt, but the child never described what "in" or "on" meant. 9/8/14 RP 167-68. The State's response relies in part upon facts presented at the pre-trial hearing, and not at the fact-finding hearing. BOR at 13-14 (citing 8/1/14 RP 61, 64). Additionally, this hearsay evidence was directly contradicted by M.A.'s testimony that he never removed his clothing around Tanner and Tanner never touched him.

This Court should reject the State's argument that Findings of Fact 4, 5, 12, and 19. In addition, Finding of Fact 12 does not support the juvenile court's conclusions of law.

c. *Tanner's conviction should be reversed and dismissed.*

M.A. testified that Tanner did not sexually abuse him, and the juvenile court erroneously discounted this testimony based upon its theory that M.A. was only trying to avoid the questions. M.A. was willing to answer defense counsel questions, however, and there is no reason to believe his trial testimony was not credible. M.A.'s testimony created a reasonable doubt that Tanner was guilty, and this Court should reverse and dismiss his adjudication.

2. The admission of M.A.'s unreliable hearsay statements violated Tanner's right to due process.

The juvenile court found Tanner guilty based upon M.A.'s hearsay statements admitted pursuant to RCW 9A.44.120. Admission under that statute requires the court to find "that the time, content, and circumstances of the statement provide sufficient indicia of reliability" when the child testifies. RCW 9A.44.120. Washington courts review nine factors in determining if a young child's hearsay statements are sufficiently reliable to be used to convict an adult or juvenile

respondent. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

Tanner argues the juvenile court's conclusions concerning six of the Ryan factors were not supported by the evidence and the court improperly admitted the hearsay statements. AOB at 20-23. First, the juvenile court's conclusion that M.A. had no motive to lie is undercut by M.A.'s awareness of the hostilities between his mother and Tanner's father, M.A.'s resentment of Tanner, and the fact that M.A. knew he was in trouble when he blamed Tanner for his behavior. The State counters that there was no evidence of hostilities between M.A.'s mother and Tanner and over six months had passed since M.A. and his family had moved out of the home they briefly shared with Tanner and his father. BOR at 17-18.

The State is incorrect. Ms. Dellinger-Frye believed Tanner had posted negative comments about her on Facebook. BOR at 17; 9/8/14 RP 109-10. She also testified Tanner and M.A. did not get along and that M.A. told her Tanner was mean to him on the school bus. 8/1/14 RP 32; 9/8/14 RP 98.

In addition, Ms. Dellinger-Frye's clear animosity towards Mr. Johnson was observed by her son. M.A.'s mother referred to Mr. J. as

“psycho stalker.” 9/8/14 RP 77. M.A. had seen his mother and Mr. J. fighting. 8/1/14 RP 34; 9/8/14 RP 151-52. Ms. Dellinger-Frye believed that Mr. J. had stolen a number of her things from the house they briefly shared, taken her cell phone, and burglarized her mother’s home, taking an Xbox, video games, and other items. Id. at 27-28. Her problems with Mr. J continued while she lived with Ms. Cate several months later. Id. at 19, 29.

A young child, M.A could observe his mother’s attitudes towards Mr. Johnson and his son, and he did not draw the same fine distinctions between the two as does the State. M.A. resented Tanner for stealing his family’s Xbox and PlayStation games, not Mr. Johnson. 9/8/14 RP 37, 48. M.A. also felt it unfair that Tanner had a chair in his room, which M.A. believed belonged to his mother although it belonged to Tanner. 9/8/14 RP 45-46, 186; 9/9/14 RP 68, 75-76. M.A.’s attitude thus reflected those of his mother.

In addition, Ms. Cate was angry when she learned that M.A. and Andrew were playing a “sex game.” 8/1/14 RP 21, 25; 9/1/14 RP 70, 71. She yelled at the boys to come out of the bedroom, told them they were in trouble, and had them sit and wait until M.A.’s mother came home. 8/1/14 RP 11-12; 9/1/14 RP 85. Only later, when Ms.

Dellinger-Frye came home and they took M.A. and Andrew into the bedroom to talk, were the boys told they were not in trouble. 9/8/14 RP 72, 85. M.A. clearly knew he was in trouble when his mother and Ms. Cate confronted him. Thus, the evidence as a whole does not support the trial court's conclusion that M.A. had no motive to lie.

The juvenile court also concluded that M.A.'s character supported the introduction of his hearsay statements because he lied like other children his age and did not appear to have a wild imagination. 8/1/14 RP 93-94. Tanner argues that, in light of M.A.'s developmental history and unconfirmed current diagnosis, this factor is not supported. BOA at 21. In addition, the juvenile court's conclusion is in contrast to the juvenile court's later inherent conclusion that M.A. was not telling the truth on the witness stand. Id. The State responds that the trial court was in the best position to "observe M.A. and properly assess his character." BOR at 18. But M.A. was not a witness at the pre-trial hearing, and the court's assessment was based only on the testimony of others.

The trial court also found that M.A.'s statements were relatively spontaneous because no one suggested that Tanner was at fault. 8/1/14 RP 94-95. All of M.A.'s hearsay statements, however, were in

response to intensive questioning, first by his mother and Ms. Cate and then by the prosecutor's interviewer. 8/1/14 RP 13-14, 55-73. And, when Ms. Cate and Ms. Dellinger-Frye began questioning their sons, M.A. said he was told to play the sex game by Andrew and did not blame Tanner until after Andrew blamed M.A. for their behavior. Id. at 14.

The State responds by misconstruing Tanner's argument, claiming appellate counsel accused M.A. of accusing Tanner of sexual abuse to win favor with his mother because of her animosity towards Tanner's father. BOR at 19. The appellant is not accusing M.A. of diabolical acts, but pointing out the chaos in his household and his testimony under oath that Tanner did not abuse him undermine his earlier accusation of Tanner.⁴

The State also accuses appellate counsel of arguing that M.A. is "significantly mentally deficient" and argues M.A. would be unable to lie about Tanner if this were true. BOR at 19; see BOR at 7. The State incorrectly portrays the appellant's argument or does not understand that developmental delays are not the same as low intelligence.

⁴ M.A.'s family had moved numerous times and lived with various adults and children before and after they lived with Tanner and his father. 9/8/14 RP 56, 59, 88, 92-93, 100-02. A number of the children M.A. know or lived with had been sexually abused, some by boys that M.A. would have had contact with. Id. at 128, 130-31, 133-34, 143.

Ms. Dellinger-Frye reported that her son had significant developmental delays in speech and toileting when he was younger, and he continued to have difficulty pronouncing words and was difficult to understand. *Id.* at 80-81, 105-06. His mother referred to M.A.'s "Asperger's Autism," and Ms. Cate reported M.A. was sometimes hyperactive. *Id.* at 78, 144. None of these problems indicate M.A. was not intelligent, and the appellate did not assert he was not.

The juvenile court also found that the reliability of M.A.'s hearsay statements was supported by his relationship with his mother and Ms. Cate, but M.A. was in trouble with both women when they posed their questions to him. 8/1/14 RP 95. The State claims that Ms. Cate specifically told the boys they were not in trouble. BOR at 20. As argued above, Ms. Cate was angry at M.A. and Andrew and told them that they were in trouble. 8/1/14 RP 11-12; 9/8/14 RP 72, 85. It was not until later that she told them they had completely their punishment and were no longer in trouble. The State's argument is inaccurate.

The trial court erred by admitting M.A.'s hearsay statements because they were not "inherently trustworthy" as required by Washington law. *State v. C.J.*, 148 Wn.2d 672, 684, 63 P.3d 765

(2003). Given M.A.'s sworn testimony, this Court cannot conclude that, had the error not occurred, the outcome of the fact-finding hearing would not have differed. Tanner's conviction should be reversed.

B. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Tanner J. asks this Court to reverse and dismiss his first degree child molestation because the State did not prove the elements of the crime beyond a reasonable doubt. In the alternative, his conviction should be reversed and remanded for a new fact-finding because the juvenile court incorrectly admitted M.A.'s hearsay statements in the absence sufficient circumstances establishing their reliability.

DATED this 21st day of September.

Respectfully submitted,

s/Elaine L. Winters
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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72523-8-I
v.)	
)	
TANNER J.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2015, 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 21ST DAY OF SEPTEMBER, 2015.

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