

67561-3

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NO. 67561-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO CABINE-MATTHEWS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A child is competent to testify regarding an event she witnessed if, *inter alia*, she had the mental capacity at the time of the event to receive an accurate impression of it. A trial court's competency ruling is accorded great deference and will be reversed only upon a showing of manifest abuse of discretion. Here, the trial court found that a child who had been sexually assaulted around the time of her seventh birthday was able, at the trial being held three years later, to recall numerous details of her daily life at that time of the assault, had been consistent in her reports of the attack, and had never been seen by her caregivers as detached from reality or so immature as to have her capacity questioned. Did the trial court properly exercise its discretion in finding the child witness competent to testify?

2. Child hearsay statements are admissible under RCW 9A.44.120 if the trial court finds that the circumstances of the statements bear sufficient indicia of reliability. In this case, the trial court, upon substantial evidence, determined that the child declarant lacked any motive to lie when she made her out-of-court declarations, and found no reason to question her character for honesty. The court further found that the child's declarations were spontaneously made and were consistent with

each other. Did the trial court properly exercise its discretion in admitting the statements?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Antonio Cabine-Matthews, a juvenile, was charged by information with two counts of rape of a child in the first degree. CP 1-2. Both counts alleged that Cabine-Matthews had sexual intercourse with K.F., a minor under twelve years of age, during a period intervening between August 2005 and December 2007. CP 1-2. Following an adjudication hearing before King County Superior Court Judge Chris Washington, Cabine-Matthews was found guilty of one count of first-degree rape of a child and acquitted on the other count. CP 66-71.

2. SUBSTANTIVE FACTS

a. Competency and child hearsay ruling

To establish that Cabine-Matthews committed the charged offenses, the State moved for admission, pursuant to RCW 9A.44.120, of statements made by K.F. to her mother and to a police officer, describing the sexual abuse she had suffered. CP 25-30. The State predicated its request on the expectation that K.F. would appear at Cabine-Matthews' adjudication, and thus also asked the juvenile court to rule on K.F.'s competency to testify. CP 20-24. The juvenile court elected to consider

K.F.'s competency and the admissibility of her child hearsay statements in the course of the adjudication, rather than as a pre-trial matter, and assured the parties that it would not rely on or otherwise consider K.F.'s out-of-court declarations in adjudicating Cabine-Matthews' guilt if it was not satisfied regarding K.F.'s competency and found her declarations inadmissible. 1RP 16-19.¹ At the conclusion of the adjudicatory hearing, the juvenile court ruled that K.F. was competent and that her out-of-court declarations bore sufficient indicia of reliability to be admitted as child hearsay under RCW 9A.44.120. CP 72-75, 76-79.

b. Facts of offense

In June 2007, Cabine-Matthews, then 14 years old, moved into the Renton home where his mother, Akia Forward, lived with her husband and Cabine-Matthews' half-sister, K.F., and half-brother, C.F. 1RP 121-23, 127. Prior to June 2007, Cabine-Matthews had been living with his aunt, in Portland, Oregon. 1RP 122-23.

K.F. was six years old in June 2007, and would turn seven on August 8th of that year. 1RP 64. Cabine-Matthews lived with K.F. and her family until October 2007, at which time he returned to his aunt's home in Portland after a violent argument with his mother. 1RP 63.

¹ The verbatim report of proceedings consists of two volumes, referred to in this brief as follows: 1RP (7/8/2011 and 8/1/2011) and 2RP (8/2/2011 and 8/12/2011).

K.F.'s parents noticed that their daughter's behavior personality seemed to change after Cabine-Matthews came to live with them. 1RP 69, 129-30. She became more withdrawn and shy, and less happy, and remained so after he departed. 1RP 69, 129-30.

In the summer of 2010, K.F. accompanied her mother on a trip to Portland to visit Cabine-Matthews, who had been arrested there on suspicion of rape. 1RP 128-29. While in Portland, K.F. clung to her mother even more than usual, particularly after Cabine-Matthews had been released from jail. 1RP 129; 2RP 14. After they returned home, Akia was caring for K.F.'s hair when K.F. began to cry, and told Akia that Cabine-Matthews had "molested" her when he had lived with them in Renton a few years earlier. 1RP 128, 133. Akia hugged K.F., who was worried that Akia would be mad at her. 1RP 130-31.

After a day or two had passed, Akia asked K.F. if she wanted to do anything about what had happened to her. 1RP 131. K.F. said that she wanted to get help for Cabine-Matthews. 1RP 131. Akia then phoned the Renton Police Department, on July 7, 2010, and arranged to bring K.F. to the station later that day. 1RP 42, 132.

At the station, K.F. spoke with Renton Police Dept. officer Michael Thompson. 1RP 42. K.F. was very shy and quiet, and reluctant

to speak at all. 1RP 46. Thompson asked Akia if he could speak to K.F. alone, and Akia agreed. 1RP 46.

K.F. then reported that on one evening she and C.F. had been left in the care of Cabine-Matthews at their Renton apartment while their parents went out. 1RP 47. While K.F. was watching cartoons on the t.v. in her parents' bedroom, Cabine-Matthews entered and took off his pants and underwear. 1RP 47-48. K.F. could see Cabine-Matthews' "private parts," which she described as the "d word" and as the area that his underwear covers. 1RP 48, 49-50. K.F. told Thompson that Cabine-Matthews lay down on top of her and had sex with her. 1RP 48, 50. When asked what she meant by "sex," K.F. replied that Cabine-Matthews had put his "private parts" in her "private parts," which she defined as her vagina. 1RP 49.

When he was finished, Cabine-Matthews put his clothes back on and left the room. 1RP 48. Two days later, K.F. told Cabine-Matthews that she was going to let her mother know what he had done, but Cabine-Matthews told her not to do so. 1RP 53.

K.F. testified in the State's case-in-chief, but only with great difficulty. She stated that she did not like to talk about what had happened to her, and did not want to do so in court. 1RP 116-17. She confirmed

that she had told the truth to her mother and to Officer Thompson about Cabine-Matthews and what he had done to her. 1RP 109- 111, 2RP 29.

Akia testified that K.F. had recently asked her, shortly before the adjudicatory hearing, whether it was possible that she had only dreamed that Cabine-Matthews had sexually assaulted her. 1RP 140-42. K.F. was recalled to the witness stand, and stated that she had never said any such thing to her mother. 2RP 32, 36-37. Akia also testified that she felt "torn" because she loved both K.F. and Cabine-Matthews, and did not want to have to "pick a side." 1RP 136.

Cabine-Matthews did not testify in the defense case-in-chief. He has never been married to K.F. 1RP 63-64.

C. ARGUMENT

1. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING K.F. COMPETENT TO TESTIFY.

Cabine-Matthews contends that the trial court erred by finding K.F. competent to testify at his adjudication. Specifically, he asserts that the court mistakenly concluded that K.F. had sufficient capacity at the time she was raped to receive an accurate impression of that event, such that she could accurately recall it during his trial. See Brief of Appellant, at 17-20. Cabine-Matthews' argument ignores the ample support in the record that justified the trial court's conclusion. His argument should be rejected.

The test of the competency of a young child as a witness involves consideration of the following five criteria: (1) the witness's understanding of the obligation to speak the truth on the witness stand; (2) the witness's mental capacity at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) whether the witness has memory sufficient to retain an independent recollection of the occurrence; (4) the witness's capacity to express in words her memory of the occurrence; and (5) the witness's capacity to understand simple questions about it. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The determination of competency rests primarily with the trial judge who sees the witness, notices her manner, and considers her capacity and intelligence. State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). The trial court has the discretion to determine a witness's competency, and its decision is accorded great deference on appellate review. Id.; see also State v. Borland, 57 Wn. App. 7, 11, 786 P.2d 810 (1990) (noting that it "is necessary to place great reliance on the trial court's judgment in assessing the competency of a child witness because the court is in the best position to assess... all the intangibles that are significant in evaluation, but not reflected in the written record."). The trial court's determination of competency will not be disturbed on appeal "in the

absence of proof of a manifest abuse of discretion.” Swan, 114 Wn.2d at 645.

Cabine-Matthews’ challenge to the trial court’s determination of competency is limited to the second criterion of the Allen test, i.e., whether K.F. had the mental ability at the time of Cabine-Matthews’ sexual assault to accurately perceive what was happening to her. He contends that the trial court erred by limiting itself to a determination of K.F.’s *current* ability, i.e., at the time of trial, to accurately perceive the world around her. See Brief of Appellant, at 17. It is difficult to understand how Cabine-Matthews reaches such a conclusion, because the trial court’s written findings and conclusions concerned K.F.’s ability at the time of her victimization. CP 77. Moreover, substantial evidence supported them.

K.F. was not an infant or toddler at the time she was raped, but a girl of late-six to seven years of age. 1RP 63-64. Children younger than K.F. was at the time she was raped have regularly been found competent by Washington courts. See, e.g., State v. Ridley, 61 Wn.2d 457, 458-59, 378 P.2d 700 (1963) (involving testimony of five-year-old witness describing events that had occurred nine months to a year earlier); State v. Woodward, 32 Wn. App. 204, 207-08, 646 P.2d 135 (1982) (upholding

competency finding as to six-year-old witness discussing rape she suffered as a five-year-old).

On the witness stand, K.F. was able to describe where she attended school while living in Renton during her early childhood and who she lived with during that time frame. 1RP 94, 97. She stated that Cabine-Matthews resided at her home for a period of time, a fact which was corroborated with more specificity by K.F.'s parents. 1RP 61, 98, 122-23. She accurately described the layout of her Renton home, including the number and location of television sets in the house. 1RP 100-01. She was asked to confirm the veracity of what she told Officer Thompson in 2010 – that Cabine-Matthews had put his “privates” inside her “privates,” and that she should not tell her mother about it – and stated that this had “really happened” to her well before she ever spoke to the officer. 2RP 32-33. She explained that she told the truth about the attack to her mother, as well. 1RP 111. K.F.'s mother and father both corroborated K.F.'s memory of her home life in Renton, and gave no indication whatsoever that K.F. lacked the very basic ability to accurately perceive the world around her at the time that Cabine-Matthews lived with them. 1RP 66-67, 137.

The trial court had ample opportunity, over the course of two days, to observe K.F. as she answered questions from counsel about her

life at the time Cabine-Matthews lived with her, her interaction with Cabine-Matthews, and her post-attack statements to her mother and investigators. Her perfectly understandable discomfort about the courtroom experience notwithstanding, K.F. satisfied the court as to her ability to understand what was happening to her at the time she was raped as a near- or newly-turned seven-year-old.² The trial court's conclusion must be accorded great deference, and, under the circumstances, it cannot be said that it manifestly abused its discretion here.

2. THE TRIAL COURT PROPERLY FOUND K.F.'S DECLARATIONS TO BE RELIABLE AND THUS ADMISSIBLE UNDER THE CHILD HEARSAY STATUTE.

Next, Cabine-Matthews contends that the trial court erred when it admitted K.F.'s statements to Officer Thompson and to her mother into evidence pursuant to RCW 9A.44.120, Washington's child hearsay statute. Cabine-Matthews claims that K.F.'s statements were inadmissible because they lacked sufficient reliability. See Brief of Appellant, at 22-27. His argument lacks merit, and should be denied.

RCW 9A.44.120 permits the use of otherwise inadmissible statements by a victim of sexual abuse under the age of ten, so long as the victim testifies, when the trial court finds that the timing, content, and

²See State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) (noting that a child's reluctance to testify about specific acts of abuse does not necessarily render her

circumstances of the statements provide satisfactory indicia of reliability. The state supreme court has identified nine factors that the trial court should use in assessing reliability, including: (1) whether the declarant had a motive to lie, (2) whether the declarant's general character suggests trustworthiness, (3) whether more than one witness heard the declarant's statement, (4) whether the statement was made spontaneously, (5) whether the timing of the statement and the relationship between the declarant and the witness suggests trustworthiness, (6) whether the statement contains express assertions of past fact, (7) whether cross-examination could show the declarant's lack of knowledge, (8) whether the possibility of the declarant's faulty recollection is remote, and (9) whether the circumstances surrounding the statement are such that there is no reason to suspect the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). This Court has found that factors (6) and (7) are of little value in determining the dependability of child hearsay statements, that factor (8) is duplicative of factor (5), and that factor (9) merely asks for reconsideration of the first five factors. See In re Dependency of S.S., 61 Wn. App. 488, 498-99, 814 P.2d 204 (1991); Borland, 57 Wn. App. at 16-19.

incompetent).

Not every factor listed in Ryan need be satisfied before a court will find a child's hearsay statements reliable. Swan, 114 Wn.2d at 652. Rather, the question of reliability is resolved by consideration of all of the factors as a whole, with no single factor being decisive. State v. Young, 62 Wn. App. 895, 902-03, 802 P.2d 829 (1991). The trial court is in the best position to assess the reliability of a child's out-of-court declarations, as it is the only court to see the child and the other witnesses in person and can best assess their demeanor and expression. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994); State v. Swanson, 62 Wn. App. 186, 191 n.1, 813 P.2d 614 (1991). Accordingly, the determination of admissibility is within the trial court's discretion, and will not be reversed absent a showing of manifest abuse of that discretion. Pham, 75 Wn. App. at 631.

An examination of each of the relevant Ryan factors, as presented to and considered by the trial court, demonstrates that the court reasonably exercised its discretion in admitting K.F.'s statements to her mother and Officer Thompson.

1. Motive to lie: In its written findings of fact, the trial court found that K.F. had no motive to lie, noting that K.F. had nothing to gain by doing so. CP 73. Falsifying a rape charge would not remove Cabine-Matthews from K.F.'s home, as he had already returned to Portland well

before she made her declarations, and fabricating a story about him would not help her avoid trouble or escape punishment. CP 73. Indeed, as the testimony of her mother showed, K.F. would seem to have far more to gain at home by *denying* Cabine-Matthews' assault than by confirming it, as it was readily apparent that Akia desperately wanted to believe that her son would never rape his half-sister. 1RP 136.

Cabine-Matthews contends that the trial court lacked any basis to believe, as it noted in its written findings, that K.F. was motivated in 2010 to disclose her assault at his hands in 2007 because she had seen him recently and feared being raped again. He argues that this could not be possible because K.F. had visited him on a couple of occasions between 2007 and 2010 and had not made any declarations during those events. He neglects two key facts, however: K.F.'s tender age and accompanying shyness and fear of causing trouble, and, quite critically, the fact that she went with Akia to visit Cabine-Matthews in 2010 because he had been arrested in Oregon for rape. 1RP 73, 111, 129. The trial court cannot reasonably be seen as abusing its discretion by concluding that the particular nature of Cabine-Matthews' 2010 arrest likely spurred K.F. into confiding in her mother. CP 74.

Nor is there any reason to believe that ten-year-old K.F. concocted a story in 2010 about *being raped* by her half-brother because he had upset

her by moving out of her Renton home three years earlier. As this ludicrous contention consists entirely of speculation, it must fail. See In re Dependency of S.S., 61 Wn. App. at 497 (rejecting defendant's claim that declarant-daughter was motivated to lie to punish him where the claim was essentially unsubstantiated). The trial court, noting both the absence of any basis to doubt K.F.'s motivation in making her out-of-court disclosures, and observing her hesitancy and discomfort about discussing in court what had happened to her, thus undercutting any claim that she was attempting to carry out a fraud on the court, reasonably concluded that the first Ryan factor was satisfied.

2. Declarant's character: The trial court determined that K.F. had no relevant history of deception or lying, understood the importance of telling the truth, and was not desperate for attention in a manner that would suggest a willingness to fabricate. CP 73-74. Cabine-Matthews desperately seizes upon a single incident, described by his mother (who plainly supported him at his trial), in which K.F. had told her that a teacher had hurt her arm. 1RP 156-57. It is unclear from the record whether Akia was even certain whether this was a fabrication, as it appears that she testified that the teacher had, in fact, grabbed K.F.'s arm. 1RP 157. Regardless, the trial court reasonably concluded that Akia lacked the detailed knowledge necessary for her to establish that K.F. was lying

about the school incident and, more importantly, that the episode was so unlike the allegations about Cabine-Matthews as to offer little value. 1RP 157-58. A single incident does not establish a *reputation* for dishonesty, which is the basis of this Ryan factor. See State v. Karpenski, 94 Wn. App. 80, 94-95, 971 P.2d 553 (1999) (finding that child-declarant lacked credibility because his mother and grandmother both testified that he regularly exaggerated, to a degree that psychological assistance was sought, and where his descriptions of abuse were entirely inconsistent). Nor can the trial court be faulted for discounting the testimony of Cabine-Matthews' despairing mother when she claimed that K.F. had told her that she had dreamt the assault, particularly when K.F. testified that she never said such a thing, and a defense investigator testified that K.F. denied her mother's "dream claim" in a pre-trial interview as well. 2RP 36-37, 83.

3. Repetition of statement to multiple listeners: Cabine-Matthews asserts that the State failed to satisfy the third Ryan factor because only her mother heard her initial declaration. However, the repetition of similar statements to different people on different occasions is sufficient. State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Here, the trial court reasonably concluded that K.F.'s statements to her mother, Officer Thompson, and King County Prosecutor's Office child interviewer Michelle Neeb met this factor. CP 74.

4. Spontaneity of statements: Cabine-Matthews concedes that K.F.'s disclosure to her mother was entirely self-initiated. However, he claims that Officer Thompson led K.F. in his conversation with her at the Renton police station. Declarations made in response to questions are spontaneous so long as the questions are neither leading nor suggestive. Young, 62 Wn. App. at 901. A determination of spontaneity requires consideration of the entire context in which the child makes the statement. State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

Cabine-Matthews provides almost no argument or relevant citation to the record in support of his contention regarding Officer Thompson and this Ryan factor. Under these circumstances, this Court need not invest time in considering his argument. See RAP 10.3(a)(5), (6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In fact, Officer Thompson's description of his conversation with K.F. shows that he took care not to suggest answers to her, but asked the kinds of open-ended questions – e.g., what happened that night, and if she knew what sex was³ – that do not cast doubt on the reliability of the answers. Compare State v. Griffith, 45 Wn. App. 728, 738, 727 P.2d 247 (1986) (finding a lack of reliability where declarant's statements were made in the context of a two-hour interrogation by her mother, who asked

numerous leading questions). The internal consistency between K.F.'s declarations to her mother and to the officer further suggest that the officer did not lead K.F. into making statements that she did not know to be true from personal experience.

5. Timing of statements and relationship between child-declarant and witnesses: Cabine-Matthews challenges the trial court's finding that K.F.'s disclosures were timely. CP 74. While it is undoubtedly true that K.F.'s disclosures came three years after her victimization, the trial court reasonably recognized that the long-suppressed disclosures were prompted by the returning sense of danger and dread that K.F. would undeniably feel after encountering Cabine-Matthews in the context of his arrest for the rape of another victim. This recognition was well within the trial court's discretion to make.

Nor does the fact that K.F. initially disclosed her victimization to her mother render her statements unreliable. To adopt Cabine-Matthews' argument in this regard would require the exclusion of child hearsay statements whenever a child reports sexual abuse to her most natural and frequent source of aid and comfort: members of her immediate family. Acceptance of Cabine-Matthews' claim would thus effectively strip RCW 9A.44.120 of nearly all its utility. Furthermore, well-established law

³ 1RP 48-51.

recognizes that no one Ryan factor mandates admission or exclusion, and the relationship between declarant and witness is merely one consideration to be weighed. Moreover, K.F.'s statement to Officer Thompson was in no way inconsistent with her disclosure to her mother. The presence of professionals investigating child abuse enhances the reliability of the statements. Lopez, 95 Wn. App. at 853.

In this case, the trial court carefully weighed all of the relevant Ryan factors, and concluded that, in the absence of reason to doubt K.F.'s motivation for disclosing her assault or to question her character for truth-telling, and in light of the consistency and general spontaneity of her statements, sufficient indicia of reliability existed to warrant admission of her disclosures. Cabine-Matthews' request that this Court essentially conduct the Ryan analysis anew should be rejected. He fails to demonstrate a manifest abuse of discretion by the trial court.

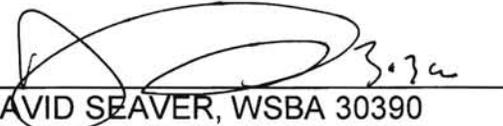
D. CONCLUSION

Cabine-Matthews' challenge to the admission of child hearsay statements is meritless. The trial court did not abuse its discretion in deeming K.F. competent to testify, and the court properly found that her out-of-court declarations of sexual abuse were sufficiently reliable to justify their admission at trial. Cabine-Matthews' conviction should be affirmed.

DATED this 18th day of May, 2012.

RESPECTFULLY submitted,

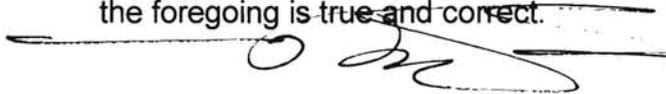
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Marla Zink, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANTONIO CABINE-MATTHEWS, Cause No. 67561-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/18/12

Date