SUPREME COURT NO. 98999-1

NO. 52357-4-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A. X. K.,

Petitioner.

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

The Honorable John Fairgrieve, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

A.K. asks this Court to grant review, pursuant to RAP 13.4, of the published decision of the Court of Appeals in State v. A.X.K., 12 Wn. App. 2d 287, 457 P.3d 1222 (2020), entered on February 11, 2020. The Court of Appeals denied A.K.'s motion for reconsideration on August 7, 2020. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

A child under the age of 12 is presumed to lack the capacity to commit a criminal act. Here, the state neither proved the acts in question occurred after A.K.'s 12th birthday nor rebutted the presumption of incapacity. Must the conviction be reversed because the remand capacity hearing ordered by the Court of Appeals is fundamentally unfair and a violation of procedural due process?

C. STATEMENT OF THE CASE

1. Substantive Facts

Appellant A.K.[1] was 11 years old when his father's girlfriend moved in. Her two children, including 9-year-old E.H., began to spend significant time with his family as well.

In July 2016, E.H.'s parents filed for legal separation. RP 123. By August or September 2016, the situation was acrimonious. RP 124. E.H.'s father was upset that his wife had moved in with another man (A.K.'s father). RP 125. He objected to the sleeping arrangements; E.H. was not allowed to sleep with his mother because she was sleeping with A.K.'s father. RP 125. E.H.'s father claimed his wife was trying to take the children from him. RP 124. He filed for divorce. RP 124.

E.H.'s father repeatedly filed petitions for restraining orders against A.K.'s father. RP 127-30. All were dismissed. RP 127-30. He accused his wife of doing drugs and sought sole custody of the children. RP 133-34. Despite his accusations, she was awarded visitation three times per week. RP 133-34. He filed

[1] This brief uses initials to refer to the child in this juvenile offender proceeding pursuant to RAP 3.4.

motions to force his wife to be alone when she picked up and dropped off the children for visits. RP 126-27.

The relationship with the extended family was similarly bitter. E.H.'s aunt, Joanna Rodriguez, was helping E.H.'s father (her brother) with his divorce paperwork and proceedings. RP 158. In 2014, an altercation between Rodriguez and E.H.'s mother led to a physical fight. RP 157.

In early March 2017, Rodriguez called the police. RP 162. Based on nine-year-old E.H.'s statements, as reported by his father and Rodriguez, the Clark County prosecutor filed charges of attempted rape of a child in the first degree and attempted child molestation in the first degree. CP 12.

The accused was A.K., the son of E.H.'s mother's new boyfriend. CP 12. The charging period ran from September 1, 2016 to March 3, 2017. CP 12. September 1, 2016 was A.K.'s twelfth birthday. CP 37.

E.H.'s father used the allegations to successfully persuade the family court to give him sole custody of his children. RP 132-33. He claimed this was because of the mother's drug issues but admitted he had told the judge about that many times before

without success. The court only stopped her access to the children after the accusations in this case. RP 132-34.

Before trial, A.K. was held in juvenile detention for nearly six months. CP 41 (credit awarded for 159 days served). He was not released to await trial because his father was so frightened of harassment by E.H.'s family that he refused to give the probation officer his address. RP 4-11, 20, 33. A.K.'s father told the court his son might be safer in detention. RP 11.

The story unfolded at trial that E.H. had tried to pull his aunt's pants down while she was babysitting. RP 146-47. When his father asked why he would do such a thing, E.H. said A.K. had done it to him and had put his "pee-pee" in his butt. RP 118. E.H.'s father and aunt (who overheard the conversation) testified to E.H.'s statements. RP 118, 149. The video recording of his forensic child interview was admitted into evidence and played for the court. Ex. 3.

E.H. reluctantly repeated his allegations at trial. RP 91-92. When asked about pulling down his aunt's pants, he was so frightened of being punished, that he would not even discuss it. RP 98-100. E.H. testified he did not know when this happened

except to say that it was when they would visit his mother. RP 92. In the forensic interview, he said it happened before his birthday. Ex. 3. His birthday is August 26. RP 112.

E.H.'s grandmother testified that, when both boys were spending time with her, she asked E.H., "Has anybody in this house hurt you?" RP 203. He told her, "No," but added, "that's not what my dad wants me to say." RP 203. She testified E.H. was terrified of his father. RP 200. A.K.'s 18-year-old sister similarly testified E.H. always acted frightened when it was time to return to his father's house. RP 211. He referred to his father as a monster and would try to hide. RP 212.

When the grandmother asked A.K. about the allegations, he began to cry. RP 205. He said he did not do it. RP 205. He did not know why this was happening. RP 205.

2. Procedural Facts

In a combined proceeding, the trial judge first found E.H. competent to testify, then found his statements to his father, his aunt, and the forensic interviewer were admissible child hearsay

under RCW 9A.44.120. RP 233, 239-40, 243. In its oral ruling,[2] the court declared E.H. was unlikely to make up an accusation that would lead to his being separated from his mother, who he loved and clearly wanted to be with. RP 234-35. The court found that E.H.'s fear of his father, and the father's animosity toward A.K.'s father, did not give E.H. a motive to lie. RP 235. The court found no evidence that the father had tried to tamper with E.H.'s statements and no evidence that E.H. was a liar. RP 235-36.

The court then considered whether A.K. could be found guilty of the charged offenses. In the oral ruling, the judge found E.H.'s aunt and father credible. RP 261. Nevertheless, the judge acquitted A.K. of first-degree child molestation. RP 263-64. This was because A.K. was not even 36 months older than E.H., and that age difference is an essential element of the offense. RP 263-64. However, the judge then found A.K. guilty of attempted rape of a child in the first degree, a crime requiring only a two-year, rather than a three-year age difference. RP 262-63; RCW 9A.44.073; RCW 9A.44.083. The court did not hold a hearing on

[2] As of the writing of this brief, no written findings or conclusions have been entered regarding the child hearsay issue.

whether A.K. had the maturity to be culpable of a sex offense at such a young age.

At the dispositional hearing the State requested a special sex offender disposition alternative (SSODA), with a suspended sentence and mandatory sex offender treatment. RP 279-80. The defense opposed this option. RP 282-91. A SSODA would only work if A.K. could return home, follow conditions, and engage in treatment. But his father was still refusing to take him home if he had to provide an address for sex offender registration. RP 284, 289-90. A.K. requested instead a sentence of 23 weeks, which he had already served. RP 291.

The court imposed the SSODA over A.K.'s objections. RP 295. A.K. was given a disposition of 36 weeks in detention, suspended on the condition that he engage in treatment. CP 40-41. Notice of appeal was timely filed. CP 45.

On appeal, A.K. argued his adjudication of guilt must be reversed for three reasons. First, the evidence was insufficient because no evidence established that the alleged act occurred after A.K.'s 12th birthday or rebutted the presumption of incapacity existing before that date. Second, the State did not prove A.K.

knew that nine-year-old E.H. was more than 24 months younger than he and, therefore, did not prove that he intended to commit first-degree rape of a child, as required for a criminal attempt. Finally, the court erred in admitting the child hearsay in light of the bitter divorce and custody dispute between E.H.'s parents.

The Court of Appeals rejected A.K.'s sufficiency claim, finding criminal capacity was not an element of the offense. A.X.K., 12 Wn. App. 2d at 293. However, the court agreed the only evidence shows the crime occurred in August 2016, when AK was 11 years old, and the state never rebutted the presumption of incapacity. Id. at 294. Instead of reversing the adjudication of guilt, the Court of Appeals remanded for a hearing on A.K.'s capacity. Id. at 295 (citing Dillenburg v. Maxwell, 70 Wn.2d 331, 355, 422 P.2d 783 (1967)). If the court, on remand, finds A.K. had the capacity to commit the charged offense, the adjudication is to be affirmed. A.X.K., 12 Wn. App. 2d at 290. If the court finds A.K. did not have capacity, the adjudication must be dismissed. Id.

A.K. asked the Court of Appeals to reconsider. He argued reversal, rather than remand, was the appropriate remedy, but

if remand were to occur, the scope of the evidence should be clarified and a deadline set so that A.K.'s adjudication of guilt would not simply remain due to inaction. A.K. raised concerns that no fair capacity hearing could be held for a child who was 11 years old at the relevant time but is now 15. A.K. asked the Court of Appeals to, at a minimum, require a feasibility determination before any capacity hearing, clarify whether new evidence could be presented at any such hearing (or whether the capacity determination should be made on the basis of the existing record), and set a deadline by which that hearing must occur.

The Court of Appeals delayed a decision on the motion to reconsider while ordering the parties to begin the process of setting a date for a remand hearing on capacity. That hearing is set for November 8, 2020. After that date was determined, the Court of Appeals denied A.K.'s motion to reconsider. A.K. now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THE COURT OF APPEALS ERRED IN ORDERING REMAND INSTEAD OF REVERSING A.K.'S CONVICTION.

Remand for a retrospective capacity hearing at this late date was improper because it violates procedural due process, is not reasonably feasible, and would cause irremediable prejudice to A.K. The passage of four years shows that a remand capacity hearing is not now feasible and A.K. will be prejudiced in the ability to defend himself. The adjudication of guilt should be reversed, and the case dismissed.

Washington law protects children "of tender years," who are less able than adults to appreciate the wrongfulness of their behavior. State v. Ramer, 151 Wn.2d 106, 118, 86 P.3d 132 (2004) (quoting State v. Q.D., 102 Wn.2d 19, 21, 23, 685 P.2d 557 (1984)). When a child lacks capacity, "he or she is legally incapable of committing the crime and for that reason is relieved of all criminal responsibility." State v. Linares, 75 Wn. App. 404, 412-13, 880 P.2d 550 (1994). A child under 12 is presumed incapable of committing a crime. RCW 9A.04.050. The State must rebut the

presumption of incapacity by clear and convincing evidence. Ramer, 151 Wn.2d at 112-13.

This Court should grant review under RAP 13.4(b)(2), (3), and (4) and reverse the adjudication of guilt. The Court of Appeals' decision to remand for a retrospective capacity hearing is fundamentally unfair, violates procedural due process, and is inconsistent with precedent.

a. It is fundamentally unfair to allow the state a second chance to establish facts necessary to show criminal culpability.

First, it is fundamentally unfair both to give the state another chance to convict A.K. and to require A.K. to defend himself with the diminished tools available due to the passage of time. The state should not be permitted to benefit from its decision to charge only conduct after A.K.'s 12th birthday without producing evidence of any conduct after that date.

The state should not get another bite at the apple because it is patently clear the state was aware of the capacity issue. There was no other reason for the decision to begin the charging period on September 1, 2017, A.K.'s birthday. That date is unmoored from any evidence about when this offense allegedly

occurred. The only mention of timing was E.H.'s testimony that this occurred when he visited his mother and before his birthday in August. Ex. 3; RP 92. The state had the burden of proof to rebut the presumption of incapacity. RCW 9A.04.050; Ramer, 151 Wn.2d at 112-13. Instead, the state knowingly and intentionally chose to evade the issue by alleging, in contravention of the evidence, that the offense happened after A.K.'s 12th birthday in September. CP 12; Ex. 3.

By restricting the charges until after A.K.'s 12th birthday, the state bound itself to proving that the alleged conduct occurred in that time frame. A.K. acknowledges that our state's precedent holds that capacity is not an element of the offense that must be proved beyond a reasonable doubt. Q.D., 102 Wn.2d at 24. But the Q.D. court did not consider an intentional attempt to prosecute a child without establishing capacity. (In Q.D., both children were found, at the time of trial, to have capacity. Id. at 21-22.) Here, by contrast, instead of rebutting the presumption of incapacity, the state undertook to prove an offense occurred after A.K. turned 12. CP 1. The state should be held to this decision rather than be

granted a second opportunity to establish facts that could sustain an adjudication of guilt.

b. A retrospective capacity hearing violates procedural due process.

A retrospective capacity hearing violates procedural due process because it impermissibly increases the risk of error in a criminal proceeding. See Mathews v. Eldredge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed.2 d 18 (1976). Procedural due process, at its core is a right to be meaningfully heard. State v. Lyons, 199 Wn. App. 235, 240, 399 P.3d 557 (2017). "The purpose of procedural due process in the context of a criminal trial is to assure the right to a fair opportunity to defend against the State's accusations." State v. Brousseau, 172 Wn.2d 331, 363, 259 P.3d 209 (2011) (quoting State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)) (internal quotes omitted).

To determine whether a given procedure violates due process under Mathews, courts balance three factors: (1) the private interests affected by the proceeding; (2) the risk of error created by the procedures used and the probable value, if any, of additional procedural safeguards; and (3) the countervailing governmental interest supporting use of the challenged procedure.

State v. Frank, 112 Wn App. 515, 521, 49 P.3d 954, 958 (2002) (citing Mathews, 424 U.S. at 335).

Here, A.X.K.'s liberty interest is among the most important recognized under our system of laws: the right not to be convicted of a crime one did not commit. "The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). Regardless of his conduct, a child too young to have criminal capacity has not committed a crime. Linares, 75 Wn. App. at 412-13 (1994). He thus has an immense interest in avoiding wrongful conviction.

The risk of error in a retrospective capacity hearing is extreme. With regards to a similar issue, an adult defendant's mental competency to stand trial, the Fifth Circuit noted, "Both the Supreme Court and this circuit are acutely aware of the hazards connected with retrospective competency hearings." United States v. Makris, 535 F.2d 899, 904 (5th Cir. 1976) (citing Drope v. Missouri, 420 U.S. 162, 182, 95 S. Ct. 896, 909, 43 L. Ed.

2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 387, 86 S. Ct. 836, 843, 15 L. Ed. 2d 815 (1966); Lee v. Alabama, 386 F.2d 97 (5th Cir. 1967) (en banc)).

In recognition of those dangers, Washington requires a feasibility determination before a retrospective competency hearing. State v. P.E.T., 174 Wn. App. 590, 605-06, 300 P.3d 456 (2013) (quoting United States v. Johns, 728 F.2d 953, 958 (7th Cir. 1984)). Before a trial court engages in a retrospective competency determination, it must first decide "whether a retrospective competency hearing is feasible." Id. at 606 (quoting People v. Lightsey, 54 Cal.4th 668, 710, 143 Cal. Rptr. 3d 589, 279 P.3d 1072 (2012)). Feasibility, in this context, means "'the availability of sufficient evidence to reliably determine the defendant's mental competence when tried earlier.'" Id. (quoting Lightsey, 54 Cal.4th at 710)). The burden is on the State to show the hearing is feasible. Id. at 606-07 (citing Lightsey, 54 Cal.4th at 710-11).

As an alternative to remand for a feasibility determination, Washington courts have also mitigated the risk of error by remanding to determine whether the failure to hold a capacity hearing in a timely manner has prejudiced the accused. See State

v. Gilman, 105 Wn. App. 366, 19 P.3d 1116 (2001); State v. B.P.M., 97 Wn. App. 294, 301, 982 P.2d 1208 (1999). If the accused would be prejudiced by holding the hearing so long after the fact, dismissal is appropriate. See id. For example, in Gilman, the court considered a violation of JuCR 7.6, which requires a capacity hearing be held within 10 days of a juvenile's first court appearance. Id. at 368. The capacity hearing was scheduled for approximately one month after the child's detention hearing when the trial court dismissed the case for violation of the rule. Id. On appeal, the parties agreed remand, rather than dismissal, was the appropriate remedy for the rule violation. Id. at 369. The court explained that dismissal would be appropriate if the child were irretrievably prejudiced by the rule violation. Id. at 370. The court remanded for the trial court to determine the issue of prejudice. Id.

Likewise, here, the question of dismissal should not hinge on whether the state can, now, persuade a fact-finder that A.K. had maturity to commit a sex offense four years ago when he was 11. It should turn on whether he is prejudiced by holding the hearing four years after the alleged conduct. See Gilman, 105 Wn.

App. at 370; B.P.M., 97 Wn. App. at 301. The decision in Dillenburg, relied on by the Court of Appeals in this case, is in accord. The court in Dillenburg specifically noted a retroactive hearing would be insufficient to sustain the conviction when "intervening events have so prejudiced the constitutional rights of the convicted person as to compel a different result." Dillenburg, 70 Wn.2d at 355.

Despite this case law, the Court of Appeals did not remand to determine feasibility, or prejudice. App. at 7-8. It simply ordered the superior court to hold a retrospective capacity hearing four years after the fact. The risk of error in such a proceeding is extreme because four years is an eternity in the maturity of a child. This is not a case in which the capacity hearing was delayed by a few weeks as in Gilman. 105 Wn. App. at 368. The relevant time period is now four years in the past.

Given the passage of time, memories are likely to have faded. It will be difficult, if not outright impossible to find witnesses with clear memories of A.K.'s moral and sexual maturity level in the summer of 2016. The SSODA assessment is not a valid indicator of A.K.'s understanding at the time of the

alleged conduct. The fact of having undergone a trial fundamentally alters a child's maturity, knowledge, awareness, and understanding vis-à-vis the wrongfulness of the alleged conduct. See State v. K.R.L., 67 Wn. App. 721, 725, 840 P.2d 210 (1992) (punishment that conditions a child, after the fact, to know that what he did was wrong is far different than the child appreciating the quality of his or her acts at the time the act is committed).

The best evidence at a capacity hearing would be A.K.'s 11-year-old self. That self no longer exists. To defend himself, A.K. needs to rebut the state's claims with evidence of what he was like before these criminal charges transformed his life. That will almost certainly be impossible now, four years later.

The government has no interest that can outweigh a child's liberty interest in not being convicted of a crime when he is too young to be held morally or legally responsible. The balancing required under the Mathews factors reveals a substantial liberty interest and an extreme risk of error, with no countervailing benefit to the state. A retrospective capacity hearing in this case violates procedural due process. Because A.K. will be prejudiced

by any belated capacity hearing, and a fair hearing on the issue is not reasonably feasible, the charges must be dismissed. Gilman, 105 Wn. App. at 369-70.

"[A]ll juvenile proceedings still must satisfy the basic requirements of due process and fairness." State v. Kuhlman, 135 Wn. App. 527, 531, 144 P.3d 1214 (2006), review granted, cause remanded, 161 Wn.2d 1014 (2007) (citing In re Gault, 387 U.S. 1, 12, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). The violation of A.K.'s procedural due process rights is a significant constitutional issue warranting this Court's attention. RAP 13.4(b)(3). Additionally, the protection of children accused of criminal offense is an issue of substantial public interest. RAP 13.4(b)(4). Review is also warranted because the decision to remand for a capacity hearing without any feasibility or prejudice determination is inconsistent with Gilman. 105 Wn. App. at 368 and P.E.T., 174 Wn. App. at 606. RAP 13.4(b)(2).

This Court should grant review and hold that reversal was required because a retrospective capacity hearing at this late date would violate procedural due process and be fundamentally unfair. Alternatively, this Court should grant review and hold

that remand should have been limited in the first instance to determining whether a retrospective capacity hearing was feasible without prejudice to A.K. At a bare minimum, to prevent irremediable prejudice to A.K., the evidence at any remand hearing should also be restricted to the evidence that was before the court at the time of trial.

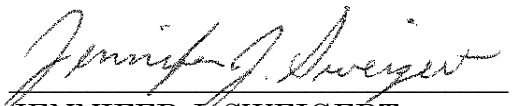
E. CONCLUSION

The Court of Appeals decision presents significant questions of constitutional law and public interest and is inconsistent with Gilman. 105 Wn. App. at 368 and P.E.T., 174 Wn. App. at 606. A.K., therefore, requests this Court grant review under RAP 13.4 (b) (2), (3), and (4) and reverse.

DATED this _3rd_ day of September, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. A.X.K. Appellant.	No. 52357-4-II PUBLISHED OPINION

MELNICK, J. — A juvenile court adjudicated AK guilty of attempted rape of a child in the first degree. The evidence at trial indicated that the incident occurred before AK turned 12 years old. The court never held a capacity hearing.

AK argues that the court erred by not holding a capacity hearing and that his adjudication should be reversed. AK also contends that insufficient evidence supports his adjudication and that the court erred in admitting the child victim's out-of-court statements.

We remand to the juvenile court to hold a capacity hearing. If the court determines that AK had the capacity to commit the charged offense, the adjudication shall be affirmed. If the court determines that AK did not have the capacity to commit the charged offense, the adjudication must be dismissed.

FACTS

EH was born in August 2007. Approximately nine years later, EH's parents, Brittnay and Alexander, filed for dissolution of their marriage.[1] They had a contentious dissolution proceeding. Pursuant to a court-ordered parenting plan, EH began splitting time between Brittnay's and Alexander's residences. EH spent three days with Brittnay and the rest with Alexander.

Sometime thereafter, Brittnay began a relationship with a man named Christopher, and the two began living together. Christopher had a son, AK, who was born on September 1, 2004.

In March 2017, Alexander's sister, Joanna, babysat EH. During the evening, EH began pulling on Joanna's pants. Joanna questioned EH about his actions. EH did not initially respond but eventually apologized. Within hours, Joanna initiated a video chat with her brother and told him about the incident.

During the video chat, Alexander scolded EH for pulling on Joanna's pants. He asked EH where he learned to do that, and EH told him that AK had pulled down his pants and attempted to penetrate him. EH did not give a specific time when the incident occurred.

Shortly after the accusations, Alexander filed pleadings in the ongoing dissolution proceedings that reflected EH's allegations. As a result, the court ordered that Brittnay have no contact with EH.

In late March, Kim Holland, a forensic interviewer with the Children's Justice Center, conducted a forensic interview with EH.[2] Near the beginning of the interview, Holland asked EH whether he knew why she was interviewing him. EH responded that Alexander had brought him

[1] For clarity and privacy, we use the first names of many adults in this case. We intend no disrespect.

[2] The court admitted a video of the interview and played it at trial.

to talk about AK. EH then described how AK had sexually abused him. During the interview, EH said that AK abused him in August 2016 and that the abuse occurred in a hallway. He also stated that he waited a long period of time before he disclosed the abuse to Alexander. AK turned 12 years of age on September 1, 2016.

In October 2017, the State charged AK with attempted rape of a child in the first degree. The State alleged in the information that the crime occurred "on or about or between September 1, 2016 and March 3, 2017." Clerk's Papers (CP) at 1. The State later amended the information to add a charge of child molestation in the first degree, occurring over the same time period. The matter proceeded to trial.[3]

At trial, EH testified and could not specify when the incident occurred. When the prosecutor asked him whether he knew what month it occurred, EH responded that he did not. When asked whether the abuse occurred in the hallway, EH responded "maybe or maybe not." Report of Proceedings (RP) (Mar. 28, 2018) at 90. EH also testified that he wanted Brittnay and Alexander to reconcile.

Alexander testified that when EH disclosed the incident to him, "[h]e didn't give a specific time when it happened." RP (Mar. 28, 2018) at 118.

[3] The court heard all of the evidence at trial before ruling on the admissibility of any out-of-court statements under RCW 9A.44.120. After the court ruled on the admissibility of out-of-court statements, it then ruled on AK's guilt.

At the conclusion of the evidence, the court went through the *Ryan*[4] factors on the record and admitted EH's out-of-court statements. The court then adjudicated AK guilty of attempted rape of a child in the first degree.[5]

In support of its rulings, the court found "[t]hat about September 1, 2016 to March 3, 2017 [AK] did an act that was a substantial step toward having sexual intercourse with [EH]." CP at 53. AK appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

AK argues that insufficient evidence supports his conviction because the evidence only showed that the abuse occurred before he turned 12 years old and therefore the State failed to prove that he had the capacity to commit the crime. Because capacity is not an element of the crime, we disagree.

"[F]ollowing a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). We examine the findings to decide whether, when viewing them in the light most favorable to the State, any rational fact finder could have found that the State proved each element of the offense beyond a reasonable doubt. *Homan*, 181 Wn.2d at 105.

Evidence is substantial if it is "sufficient to persuade a fair-minded person of the truth of the asserted premise." *Homan*, 181 Wn.2d at 106. Unchallenged findings of facts are verities on

[4] *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

[5] The court found AK not guilty of child molestation in the first degree because the State failed to prove that AK was 36 months older than EH.

appeal. *Homan*, 181 Wn.2d at 106. We review conclusions of law de novo. *Homan*, 181 Wn.2d at 106.

To prove attempted rape of a child in the first degree, the State must establish that, with intent to commit the criminal act, the defendant took a substantial step toward having sexual intercourse with another who was less than 12 years old and not married to the defendant and the defendant was at least 24 months older than the victim. RCW 9A.28.020(1); RCW9A.44.073(1).

Children older than 8 but less than 12 years old "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." RCW 9A.04.050. However, capacity is not an element of attempted rape of a child in the first degree. "While capacity is similar to the mental element of a specific crime or offense, it is not an element of the offense, but is rather a general determination that the individual understood the act and its wrongfulness." *State v. Q.D.*, 102 Wn.2d 19, 24, 685 P.2d 557 (1984).

Here, the only evidence shows that the crime occurred in August 2016, when AK was 11 years old. Therefore, AK was presumed to lack capacity, and the State never rebutted that presumption. However, because capacity is not an element of the crime, AK's presumed lack of capacity does not implicate the sufficiency of the evidence.

Insufficient evidence claims go to the State's proof of the elements of the crime. Because capacity is not an element, AK's argument on this issue fails. When viewing the evidence in the light most favorable to the State, a rational fact finder could have found that the State proved every element beyond a reasonable doubt.

II. CAPACITY

AK argues that the juvenile court did not have the authority to enter a judgment against him because it failed to hold a capacity hearing and he was younger than 12 years old at the time the crime occurred. Therefore, he argues that we should reverse his conviction. We agree that the juvenile court lacked authority but disagree with AK's proposed remedy.

As previously noted, RCW 9A.04.050 provides that children older than 8 but less than 12 years old "are presumed to be incapable of committing crime" but that this presumption can be rebutted. JuCR 7.6(e) necessitates that a court, when a determination of capacity is required, hold a hearing on capacity within 14 days after the juvenile's first court appearance.

"The legal test [for capacity] is whether [the defendant] had knowledge of the wrongfulness of the act at the time he committed the offense." *State v. J.P.S.*, 135 Wn.2d 34, 37-38, 954 P.2d 894 (1998). The State must overcome the presumption of an 8 to 12 year old's lack of capacity with clear and convincing evidence. *J.P.S.*, 135 Wn.2d at 37. "[W]hen a juvenile is charged with a sex crime, the State carries a greater burden of proving capacity, and must present a higher degree of proof that the child understood the illegality of the act." *State v. Ramer*, 151 Wn.2d 106, 115, 86 P.3d 132 (2004).

Until a juvenile's presumed lack of capacity is rebutted, the trial court does not have the statutory "authority to act" as to that juvenile.[6] *State v. Golden*, 112 Wn. App. 68, 77, 47 P.3d 587 (2002). Until the court holds a capacity hearing, it has "no authority to do anything but dismiss the charge." *Golden*, 112 Wn. App. at 77.

[6] *State v. Kassner*, 5 Wn. App. 2d 536, 540-41, 427 P.3d 659 (2018), *review denied*, 192 Wn.2d 1024 (2019), clarified that a juvenile's presumed lack of capacity does not implicate the trial court's jurisdiction.

Here, the only evidence in the record indicates that AK abused EH in August 2016, before AK turned 12 years of age. The only date given in the record came from the forensic interview when EH said the sexual assault occurred in August 2016. At trial, neither EH nor Alexander could provide a date. Nor did any circumstantial evidence exist from which a reasonable fact finder could have found that the incident occurred after AK turned 12 years of age. Therefore, a presumption exists that AK lacked capacity, and the State did not rebut that presumption. As a result, we conclude that the juvenile court lacked the statutory authority to enter a judgment against AK.

However, we do not reverse AK's conviction as he requests. Rather, we remand for the court to hold a capacity hearing.

This case is analogous to the situation presented in *Dillenburg v. Maxwell*, 70 Wn.2d 331, 355, 422 P.2d 783 (1967). In that case, a probation officer signed a document which declined juvenile jurisdiction over the petitioner, a 16 year old. *Dillenburg*, 70 Wn.2d at 349. The petitioner then entered a plea of guilty. *Dillenburg*, 70 Wn.2d at 349.

The Supreme Court decided that the decline occurred improperly and determined that because of the faulty transfer, the superior court lacked authority to enter the guilty plea. *Dillenburg*, 70 Wn.2d at 352-53. Therefore, the court ordered that a hearing be held to determine "whether the facts before the juvenile 'session' of the superior court in the first instance warranted and justified the transfer for criminal prosecution." *Dillenburg*, 70 Wn.2d at 355.

> If at the time of the hearing the convicted person still be under the age of 18 years, such hearing should be held before the superior court sitting in juvenile court session. . . . [A]nd, at the conclusion of the hearing, the court would be required to make findings of fact and conclusions of law relative to any relevant and disputed issue between the prosecuting officials and the convicted person.

Dillenburg, 70 Wn.2d at 355.[7]

Here, we believe that the remedy ordered in *Dillenburg* should be applied. As in *Dillenburg*, we need to determine if the court had authority to act. Consequently, we remand to the trial court to hold a capacity hearing. If AK is found to have had capacity at the time of the crime, "then the challenged conviction will stand." *Dillenburg*, 70 Wn.2d at 355. On the other hand, if the State does not overcome the presumption that AK lacked capacity, "then the conviction should be set aside." *Dillenburg*, 70 Wn.2d at 355.

III. SUFFICIENCY OF THE EVIDENCE—AGE DIFFERENCE

AK argues that the crime of attempted rape of a child in the first degree requires the State to prove that "he was aware of the age difference between himself and E.H.," which it failed to do. Br. of Appellant at 22. Because the State never proved that he knew of the age difference, AK contends that insufficient evidence supports his conviction. We disagree.

"[T]he age of the victim of child rape—either the child victim's actual age or the defendant's belief in a fictitious victim's age—is material to proving the specific intent element of attempted child rape." *State v. Johnson*, 173 Wn.2d 895, 908, 270 P.3d 591 (2012). When a crime involves fictitious victims, the State must "prove that [the defendant] believed his victims to be minors." *Johnson*, 173 Wn.2d at 909. However, for non-fictitious victims, i.e., when the victim falls within the terms of the statute, the State need only "show that the defendant intended to have sexual intercourse with this victim" to prove the requisite intent. *Johnson*, 173 Wn.2d at 908.

Here, the State presented evidence that EH met the statutory definition. He was less than 12 years old, not married to AK, and AK was more than 24 months older than him. RCW

[7] The court also provided the proper procedures to follow if the person was over 18 years of age at the time of remand. *Dillenburg*, 70 Wn.2d at 355-56. In this case, AK is still under 18 years of age, so we do not address that scenario.

9A.44.073(1). Therefore, the State needed only to prove that AK intended to have sexual intercourse with EH and took a substantial step toward doing so. We conclude that sufficient evidence exists.

IV. CHILD HEARSAY

AK argues that the trial court erred in admitting two child hearsay statements, EH's initial disclosure and EH's statements at the forensic interview. AK contends that the trial court erroneously applied the *Ryan* factors. We disagree.

"[W]e review the trial court's decision to admit child hearsay evidence for an abuse of discretion." *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court abuses its discretion 'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *Borboa*, 157 Wn.2d at 121 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)).

We review challenges to findings of fact to determine whether substantial evidence supports each challenged finding, and we review the trial court's conclusions of law de novo to determine whether the findings support the challenged conclusions. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993); *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007); *State v. Alvarez*, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the premise's assertion. *Halstien*, 122 Wn.2d at 129. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We defer to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). They "are not subject to review." *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017).

"RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse." *State v. Brousseau*, 172 Wn.2d 331, 351, 259 P.3d 209 (2011). RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or attempts at, "sexual conduct performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child "[t]estifies at the proceedings."

In determining the reliability of child hearsay statements, the trial court considers the following nine *Ryan* factors:

> (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statement, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009) (footnote omitted). The reliability assessment is based on an evaluation of all the factors, and no single factor is determinative. *Kennealy*, 151 Wn. App. at 881. But the factors must be substantially met to establish reliability. *Kennealy*, 151 Wn. App. at 881.

AK challenges a number of the findings of fact; however, after applying the above principles of law, we conclude that substantial evidence supports the court's findings. In addition, after reviewing the findings, we conclude that the *Ryan* factors were substantially met to establish reliability.

The court carefully considered all of the *Ryan* factors and did not abuse its discretion in admitting the child hearsay statements.

CONCLUSION

Because no capacity hearing occurred, we remand to the juvenile court to hold a capacity hearing. If the court determines that AK had the capacity to commit the charged offense, the adjudication shall be affirmed. If the court determines that AK did not have the capacity to commit the charged offense, the adjudication must be dismissed.

Melnick, J.

We concur:

Maxa, C.J.

Glasgow, J.

NIELSEN KOCH P.L.L.C.

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