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Supreme Court No. 99756-0
(COA No. 36978-1-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON HANCOCK,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Johnathon Hancock asks this Court to review the opinion of the Court of Appeals in *State v. Hancock*, 36978-1-III (issued on April 9, 2021). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A challenge to a child's competency to testify requires the court to apply the five-factor test enumerated in *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967). All five factors must be met. Here, the trial court failed to properly apply the *Allen* test, which the child witness could not have passed because she lacked any independent recollection of the occurrence she reported years earlier. Did the trial court err by finding the child competent to testify under the *Allen* test despite her total lack of independent recollection of the incidents? RAP 13.4(b)(1), (4).

C. STATEMENT OF THE CASE

Mr. Hancock was friends with Victoria Forster, K.F.'s mother, in 2016.[1] RP 472. Since then, the two have entered a romantic relationship and share a son. RP 472. In 2016, K.F. lived primarily with her father in Montana and had occasional visits with her mother in

[1] K.F. and her mother do not share a last name. K.F. and her father Robert do share a last name, and to protect K.F.'s identity, Robert will be referred to by first name only.

Spokane. RP 287, 289. The visits were typically several days, and K.F. would either sleep at her mother's home or her maternal grandmother's home. RP 289, 475.

During the summer of 2016, then-four-year-old K.F. reported to her father, Robert, and her former stepmother, Shyla Horowitz, that she did not want to visit her mother. RP 301. When asked why, K.F. indicated someone made her play games that sometimes hurt. RP 302. After Ms. Horowitz questioned her further, K.F. stated that her mother's friend, "Famous," sometimes "would touch her with things and it hurt." RP 304, 313. K.F. described a "pink" object that was "like her brother's" and was attached to a person. RP 306-07; 415-16. K.F. got her stepmother's vibrator, stating the object was similar, and Ms. Horowitz deduced K.F. was describing male genitalia. RP 307; 415-16. K.F. reported acts of touching, including oral sex, being touched on the genitals, and being touched on her body. RP 307-08; 309; 416-17. She also described what Ms. Horowitz believed was semen. RP 417.

K.F.'s father and stepmother reported the incident to a local sheriff's deputy, who referred the incident to the Spokane Police Department. RP 282; 521; 540. Using Facebook photos, K.F. identified Mr. Hancock as "Famous." RP 525-26. As part of the investigation,

K.F. completed a physical exam and forensic interview. RP 493. The interview was videotaped and played for the jury. RP 495. During the interview, K.F. made statements similar to those she made to her father and stepmother. Ex. P2. She described various instances of touching and sexual contact. Ex. P2.

A physical examination by a nurse and forensic interviewer, revealed no injuries or evidence of sexual contact. RP 460. K.F. was "healthy and normal." RP 460. During the exam, K.F. stated her "bottom" had bled "white stuff" that came from "Famous." RP 461.

No witnesses or physical evidence corroborated K.F.'s reports. Her mother, Ms. Forster, denied the allegations. According to Ms. Forster, Mr. Hancock had never spent the night in her home during any of K.F.'s visits. RP 473. Although the two later developed a romantic relationship, he did not live with her or spend the night during 2016. RP 474. K.F. met Mr. Hancock when Ms. Forster would run into him on the bus or while shopping. RP 474. During K.F.'s visits, Ms. Forster would often take her to the child's grandmother's home to visit with family and spend the night. RP 476. Mr. Hancock had never been alone with K.F. and had never helped babysit her. RP 474.

During pretrial hearings, the State moved to admit K.F.'s out-of-court statements under a statutory exception for child hearsay. RP 338-347. During the hearing, K.F. could not remember anything about the events she previously reported. RP 223-30. Mr. Hancock objected to her testifying at trial, arguing the State failed to establish the threshold matter of K.F.'s competency to testify. RP 347-48. Defense cited the *Allen* child witness competency test, and noted K.F.'s total lack of independent recollection of the events. RP 348-49.

The trial court analyzed K.F.'s competency under a "totality of the facts" analysis, finding she could remember some things that happened around the events in question. RP 353. Finding K.F. competent to testify, the court also found her hearsay statements were admissible under the child hearsay statute. RP 353-58.

On review, citing *State v. Woods*, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005), the Court of Appeals found the trial court had not abused its discretion by finding K.F. competent to testify because she could recall other details contemporaneous to the incidents that she could not remember at all. Slip Op. at 10-11. The Court of Appeals affirmed Mr. Hancock's convictions.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should accept review to determine whether the trial court improperly applied the five-factor *Allen* test for child competency, and whether the Court of Appeals misapplied this Court's holding in *State v. Woods*.

RCW 5.60.050 provides that the "following persons shall not be competent to testify:":

> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
>
> (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

When challenged, the competency of a child witness must be assessed under the test set forth in *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). Under this test, the child must demonstrate:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) *a memory sufficient to retain an independent recollection of the occurrence*; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692 (emphasis added); *see also State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2003). A trial judge must find all five factors before finding a child competent to testify. *In re Dep. of A.E.P.*,

135 Wn.2d 208, 223, 956 P.2d 297 (1998). The *Allen* factors must be supported by affirmative evidence, and the failure of any factor is dispositive of a child's incompetence. *Id*. 223-24.

In *A.E.P.*, the trial court questioned a five-year-old witness about allegations of sexual abuse by her father. *Id*. at 221. The court did not ask the child when the incidents had occurred, but nevertheless found her competent to testify. *Id*. On appeal, this Court reversed, emphasizing the child "was unable to fix any particular point in time when the alleged touching occurred." *Id*. at 224. The Court concluded A.E.P. was incompetent to testify because the second *Allen* factor had not been met. *Id*. at 225, 234. Specifically, this Court reasoned that the trial court "cannot possibly rule on a child's 'mental capacity at the time of the occurrence . . . to receive an accurate impression of it' when the court has never determined when in the past the alleged events occurred." *Id*. at 225 (quoting *Allen*, 70 Wn.2d at 692).

Here, Mr. Hancock challenged K.F.'s competency as a witness as a threshold matter to the admissibility of her child hearsay statements. RP 347-49. Citing the *Allen* factors, specifically the third factor, Mr. Hancock noted K.F.'s total lack of independent recollection about the alleged incidents. RP 348. Despite the challenge to K.F.'s

competency as a witness, the trial court failed to apply the *Allen* test to determine K.F.'s competence. RP 352-53.

Citing the first subsection of RCW 5.60.050, the court found no reason to believe K.F. had been of unsound mind or intoxicated at the time of the incident. RP 352. As to the second subsection, the court applied a "totality of the facts" test, and found that K.F.'s ability to recall details about her life during the time of the allegations was sufficient to show she was competent to testify. RP 353. The court did not consider all of the *Allen* factors and did not find each factor had been met. The trial court's child witness competency assessment was wholly inadequate.

Nevertheless, the Court of Appeals affirmed, finding the trial court had a "tenable" reason to find K.F. competent to testify, namely that she could recall details of her life contemporaneously to the alleged incidents. Slip Op. at 10-11. The court cited *State v. Woods*, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005), to support its holding, stating that K.F.'s memory of the contemporaneous details demonstrated her ability to perceive and recall things that happened to her during the charging period, satisfying the competency standard. Thus, the Court of Appeals

concluded, the trial court had an appropriate basis for admitting K.F.'s testimony and, consequently, her child hearsay statements.

Woods, however, is entirely inapposite. In *Woods*, this Court addressed the second *Allen* factor: whether the child, at the time of the occurrence, had the mental capacity to receive an accurate impression of the incident. 154 Wn.2d at 619-22. Distinguishing *A.E.P.*, this Court held that the children in *Woods* were "able to provide details of contemporaneous events and circumstances which demonstrated that they had the mental capacity to receive accurate impressions." *Id*. at 620. That is, this Court concluded the second *Allen* factor was satisfied.

Mr. Hancock, on the other hand, challenges the *third* *Allen* factor: whether the child has a memory sufficient to retain an *independent recollection* of the incident. Although the Court of Appeals cited *Woods*, that case simply does not control here, where the record reviewed as a whole demonstrates K.F. lacked any independent recollection of the events leading to the charges against Mr. Hancock. Indeed, during the child competency and hearsay hearings, K.F. could not remember any details about her allegations. RP 223-30. She could not remember if Mr. Hancock did "things to [her] private parts," or if she saw his genitalia. RP 224-25. When asked what Mr. Hancock did

that she did not like, K.F. only recalled that he had locked her in the bedroom. RP 227. She had no recollection of speaking to any forensic interviewers. RP 226. She testified similarly during trial. RP 398-403.

K.F.'s testimony shows she did not meet all five *Allen* factors because she lacked any independent recollection of the occurrence leading to the charged offenses. This Court should accept review as a matter of substantial public interest, and to address the misapprehension of the *Allen* test as demonstrated by the Court of Appeals's treatment of the issue in this case. RAP 13.4(b)(1), (4).

E. CONCLUSION

Based on the foregoing, Mr. Hancock respectfully requests that review be granted. RAP 13.4(b)(1) and (4).

DATED this 10th day of May 2021.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. JOHNATHON JAMES HANCOCK, Appellant.	)))))))))	No. 36978-1-III PUBLISHED OPINION

PENNELL, C.J. — Johnathan Hancock appeals his convictions for first degree child rape and first degree child molestation. He argues convictions for both offenses violate his right to be free from double jeopardy and that the trial court should have excluded the child witness from testifying based on incompetence. We disagree. Mr. Hancock's two convictions were imposed under different statutes and were justified by different evidence. In addition, the trial court had a tenable basis for its competency decision. The judgment of conviction is affirmed.

FACTS

In 2016, four-year-old K.F.[1] reported being sexually assaulted by her mother's friend, an individual eventually identified as Johnathan Hancock. K.F. disclosed multiple instances of abuse occurring over a period of time. Some incidents involved penetration, others did not.

In 2018, the State charged Mr. Hancock with one count of first degree child rape and one count of first degree child molestation. Both counts covered the same time period: January 1, 2016 to September 1, 2016. Trial did not take place until 2019, when K.F. was seven years old.

At the outset of trial, the court held a hearing to determine K.F.'s competence and the admissibility of child hearsay statements. K.F. testified at the hearing, along with other witnesses. During her testimony, K.F. could not make an in-court identification of Mr. Hancock or recall any acts of sexual assault. However, she did recall other details about her life occurring during the time period in question. After hearing from the witnesses, the trial court ruled K.F. was presumed competent and the defense had not met

[1] To protect the privacy interests of K.F., a minor, we use her initials throughout this opinion. Gen. Order 2012-1 of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

its burden of showing otherwise. The court also admitted K.F.'s hearsay statements over Mr. Hancock's objection.

The jury convicted Mr. Hancock as charged. Mr. Hancock now appeals.

ANALYSIS

Double jeopardy

Mr. Hancock argues his two convictions encompass the same offense in violation of his right to be free from double jeopardy. We disagree.

Both the United States Constitution and Washington State Constitution protect the right of individuals to be free from double jeopardy. U.S. CONST. amend. V, XIV; WASH. CONST. art. I, § 9. The three components of this protection are: (1) the right not to be prosecuted a second time for the same offense after acquittal, (2) the right to be free from a second prosecution for the same offense after conviction, and (3) the right not to be punished multiple times for the same offense. *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016). The third component is at issue here.[2]

The right to be free from multiple punishments is a unique constitutional protection. The State has broad authority to extract multiple punishments for the same

[2] The fact that multiple punishments are ordered to run concurrently does not change the double jeopardy analysis. *State v. Calle*, 125 Wn.2d 769, 773, 888 P.2d 155 (1995).

conduct. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 980, 329 P.3d 78 (2014). Double jeopardy provides no defense, so long as multiple punishments are consistent with legislative intent. *Id*. The question presented by a double jeopardy/multiple punishment challenge is, therefore, purely a matter of statutory interpretation. *Id*. The constitutional hook is that unlike other statutory rights, a double jeopardy challenge can be raised for the first time on appeal. *See State v. Adel*, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

When analyzing legislative intent, our reference point is statutory language. *State v. Freeman*, 153 Wn.2d 765, 771-72, 108 P.3d 753 (2005). If the legislature has expressly authorized multiple punishments for the same offense, then our analysis ends; double jeopardy is no bar to multiple punishments. The prime example of express legislative intent is the anti-merger provision in Washington's burglary statute, RCW 9A.52.050. This provision "explicitly provides that burglary shall be punished separately from any related crime." *Freeman*, 153 Wn.2d at 772. Unfortunately, the legislature does not generally provide express intent. Thus, the double jeopardy analysis must go further.

Our courts have developed a multi-pronged, cyclical test for discerning legislative intent in the double jeopardy context. The test is complex and its components are frequently misapplied. A road map is in order.

The rules for analyzing legislative intent in the double jeopardy context depend on the type of claim at issue. When a defendant challenges multiple convictions under the same statute, double jeopardy turns on the unit of prosecution analysis. *See, e.g.*, *Villanueva-Gonzalez*, 180 Wn.2d at 980-81.[3] But when, as here, a defendant is challenging convictions under more than one statute, double jeopardy looks to the same evidence test. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536-37, 167 P.3d 1106 (2007).

The same evidence test mirrors the test outlined by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *State v. Louis*, 155 Wn.2d 563, 569, 120 P.3d 936 (2005). The same evidence test asks, in a nonabstract manner, whether two offenses are the same in law and in fact. *Freeman*, 153 Wn.2d at 772. "If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not

[3] The unit of prosecution analysis asks whether the legislature intended to punish a course of conduct or separate discrete acts. *Villanueva-Gonzalez*, 180 Wn.2d at 982. Double jeopardy does not prohibit the State from filing multiple counts under the same statute to cover several discrete acts; however, in such circumstances double jeopardy generally requires the jury to be instructed that its verdict on each count must be based on separate and distinct acts. *State v. Mutch*, 171 Wn.2d 646, 662, 254 P.3d 803 (2011).

constitutionally the same under this test." *State v. Hughes*, 166 Wn.2d 675, 682, 212 P.3d 558 (2009).

The results of the same evidence test create a strong presumption of the legislature's intent regarding multiple punishments. *Louis*, 155 Wn.2d at 570. But it is not dispositive. The presumption can be overcome "by clear evidence of contrary intent." *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995).

One way the same evidence presumption can be rebutted is under the doctrine of merger. *See Louis*, 155 Wn.2d at 570. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *Freeman*, 153 Wn.2d at 772-73.

The outcome of a formal merger analysis is also not dispositive. Even when two statutory violations appear to merge on an abstract level, "they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect of each" offense. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).[4]

[4] The double jeopardy analysis is distinct from the same criminal conduct analysis under RCW 9.94A.589(1)(a). The same criminal conduct test applies at sentencing when multiple separate offenses involve "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a)

Here, Mr. Hancock was convicted of first degree rape of a child in violation of RCW 9A.44.073(1) and first degree child molestation in violation of RCW 9A.44.083(1). The legislature has not expressly stated whether child rape and child molestation should be punished separately when committed during the same charging period. Thus, we must engage in statutory interpretation to discern the legislature's intent.

Because Mr. Hancock's double jeopardy challenge involves violations of different statutes, we turn to the same evidence test.[5] We begin by noting there are technical differences between the offense of child rape and child molestation. Child rape requires proof of sexual intercourse, child molestation does not; child molestation requires specific intent (acting with the purpose of sexual gratification), while child rape does not. *State v. Wilkins*, 200 Wn. App. 794, 807-08, 403 P.3d 890 (2017). But technical differences are not always sufficient to distinguish two crimes under the same elements test. *See Hughes*, 166 Wn.2d at 682-84. The real question is whether, under the circumstances of a case, each charged offense required proof of a fact that the other did not. *Freeman*, 153 Wn.2d

[5] Mr. Hancock spends most of his brief arguing the trial court should have instructed the jury that the two charged offenses needed to be proven by separate and distinct conduct. But this analysis is part of the unit of prosecution test, applicable when the State brings multiple charges based on the same criminal statute. Here, Mr. Hancock was charged with violations of different statutes. Accordingly, the legal issues pertaining to the unit of prosecution analysis are not applicable.

at 772. We look to the entire record to make this determination. *See In re Pers. Restraint of Knight*, 196 Wn.2d 330, 341-42, 473 P.3d 663 (2020).

In Mr. Hancock's case, the State made clear the rape charge was factually distinct from the child molestation charge. The State did not argue Mr. Hancock committed the crimes of child rape and child molestation during the same specific act of abuse. The evidence at trial was Mr. Hancock sexually assaulted K.F. on multiple occasions. During summation, the prosecutor explained child rape referred to those instances where Mr. Hancock engaged in sexual intercourse. Child molestation occurred when the encounter "didn't rise to the level of sexual intercourse."[6] 3 Report of Proceedings (June 24, 2019) at 601.

Mr. Hancock's two convictions were not based on the same evidence. We therefore invoke a strong presumption that double jeopardy does not bar his two convictions. Mr. Hancock has not attempted to rebut this presumption with any clear evidence of contrary legislative intent. Nor does the merger doctrine apply. We therefore affirm Mr. Hancock's judgment against his double jeopardy challenge.

[6] An instruction advised the jury it must unanimously agree which act served as the basis of each conviction. Mr. Hancock does not raise a unanimity challenge.

Competency of child witness

Relying on *State v. S.J.W.*, 149 Wn. App. 912, 206 P.3d 355 (2009) (*S.J.W.* I), Mr. Hancock argues the trial court used the wrong standard to assess K.F.'s competence. According to Mr. Hancock, *S.J.W.* I stands for the rule that the party offering a witness's testimony—in this case the State—has the burden to prove competence. Mr. Hancock claims K.F.'s memory problems prohibited the State from meeting its burden. Thus, K.F. should not have been allowed to testify and her child hearsay statements should have been excluded.[7]

In *S.J.W.* I, Division One of this court ruled the proponent of a witness statement has the burden of proving competence. 149 Wn. App. at 922. Our court assessed the circumstances of S.J.W.'s case and determined the trial court improperly assigned the burden of proof to the defense—the party challenging the witness's testimony. Nevertheless, we held this error was harmless because the record as a whole showed the witness was competent.

Even though our court upheld S.J.W.'s conviction, the State filed a petition for review, arguing we had misstated the burden of proof. The Supreme Court granted review

[7] The standard for admission of child hearsay statements is less onerous if the child testifies at trial. *See* RCW 9A.44.120(c)(i).

and agreed with the State that the party challenging a witness's competence bears the burden of proof. *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010) (*S.J.W.* II). The Supreme Court's decision in *S.J.W.* II did not technically reverse our court's disposition of the appeal, given we had upheld S.J.W.'s conviction. Nevertheless, the Supreme Court reversed our holding as to burden of proof. Given the Supreme Court's ruling, our decision in *S.J.W.* I regarding the burden of proof on witness competence is not good law and should not be cited as such.

The trial court here accurately understood the burden of proof and had a tenable basis for finding Mr. Hancock had not rebutted the presumption of K.F.'s competence.[8] At the competency hearing, the trial court went through the factors relevant to competence under *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).[9] The only real issue was K.F.'s memory problems. The trial court correctly noted that despite her memory problems, K.F. retained the ability to detail events occurring contemporaneously to the incidents of abuse. *State v. Woods*, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005)

[8] A trial court's competency decision is reviewed for manifest abuse of discretion. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

[9] The *Allen* factors are: (1) an understanding of the duty to speak the truth, (2) mental capacity at the time of the occurrence to retain an independent recollection, (3) sufficient memory to retain an independent recollection of the occurrence, (4) ability to express memory in words, and (5) ability to understand simple questions about the occurrence. 70 Wn.2d at 692.

(plurality opinion). This suggested K.F. had the mental ability to perceive and recall things that happened to her during the relevant time period. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). This satisfies the competency standard. *Id*. The trial court therefore had an appropriate basis for allowing K.F.'s testimony over Mr. Hancock's objection.

CONCLUSION

The judgment of conviction is affirmed.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36978-1-III
	)	
JOHNATHON HANCOCK,	)	
	)	
PETITIONER.	)	

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF MAY, 2021.

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