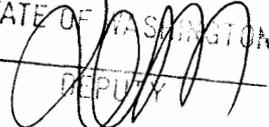


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DIVISION II

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STATE OF WASHINGTON
BY 
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NO. 37852-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

A.A., a minor child, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE	2
IV.	ARGUMENT	7
	ISSUE 1: THE TRIAL COURT ERRED BY FINDING THAT K.A. WAS COMPETENT TO TESTIFY AT TRIAL DESPITE HER TESTIMONY OF EVENTS THAT COULD NOT HAVE OCCURRED AND LACK OF MEMORY OF MAKING THE HEARSAY STATEMENTS.....	7
	ISSUE 2: THE TRIAL ERRED BY FINDING THAT K.A. RETAINED SUFFICIENT MEMORY OF THE EVENT AND COULD EXPRESS HER MEMORY OF THE EVENT WITHOUT EVER HAVING THE CHILD TESTIFY ABOUT THE EVENT IN THE COMPETENCY HEARING	11
	ISSUE 3: THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE THE CHILD HEARSAY BECAUSE AT THE TIME OF TRIAL, THE CHILD WAS NOT COMPETENT TO TESTIFY AND DID NOT RETAIN AN INDEPENDENT MEMORY OF MAKING THE HEARSAY STATEMENTS.....	12
V.	CONCLUSION.....	14

TABLE OF AUTHORITIES

TABLE OF CASES

United States Supreme Court Cases

<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	12, 13
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Washington Cases

<i>Jenkins v. Snohomish County PUD No. 1</i> , 105 Wn.2d 99, 101-03, 713 P.2d 79 (1986).....	13
<i>State v. Allen</i> , 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).....	8
<i>State v. C.J.</i> , 148 Wn.2d 672, 682, 63 P.3d 765 (2002).....	11
<i>State v. Jackson</i> , 46 Wn. App. 360, 368 n.6, 730 P.2d 1361 (1986)	13
<i>State v. Justiniano</i> , 48 Wn. App. 572, 578, 740 P.2d 872 (1987).....	13
<i>State v. Karpenski</i> , 94 Wn. App. 80, 101, 971 P.2d 553 (1999)....	8, 9, 10, 13, 14
<i>State v. Rohrich</i> , 132 Wn.2d 472, 481, 939 P.2d 697 (1997)	12
<i>State v. Ryan</i> , 103 Wn.2d 165, 173-74, 691 P.2d 197 (1985).....	13
<i>State v. Swan</i> , 114 Wn.2d 613, 645, 790 P.2d 610 (1990)	8
<i>State v. Watkins</i> , 71 Wn. App. 164, 170, 857 P.2d 300 (1993)	8, 11

STATUTES

RCW 5.60.050	11
RCW 9A.44.120.....	7, 11, 12

I. ASSIGNMENTS OF ERROR

1. The trial court erred by finding K.A. was competent to testify when she related as truth events that could not have occurred, demonstrating her inability to distinguish truth from fiction.
2. The trial court erred by permitting K.A. to testify when she was not competent.
3. The trial court erred by finding without sufficient evidence that K.A. had sufficient memory to retain an independent recollection of the incident.
4. The trial court erred by finding without sufficient evidence that K.A. had the capacity to express in words her memory of the incident.
5. The trial court erred by finding K.A.'s hearsay statements reliable.
6. The trial court erred by finding K.A.'s hearsay statements admissible.
7. The trial court erred by finding K.A. credible despite her testimony to events that could not have occurred.
8. The trial court erred by finding A.A. guilty based on the testimony of K.A. and her hearsay statements.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by finding that K.A. was competent to testify at trial despite her lack of memory of making the hearsay statements, and testimony to events that could not have occurred?
2. Did the trial court have sufficient evidence in the record to support its findings that K.A. retained sufficient memory of the event and could express her memory of the event without ever having the child testify about the event in the competency hearing?
3. Did the trial court err by denying the defense motion to exclude the child hearsay where the child was not competent to testify and did not retain an independent memory of making the hearsay statements?

III. STATEMENT OF THE CASE

Substantive History

In late April of 2007, Cynthia Armstrong got a call from her friend telling her that there was a rumor that Armstrong's seven-year-old daughter, K.A., had been sexually active with her fifteen-year-old cousin, A.A. RP 240, 156. This rumor had originated with K.A.'s teenage

brother, De'Andre, who had laughingly told his friend that K.A. was no longer a virgin. RP 138-39.

When Ms. Armstrong confronted De'Andre with the rumor, he denied saying anything, but later changed his story. RP 241. On the stand, De'Andre testified that K.A. told him on the way home from A.A.'s house that A.A. "had been touching her, and in inappropriate places." RP 196. De'Andre never said anything to his mother about this, but instead, weeks later, made a joke about it to his friend, Misti Griffin. RP 197-98. De'Andre denied telling Misti that K.A. was not a virgin or that she had sex—testifying that he only told Misti what K.A. told him. RP 207, 209.

Misti waited a few weeks, then she sent an electronic message to her friend, Tiffany Gordon, who was also a good friend of Ms. Armstrong, telling her what De'Andre had said. RP 144, 318. Gordon then contacted Ms. Armstrong. RP 319.

After receiving this information, Ms. Armstrong kept her daughter home from school the next day to talk with her. RP 242. She asked K.A. why she "was hearing what she was hearing" about K.A. and A.A. RP 242. When K.A. asked what she meant, Ms. Armstrong asked K.A. "if

anyone had touched her inappropriately.” RP 242. K.A. answered: “Yes,” that A.A. had put his “yuck yuck”¹ in her. RP 243.

Ms. Armstrong took K.A. to her pediatrician later that day. RP 246. After K.A. failed to disclose to her doctor, the nurse went in to talk with her. RP 266. K.A. told the nurse that she went with A.A. to his bedroom and that he had put her on his bed, pulled down her pants and “stuck his thing inside her.” RP 272. K.A. said she did not feel pain and had no bleeding. RP 275, 279.

The next day, K.A. was taken to Mary Bridge Children’s Hospital, where she told the nurse that A.A. had put his “yuck yuck” in her private parts. RP 355, 357. The physical examination revealed possible trauma to the hymen, consistent with a healed tear. RP365-67.

On the stand, K.A. said that on the day of the incident, she and her six-year-old brother, L., were at her Uncle Randy Armstrong’s house. RP 95. While she and L. were watching television in one of the bedrooms, A.A. came over to her and touched her “private parts” with his “private parts.”² RP 98-99. K.A. testified that while this happened, L. was next to her on the bed, had seen it happen, but continued to watch television. RP

¹ Armstrong testified that K.A.’s word for penis is “yuck yuck.” RP 227.

² K.A. also said that A.A. “raped her,” but then said she did not know what rape meant and had heard the word from her mother. RP 100, 120.

97, 105-6. K.A. said she had never told anyone before that L. was in the room during the alleged incident because she forgot. RP 106.

K.A. had no memory of any of her prior hearsay statements. In fact, she testified that she never told her mother, Ms. Griffin or De' Andre about it. RP 109-110. And she testified, "I know for sure I didn't talk to a nurse." RP 113.

Ms. Armstrong testified that K.A. has learning disabilities, A.D.D., and a sleeping disorder. RP 221. Ms. Armstrong said that K.A. is a "typical child" in that she occasionally lies and steals. RP 224. Misti and De' Andre both testified that K.A. often lied when she thought she would get in trouble, blaming someone else to divert blame, and had stolen from her mother and others. RP 135, 136, 189. 2007 was also a very difficult year for K.A. because her father died in January, just a couple of months before making the allegation. RP 239. K.A. was very close to her father and was very upset when he died, missing quite a bit of school. RP 50-51.

According to Ms. Armstrong, the last time K.A. went to her Uncle Randy's (A.A.'s) house was March 30, 2007. RP 235. Ms. Armstrong talked to K.A. during the visit and K.A. said she was having a good time—she asked to spend the night. RP 235, 237. K.A. went on this visit alone—L. did not go with her. RP 168, 236. When Ms. Armstrong saw

K.A. the next day after her visit, K.A. seemed happy and “bubbly,” “normal.” RP 239.

Randy Armstrong, A.A.’s father and K.A.’s uncle, testified that he was present during K.A.’s entire visit at his house. RP 167. K.A. spent the night at his house—without her brother. RP 168. Mr. Armstrong testified that K.A. and A.A. were never alone. RP 175. Moreover, Mr. Armstrong testified that both bedrooms had transom openings above the door, completely open to the living room, and he would have heard any conversation inside. RP 175.

Procedural History

A.A. was charged with two counts of rape of a child in the first degree. CP 1-2. The charges were later amended to one count of rape of child in the first degree and one count of child molestation in the first degree. CP 3-4. The charges alleged that the crime occurred on or about March 30, 2007, CP 3-4, but were later amended as to charging period to include December 6, 2006 through May 1, 2007. CP 34-35.

A.A. moved pre-trial to prevent K.A. from testifying—arguing she was not a competent witness—and to exclude K.A.’s hearsay statements as unreliable and, because K.A. was not “available” to testify due to her incompetence. CP 22-27. The court found K.A. competent to testify prior to trial. CP 32-33.

The court reserved ruling on the hearsay issue until after the trial, when the judge ruled that K.A.'s statements to De'Andre, Ms. Armstrong, and prosecution interviewer Kim Brune were admissible child hearsay. CP 36. The court further ruled that K.A.'s statements to the nurses at the pediatric clinic and Mary Bridge were admissible as statements made for medical purposes. CP 36.

A.A. was tried as a juvenile and received a bench trial.³ CP 40. He was found guilty of rape of a child in the first degree and not guilty of child molestation. CP 42-43. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY FINDING THAT K.A. WAS COMPETENT TO TESTIFY AT TRIAL DESPITE HER TESTIMONY OF EVENTS THAT COULD NOT HAVE OCCURRED AND LACK OF MEMORY OF MAKING THE HEARSAY STATEMENTS.

The trial court abused its discretion in finding that K.A. was competent to testify because she lacked the ability to distinguish between truth and lies. Under the child victim hearsay statute, RCW 9A.44.120, a child's description of sexual abuse is admissible as evidence if the statements are reliable and if the child either testifies or is unavailable as a witness. A young child is competent to testify as a witness at trial if that child has (1) an understanding of the obligation to speak the truth on the

³ A.A.'s motion for jury trial was denied. RP 14.

witness stand, (2) the mental capacity at the time of the occurrence to receive an accurate impression of the matter about which the witness is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words the witness' memory of the occurrence, and (5) the capacity to understand simple questions about it. *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (citing *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)). A trial court's ruling that a child is competent to testify is reviewed under the abuse of discretion standard. *State v. Watkins*, 71 Wn. App. 164, 170, 857 P.2d 300 (1993).

Key to the determination of whether a child is competent is whether the child, at the time of the testimony, is describing an event that "he or she has the capacity to accurately recall" and "accurately relate." *State v. Karpenski*, 94 Wn. App. 80, 101, 971 P.2d 553 (1999). These questions go to the core of whether the child had "the capacity to distinguish truth from falsehood." *Karpenski*, at 101.

In *Karpenski*, the child promised to tell the truth and not make up stories. 94 Wn. App. 106. Yet, Z then went on to tell a story "describing in vivid detail how he and his younger brother had been born at the same time," an "impossible" story. *Karpenski*, at 106. The court then goes on to conclude, "the only reasonable view of this record is . . .

that Z lacked the capacity to distinguish truth from falsehood.” *Id.*

Because the evidence was insufficient to support a finding that Z was capable of distinguishing truth from falsity, the court held that Z was incompetent to testify. *Id.*

During the competency hearing in this case, K.A. was never asked about her recollection of the alleged sexual act with A.A, RP 38, so there was no direct way for the court to evaluate K.A.’s actual recollection. Like in *Karpenski*, K.A. responded appropriately during the competency hearing to general questions about what was truth and what was a lie. RP 33. Also like the child witness in *Karpenski*, K.A. was known to lie when it suited her. RP 135, 136, 189.

Like in *Karpenski*, although K.A. promised to tell the truth, she went on to describe events that could not have happened. For the first time at trial, K.A. testified under oath that her little brother was on the bed the entire time during the alleged incident with A.A. RP 97. K.A. describes in detail where L. was sitting on the bed during the alleged incident and what he was doing, and even draws L. into her picture of the event. RP 105-6. K.A. says that she “forgot” to mention before that L. was there. RP 106. Given the extensive questioning K.A. went through during the investigation, the fact that she never before mentioned this fact, and the fact that L. never mentioned being there, her testimony about L.

being present when she was allegedly raped seems to be the product of fantasy rather than actual recollection, although she may very well believe her testimony to have been true.

K.A. goes on to testify that she never told anybody about what happened with A.A., specifically contradicting the testimony of her mother, her brother, and several other witnesses who said K.A. talked to them. RP 109-110.

K.A.'s testimony about an event that we know did not occur (her brother being present during the alleged sexual act), coupled with her lack of memory of her hearsay statements, seriously call into question K.A.'s capacity to distinguish truth from falsehood. Although the trial court did not have this information at the time of the competency ruling because K.A. was not asked at that time to describe the event, it is certainly clear when K.A. is on the stand that she could not distinguish between truth and fiction and was thus incompetent to testify. Therefore, there is insufficient evidence to support the finding that K.A. had the ability to distinguish truth from lies and accurately relate events. Therefore, the trial court's conclusion that K.A. was competent to testify was erroneous.

ISSUE 2: THE TRIAL ERRED BY FINDING THAT K.A. RETAINED SUFFICIENT MEMORY OF THE EVENT AND COULD EXPRESS HER MEMORY OF THE EVENT WITHOUT EVER HAVING THE CHILD TESTIFY ABOUT THE EVENT IN THE COMPETENCY HEARING.

A trial court can find a child competent if the child understands an obligation to testify truthfully and possesses (1) the mental capacity accurately to perceive events at the time of occurrence, (2) sufficient memory to retain the events in question, (3) the ability to express orally her memory of the event, and (4) the capacity to understand and to answer simple questions about the event. *State v. C.J.*, 148 Wn.2d 672, 682, 63 P.3d 765 (2002); RCW 9A.44.120; RCW 5.60.050. A trial court's ruling that a child is competent to testify is reviewed under the abuse of discretion standard. *State v. Watkins*, 71 Wn. App. 164, 170, 857 P.2d 300 (1993).

In this case, the court found that K.A. had "sufficient memory to retain an independent recollection of the incident;" and that she had "the capacity to express in words her memory of the incident" without ever hearing K.A. testify about the incident. CP 32-33; RP1. Therefore, there is not sufficient evidence in the record to support the trial courts findings in support of K.A.'s competency and those findings are in error.

This error was not harmless because due to the inadequacy of the competency hearing, it was not until trial, when K.A. finally tells her

version of the event, that she testified that L. was in the room with her, within reach, on the bed, during the alleged rape, revealing her inability to distinguish fantasy from fact. If K.A. had been asked about the event at the competency hearing, it would have been clear at that time that K.A. could not distinguish truth from fiction and therefore was not competent to testify.

ISSUE 3: THE TRIAL COURT ERRED BY DENYING THE DEFENSE MOTION TO EXCLUDE THE CHILD HEARSAY BECAUSE AT THE TIME OF TRIAL, THE CHILD WAS NOT COMPETENT TO TESTIFY AND DID NOT RETAIN AN INDEPENDENT MEMORY OF MAKING THE HEARSAY STATEMENTS.

The child hearsay statute, RCW 9A.44.120, provides for the admissibility of child hearsay when certain conditions are met:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness:
PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

“‘[T]estifies’, as used in RCW 9A.44.120(2)(a), means the child takes the stand and describes the acts of sexual contact alleged in the hearsay.”

State v. Rohrich, 132 Wn.2d 472, 481, 939 P.2d 697 (1997). Further, under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d

177 (2004), under the federal confrontation clause, hearsay testimony is inadmissible unless the declarant is available for true cross-examination.

In *Karpenski*, the court noted that: “Even though a hearsay statement falls within a hearsay exemption or exception, it cannot be reliable if, when it was made, the declarant was incompetent.” 94 Wn. App. at _____. See also *Jenkins v. Snohomish County PUD No. 1*, 105 Wn.2d 99, 101-03, 713 P.2d 79 (1986); *State v. Ryan*, 103 Wn.2d 165, 173-74, 691 P.2d 197 (1985); *State v. Justiniano*, 48 Wn. App. 572, 578, 740 P.2d 872 (1987) (“We conclude that the inability of a child witness to testify at trial does not render inadmissible the child's earlier out-of-court statement so long as the child was then competent to make such statement and the other requirements of RCW 9A.44.120 have been satisfied.”); *State v. Jackson*, 46 Wn. App. 360, 368 n.6, 730 P.2d 1361 (1986) (“On retrial, the trial court must determine the child's competency to be a witness at trial and her competency at the time the statements were made.”). Therefore, *Karpenski* held:

But when the competency of a declarant is in issue--as, for example, when a young child is not shown to be competent at trial and the opponent voices a proper objection to the child's pretrial hearsay statement--the proponent must demonstrate not only circumstances described on the face of a hearsay exception, but also circumstances showing that at the time of the hearsay statement the child was describing an event that the child had the capacity to accurately perceive; to accurately recall; and to accurately

relate. It matters little whether these capacity-related circumstances are called "elements of competency," "competency-related preliminary facts," "indicia of reliability," or "particularized guarantees of trustworthiness." If any one of them is missing, the child's hearsay statement cannot be reliable.

94 Wn. App. at ____.

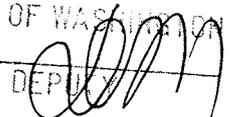
In this case, K.A.'s statements were not reliable because she was not competent to testify. Even if K.A. seemed to be competent based on the very cursory examination conducted during the competency hearing, her inexplicable testimony regarding L.'s presence on the same bed where she claimed to remember being raped shows that at the time of trial K.A. could not distinguish between truth and fantasy. Nor does K.A. retain any memory of making the hearsay statements at all. Therefore, in the absence of findings that she was competent at the time of the hearsay statements, the trial court erred in finding them to be reliable and permitting the statements into evidence.

V. CONCLUSION

The trial court erred by convicting A.A. based on the testimony and hearsay statements of K.A., whose testimony showed that she was unable to distinguish between fantasy and truth and was therefore incompetent to testify. Therefore, A.A.'s conviction for first degree child rape must be reversed.

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DATED: November 19, 2008

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CERTIFICATE OF SERVICE

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