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COURT OF APPEALS
DIVISION ONE

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM J. CARLSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ABUSED ITS DISCRETION IN CONCLUDING C.C. WAS COMPETENT TO TESTIFY

a. The State unsuccessfully claims C.C. was competent to testify by drawing erroneous comparisons to *Kennealy*. The State argues that the trial court did not abuse its discretion in certifying C.C. as competent to testify at trial. See Br. of Resp. at 17-24. But this conclusion is incorrect because C.C.'s statements at the competency hearing and trial unequivocally demonstrate an inability to recall and describe the incident.

A child witness is competent to testify if he or she (1) understands there is an obligation to speak the truth on the witness stand; (2) has the mental capacity at the time of the occurrence concerning which he or she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words his memory of the occurrence; and (5) has the capacity to understand simple questions about it. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Rephrasing the third and fourth Allen factors, the Kennealy court held that a child was competent to testify if he had "adequate

memory” of the incident and “the mental capacity to relay the information in court.” State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009). In Kennealy, the child was competent to testify because he consistently recalled the same incident. Id. While the description of details surrounding the incident changed, the child continually described the same incident. Id. (“[H]e never changed his story about Kennealy sucking ‘his privates.’”). Thus the court found the child competent despite inaccurate testimony about surrounding details: the shape of the bed, and types of floors and doors in the apartment. Id. at 878.

The State’s response brief ignores Kennealy’s mandate that the child consistently recall the specific charged incident. Instead the State selectively focuses on the Kennealy court’s willingness to overlook surrounding discrepancies. See Br. of Resp. at 23. However, the Kennealy court only overlooked these miscellaneous details because the child consistently recalled the same incident. See Kennealy, 151 Wn. App. at 878-89.

In juxtaposition to the child in Kennealy, C.C.’s description of the charged incidents was inconsistent. The problem is not that C.C. described multiple incidents to the trial court, but that C.C. fundamentally and continually changed his description of these

incidents. First, C.C. was inconsistent on the number of incidents. At the competency hearing he stated he had been touched “like a hundred times.” 3RP 21. But the very next day at trial, C.C. stated that Mr. Carlson had touched him fifty times. 4RP 92. Second, C.C. could not consistently describe the nature of the incidents to the court. At the competency hearing, C.C. claimed that Mr. Carlson had “touch[ed his] privates.” 3RP 19. But at trial C.C. claimed that Mr. Carlson had “[t]ouched my fender.” 4RP 105. C.C. did not use the word fender as a euphemism – instead he used it literally to describe automobiles. See id. Third, C.C. could not provide any details of the incidents. C.C. refused to describe what “touching” meant other than stating that it was a “bad thing.” 3RP 109. But at another point C.C. claimed that when he was touched it felt “like a turtle was biting him,” and as if his “wiener was sawed off.” 8RP 594-95. Unlike the child in Kennealy who consistently described forced oral sex, C.C. provided a vague and inconsistent claim.

Because of this inconsistency, Kennealy is not controlling. C.C.’s inaccurate testimony cannot be ignored when reviewing his competency.

b. As Karpenski demonstrates, C.C. was not competent to testify. A child is competent to testify only if he or she

can distinguish truth from falsehood. State v. Karpenski, 94 Wn. App. 80, 101, 971 P.2d 553 (1999) (“The dispositive question here is whether Z had the capacity to distinguish truth from falsehood.”). The child’s whole testimony, not just the testimony relating to the incident, must demonstrate the ability to distinguish truth from falsehood. See id. at 106

In Karpenski, a child was determined not to be competent to testify about molestation because he told false stories unrelated to the molestation at his competency hearing. Id. The child told stories that simply were not true – such as describing how he and his younger brother had been born at the same time and describing a fictitious vacation to Hawaii. Id. at 86, 106. Despite these indicators, the trial court allowed the child to testify because he appeared to be able to discern truth from fiction when testifying about the incident. Id. at 97. The court of appeals reversed because the child was generally unable “to distinguish what was true from what was not” and thus not competent to testify about the specific incident. Id. at 106.

The State’s response does not distinguish C.C. from the child in Karpenski and offers no substantive analysis:

In contrast to Karpenski, C.C. was not a child who had a demonstrated inability to distinguish

between the truth and a lie. Although C.C.'s testimony may have been affected by being on the witness stand for an extended period, the testimony at the competency hearing was not as clearly defective as in Karpenski.

Br. of Resp. at 21-22. There is no citation to the record. The State simply asserts Karpenski is not applicable.

But the record indicates otherwise. Karpenski is indistinguishable both procedurally and factually.

Procedurally, the trial judge made the same mistake as the trial judge in the Karpenski case—determining competency only on the child's ability to discern truth from fiction relating to the incident. The judge openly admitted his uncertainty about the issue and stated, "I don't know if [the scope of competency hearings are] supposed to be broader than simply the alleged criminal events." 3RP 37. And like the judge in the Karpenski case, he decided to determine competency based only on the child's ability to truthfully recall the incident. See 3RP 37 ("I don't want [this hearing] to get too far afield. . . .").

Moreover, at his competency hearing, C.C. demonstrated an inability to communicate the factual truth. When asked what grade comes after first grade, he responded "Eight." 3 RP 17. A short while later at the same hearing, C.C. like the child in Karpenski,

invented a vacation. 3 RP 31 (claiming he had been on a vacation to Disneyland the day before). When asked whether he had spent a day in the town where the alleged incident occurred he replied “No,” only to change his answer to “sometimes” two questions later. 3RP 20. And any ability to determine whether C.C. was truthfully testifying was quickly lost as he began answering questions nonsensically. When asked if he could speak “out loud,” C.C. responded with an animal sound of “Roar.” 3RP 18. And when asked if he could remember what happened last week, C.C. responded “I was doing this all day and make it big and big and big, and pop.” 3RP at 33.

At trial, C.C. had even more difficulty discerning truth from fiction. C.C.’s testimony became a fantasy. At one point C.C. described himself as having superhuman powers and stated “I was just picking up all the cars and throwing the back of his truck. . . . And one of my uncles dropped an escalator.” 4RP 106. When asked to confirm that he was actually smashing cars, C.C. replied “[y]eah.” Id. C.C.’s inability to distinguish fact from fiction was so pervasive that he could not accurately describe any incident of sexual contact. When asked “What does that mean when somebody touches you? What does that mean?” he responded,

“Willy opened my closet in there. Ghost is haunted in my bedroom. And I shut the door, shut my bedroom door. And I would go up, so up to the ceiling.” 4RP 109-09. C.C. did not have the ability to determine truth from fantasy.

The Karpenski court remarked that, “no one suggests that [the child] was intentionally lying; it seems that he actually believed what he was saying.” Likewise, there is no indication that C.C. intentionally lied. However, C.C. could not discern fact from fiction and thus was not competent to testify at trial.

2. HEARSAY STATEMENTS MADE BY C.C.
WERE IMPERMISSIBLY ADMITTED IN
VIOLATION OF RCW 9A.44.120

a. RCW 9A.44.120 allows child hearsay statements to be admissible at trial only if the child testifies or there is corroborative evidence of each alleged incident. However, the testimony of a non-competent child does not suffice: when a court improperly determines that a child is competent to testify at trial his or her statements are admissible only if they are corroborated. In re Dependency of A.E.P., 135 Wn.2d 208, 234, 956 P.2d 297 (1998). Since C.C was not competent to testify, for reasons articulated *supra*, his statements to others were only admissible under RCW 9A.44.120 only if they were corroborated. In its response brief, the

State concedes that if C.C. was not properly determined to be competent, then his statements were admissible only if they were corroborated. See Br. of Resp. at 36.

b. There is insufficient evidence corroborating each separate incident. When a court attempts to corroborate a child's hearsay statement under RCW 9A.44.120 it must find evidence to corroborate each alleged incident. State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 772 (2003) (“[E]ach act of abuse must be separately corroborated under the statute.”).

Corroboration of one incident does not serve as corroboration of other incidents. In State v. Jones the trial court allowed a child's hearsay statements of abuse under RCW 9A.44.120. 112 Wn.2d 488, 494, 772 P.2d 499 (1989). The statements alleged three types of abuse: “urolagnia,” fingering, and masturbation. Id. at 496. However, the State offered corroboration of only “urolagnia.” Id. Since the evidence of “urolagnia” did not corroborate the claims of fingering and masturbation the Washington Supreme Court found the child's statements of fingering and masturbation to be inadmissible. Id.

In this case, the trial court found only two pieces of evidence corroborated C.C.'s statements. One piece was the statements of

family friend Dorothy Buckley. Ms. Buckley claimed that C.C. would throw up if he learned that he was returning to Rockport, the location of the incident. 3RP 88-90. But as the court recognized, this was insufficient to corroborate C.C.'s claims of abuse. The court admitted that, "every time that sort of thing happens it doesn't mean a child has been sexually abused." Id. 89-90.

The other piece of evidence the court found corroborated C.C.'s statements was the testimony of Misty Carlson. Ms. Carlson claimed she saw Mr. Carlson put his hand down C.C.'s pants on two occasions: once on a couch and once on a chair. Id. at 89. But the court later found that one of these occasions was not a criminal act. CP 64. Therefore, Ms. Carlson's testimony corroborated, at best, only a single alleged act of abuse.

Alarming, the uncorroborated statements C.C. made to Nicol Flacco were the sole basis for one of the two convictions. The trial court found Mr. Carlson guilty of two separate counts of child molestation. CP 64. C.C.'s statements made to Misty Carlson supported one conviction while "the act disclosed by C.C. to [Nicol] Flacco was an act of Child Molestation in the First Degree." CP 64. But C.C.'s statements to Nicol Flacco were never corroborated. This contradicts the requirement that "each act of abuse must be

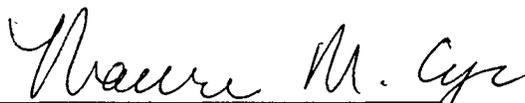
separately corroborated under the statute.” C.J., 148 Wn.2d at 687. As in Jones, this case has more than one separate claim of abuse. Evidence of one act of abuse does not prove the other act of abuse. Thus because the trial court did not find that any evidence separately corroborated C.C.’s statements to Nicol Flacco, these statements were inadmissible.

Many of C.C.’s statements were not corroborated yet were allowed at trial under RCW 9A.44.120. In particular, C.C.’s statements to Nicol Flacco were not corroborated. Because this impermissible evidence was used to find Mr. Carlson guilty, his conviction should be reversed and a new trial granted.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Carlson's convictions should be reversed and remanded for a new trial.

Respectfully submitted this 12th day of July 2010.



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
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v.)	NO. 63652-9-I
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WILLIAM CARLSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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