FILED
Court of Appeals
Division II
State of Washington
8/1/2022 3:51 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
8/2/2022
BY ERIN L. LENNON
CLERK

No. 101134-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

STANLEY HOWARD FRIEZE,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 56049-6-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 19-1-02551-6
The Honorable Matthew Thomas, Judge

STEPHANIE C. CUNNINGHAM
Attorney for Petitioner
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The Petitioner is STANLEY HOWARD FRIEZE, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 56049-6, which was filed on July 12, 2022. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. INTRODUCTION

The State accused Stanley Frieze of multiple counts of molestation and rape of his adopted daughter, L.F. The charging periods for the rape counts included periods of time when L.F. was between the ages of 12 and 23. The State alleged that L.F. was incapable of consent by reason of being mentally incapacitated. However, the evidence showed that, while L.F. was developmentally and cognitively delayed, she was not mentally

incapacitated and was fully capable of consenting or refusing consent to engage in sexual acts. The rape convictions therefore must be reversed and dismissed with prejudice.

IV. ISSUES PRESENTED FOR REVIEW

1. As charged in this case, second-degree rape requires proof that the alleged victim was incapable of consent at the time of the intercourse due to "mental incapacity," which means they were not able to understand the nature or consequences of the act of intercourse at the time it occurred. Did the state fail to prove the alleged victim in this case was unable to understand the nature and consequences of intercourse?

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Stanley Howard Frieze with eight counts of sexual offenses against his adopted daughter, L.F.. (CP 154-57) Counts one through five charged second degree rape by sexual intercourse when L.F. was incapable of consent due to mental incapacity. (CP 154-56) The State alleged that Frieze committed these acts

when L.F. was between 12 and 23 years old. (CP 154-56)

Count six charged one count of second degree rape of a child when L.F. was 12 or 13 years old. (CP 156) Count seven charged one count of child molestation when L.F. was 12 or 13 years old. (CP 156-57) Count eight charged one count of third degree rape of a child when L.F. was 14 or 15 years old. (CP 157)

For each of the counts, the State also alleged that the crime was aggravated because L.F. was particularly vulnerable. (CP 154-57)

A jury found Frieze guilty of counts one through seven, and found that L.F. was particularly vulnerable. (CP 292-305; 06/08/21 RP 1737-39)[1] Frieze was found not guilty of third degree rape of a child charged in count eight. (CP 306-07; 06/08/21 RP 1739)

[1] The transcripts will be referred to by the date of the proceeding.

The trial court vacated count six to prevent a double jeopardy violation, because it was not clear that the jury relied on separate acts to convict Frieze of count one and count six. (08/06/21 RP 42-43; CP 332, 335) The trial court also rejected the State's request for an exceptional sentence above the standard range. (08/06/21 RP 58) The trial court imposed a standard range sentence on each count, for a total term of confinement of 280 months. (08/06/21 RP 45; CP 335)

Frieze timely appealed. (CP 325, 349)) The Court of Appeals affirmed Frieze's conviction and sentence.

B. SUBSTANTIVE FACTS

Stanley and Jeanette Frieze have been married for about 30 years. (05/19/21 RP 885) They share three biological children and one adopted daughter, L.F. (05/19/21 RP 885-86) L.F. was placed with the Frieze family through the foster care system when she was about four years old. (05/19/21 RP 886, 887)

The Friezes fairly quickly saw that L.F. was developmentally delayed, as she displayed a number of cognitive deficits and behavioral regulation issues. (05/19/21 RP 888, 977-78) With patience and consistent care and attention from the Friezes, L.F.'s behavior started to improve. (05/19/21 RP 978-79) The Friezes had some concerns about raising a special needs child, but could not bear to see L.F. re-enter the foster care system and potentially be moved from home to home, so they decided to adopt her once that was legally possible. (05/19/21 RP 979-80)

The family lived in an apartment in Puyallup when L.F. was 12 or 13 years old. (05/18/21 RP 730; 05/19/21 RP 884, 982) They moved into a four-bedroom trailer in a Puyallup trailer park when L.F. was about 14 years old. (05/18/21 RP 797; 05/19/21 RP 899, 984) Around this same time the Frieze family joined a strict Pentecostal church called Soul's Harbor. (05/19/21 RP 922-23) L.F.

continues to be very actively involved with the church, and it remains her main source of social activity. (05/18/21 RP 783-84)

Jeanette Frieze testified that, as a child and teenager, L.F. frequently masturbated or touched her private areas when she was in public or in common areas of the trailer. (05/19/21 RP 917-18; 05/20/21 RP 1019) She would remind L.F. that it was fine to engage in that activity, but she should do it in private. (05/19/21 RP 917-18; 05/20/21 RP 1019)

L.F. attended Soul's Harbor Christian Academy for about a year, but received most of her education at the local public middle and high schools. (05/18/21 RP 731-32) After she graduated from high school, L.F. attended the Transitions Program for three additional years. (05/18/21 RP 732-33) This program is designed to teach life and functional skills to young adults with special needs. (05/17/21 RP 642)

Her teacher in the Transitions Program, Dr. Paula Luedke, testified that L.F. was functioning cognitively at a third grade level and reading at a fourth grade level. (05/17/21 RP 654-55) She was also at the lower end for adaptive skills like bathing and hygiene. (05/17/21 RP 655) She could manage tasks, but needed a lot of directions. (05/17/21 RP 657) However, she was generally a happy and enthusiastic student. (05/17/21 RP 655, 656, 664)

According to Dr. Luedke, L.F. did not pick up on normal social cues, had to be reminded not to talk to strangers on busses and field trips, and did not always show an awareness of "stranger danger." (05/17/21 RP 658, 660, 661, 669) L.F. was generally eager to please, and responded well to the reward system used by the program. (05/17/21 RP 656, 669)

After L.F. completed the Transitions Program, she was keen to move out of her parents' home and try living

more independently. (05/18/21 RP 743, 787) She originally planned to move into a nearby group home, but was invited to move in with a family friend named Wanda Bower. (05/13/21 RP 471-72, 497; 05/18/21 RP 743, 787-88) Bower also attended Soul's Harbor Church, and babysat the Frieze children when they were younger. (05/13/21 RP 473, 479, 481)

L.F. likes reading elementary age books and playing with toys like Legos. (05/13/21 RP 504-05; 05/18/21 RP 736-37) She needs reminders to do certain daily hygiene tasks and requires some assistance with money management and shopping and other complex life skills. (05/13/21 RP 500, 506; 05/17/21 RP 578; 05/19/21 RP 902, 904-05) Bower assists her with these tasks and reminders. (05/13/21 RP 502, 505. 512)

One day in March of 2019, during an outing with Bower, L.F. was unusually agitated about using the bathroom and seemed to be in a lot of discomfort.

(05/13/21 RP 517-18) Bower, who had been sexually abused as a child, "had a feeling" that L.F. had been sexually abused too because of how often she masturbated despite having frequent urinary tract infections. (05/13/21 RP 514, 521, 05/17/21 RP 583-84)

When they got home, Bower asked L.F. if anyone had ever touched her. (05/13/21 RP 520) According to Bower, L.F. told her that she had a secret but that she was told it would split the family if she ever shared it. (05/13/21 RP 544) Then L.F. started crying and told Bower that her father had touched her with his penis. (05/13/21 RP 544)

At trial, L.F. testified that Frieze "stuck his penis up" into her vagina more than once, starting when she was 22 years old. (05/18/21 RP 743-44) She specifically described two incidents of vaginal intercourse, one in the master bedroom of the trailer and one in the dining room of the trailer. (05/18/21 RP 744-45) She described how

Frieze “humped” her, which she explained meant he went “back and forth.” (05/18/21 RP 745) She also testified that she asked Frieze to stop, but he replied, “I know you like it.” (05/18/21 RP 745) Frieze also told her to keep it secret because it could ruin their family. (05/18/21 RP 745-46)

L.F. described one incident of anal intercourse occurring in the dining room of the trailer. (05/18/21 RP 747) She specifically recalled that she was 22 years old, that Frieze made her bend over a chair, and that she was facing the china hutch. (05/18/21 RP 747-48)

Next, L.F. testified about two incidents where she was made to kneel down in front of Frieze and put his penis in her mouth. (05/18/21 RP 750) White “goo” came out, which made her gag and throw up. (05/18/21 RP 751-52) Both times this act occurred in the living room of the trailer. (05/18/21 RP 751-52)

L.F. also testified that, on more than one occasion,

Frieze put his mouth on L.F.'s vagina. (05/18/21 RP755-56) And on three occasions, Frieze put his mouth on her breast and sucked. (05/18/21 RP 754-55) These acts occurred when she was 23 years old and living in the trailer. (05/18/21 RP 755-56)

Finally, L.F. testified that Frieze put his fingers in her vagina on more than one occasion, when they were living at both the apartment and the trailer. (05/18/21 RP 752) She testified that she was 13 years old the first time this act happened. (05/18/21 RP 752-53) She testified that they were in the living room of the apartment and she would either be sitting or standing, and that this act continued to happen when they lived in the trailer. (05/18/21 RP 753-54) She also testified that Frieze put his fingers in her vagina when they were sitting on the couch and also laying in different beds in the trailer. (05/18/21 RP 768, 769, 770, 775)

Frieze had always worked but broke his neck

around 2006 and later suffered a stroke in 2010. (05/19/21 RP 927, 983; 06/03/21 RP 1499-1500, 1503-04, 1506) He spent almost six months in a rehabilitation facility after his stroke, and even when he returned home he had very limited mobility and needed in-home care for several more years. (05/19/21 RP 927-28, 992; 06/03/21 RP 1506-07) Eventually Frieze regained some mobility and independence, but still has trouble with balance and walking, difficulty swallowing, and weakness in his left side and right arm. (05/19/21 RP 929-30, 993; 06/05/21 RP 1506-07)

Frieze denied ever having sexual contact or sexual intercourse with L.F. (06/03/21 RP 1548) Frieze suffered from erectile dysfunction both before and after the stroke. (05/19/21 RP 931, 932, 05/20/21 RP 1025-26; 06/03/21 RP 1523) He would need to take medication 30-60 minutes before any sexual activity, and the medications did not always work. (05/20/21 RP 1027; 06/03/21 RP

1524, 1529) He also testified that his issues with balance, weakness, and stamina would have made it impossible for him to do the acts that L.F. described. (06/03/21 RP 1546-47)

VI. ARGUMENT & AUTHORITIES

The issues raised by Frieze's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

Reversal and dismissal is required because the state failed to prove beyond a reasonable doubt that L.F. was incapable of consent by reason of mental incapacity, which is one of the essential elements of second-degree rape as charged in this case.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v.*

Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14; Wash. Const., Article I, § 3. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

The State charged Frieze with five counts of second degree rape committed while L.F. was "incapable of consent." (CP 155-56) The State was thus obligated to prove that Frieze engaged in "sexual intercourse" with L.F. and that she was "incapable of consent by reason of being … mentally incapacitated." RCW 9A.44.050(1)(b).

"Mental incapacity" is defined as "that condition

existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause." RCW 9A.44.010(4).

"A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse." *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994) (emphasis in original). As explained by the Court in *Ortega-Martinez*,

> A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse. It also includes, however, an understanding of a wide range of other particulars. For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it

> may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death. While the law does not require an alleged victim to understand any or all of these particulars before a defendant can be considered insulated from liability under RCW 9A.44.050(1)(b) for having had sexual intercourse with a mentally incapacitated individual, all of the above are elements of a meaningful understanding of the nature and consequences of sexual intercourse and are important for a trier-of-fact to bear in mind when it is evaluating whether a person had a condition which prevented him or her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse.

Ortega-Martinez, 124 Wn.2d at 711-12.

In *Ortega-Martinez* the evidence showed the victim had an I.Q of 40. Her mental age was comparable to a 5 or 6 year old child. 124 Wn.2d at 714-15. She could learn some things, but would be unable to apply what she had learned from one situation to another. 124 Wn.2d at 716. At trial she demonstrated an inability to understand

the connection between sperm and disease—she associated sperm with "disease," but "seemed to believe that if she did not talk about sperm, any disease associated with sperm would not harm her." 124 Wn.2d at 714. And her testimony was often not responsive to the question asked. 124 Wn.2d at 715. Taking this evidence in the light most favorable to the State, the Court found there was sufficient evidence that the victim had a mental incapacity at the time of the offense which prevented her from understanding the nature and consequences of the act of sexual intercourse. 124 Wn.2d at 716-717.

While there are some similarities between L.F. and the victim in *Ortega-Martinez*, the evidence here does not show that L.F.'s mental incapacity truly prevented her from understanding the nature and consequences of the act of sexual intercourse.

In assessing whether the victim understands the

nature or consequences of sexual intercourse, the jury may evaluate that person's testimony and other relevant evidence, including the victim's demeanor, behavior, and clarity on the stand. *Ortega-Martinez,* 124 Wn.2d at 714. The jury may also consider the victim's IQ; mental age; ability to understand fundamental, nonsexual concepts; mental faculties generally; and ability to translate information acquired in one situation to a new situation. *Ortega-Martinez,* 124 Wn.2d at 714.

The *Ortega-Martinez* victim's mental age was that of a kindergartner, while L.F.'s mental age was closer to a "pre-adolescent" third or fourth grader. (05/17/21 RP 623, 655) Her answers were responsive to the questions being posed to her at trial. She did not use childlike words to describe body parts, but rather used words like "penis" and "vagina" and "breast."[2] (05/18/21 747. 750,

[2] She apparently mispronounced the word vagina as "virginia." (05/18/21 RP 743)

752, 754, 777) She was able to describe the acts clearly, and recounted specific details like her age, location, positions, and the furniture involved. (05/18/21 744-56, 759-77)

L.F. also had more of an understanding of the nature and consequences of sexual intercourse than the victim in *Ortega-Martinez*. She attended public schools, where part of the curriculum included sex education. (05/19/21 918, 05/25/21 1378) She understood that sexual intercourse "is associated with the possibility of pregnancy"[3] because she knew that the white "goo" made babies. (05/18/21 746) She also testified that Frieze "humped" her and that "humping" makes babies. (05/18/21 745, 776, 814)

She understood that sexual acts could "result in a disruption in one's established relationships"[4] because

[3] *Ortega-Martinez*, 124 Wn.2d at 712.
[4] *Ortega-Martinez*, 124 Wn.2d at 712.

she knew if she shared the "secret" of what she and Frieze were doing that it could ruin her family. (05/18/21 RP 745-46) And she was told that masturbating is something that should be done in private. (05/19/21 917-18; 05/20/21 RP 1019)

Keri Arnold, the forensic interviewer who met with L.F. after she disclosed, testified that L.F. was able to comprehend the "vast majority" of the questions she asked. (05/20/21 RP 1090) L.F. frequently corrected or clarified her answers, which Arnold said "shows a strength of the individual to kind of manage whoever it is they're speaking with." (05/20/21 RP 1093, 1118)

L.F. was able to give detailed descriptions of the acts and positions, and of her feelings about what had happened. (05/20/21 RP 1117) Arnold testified that L.F.'s demeanor and responses during the interview showed strength, clarity, and understanding. (05/20/21 RP 1093, 1118).

This is a far cry from the demeanor and lack of maturity and understanding demonstrated by the victim in *Ortega-Martinez*. L.F.'s mental development, recollection and understanding of the acts engaged in, and her demeanor both during the forensic interview and on the stand at trial, show that L.F., while not as mature as her chronological age, certainly had the mental capacity to understand the nature of sexual intercourse.

The State chose to charge Frieze and instruct the jury using the "mental incapacity" means of committing second degree rape. The State assumed the burden of proving that L.F. was incapable of consent to any sexual act with any other individual—whether that be Frieze or, for example, another young adult in the Transitions Program or her church congregation—due to her mental incapacity. But the State failed to prove that L.F.'s condition "prevented … her from having a meaningful understanding of the nature or consequences of the act of

sexual intercourse." *Ortega-Martinez*, 124 Wn.2d at 712.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because no rational trier of fact could have found that L.F. was incapable of consent due to a mental incapacity, Frieze's second degree rape convictions must be reversed and dismissed.

VII. CONCLUSION

This Court should accept review and, because of the State's failure to prove all of the elements of the crime of second degree rape, reverse and vacate these convictions.

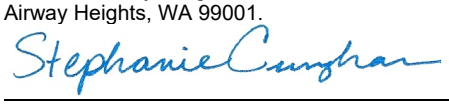
This document contains 3354 words, excluding the parts of the document exempted from the word count, according to the calculation of the word processing software used to prepare this brief, and therefore complies with RAP 18.17.

DATED: August 1, 2022

STEPHANIE C. CUNNINGHAM
WSBA #26436
Attorney for Petitioner Stanley H. Frieze

CERTIFICATE OF MAILING

I certify that on 08/01/2022, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Stanley H. Frieze, DOC# 428296, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Stanley H. Frieze*, No. 56049-6-II

Filed
Washington State
Court of Appeals
Division Two

July 12, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STANLEY HOWARD FRIEZE, Appellant.	No. 56049-6-II UNPUBLISHED OPINION

LEE, J. — Stanley H. Frieze appeals his five convictions for second degree rape. Frieze argues that the evidence was insufficient to support his second degree rape convictions because the State failed to prove that the victim was incapable of consent due to mental incapacity. We hold that the evidence was sufficient to support Frieze's second degree rape convictions and affirm the convictions.

FACTS

The State charged Frieze by first amended information with eight counts of sexual offenses against his adopted daughter, L.F.,[1] which occurred when L.F. was between the ages of 12 and 23 years old. The charges included five counts of second degree rape and one count each of second degree rape of a child, second degree child molestation, and third degree rape of a child. The five

[1] Initials instead of names are used for victims of sex crimes to protect their privacy. Gen. Order 2011-1 of Division II, *In re Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App Aug. 23, 2011), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2011-1&div=II.

counts of second degree rape were charged as being against a victim incapable of consent by reason of being physically helpless or mentally incapacitated in violation of RCW 9A.44.050(1)(b).[2] All eight charges included allegations that Frieze knew or should have known that L.F. was particularly vulnerable or incapable of resistance.

A. TRIAL TESTIMONY

At trial, witnesses testified to the following facts.

1. L.F.'s Background

Frieze and his wife Jeanette[3] adopted L.F. when L.F. was six years old. L.F. was diagnosed with a low IQ and needed near-constant supervision as the Friezes raised her. L.F.'s sister testified that she did not know the medical term but, from what she understood, L.F.'s mental capacity was capped out at as an eight-year-old. From the age of twelve onward, L.F. could take care of her own hygiene, but not always as well as she should. L.F. would need to be reminded about menstrual cycle hygiene.

Jeanette talked to L.F. about body parts, but she did not explain to L.F. how babies are made. At one point, L.F. heard Frieze and Jeanette having sex and brought it up at the dinner table.

[2] RCW 9A.44.050(1)(b) provides that a person is guilty of second degree rape when the person engages in sexual intercourse with a victim who is incapable of consent by reason of being physically helpless or mentally incapacitated.

RCW 9A.44.050 was amended in 2021, but no substantive changes were made affecting this appeal. Therefore, this opinion cites to the current statute.

[3] For clarity, this opinion uses Jeanette Frieze's first name because she shares the same last name as the appellant. We intend no disrespect.

Jeanette asked if L.F. knew what sex was, and L.F. said it was when Frieze "[was] on top of you and rubs on you." 7 Verbatim Report of Proceedings (VRP) (May 19, 2021) at 915.

L.F. masturbated regularly from the time she was adopted. Jeanette did not teach L.F. what masturbation was but did tell L.F. it was something she needed to do in her room in private.

Joanne Hardtke, an acquaintance of the Friezes from church, testified that L.F. would need reminders to put on deodorant or clean because L.F. would not notice the smell. Hardtke once noticed L.F. touching herself inappropriately over her clothing when she was driving L.F. home from a trip. Hardtke told L.F. to stop, and she did. Hardtke also testified that L.F. talked about marriage and dating in her own unique, childlike way. For example, L.F.'s favorite color is purple, and if she met a man whose favorite color was also purple, to L.F. that would mean they could get married.

Wilma Bower, another acquaintance from church, testified that she knew L.F. since L.F. was 12 or 13 years old. Bower noticed L.F.'s disability when she first met L.F. Bower babysat L.F. until L.F. was approximately 15 or 16 years old. L.F. moved in with Bower when L.F. was 23. L.F. was living with Bower at the time of trial.

Bower considers herself a kind of guardian to L.F. According to Bower, L.F. needs help with daily life and requires reminders to drink water, use deodorant, match her clothes, brush her teeth, wash her face, and do her hair. L.F. can use the bathroom by herself but "has a hard time" handling her menstrual cycles. L.F. struggles to take regular, thorough showers to clean herself completely. L.F. is afraid of the oven and cannot organize her own transportation. L.F. cannot grocery shop or manage money on her own. L.F. does not always feed herself, and Bower believes L.F. could be left alone for approximately two days.

For entertainment, L.F. reads children's books. L.F. can read and sound out big words like "'impossible'" but does not always understand them. 4 VRP (May 13, 2021) at 503. L.F.'s favorite book is a pre-K to first grade level book. L.F. also uses math workbooks, though she gets stuck with time tables and does not like division. Bower testified that these workbooks are "barely fourth grade" level. 4 VRP (May 13, 2021) at 508. L.F. also uses workbooks for reading comprehension but forgets what she reads and gets frustrated.

L.F.'s communication is "[c]hildlike," and L.F. often stares silently instead of answering simple yes or no questions. 4 VRP (May 13, 2021) at 506. L.F. can sometimes articulate what she wants. L.F. knows how to send text messages but texts very slowly.

Jennifer Nazarowski, a licensed clinical social worker and an acquaintance of the Friezes through church, testified about L.F. In her work, Nazarowski helps families with a variety of issues, including understanding individual cognitive abilities and any resulting limitations, putting assistance in place as needed, and providing the appropriate level of care. Nazarowski knew L.F. for over ten years through church activities and saw L.F. two or three times per week. Nazarowski believes L.F. functions mentally as a pre-adolescent in the 10- to 12-year-old range.

Paula Luedke, Ph.D., also testified. Dr. Luedke teaches in the Transitions Program, which is a program for students between the ages of 18 and 21 who have developmental disabilities. The mission of the Transitions Program is to give the students opportunities to learn and apply life skills and functional skills, and be able to work in society. Typically, students in the Transitions Program function academically somewhere between a preschool level and a sixth grade level, with a few students functioning "a little higher." 5 VRP (May 17, 2021) at 647.

Dr. Luedke taught L.F. as a student in the Transitions Program. Dr. Luedke testified that

> according to the psychologist's report, [L.F.] functioned pretty much at high third grade, in close approximately to a fourth grader in academic subjects. Adaptive-wise, [L.F.] was low end of the scores.

5 VRP (May 17, 2021) at 655. Dr. Luedke explained that "adaptive" means bathing, clothing, and toileting. 5 VRP (May 17, 2021) at 655. Dr. Luedke noted that, during tests, L.F.'s reading level was actually closer to a fifth grade level. Dr. Luedke did not think L.F. picked up on social skills or social cues. For example, L.F. smiled when another child tripped and fell. L.F. would need to be reminded not to talk to strangers. L.F. aged out of the Transitions Program around the age of 21, and Dr. Luedke did not believe L.F. could live independently without some sort of assistance.

2. Allegations Against Frieze

In March 2019, when L.F. was 23 years old and living with Bower, Bower asked L.F. if anyone had ever touched her. L.F. said she had a secret and that it would split up the family if she told Bower. L.F. started crying. L.F. said she had been touched by the penis, which had rubbed in her front and back and inside.[4] Bower said L.F. uses the word "'in the front'" for her vagina, and uses the word "'butt'" for her butt or anus. 4 VRP (May 13, 2021) at 545. Before this conversation, Bower had not heard L.F. talk about sex or how babies are made.

Following this disclosure, Detective Sergeant Alexa Moss of the Pierce County Sheriff's Department spoke with L.F. Detective Sergeant Moss was tasked with evaluating if L.F. qualified for a forensic interview, which is for children between the ages of 3 and 15 and for individuals who present at that development level. In the interview, Detective Sergeant Moss paid attention to L.F.'s word choice, descriptions, and delay in answering questions. Detective Sergeant Moss

[4] Bower did not testify about who L.F. said touched her because the State asked her not to name any names.

believed that L.F. had the conversational ability of someone who was at a young elementary school to mid-elementary school age level. Detective Sergeant Moss concluded that L.F. qualified for a forensic interview.

Keri Arnold, a child interviewer at the Pierce County Prosecuting Attorney's Office, performed the forensic interview. Arnold believed that L.F. understood the vast majority of Arnold's questions. However, L.F. took long pauses before answering questions, with the delay sometimes reaching up to a minute. Arnold was unable to place L.F.'s cognitive ability on a scale of chronological age because L.F.'s functioning varied greatly. Arnold stated that she "[didn't] know that [L.F.] was even functioning at a teenage level, but it just kind of depended." 8 VRP (May 20, 2021) at 1094. Arnold believed that L.F.'s ability to measure time and space was affected. However, L.F. corrected Arnold several times during the interview, which Arnold believed demonstrated clarity and understanding.

3. L.F.'s Testimony

L.F. testified at trial that Frieze "sticked his penis up into" her "virgina." 6 VRP (May 18, 2021) at 743. L.F. said Frieze humped her, which L.F. said meant he went back and forth. The State asked if anything came out of Frieze's penis when he was humping L.F., and L.F. said, "White goo." 6 VRP (May 18, 2021) at 746. The State asked what happened with the white goo, and L.F. paused then said, "It makes babies." 6 VRP (May 18, 2021) at 746. The State asked L.F. how she knew that, and L.F. said, "I'm not sure on that one." 6 VRP (May 18, 2021) at 746.

L.F. also testified to other acts of sexual intercourse and molestation committed by Frieze against L.F.'s bottom, which she call "[m]y bacoosh," and her "virgina." 6 VRP (May 18, 2021) at 747, 752-54, 756. L.F. told Frieze to stop three times because she did not like it.

L.F. further testified that she has a disability and thinks like a child. L.F. tries "to get [her] brain to think like an adult," but it is hard for her. 6 VRP (May 18, 2021) at 741. L.F. has never had a boyfriend, though she has wanted a boyfriend. L.F. does not know if she wants to get married and does not know what it means to be married. L.F. testified that dating means going out with someone, chitchatting, and eating. L.F. also testified that married means "when you're together." 6 VRP (May 18, 2021) at 789.

L.F. testified that her "virgina" is used to go to the bathroom, and penises are also used to go to the bathroom. 6 VRP (May 18, 2021) at 747. The State asked if L.F. knew how babies are made, and L.F. said no. The State then asked what L.F. thought the white goo stuff does, and L.F. said, "It probably forms a baby." 6 VRP (May 18, 2021) at 759. L.F. went on to testify that she did not remember how she knew that and did not learn it in school. L.F. also testified that her private area is involved in making babies and that babies get made by a man. L.F. said she did not know how a man makes a baby. L.F. testified that babies grow in the mother's stomach. L.F. knew that, for a baby to grow, the man has to do something to the woman, but L.F. did not know what that was. The State asked L.F. if she knew what "'oral sex,'" "'anal sex,'" or "'vaginal sex'" meant, and L.F. said no to all three questions. 6 VRP (May 18, 2021) at 813.

4. Frieze's Testimony

Frieze testified at trial. Frieze testified that he had never had sexual contact or intercourse with L.F., had erectile dysfunction following a stroke, and could no longer ejaculate due to medication.

B. JURY INSTRUCTIONS

On each of the second degree rape charges, the trial court instructed the jury that the State must prove beyond a reasonable doubt that Frieze engaged in sexual intercourse with L.F. when L.F. was incapable of consent by reason of being physically helpless or mentally incapacitated. The trial court also instructed the jury that mental incapacity is a "condition existing at the time of the offense that prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or by some other cause." Clerk's Papers at 277.

C. VERDICT AND SENTENCING

The jury found Frieze guilty of five counts of second degree rape, one count of second degree rape of a child, and one count of second degree child molestation. For each of the findings of guilt, the jury returned a special verdict that Frieze knew or should have known that L.F. was particularly vulnerable or incapable of resistance. The jury found Frieze not guilty of third degree rape of a child.

The trial court vacated the second degree rape of a child conviction because it was not clear if the jury based its guilty finding for that crime on the same act as that for its guilty finding on one of the second degree rape charges. The trial court imposed a standard range sentence on all counts, bringing the sentence of total confinement to 280 months to life.

Frieze appeals.

ANALYSIS

Frieze argues that the evidence is insufficient to support his five convictions for second degree rape of a person who was incapable of consent by reason of being mentally incapacitated.

Specifically, Frieze argues that the evidence was insufficient to show that L.F. was incapable of consent by reason of being mentally incapacitated. We disagree.

We review challenges to the sufficiency of the evidence by considering whether any rational trier of fact, in viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). An insufficiency of the evidence claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All such inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Direct and circumstantial evidence are equally reliable. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

The State charged Frieze with second degree rape under RCW 9A.44.050(1)(b), which required the State to prove beyond a reasonable doubt that Frieze engaged in sexual intercourse with L.F. when she was incapable of consent by reason of being physically helpless or mentally incapacitated. Frieze challenges the sufficiency of the evidence for L.F. being incapable of consent by reason of being mentally incapacitated and does not provide argument on the other elements. Br. of Appellant 13-14, 22.

"Mental incapacity" is a condition existing at the time of the offense that prevents the victim from understanding the nature or consequences of the act of sexual intercourse. RCW

9A.44.010(7).[5] A finding of mental incapacity is appropriate if the "jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse." *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994) (emphasis in original). "A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse." *Id.* at 711-12. But a meaningful understanding also includes "a wide range of other particulars." *Id.* at 712. For example, the nature and consequences of sexual intercourse can include the development of emotional intimacy between sexual partners, disruption in established relationships, pregnancy and its accompanying decisions and consequences, and "the specter of disease and even death." *Id.* A victim is not required to understand any or all of these particulars before they meaningfully understand the nature or consequences of sexual intercourse, but a factfinder should keep these particulars in mind when determining whether or not the victim was capable of having that meaningful understanding. *Id.* These particulars

> are especially important to acknowledge in prosecutions involving the mentally disabled because such individuals may have a condition which permits them to have a knowledge of the basic mechanics of sexual intercourse, but no real understanding of either the encompassing nature of sexual intercourse or the consequences which may follow.

Id.

In assessing whether a victim had a condition that prevented them from understanding the nature or consequences of sexual intercourse at the time of the incident, the jury can consider the victim's testimony about their own understanding; the victim's demeanor, behavior, and clarity on

[5] RCW 9A.44.010(7) was renumbered from RCW 9A.44.010(4) in 2007 and 2020 to RCW 9A.44.010(7) in 2022.

the stand; the victim's IQ, mental age, and ability to understand fundamental nonsexual concepts; the victim's general mental faculties; and the victim's ability to translate information acquired in one situation to a new situation. *Id.* at 714.

Here, the State produced evidence that L.F. was disabled and mentally functioned as a child. Several witnesses testified about L.F.'s mental disability, and Jeanette testified that L.F. was diagnosed with a low IQ. Witnesses described L.F.'s mental age and abilities as everything from young elementary school to 8 years old to pre-adolescent in the 10- to 12-year-old range. Bower and Dr. Leudke both testified about L.F.'s academic functioning and placed L.F. somewhere between a third grade and fifth grade level. The State also presented evidence that L.F. struggled with understanding and performing fundamental nonsexual concepts like hygiene, eating, drinking water, going places, shopping, managing money, and measuring time and space.

Several other statements indicated that L.F. struggles with personal relationships and social skills. Dr. Luedke testified that L.F. did not pick up on social cues, responded inappropriately by smiling when someone tripped and fell, and needed to be reminded not to talk to strangers. One church acquaintance testified about L.F.'s "unique" and "childlike" conception of marriage and stated that L.F. might think marriage is proper if she meets someone with the same favorite color as her. 6 VRP (May 18, 2021) at 713. L.F. testified that she did not know what marriage meant and at another point stated that marriage was "when you're together." 6 VRP (May 18, 2021) at 789. Similarly, L.F. testified that dating means going out with someone, chitchatting, and eating. From this testimony, a rational factfinder could conclude that L.F. was incapable of connecting the idea of romantic or emotional intimacy to sexual situations or understanding how sex might disrupt existing relationships.

Importantly, L.F.'s testimony showed a poor understanding of the physical mechanics of sexual intercourse and how it can result in pregnancy. While L.F. could name some body parts and describe what happened to her, the ability to name body parts and say what physically happened to them does not constitute a *meaningful* understanding of the nature and consequences of sexual intercourse. *See Ortega-Martinez,* 124 Wn.2d at 711-12. Similarly, L.F.'s acts of masturbation and knowledge that masturbation is private do not show any understanding of sexual intercourse. While L.F. could identify a penis, she referred to her vagina as her "virgina," referred to her bottom or anus as her "bacoosh," and called semen "[w]hite goo." 6 VRP (May 18, 2021) at 743, 747, 746. L.F. believed that her "virgina" is used to go to the bathroom and that babies grow in the mother's stomach. 6 VRP (May 18, 2021) at 747. L.F. testified that she did not know how babies are made, then said white goo "probably forms a baby," though she did not know what a man needed to do to a woman to make a baby. 6 VRP (May 18, 2021) at 759. L.F. also testified that she did not know what "'oral sex,'" "'anal sex,'" or "'vaginal sex'" meant. 6 VRP (May 18, 2021) at 813. There is little evidence that L.F. understood any part of pregnancy and no evidence that L.F. understood pregnancy's resulting consequences or decisions.

Beyond all this testimony, the jurors had the opportunity to observe and draw conclusions from L.F.'s demeanor, behavior, and clarity while on the stand. *See Ortega-Martinez,* 124 Wn.2d at 714. Throughout L.F.'s testimony, she misused basic language and mispronounced words. Multiple witnesses described or alluded to L.F. as having a unique conversational style that includes long delays in responding to questions. While not dispositive, the jury's observations of L.F.'s behavior and responses on the witness stand likely assisted the jury in evaluating her general mental faculties.

Viewing all the evidence above in the light most favorable to the State, a rational factfinder could conclude that L.F.'s mental disability prevented her from meaningfully understanding the nature and consequences of sexual intercourse at the time of the offenses.[6] *See id.* at 711-12. Therefore, a rational factfinder could conclude that L.F. was incapable of consent by reason of being mentally incapacitated at the time of Frieze's offenses. *See* RCW 9A.44.010(7); *Ortega-Martinez*, 124 Wn.2d at 711. Accordingly, we hold that the evidence is sufficient to support Frieze's five convictions for second degree rape.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Price, J.

[6] Frieze appears to argue that L.F. was not incapacitated because L.F. had a greater mental capacity than the victim in *Ortega-Martinez*. We reject this interpretation of *Ortega-Martinez*. *Ortega-Martinez* set forth the legal standard on which courts determine incapacity—whether the victim has a condition that prevented them from meaningfully understanding the nature or consequences of sexual intercourse. 124 Wn.2d at 711. *Ortega-Martinez* did not set forth a standard that all victims with more capacity than the victim in *Ortega-Martinez* are not incapacitated.

August 01, 2022 - 3:51 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56049-6
Appellate Court Case Title:	State of Washington, Respondent v Stanley H. Frieze, Appellant
Superior Court Case Number:	19-1-02551-6

The following documents have been uploaded:

- 560496_Petition_for_Review_20220801155022D2064334_3076.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Frieze P4R.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- pcpatcecf@piercecountywa.gov
- teresa.chen@piercecountywa.gov

Comments:

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com
Address:
4616 25TH AVE NE # 552
SEATTLE, WA, 98105-4183
Phone: 206-526-5001

Note: The Filing Id is 20220801155022D2064334