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ORIGINAL

COA NO. 648144

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JASON BRIDGES, Appellant,

v.

STATE OF WASHINGTON, Respondent,

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED WHEN IT FOUND C.H.B. COMPETENT TO TESTIFY UNDER CRR 6.12(c)(2).
2. THE TRIAL COURT ERRED WHEN IT ADMITTED CHILD HEARSAY STATEMENTS UNDER RCW 9A.44.120 BECAUSE THOSE STATEMENTS WERE NOT RELIABLE.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it found C.H.B. competent to testify when C.H.B. would not distinguish between fiction and reality, i.e. Santa Clause, and hearsay statements show that her statements to others about the abuse were varied and inconsistent. (Assignment of Error 1)
2. Whether the trial court erred when it admitted child hearsay as reliable when two witnesses testified that C.H.B. reported that the sexual contact was a “touch” while another witness reported that it was a “suck,” i.e. penetration. (Assignment of Error 2)

C. STATEMENT OF THE CASE

Around Christmas 2008, Mr. Bridges was watching his three children; he was divorced from their mother at the time. After Mr. Bridges returned his children to their mother, he received a call from the children’s grandmother, who accused him of raping his then six year-old daughter, “C.H.B.”

On December 12, 2008, C.H.B. told her mother that Mr. Bridges’s had showed her his “private spot” and C.H.B. touched it. Soon thereafter, Ms. Bridges called her grandmother, who recommended that she report C.H.B.’s allegations to the police. Once she called police, Detective Teri

Gardner of the Oak Harbor Police Department interviewed C.H.B. about the allegations of sexual abuse. After the investigation, Mr. Bridges was charged with first degree rape of a child.

On October 7, 2009, the State filed a pre-trial motion for a hearing to determine whether C.H.B. was competent to stand trial. In addition, it filed a motion for a hearing to determine whether C.H.B. was competent to testify and to determine the admissibility of C.H.B.'s hearsay statements under the child hearsay statute, RCW 9A.44.120. The court held a hearing regarding the competency and hearsay issues on November 10, 2009.

With regard to the hearsay statements, the State called four witnesses who testified as to statements by C.H.B. about the alleged sexual contact: Ms. Bridges, Ms. Wood (C.H.B.'s grandmother), Detective Gardner, and Dr. Patricia Lenehan (a child therapist). Although the State only alleged that one incident of Rape occurred here, C.H.B. told these witnesses different versions regarding the nature of the alleged sexual contact between her and Mr. Bridges on that occasion. These inconsistencies were brought to light in the competency and child hearsay hearing.

In the hearing, Officer Gardner testified that C.H.B. told her that Mr. Bridges "unzipped his pants and she – he had her touch his – she used

the word “nuts” and put her mouth and sucked on it.” RP (November 11, 2009) at 84. However, this testimony conflicts with what C.H.B.’s told her mother, Ms. Bridges, and her grandmother, Ms. Wood, that the alleged sexual encounter was a mere “touch” but not that any rape actually occurred. RP (November 11, 2009) at 16 (“She told me that daddy had her – had her touch him . . . in the private spot”).

After each witness took the stand, the court heard each party’s arguments. Defense counsel properly objected to the inconsistencies above and pointed out the lack of reliability inherent in these hearsay statements. RP (November 11, 2009) at 87-89 (Ms. Wood’s “testimony is not reliable because it does not match the testimony of the child to Detective Gardner”). Specifically, he noted the legal significance in the difference between a “touch” and oral penetration because a touch (by itself) does not “fit the definition of a rape.” RP (November 11, 2009) at 88; *see* RCW 9A.44.070. Ultimately, the judge ruled that C.H.B. was competent to testify and that the hearsay statements from Det. Gardner, Ms. Bridges, and Mrs. Wood were all admissible. RP (November 11, 2009) at 93-96.

At trial, Ms. Bridges and Detective Gardner testified as they did in the pre-trial competency/hearsay hearing, quoting the hearsay from C.H.B. C.H.B. also testified at trial. In addition, C.H.B. testified as the only witness to the alleged abuse. RP (November 11, 2009) at 127-150. On

November 19, 2009, the appellant-defendant, Jason Bridges, was convicted of 1st degree rape of a child.

D. AUTHORITY AND ARGUMENT

A. **The trial court erred when it found C.H.B. competent to testify.**

“[C]hildren who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly” are incompetent to testify. CrR 6.12(c)(2).

The test for the competence of a young child as a witness is:

(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 [she] 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 [her] memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn. 2d 690, 692, 424 P.2d 1021 (1967),

Under this standard, the competency of a witness turns on three basic preliminary questions of fact. *See State v. Watkins*, 71 Wn. App. 164, 170, 857 P.2d 300 (1993) (“Ordinarily, the competency of a witness is a preliminary fact question to be determined by the trial court.”). First, the court must decide whether, at the time of his or her in-court statement (i.e., his or her “testimony”), the witness is describing an event that he or she had the capacity to accurately perceive (or, in alternative terms, an

event about which he or she could “receive just impressions”). *State v. Karpenski*, 94 Wn. App. 80, 101, 971 P.2d 553 (1999) abrogated on other grounds by *State v. C.J.*, 148 Wn. 2d 672, 63 P.3d 765 (2003). Second, the court must determine whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately recall. *Id.* Third, the court should ask whether the witness, at the time of his or her in-court statement, is describing an event that he or she has the capacity to accurately relate. *Id.*

To answer this last question, the court should address several sub-issues, including the following: (a) whether the witness has the capacity to understand simple questions about the event; (b) whether the witness has the capacity to express in words his or her memory of the event; (c) whether the witness has the capacity to speak in the formal courtroom setting; (d) *whether the witness has the capacity to distinguish truth from falsehood*; and (e) whether the witness has the capacity to understand and carry out his or her obligation to speak the truth. *Id.*

None of these three questions involves credibility. Competency is whether a witness possesses the capacity to accurately perceive, recall and relate. Credibility is whether a witness is correctly *exercising* the capacity that he or she possesses. The trial judge decides the former; the jury decides the latter. *See Jenkins v. Snohomish County PUD*, 105 Wn. 2d,

102, 713 P.2d 79 (1986) (at time of making an out-of-court hearsay statement, later offered at trial to prove its truth, the declarant “understood his obligation to tell the truth;” “knew the difference between truth and falsehood;” “had the mental capacity . . . to understand simple questions;” and “the ability to express his recollection in words”).

In *State v. Karpenski*, an alleged child sexual abuse victim was incapable of distinguishing truth from falsity, and thus, he was incompetent to testify in a prosecution for first degree rape of child and first degree child molestation. 94 Wn. App. at 80. At the outset of the competency hearing, the victim took the stand and promised not to “make up any stories,” but moments later he described in vivid detail how he and his younger brother had been born at same time, which was impossible because victim was seven and his little brother was two, and the victim apparently believed what he was saying. The court found that his testimony was not reliable and manifested a long-standing, often-observed inability to distinguish what was true from what was not.

In this case, during his cross examination at the hearsay hearing, defense counsel cast serious doubt about C.H.B.’s ability to distinguish reality from fantasy, specifically by pointing out that she believes that Santa Clause actually delivers presents on Christmas when he in fact does not exist. Just as the 7 year-old in *Karpenski* who described how his 2

year old brother was born at the same time as him—a fantasy that could not be logically true—then 7-year-old C.H.B. told the court that she believes in a fictional character that brings presents on Christmas. *See Karpenski*, 94 Wn. App. at 80. Her belief in fictional characters shows her susceptibility to outside influence from others, which casts serious doubt on the reliability of her statements to Ms. Bridges and to Detective. When considering these factors the judge dismissed the Santa Clause fantasy because a lot of children believe in Santa at this young age. RP (November 11, 2009) at 90. However, he failed to consider how that belief shows who susceptible 6 year-old children are to believing that they witnessed things they did not in fact see, i.e. Santa who brings them presents.

Consequently, because C.H.B. could not perceive the difference between reality and fantasy (gifts from Santa versus from her parents), she could not have had the required “mental capacity at the time of the occurrence concerning which [she] is to testify, to receive an accurate impression of it.” *See Allen*, 70 Wn. 2d at 692.

B. The trial court erred because C.H.B’s hearsay statements were not reliable.

RCW 9A.44.120 governs the admissibility of a child victim’s out of court hearsay statements. ER 807. The statute provides:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on

the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (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.

RCW 9A.44.120 (emphasis added); ER 807. Although admissibility of child abuse hearsay is within discretion of trial court, an appellate court must reverse if the trial court abused its discretion in admitting such evidence. *State v. Pham*, 75 Wn. App. 626, 879 P.2d 321 (1994). Here, defense counsel did not object to the absence of corroborative evidence at trial; as such, reliability is the focus of this appeal. By admitting the hearsay statements of declarant C.H.B. through Ms. Bridges, Detective Gardner, and Ms. Wood, the court abused its discretion because those statements were not “reliable” as required by RCW 9A.44.120.

Since the child sexual abuse exception is not a “firmly rooted” hearsay exception, particularized guarantees of

trustworthiness are required before the hearsay is admissible, thus requiring a higher standard of reliability as a substitute for the traditional hearsay exceptions. *State v. Slider*, 38 Wn. App. 698, 688 P.2d 538 (1984).

Courts will consider nine factors to determine the reliability of hearsay statements by children under the child victim hearsay statute are: (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. *State v. Woods*, 154 Wn. 2d 613, 114 P.3d 1174 (2005).

Here, the trial court erred by allowing C.H.B.'s hearsay statements because they were not reliable. Defense counsel objected to the admissibility of C.H.B.'s hearsay statements under the child hearsay

statute, RCW 9A.44.120. RP (November 11, 2009) at 87-89 (Ms. Wood's "testimony is not reliable because it does not match the testimony of the child to Detective Gardner"). Specifically, he noted the legal significance in the difference between a "touch" and oral penetration because a touch (by itself) does not "fit the definition of a rape." RP (November 11, 2009) at 88.

Although the State only alleged that one incident of Rape occurred here, C.H.B. told different people different things regarding the nature of the alleged sexual contact between her and Mr. Bridges on that occasion. These inconsistencies were brought to light in the competency and child hearsay hearing. In the hearing, Officer Woods testified that C.H.B. told her that Mr. Bridges "unzipped his pants and she – he had her touch his – she used the word "nuts" and put her mouth and sucked on it." RP (November 11, 2009) at 84.

However, this testimony conflicts with what C.H.B.'s told her mother, Ms. Bridges, and Ms. Wood over the phone, that the alleged sexual encounter was a mere "touch" but not that any rape actually occurred. RP (November 11, 2009) at 16 ("She told me that daddy had her – had her touch him . . . in the private spot").

In addition to the conflicting reports of sexual contact, C.H.B.'s competency issues cast doubt on the reliability of her statements to all

three hearsay witnesses. The competency of a child to testify and his ability to relay facts honestly and truthfully is a factor in determining reliability and hence admissibility of child hearsay statement. *State v. John Doe*, 105 Wn. 2d 889, 896, 719, P.2d 554 (1986).

Here, as discussed above, C.H.B was not competent at trial because she could not tell the difference between reality and fantasy; thus, she was likely less competent when she made the original hearsay statements. At the time she took the stand, C.H.B. was one full year older than when she made the statements to Detective and Ms. Bridges, which casts further doubt on her competency at the time the original statements were made, i.e. that Mr. Bridges had her touch his private parts.

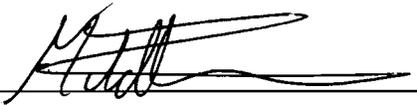
E. CONCLUSION

The only evidence admitted at trial against Mr. Bridges was through the direct testimony of the alleged victim, C.H.B., and through hearsay statements by Ms. Bridges, Ms. Wood, Detective Gardner, and Dr. Lenehan. Because those statements were not reliable and C.H.B. was not competent to distinguish truth from fiction, the appellant court should reverse the trial court's rulings on those issues and order a new trial.

DATED this 9th day of November, 2010.



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PROOF OF SERVICE

On November 9, 2010, I filed with the Court of Appeals, Division I, at 600 University St, One Union Square, Seattle, WA 98101 the original and one copy of our Appellant's Brief via ABC legal courier service. On this same date, a copy of this Brief and proof of service was also sent via the United States Postal Service to the King County Prosecutor's Office, Appellate Unit, 516 Third Avenue W 554, Seattle, WA 98104-2312. A copy of this document was also mailed on today's date to Jason Bridges, Jason Bridges, DOC# 336061, Coyote Ridge Corrections Center, 1301 N Ephrata Ave, PO Box 769, Connell, WA 99326.



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