

67561-3

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NO. 67561-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

Antonio C.-M.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
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A. SUMMARY OF ARGUMENT

Antonio C.-M., a juvenile, was adjudicated guilty of rape of a child in the first degree. In a statement to her mother when she was 10 years old, his sister, K.F., alleged Antonio had sexual intercourse with her three years earlier while he was babysitting. The adjudication should be reversed based on the following trial court errors.

First, K.F. was not competent to testify at trial because the court neglected to consider whether, and the evidence does not show that, she was competent to accurately perceive the incident at the time that it allegedly occurred. K.F. claimed the rape happened when she was 6 or 7 years old, but she was almost 11 when she appeared at trial.

Second, K.F.'s statements to her mother and a police officer reporting sexual intercourse were not sufficiently supported by indicia of reliability. The statements should not have been admitted under the child hearsay exception.

Because the trial court found K.F.'s testimony critical to adjudication, the exclusion of her testimony and out-of-court statements requires reversal of the adjudication.

Finally, the adjudication is not supported by sufficient evidence that sexual intercourse took place.

B. ASSIGNMENTS OF ERROR

1. In violation of the right to due process protected by the Fourteenth Amendment and article 1, section 3 of the Washington Constitution, the juvenile court abused its discretion in finding child witness K.F. competent to testify.

2. The juvenile court erred in finding “There was no evidence that K F did not have an accurate impression of what was occurring in the Renton home.” (Competency Finding of Fact 10)¹

3. The juvenile court erred in finding “There is no evidence that K F’s memory has been tainted.” (Competency Finding of Fact 12)

4. The juvenile court erred in finding “There is no evidence that Ms. Forward planted the idea of sexual assault in K F’s head.” (Competency Finding of Fact 14)

5. The juvenile court erred in finding “K F’s testimony credible.” (Competency Finding of Fact 19)

6. The juvenile court erred in concluding “K F has the mental capacity to receive an accurate impression of events she is here to testify about.” (Competency Conclusion of Law 5)

¹ A copy of the juvenile court’s Findings of Fact and Conclusions of Law Regarding Competency of Child Witness Pursuant to CrR 6.1(d) and JuCR 7.11 (“Competency Findings of Fact”) is attached as Appendix A.

7. In violation of the right to due process protected by the Fourteenth Amendment and article 1, section 3 of the Washington Constitution, the trial court erred in admitting unreliable child hearsay.

8. The juvenile court erred in finding K.F. had no motive to make up or lie about “the events that occurred.” (Child Hearsay Finding of Fact 7, including subparts “a” through “e”)²

9. The juvenile court erred in finding “K F does not have a history of deception or lying.” (Child Hearsay Finding of Fact 8, including subparts a through e)

10. The juvenile court erred in finding “K F’s testimony credible.” (Child Hearsay Finding of Fact 10)

11. The juvenile court erred in finding “The disclosure of the sexual assault was triggered by the possibility that it would happen again[.] K F realized that possibility and that it could not be ignored and that she needed to disclose[.] K F was the one who initiated the conversation and brought up the issue of sexual assault.” (Child Hearsay Finding of Fact 13)

² A copy of the juvenile court’s Findings of Fact and Conclusions of Law Regarding Child Hearsay Exception RCW 9A.44.120 Pursuant to CrR 6.1(d) and JuCR 7.11 (“Child Hearsay Findings of Fact”) is attached as Appendix B.

12. The juvenile court erred in finding “K F’s statements to Officer Thompson were spontaneous and not in response to leading questions[.] The officer asked open-ended questions, and K F responded with detailed answers.” (Child Hearsay Finding of Fact 14)

13. The juvenile court erred in finding “K F’s statements to Ms Forward and Officer Thompson were timely[.] Even though there was a significant lapse in time between the disclosure and the sexual assault, K F did not have a sense of danger until she saw Antonio [] again[.] The reintroduction of Antonio [] into K F’s life caused her to revive her concern and prompted the basis for her disclosure[.]” (Child Hearsay Finding of Fact 15)

14. The juvenile court erred in finding “K F is competent. She was available for trial.” (Child Hearsay Finding of Fact 17)

15. The juvenile court erred in finding the “Ryan factors have been met and that K F’s statements to Akia Forward and Officer Michael Thompson are admissible under the Child Hearsay Exception RCW 9A 44 120.” (Child Hearsay Conclusion of Law 2)

16. The juvenile court erred in finding “The time, content and circumstances of the statements by complaining witness, K F, to Akia Forward and Officer Michael Thompson provide sufficient indicia of

reliability[.] The Court concludes that the statements made by K F were reliable.” (Child Hearsay Conclusion of Law 3)

17. In the absence of sufficient evidence to establish beyond a reasonable doubt Antonio had sexual intercourse with K.F., his adjudication violates his constitutional right to due process.

18. The juvenile court erred in entering finding of fact 6 through 15.³

19. The juvenile court erred in entering finding of fact 30 through 32.

20. The juvenile court erred in entering finding of fact 36.

21. The juvenile court erred in concluding the State proved Rape of Child in the First Degree beyond a reasonable doubt. (Conclusion of Law II)

22. The juvenile court erred in concluding Antonio “is guilty of Count I, the crime of Rape of a Child in the First Degree.” (Conclusion of Law IV)

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourteenth Amendment and article 1, section 3 require that the evidence used to convict a person at trial be reliable. For this

³ A copy of the juvenile court’s Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d) and JuCR 7.11 is attached as Appendix C.

reason, incompetent persons are not permitted to testify. On appeal of a finding that a child witness was competent, the reviewing court decides whether, viewed in the light most favorable to the State, the evidence shows the witness had the capacity to accurately perceive at the time of the alleged event. Where the juvenile court did not find K.F. had the ability to accurately perceive at the time of the alleged rape and the evidence does not support such a finding, did the trial court err in finding the witness competent?

2. Child hearsay must be excluded if it is unreliable. Did the trial court err in concluding that multiple instances of unreliable child hearsay were admissible?

3. The federal and state constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. Rape of a child requires the State to prove the accused had sexual intercourse with another who is less than 12 years old, not married to the accused, and the accused is at least 24 months older than the victim. Should the adjudication be reversed for insufficient evidence that Antonio had sexual intercourse with his half-sister, K.F., where the timing of the allegation suggested it was likely planted in K.F.'s head, her demeanor was not consistent with abuse, circumstantial evidence

indicates her initial report was likely a lie and no direct evidence corroborates her initial report?

D. STATEMENT OF THE CASE

K.F. was born August 8, 2000. 1RP 64, 121. From 2006 until 2009, she lived in a home on Benson Road in Renton with her parents and younger brother. 1RP 61. Her half-brother, Antonio C.-M., also lived with them, but only for a six-month period from May to October 2007. 1RP 63-64, 123; 2RP 55, 61-62. Antonio was born April 4, 1993. 1RP 121-22. Though Antonio moved out of the family's home in October 2007, K.F. visited him in Portland on several occasions. 1RP 73, 122-23; 2RP 55.

The juvenile court declined to determine K.F.'s competency before trial. 1RP 16-19, 30. The court waited until all testimony and evidence had been presented before determining K.F. was competent to testify and the child hearsay exception was satisfied. 2RP 98-102, 109-10.

Akia Forward, K.F. and Antonio's mother, testified K.F. told her she had been molested by her brother three years earlier. 1RP 127-28, 133. Ms. Forward could not recall the exact words K.F. used, except that K.F. did not go beyond saying Antonio got on top of her.

1RP 128, 142.⁴ K.F. reported the incident while her mother was fixing K.F.'s hair about one week after they had returned from visiting Antonio in Portland, Oregon. 1RP 129-30; 2RP 12-13. K.F. and her mother visited Antonio to support him in his release from jail on a charge of rape—an unrelated charge. 1RP 129. K.F. knew Antonio had been charged with rape. 2RP 13. Ms. Forward testified K.F. was more attached to her than normal while in Portland but resumed a more normal, talkative demeanor on the drive back home. 1RP 129; 2RP 14-15.

A couple days later, Ms. Forward testified she asked K.F. if she “wanted to stick by” what she said and whether she wanted to do anything about it. 1RP 131. K.F. responded she wanted to stick by it and get her brother help. 1RP 131-32. Thus, Ms. Forward decided to report it to the police and took K.F. to a doctor. 1RP 132-33. The doctor did not conduct an internal exam. 1RP 132-33.

Renton police officer Michael Thompson responded to Ms. Forward's report. 1RP 42. When Ms. Forward told him her daughter had been sexually abused by her son, Officer Thompson asked Ms. Forward and her daughter to come into the police station. 1RP 42.

⁴ On redirect, Ms. Forward testified K.F. told her Antonio “put his privates inside her privates.” 2RP 8.

They arrived at the station around 8 p.m. that evening. 1RP 42. K.F. told Officer Thompson she was watching cartoons “maybe two years ago” in her parents’ bedroom while they were out of the house when her brother came into the room, took his pants and underwear off, had sex with her, put his clothes back on and left the room. 1RP 47-48. K.F. indicated to Officer Thompson where her “private parts” are and said she saw her brother’s private parts. 1RP 48-50. She was unable to describe the incident in further detail or when it occurred. 1RP 48-49, 51. K.F. apparently told Officer Thompson the incident occurred “maybe two years ago,” in 2008, but K.F.’s written statement alleges it occurred in 2007. 1RP 56.⁵ K.F. was unable to say how the sexual assault occurred, and reported it was not painful and no fluids were present. 1RP 50, 56-57. She was unable to say how long the sexual intercourse lasted. 1RP 50. Overall, K.F. did not provide much detail. 1RP 57. She informed Officer Thompson her brother told her not to tell anyone, so she did not tell anyone at the time. 1RP 49.⁶

⁵ The information charged for the period between August 8, 2005 and December 31, 2007. CP 1.

⁶ Officer Thompson testified he had interviewed children as young as seven years old, but his technique for interviewing children and adults is the same. 1RP 40-41. A trained child interview specialist testified children and adults have to be interviewed differently; it is important to use non-suggestive, open-ended questions with a child and then narrow the focus based on the child’s

K.F. also spoke with an interviewer for the King County Prosecutor's Office. 2RP 45. An observer noted K.F. was reserved and reluctant to talk. 2RP 49. She did not provide any specifics. 2RP 49, 53. The interviewer testified K.F. did not respond when asked whether she told the police the truth and she thinks she was five years old when "something" happened (which would have placed the incident five years prior to her report). 2RP 91-92.

A Renton police detective contacted Antonio by telephone. 2RP 40, 44. The detective testified Antonio seemed concerned about the allegations and was open and willing to speak with her. 2RP 44.

Ms. Forward testified K.F. later asked whether it was possible the incident had not occurred, if she had derived it from a dream. RP 140, 143-44, 150. K.F. then told her mother shortly before the trial that "she didn't believe that what she had told me was true because it came from a dream." 1RP140, 143. At that point, Ms. Forward believed K.F. truly no longer believed a rape had taken place. 1RP 144; *see* 1RP 158-59 (K.F. happier and more talkative after telling mother that she had dreamed the allegation); 2RP 20 (K.F. adamant it was a dream).

answers. 1RP 92-96. Officer Thompson asked K.F. the following: "I asked her when this occurred, I asked her how long the sex happened, I asked her about the pain, I asked her about if she knew – knew what sex was, those types of questions. 1RP 54.

Ms. Forward believes K.F. had a dream that formed the basis of the allegation. 2RP 22, 24. Ms. Forward promptly informed the State and defense counsel of this development. 1RP 140.

K.F. had previously told an untrue story that a teacher grabbed her and hurt her arm. 1RP 156-57. The teacher had upset K.F. by requiring her to do something she did not want. *Id.* The court did not allow further evidence about K.F.'s prior fib. 1RP 157.

K.F. was almost 11 years old at the time of trial. 1RP 88-89. On her first day of testimony, K.F. answered some background questions but refused to testify regarding the alleged events at issue. *Compare* 1RP 88-102 (responsive to introductory questions about school, house) *with* 1RP 103-20 (does not want to answer questions, "everything" makes her mad, does not remember key events). She indicated she knew the difference between a truth and lie, said the truth is better, and promised to tell the truth. 1RP 102.

The next day, K.F. reappeared for testimony with a "service dog." 2RP 25.⁷ K.F. did not confirm the content of her report of the assault to her mother. 2RP 27-28. But she testified she told her mother the same information she provided to Officer Thompson. 2RP 27-28.

⁷ Because it was a bench trial, defense counsel "reserved" objection to the presence of the "service dog." 2RP 25.

As the prosecutor read from K.F.'s written statement to Officer Thompson, K.F. said simply "yes," it reflected what she told him. 2RP 30-31. K.F. further testified the incident was not a dream and she was testifying truthfully. 2RP 32.

On cross-examination, K.F. testified she had told many friends about the incident, but could not say who. 2RP 34. She did not "remember all the small details of [the incident]." 2RP 37.

K.F.'s testimony revealed some inconsistencies. Contrary to other evidence, K.F. testified her mother was present during her entire interview with Officer Thompson. *Compare* 1RP 107-08 (K.F.'s testimony) *with* 1RP 132 (mother's testimony she was not present for duration of interview); 1RP 45-46, 48 (officer's testimony mother was present for only part of the interview). Although her written statement and initial report to her mother only discussed one incident, K.F. testified on redirect that "this" happened to her more than three times. 2RP 38.

K.F.'s father, Christopher Forward, testified K.F. is an age-appropriate grade and does reasonably well in school. 1RP 64. She is generally a happy person, though her demeanor is up and down. 1RP 68. Mr. Forward thought K.F. and Antonio had a great sibling

relationship throughout the time Antonio lived in the Renton home. 1RP 70-71, 77-78. Ms. Forward confirmed K.F. “adored” Antonio when she was young. 1RP 133. Both parents agreed, K.F. was upset when Antonio moved out of the house in 2007. 1RP 71-72, 134.

Over the next several years, Mr. Forward noticed K.F. and her half-brother argued more and K.F. became more withdrawn, less interested in going places with the family. 1RP 69-70, 74, 78. He took the change “as being, you know just [K.F.] growing up.” 1RP 70. Ms. Forward also described a gradual change in K.F.’s behavior as she grew older, which she attributed to puberty. 1RP 129-30, 134. K.F. had become more closed off, grumpier. 1RP 129-30. Ms. Forward could not identify when the change had commenced, but testified K.F.’s demeanor changed about a year before she started fighting with Antonio. 1RP 130, 144.

Antonio’s aunt, with whom he resided in Portland, testified K.F. and Antonio interacted normally during K.F.’s 2010 visit. 2RP 55, 75, 78. K.F. was upset when they had to part. 2RP 75.

K.F. started counseling in 2010, after she told her school counselor she wanted to kill herself. 1RP 71-72, 134. This took place after K.F. reported the allegation to her mother. RP 145, 147.

Mr. Forward testified they never let the children watch television in their bedroom and rarely allowed the children in their room at all. 1RP 79. The house had several television sets, including one in K.F.'s room. 1RP 80, 82, 100-01. K.F. testified she sometimes watched television in her parents' room, but she had to ask her parents for permission. 1RP 101.

Mr. and Mrs. Forward testified the children were never left alone together for more than 30 to 40 minutes. 1RP 80-81, 126. During the summer of 2007, Ms. Forward left them together "maybe" six times. 1RP 126.

At the conclusion of the bench trial, the juvenile court found K.F. competent and her out-of-court statements to her mother and Officer Thompson sufficiently reliable to be admitted. 2RP 102, 109-10.

The court then found Antonio guilty of one count rape of child in the first degree. 2RP 129-32. He was acquitted of the second count. 2RP 131; CP 2.

At sentencing, Ms. Forward told the court that "since I found out what was said in the courtroom, [I now know that] my daughter

lied.” 2RP 138-39. Ms. Forward elaborated that K.F. testified falsely in court about statements K.F. made to her. 2RP 140.

E. ARGUMENT

1. The trial court violated Antonio’s due process right to a fair trial by erroneously concluding K.F. was competent to testify.

- a. In a criminal proceeding, the due process guarantee of a fair trial is violated where an incompetent person’s testimony is admitted.

An accused person has the due process right to a fair trial, including that the evidence used to convict will meet elementary requirements of fairness and reliability. U.S. Const. amend. XIV; Const. art. 1, § 3; *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); see *State v. Ahlfinger*, 50 Wn. App. 466, 472-73, 749 P.2d 190 (1988) (upholding exclusion of polygraph evidence, although relevant and helpful to accused’s defense, given “the State’s legitimate interest in excluding inherently unreliable testimony”). In keeping with this constitutional guarantee, RCW 5.60.020 bars the testimony of incompetent persons.⁸ A person is not competent to testify if he or she is “incapable of receiving just

⁸ RCW 5.60.020 provides in pertinent part: “Every person of sound mind and discretion . . . may be a witness in any action, or proceeding.”

impressions of the facts, respecting which they are examined, or of relating them truly.” RCW 5.60.050(2).

The Washington Supreme Court has held a child witness is competent to testify if he or she: (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity at the time of the occurrence 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 or her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The determination whether a child witness is competent requires the court to consider not only the child’s competency at the time of testimony, but also his or her “ability to receive just impressions at the time of abuse.” *State v. Woods*, 154 Wn.2d 613, 114 P.3d 1174 (2005) (plurality opinion) (citing *In re Dependency of A.E.P.*, 135 Wn.2d 208, 224-26, 956 P.2d 297 (1998)). Thus, a key question is whether the witness is describing an event that she had the capacity to accurately perceive at the time it allegedly occurred. *Id.*; *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, 684, 63 P.3d 765 (2003).

An appellate court reviews a trial court's determination that a child witness is competent to testify for an abuse of discretion based on consideration of the entire trial record. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011); *State v. Borland*, 57 Wn. App. 7, 10-11, 786 P.2d 910, *review denied*, 114 Wn.2d 1026 (1990). In a child competency determination, the precise question posed by the "abuse of discretion" standard is whether, "[t]aking the record in the light most favorable to the State, could a trial judge reasonably find it to be more likely true than not true that [the child] was capable of distinguishing truth from falsity?" *Karpenski*, 94 Wn. App. at 105-06.

- b. Because the juvenile court did not find K.F. had the capacity at the time of the alleged incident to accurately perceive it and because the evidence does not support such a determination, the juvenile court erred in finding her competent to testify.

As stated, a child witness is not competent to testify if she lacked capacity at the time of the alleged incident. Here, the court did not address the question of K.F.'s competency at the time of the described event, but instead focused solely on K.F.'s mental capacity at the time of trial (three years later). Under *A.E.P.*, this omission

precludes a finding that K.F. was competent to testify. 135 Wn.2d at 224.

In *A.E.P.*, as here, the alleged child victim was unable to testify about when the alleged touching occurred. The Supreme Court observed, “If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it.” *Id.* at 225. The Court noted that the child herself could not answer questions about when the event occurred, and found that “[h]er confused answer raises questions about her capacity at the time of the alleged event.” *Id.* at 224.

The court stressed, “[t]o be competent to testify, A.E.P. must have had the mental capacity at the time of the alleged abuse to receive an accurate impression of it.” *A.E.P.*, 135 Wn.2d at 224 (emphasis in original). A child’s inability to recollect when an incident forming the basis of criminal charges occurred undermines the trial court’s capability to determine the child’s competency at the time of trial: “Without any concrete reference, there is no way to guarantee the child's recall of details is based on fact, as opposed to fantasy.” *Id.* at 225.

In its oral findings, the juvenile court neglected to consider K.F.'s mental capacity at the time of the alleged incident. 2RP 102. The omission is particularly significant here, where the event was alleged to have occurred years before K.F.'s trial testimony. Unlike in *Brousseau* and *Woods*, K.F.'s report to her mother and Officer Thompson was not contemporaneous with the alleged incident itself. Compare *Brousseau*, 149 Wn. App. at 925-26; *Woods*, 154 Wn.2d at 622 with 1RP 133 (K.F. reported incident three years after it allegedly occurred). Consequently, her report years later cannot support a finding that she had capacity at the time of the alleged incident to receive an accurate impression of it. A finding that K.F. was competent when she appeared in court, at ten years of age, does not necessitate a finding that she was competent three or more years earlier.

The juvenile court's written findings of fact and conclusions of law also do not resolve the issue. The court concluded "K F has the mental capacity to receive an accurate impression of the events she is here to testify about[.]" CP 78 (emphasis added). But this conclusion only demonstrates that the court found 10-year-old K.F. competent to accurately perceive events. As discussed above, a critical issue remains whether K.F. had the capacity to accurately perceive the events alleged

to have occurred when she was seven or eight years old. The court's written findings merely state, "There was no evidence that K F did not have an accurate impression of what was occurring in the Renton home." CP 77 (FF 10). K.F. lived in the Renton house for three years—from 2006 to 2009. 1RP 61. The court's findings neither specify a period of time nor a subject area. Moreover, K.F.'s ability to recall the layout of the Renton house as of the time she moved out in 2009 at nine years of age does not speak to her ability to accurately perceive in 2007. *See* Competency Finding of Fact 9. And in fact, K.F.'s initial report and subsequent recounting lacked detail that would indicate her capacity to accurately perceive the specific incident in question.

Notwithstanding the deference accorded to a trial court's competency findings, this court's failure to engage in any inquiry regarding whether K.F. was competent at the time of the alleged events requires the competency determination be reversed.

c. The trial court's ruling should be reversed and K.F.'s testimony excluded.

Because the evidence is insufficient to show K.F. had capacity to accurately perceive and relay the incident at the time it allegedly occurred, the juvenile court abused its discretion in finding K.F.

competent to testify. The juvenile court's ultimate decision to find Antonio guilty was dependent upon K.F.'s testimony. 2RP 129-31 (oral ruling). Absent K.F.'s testimony, the adjudication cannot stand. Because Antonio's due process right to a fair trial was violated by the admission of incompetent evidence and because the error was not harmless, the adjudication should be reversed.

2. In violation of due process, the trial court erroneously admitted K.F.'s unreliable statements under the statutory child hearsay exception.

Constitutional due process requires the evidence used to convict an accused person be reliable. *E.g., Chambers*, 410 U.S. at 302. Under RCW 9A.44.120, proffered child hearsay is only admissible 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. The proponent of the child hearsay, as with hearsay generally, bears the burden of demonstrating its reliability. *Karpenski*,

94 Wn. App. at 107-08. A trial court's admission of child hearsay statements is reviewed for abuse of discretion. *Woods*, 154 Wn.2d at 623.

The hearsay statements were improperly admitted because (a) there were insufficient indicia of reliability and (b) corroborative evidence does not support the incident occurred, requiring exclusion of the statements if K.F. was unavailable to testify under the competency analysis above.

- a. The hearsay statements lacked sufficient indicia of reliability.

In determining reliability under RCW 9A.44.120, our Supreme Court has identified nine factors that must be considered:

1. Whether the declarant, at the time of making the statement, had an apparent motive to lie;
2. Whether the declarant's general character suggests trustworthiness;
3. Whether more than one person heard the statement;
4. The spontaneity of the statement;
5. Whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness;
6. Whether the statement contains express assertions of past fact;

7. Whether the declarant's lack of knowledge could be established by cross-examination;

8. The remoteness of the possibility that the declarant's recollection is faulty; and

9. Whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

C.J., 148 Wn.2d at 683-84 (citing *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984)). A child's out-of-court statement lacks reliability where these factors are not substantially satisfied. *State v. Griffith*, 45 Wn. App. 728, 738-39, 727 P.2d 247 (1986).

K.F.'s statements do not substantially satisfy these factors.

First, the court's finding that K.F. had no motive to lie is not based on sufficient evidence. K.F. was upset when Antonio moved out of the family home in 2007 due to disagreements with their mother. 1 RP 63, 71-72, 134. She visited Antonio on several occasions after he moved away, and yet did not report any mistreatment or fear of being harmed. *See* 1RP 73, 122-23; 2RP 55. Thus, the court's finding that "K F's disclosure was triggered by seeing [Antonio] again and the likely possibility that a sexual assault would occur again" is without basis. Child Hearsay Findings of Fact 7b. K.F. had previously seen Antonio without feeling compelled to report a past abuse. Then, in 2010 K.F.

learned Antonio was arrested and falsely charged with rape. Within a week of returning from a post-release visit with him, K.F. reported he raped her three years earlier. Her mother's explanation of Antonio's unrelated rape charges likely planted the idea in K.F.'s head. *Contra* Competency Findings of Fact 14 ("There is no evidence that Ms Forward planted the idea of sexual assault in K F's head.").

The second factor also weighs against admission because the evidence showed K.F. lacked a general character for trustworthiness. K.F. had lied about an incident with a teacher, even accusing the teacher of physically harming her. 1RP 156-57. Additionally, Ms. Forward testified she believed K.F. when K.F. told her that the allegations stemmed from a dream she had and were not based in fact. RP 140, 143-44, 150; 2RP 20, 22, 24. K.F. did not accurately testify as to her mother's presence during her statement to Officer Thompson. *Compare* 1RP 107-08 (K.F.'s testimony) *with* 1RP 132 (mother's testimony she was not present for duration of interview); 1RP 45-46, 48 (officer's testimony mother was present for only part of the interview). Further, though K.F. told her mother and Officer Thompson about only one incident, at trial she claimed she was raped at least three times. *See* 2RP 38.

With regard to the third factor, only Ms. Forward heard K.F.'s initial report of the incident. As K.F.'s mother, her objectivity is particularly questionable. *E.g., Ryan*, 103 Wn.2d at 176.

The fourth factor does not support reliability. K.F.'s initial statements to her mother were spontaneous; her mother indicated K.F. volunteered the report without any prompting. *See State v. Henderson*, 48 Wn. App. 543, 740 P.2d 329 (1987) (statements spontaneous where not the result of suggestive or leading questions). However, though the court found Officer Thompson used open-ended questions, this finding conflicts with his testimony. 1RP 54. Thus the fourth factor is, at best, neutral.

Fifth, the timing of the statements and K.F.'s relationship to the initial recipient, her mother, supports their unreliability. K.F. did not report the incident until three years after she claimed it had occurred. 1RP 133. Not coincidentally, her revelation followed a visit to her brother upon his release from a false charge of rape, of which K.F. was aware. 2RP 13. Further, Washington courts recognize the parent-child relationship renders objectivity difficult. *E.g., Ryan*, 103 Wn.2d at 176; *In re Dependency of S.S.*, 61 Wn. App. 488, 498, 814 P.2d 204 (1991).

The sixth factor applies to statements of a co-conspirator or against penal interest rather than in the child hearsay context, where the statement necessarily contains an assertion about a past event. *E.g.*, *State v. Borland*, 57 Wn. App. 7, 786 P.2d 810 (1990), *disapproved of on other grounds*; *State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997); *State v. Stange*, 53 Wn. App. 638, 646-47, 769 P.2d 873 (1989).

Whether cross-examination could not show K.F.'s lack of knowledge, the seventh factor, almost always weighs against admission. *Borland*, 57 Wn. App. at 18-19. That is the case here because overwhelming evidence does not corroborate K.F.'s knowledge or the facts alleged. *Id.*

The eighth factor, faulty recollection, is substantially the same as the capacity to accurately perceive at the time of the alleged incident. *State v. Gribble*, 60 Wn. App. 374, 382-83, 719 P.2d 554 (1991). As discussed above, this factor cuts against reliability. Section E.1.b, *supra*. The *Ryan* and *Borland* courts condensed this factor with the fifth factor, the timing of the statement. *Borland*, 57 Wn. App. at 19 (citing *Ryan*, 103 Wn.2d at 176). Because K.F.'s out-of-court

statements were made three years after the incident allegedly occurred, this factor again cuts against reliability. *See* 1RP 133.

The ninth factor, which evaluates the circumstances surrounding the statement, is covered by the third and fifth factors in child hearsay cases like this. *Borland*, 57 Wn. App. at 19.

Analysis of these reliability factors shows they were not substantially satisfied. Accordingly, the trial court abused its discretion in admitting K.F.'s out-of-court statements to her mother and Officer Thompson.

- b. Assuming K.F. was unavailable due to incompetence, corroborative evidence of the incident was lacking.

Because the juvenile court found K.F. competent to testify, it did not determine whether there was sufficient corroborative evidence to admit the hearsay statements. *See* RCW 9A.44.120(2) (requiring either the child testify or be unavailable but evidence corroborates the act occurred). If the court had undertaken such an analysis, it would have found corroboration lacking.

Here, the “most effective” types of corroboration were not present—eyewitness testimony, a confession or admission by the accused, medical or scientific evidence documenting the alleged abuse. *State v. Swan*, 114 Wn.2d 613, 622-23, 790 P.2d 610 (1990). Indirect

evidence that the alleged rape occurred was also missing. K.F. did not complain of pain or experience nightmares or display other psychological effects around the time of the alleged incident. *See id.* at 623 (discussing that “a child’s nightmares and psychological evidence” may provide indirect corroborative evidence), 637-38 (discussing contemporaneous complaints of pain). Although K.F.’s parents testified her demeanor changed, the transformation was not immediate or sudden. K.F. exhibited only gradual alterations in her mood and demeanor consistent with growing up, not the more sudden transformation consistent with a traumatic event. 1RP 69-70, 74, 78, 129-30, 134 (change in K.F.’s demeanor was gradual and consistent with growing up); *State v. Robinson*, 735 P.2d 801, 805, 812 (Ariz. 1987) (holding acute post-traumatic stress disorder and behavioral changes corroborate child hearsay); *State v. Grey Owl*, 316 N.W.2d 801, 805 (S.D. 1982) (holding testimony corroborated where several witnesses testified to victim’s “distraught emotional condition immediately subsequent to the incident”).

Courts have also found “precocious knowledge of sexual activity” to indirectly corroborate allegations of sexual abuse. *Swan*, 114 Wn.2d at 623. K.F.’s knowledge of sexual activity was limited.

1RP 49-50 (K.F. stated sex involved putting his private parts in her private parts; her private part is called a vagina and his is the “D-word”); 1RP 56 (K.F. did not provide any detail in describing “private parts”). This is not the kind of information that K.F. could only have learned as a result of rape. *See Swan*, 114 Wn.2d at 632-33 (discussing cases, including *State v. Jones*, 112 Wn.2d 488, 491, 772 P.2d 496 (1989) and finding three-year-olds’ knowledge of fellatio, ejaculation, intercourse and possibly cunnilingus precocious sexual knowledge that is corroborative of abuse). It is also not of the type that would be considered “exceptionally early” for an almost-eleven-year-old who is about to enter the sixth grade. *Webster’s Third New International Dictionary* 1785 (1993) (defining “precocious”). Moreover, as Ms. Forward testified, she had previously discussed “rape” with K.F. 2RP 13.

Therefore, if K.F. was not competent to testify, her hearsay reports should have been excluded on the additional ground that the incident lacks corroborating evidence.

3. Because the State's evidence was insufficient to prove Antonio had sexual intercourse with K.F., the adjudication should be reversed and the charges dismissed.

A criminal defendant has the right to a jury trial and may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Here, the State was required to prove Antonio and K.F. had sexual intercourse. RCW 9A.44.073(1).⁹ There was no witness to the alleged rape, and no direct evidence proving sexual intercourse occurred.

⁹ The remaining elements of rape of a child in the first degree—that K.F. was less than twelve years old, not married to Antonio and at least 24 months younger than Antonio—are not contested here.

The State's case hinged on K.F.'s three-year-delayed report of sexual contact. But circumstantial evidence discredited K.F.'s statements. First, K.F. had both the reason and opportunity to fabricate an account of rape. When she reported the incident, she was ten years old and had recently been told about false accusations of rape against her step-brother. Though K.F. was close with her brother, and adored him, he was sent to live far away from her. K.F.'s emotions about her brother and his relationship with their mother were likely conflicted.

Further, K.F. did not demonstrate any immediate change around the time of the alleged incident. Her parents testified that her demeanor changed generally and gradually over a several-year period. Both thought the changes were tied to her maturing state. Thus, K.F. did not manifest any symptoms of sexual assault in 2007 when the crime was alleged to have occurred.

On the other hand, K.F. demonstrated extreme behavior in 2010 when she reported the allegation to her mother for the first time. K.F. made statements about wanting to kill herself. She also lied about an incident with a teacher because she was mad at the teacher.

Moreover, though K.F. told Officer Thompson her brother had sex with her in September or October, the children were not left alone

except for a few times and for short periods during the summer only. The incident therefore could not have occurred in September or October 2007.

K.F.'s mother's statements at sentencing further corroborates that K.F.'s allegations were untrue. At sentencing, Ms. Forward told the court that "since I found out what was said in the courtroom, [I now know that] my daughter lied." 2RP 138-39. Ms. Forward elaborated that K.F. testified falsely in court about statements K.F. made to her. 2RP 140.

In light of the evidence, no rational trier of fact could find Antonio had sexual intercourse with K.F. in 2007. The adjudication should be reversed and the charges dismissed with prejudice. *See, e.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

F. CONCLUSION

Because the juvenile court did not assess her capacity to perceive when the crime allegedly occurred and because the evidence shows she lacked capacity at that time, the trial court abused its discretion in finding K.F. competent to testify. The trial court also abused its discretion in admitting K.F.'s hearsay statements absent

sufficient indicia of reliability. Each of these errors requires reversal of Antonio's adjudication because it rests solely on the words of K.F. Alternatively, the State presented insufficient evidence that rape of a child in the first degree occurred.

DATED this 21st day of March, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLZ', is written over a horizontal line.

Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX A

FILED
 KING COUNTY WASHINGTON
 OCT 7 - 2011
 SUPERIOR COURT CLERK
 BY JOVELITA V AVILA
 DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
 JUVENILE DIVISION

8 STATE OF WASHINGTON,)	
)	
)	
)	
9)	No 11-8-00736-9
)	
10)	
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)	
11)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
12)	REGARDING COMPETENCY OF
)	CHILD WITNESS PURSUANT TO
	)	CrR 6 1(d) AND JuCR 7 11
13)	
)	
14)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding on August 1, 2011, and August 2, 2011, before Judge Chris Washington in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Monique Cohen, the respondent appearing in person and having been represented by his attorneys, Holli Giffin, ACA and Steve Rommel, Rule 9, the State speaking in support of a determination of witness K F 's competency and the respondent and defense counsel speaking against a determination of competency, the Court having questioned the witness, having heard sworn testimony of witnesses and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law regarding the competency of witness K F (DOB 8/8/2000)

FINDINGS OF FACT

- 21 1 K F is ten years old
- 22 2 K F understands her obligation to tell the truth
- 23 3 K F understands the difference between telling the truth and telling a lie She understands telling the truth is better and avoids getting into trouble

24 COMPETENCY FINDINGS OF FACT AND
 CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
 and JuCR7 11 - 1

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1 4 The adults who know her have described K F as doing fairly well in school
2 5 K F (DOB 8/8/2000) is entering the sixth grade at Cascade Elementary School in the
3 Kent School District
4 6 K F is of normal intelligence She is in the age appropriate grade with her peers
5 7 K F is credible and able to recall and relate details of school events, the people she
6 resides with, and the differences between school districts
7 8 K F gave responsive answers to questions asked of her on the stand, even if talking about
8 the subjects matter was a struggle for her on the stand and she did not want to answer the
9 questions
10 9 K F was able to describe the rooms in her previous Renton residence, where they were
11 and what they looked like K F was further able to describe who lived there and describe
12 routine activities in the home The accuracy of these descriptions was corroborated by
13 other witnesses
14 10 There was no evidence that K F did not have an accurate impression of what was
15 occurring in the Renton home
16 11 K F demonstrates that she has an independent recollection of the events
17 12 There is no evidence that K F 's memory has been tainted
18 13 After K F disclosed to her mother, Akia Forward, Ms Forward asked K F whether she
19 wanted to report the incident K F said that she wanted to get her brother, respondent
20 Antonio Cabine-Matthews, help
21 14 There is no evidence that Ms Forward planted the idea of sexual assault in K F 's head
22 15 K F provided information to Officer Michael Thompson Ms Forward and K F spoke
23 with Renton Police Officer Michael Thompson shortly after the disclosure K F disclosed
24 the events of the assault to the officer K F told the officer that the respondent walked
into the bedroom where K F was watching TV He then walked over to where she was
lying on the bed The respondent took off his pants and underwear K F could see
Antonio's private parts K F explained that the respondent's private parts were where his
underwear covered his body She then said that the respondent started having sex with
her When the respondent was done, he put on his clothes and left the room Officer
Thompson asked K F what having sex meant and she said that the respondent put his
private parts inside her private parts The officer then asked where her private parts were
and she said it is what her underwear covered K F said that her private parts were called
her vagina and that the respondent's private parts were called the "D" word K F 's use of
the term "D" word means the same as penis

COMPETENCY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
and JuCR7 11 - 2

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- 1 16 K F provided information to Michelle Neeb K F told child interviewer, Michelle Neeb,
2 that what she had disclosed to Officer Thompson regarding the sexual assault by the
3 respondent was the truth
- 4 17 K F was able to describe the sexual assault consistently to multiple people in detail years
5 after the event
- 6 18 The Court finds Christopher Forward's testimony credible
- 7 19 The Court finds K F 's testimony credible
- 8 20 The Court finds Akia Forward's testimony credible

8 And having made those Findings of Fact, the Court also now enters the following

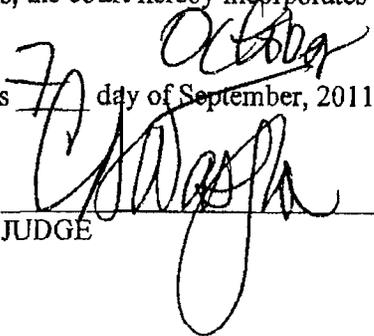
9 CONCLUSIONS OF LAW

10 I

- 11 1 The witness, K F (DOB 8/8/2000) is competent to testify at trial
- 12 2 K F understands the obligation to speak the truth on the witness stand
- 13 3 K F understands the questions that were asked of her on the stand
- 14 4 K F has the mental capacity and ability to respond to appropriately to questions
- 15 5 K F has the mental capacity to receive an accurate impression of the events she is here to
16 testify about

17 II

18 Judgment should be entered in accordance with Conclusion of Law I through V In addition to
19 these written findings and conclusions, the court hereby incorporates its oral findings and
20 conclusions as reflected in the record

21 DONE IN OPEN COURT this 7th October day of September, 2011
22 
23 JUDGE

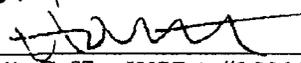
24 COMPETENCY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
and JuCR7 11 - 3

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1 Presented by

2 
3 Monique Cohen, WSBA#42129
4 Deputy Prosecuting Attorney

5 Respondent

6 *copy received*
7 
8 Hollie Giffin, WSBA #35015
9 Attorney for Respondent

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COMPETENCY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
and JuCR7 11 - 4

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APPENDIX B

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FILED
KING COUNTY WASHINGTON
OCT 7 - 2011
SUPERIOR COURT CLERK
BY JOVELITA V AVILA
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
	)	No 11-8-00736-9
vs)	
	)	FINDINGS OF FACT AND
ANTONIO CABINE-MATTHEWS,	)	CONCLUSIONS OF LAW
DOB 4/4/1993	)	REGARDING CHILD HEARSAY
	)	EXCEPTION RCW 9A 44 120
	)	PURSUANT TO CrR 6 1(d) AND JuCR
Respondent	)	7 11
)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding and a determination of admissibility of the child hearsay exception pursuant to RCW 9A 44 120 on August 1, 2011 and August 2, 2011, before Judge Chris Washington in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Monique Cohen, the respondent appearing in person and having been represented by his attorneys, Hollis Giffin, ACA and Steve Rommel, Rule 9, the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law regarding the admissibility of statements of witness K F (DOB 8/8/2000) made to Akia Forward and Renton Police Officer Michael Thompson

FINDINGS OF FACT

1 The complaining witness, K F (DOB 8/8/2011) was under the age of ten when she described sexual abuse by the respondent to Akia Forward and Officer Michael Thompson

CHILD HEARSAY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
AND JuCR7 11- 1

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1 2 In June or July 2010, K F and Ms Forward drove down to Portland, Oregon to see
2 Antonio Cabine-Matthews after he had been released from detention on an unrelated
charge

3 3 During the visit to Portland in the summer of 2010, K F became very clingy towards her
4 mother and shy while they were with the respondent After visiting the respondent, K F
5 told her mother, Akia Forward, that the respondent, Antonio Cabine-Matthews (DOB
4/4/1993), had sex with her when he previously lived with them

6 4 On July 7, 2010, Renton Police Officer Michael Thompson responded to Ms Forward's
7 phone call and asked her to bring K F to the Renton Police Department Officer
8 Thompson spoke with K F and Ms Forward was initially present Officer Thompson
9 noticed that K F looked uncomfortable and asked her if she would be more comfortable
if her mother left the room K F indicated that she would be more comfortable Officer
Thompson asked Ms Forward if it would be all right to speak with K F alone After Ms
Forward left the room, K F told the officer about the incident that occurred

10 5 She told the officer that the respondent walked into the bedroom where K F was
11 watching TV He then walked over to where she was lying on the bed The respondent
12 took off his pants and underwear K F could see Antonio's private parts K F explained
that the respondent's private parts were where his underwear covered his body She then
said that the respondent started having sex with her When the respondent was done, he
put on his clothes and left the room

13 6 Officer Thompson asked K F what having sex meant and she said that the respondent put
14 his private parts inside her private parts The officer then asked where her private parts
15 were and she said it is what her underwear covered K F said that her private parts were
called her vagina and that the respondent's private parts were called the "D" word

16 7 K F had no motive to make this up or lie about the events that occurred to Ms Forward
or Officer Thompson

- 17 a She did not have a motive to lie and there was not a benefit to lie, because the
18 respondent, Antonio Cabine-Matthews, was no longer living with K F at the time
of the disclosure Also, K F was not in trouble or trying to avoid punishment
- 19 b K F 's disclosure was triggered by seeing Antonio Cabine-Matthews again and the
likely possibility that a sexual assault would occur again
- 20 c In her disclosure to Ms Forward and Officer Thompson, K F did not demonstrate
any apparent motive to lie about the assault involving Antonio Cabine-Matthews
- 21 d K F appeared clearly reluctant to talk about the incident
- e K F did not exhibit behavior that would lead the Court to believe that K F was
lying

- 22 8 K F does not have a history of deception or lying
- a K F was described as an overall happy person
- 23 b K F was not described as being dishonest
- 24 c K F understands the difference between telling the truth and telling a lie

CHILD HEARSAY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 I(d)
AND JuCR7 11- 2

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- d K F understands that there are consequences for lying
- e Under the circumstances of the disclosures, K F did not appear to be lying to get attention

- 9 K F disclosed to more than one person She made the disclosure to her mother, Ms Forward, Officer Thompson, and Ms Neeb
 - a Ms Forward was the only person present when the initial disclosure was made
 - b Officer Thompson was the only person present when K F described the details of the sexual assault to him
 - c The Court finds Officer Thompson's testimony credible
 - d The Court finds Ms Forward's testimony credible Her testimony was thoughtful and practical

10 The Court finds K F 's testimony credible

11 The Court finds Christopher Forward, Sr 's testimony credible His testimony was thoughtful and practical

12 The Court finds Officer Michael Thompson's testimony credible

13 K F 's initial disclosure to Ms Forward was spontaneous and was not prompted by leading questions The disclosure of the sexual assault was triggered by the possibility that it would happen again K F realized that possibility and that it could not be ignored and that she needed to disclose K F was the one who initiated the conversation and brought up the issue of the sexual assault

14 K F 's statements to Officer Thompson were spontaneous and not in response to leading questions The officer asked open-ended questions, and K F responded with detailed answers

15 K F 's statements to Ms Forward and Officer Thompson were timely Even though there was a significant lapse in time between the disclosure and the sexual assault, K F did not have a sense of danger until she saw Antonio Cabine-Matthews again The reintroduction of Cabine-Matthews into K F 's life caused her to revive her concern and prompted the basis for her disclosure

16 K F was under the age of 10 when she disclosed to Ms Forward and Officer Michael Thompson

17 K F is competent She was available for trial and testified during the proceedings

CHILD HEARSAY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
AND JuCR7 11- 3

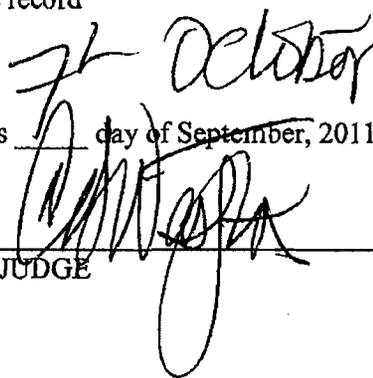
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Juvenile Court
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Seattle Washington 98122
(206) 296-9025, FAX (206) 296 8869

1 And having made those Findings of Fact, the Court also now enters the following

2 CONCLUSIONS OF LAW

- 3 1 The above-entitled court has jurisdiction of the subject matter and of respondent, Antonio
4 Cabine-Matthews in the above-entitled cause
- 5 2 The Court finds that the Ryan factors have been met and that K F 's statements to Akia
6 Forward and Officer Michael Thompson are admissible under the Child Hearsay
7 Exception RCW 9A 44 120
- 8 3 The time, content and circumstances of the statements by complaining witness, K F , to
9 Akia Forward and Officer Michael Thompson provide sufficient indicia of reliability
10 The Court concludes that the statements made by K F were reliable
- 11 4 Judgment should be entered in accordance with Conclusion of Law three In addition to
12 these written findings and conclusions, the court hereby incorporates its oral findings and
13 conclusions as reflected in the record

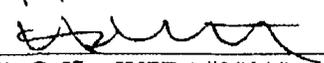
14 DONE IN OPEN COURT this 7th day of September, 2011

15 
16 _____
17 JUDGE

18 Presented by

19 
20 _____
21 Monique Cohen, WSBA #42129
22 Deputy Prosecuting Attorney

23 Respondent

24 *copy received*


Hollie Giffin, WSBA#35015
Attorney for Respondent

CHILD HEARSAY FINDINGS OF FACT AND
CONCLUSIONS OF LAW PURSUANT TO CrR 6 1(d)
AND JuCR7 11- 4

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APPENDIX C

FILED
KING COUNTY WASHINGTON
OCT 7 - 2011
SUPERIOR COURT CLERK
BY JOVELITA V. AVILA
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

8	STATE OF WASHINGTON,)	
)	
9		)	Plaintiff,
		)	No 11-8-00736-9
10	vs)	
		)	FINDINGS OF FACT AND
11	ANTONIO CABINE-MATTHEWS,	)	CONCLUSIONS OF LAW
	DOB 4/4/1993	)	PURSUANT TO CrR 6 1(d) AND JuCR
12		)	7 11
)	
13		)	Defendant
)	
14)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding on August 1, 2011 and August 2, 2011, before Judge Chris Washington in the above-entitled court, the State of Washington having been represented by Deputy Prosecuting Attorney Monique Cohen, the respondent appearing in person and having been represented by his attorneys, Holli Giffin, ACA and Steve Rommel, Rule 9, the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

I

The following events took place within King County, Washington

1 Antonio Cabine-Matthews, lived with his mother, Akia Forward (victim's and
22 respondent's mother), sister, K F (born 2000), Christopher Forward, Sr (step-father), and
23 C F during May 2007 through October 2007 The residence is located at 2223 Benson
24 Road South #I-101 in Renton, Washington

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 1

Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
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1 2 In approximately October 2007, the respondent was sent to live with his aunt, Lorena
2 Quintanilla de Jimenez, in Portland because of his anger issues

3 3 Antonio Cabine-Matthews was born on April 4, 1993 and was therefore fourteen years
3 old during the period of time intervening between May 2007 and December 2007

4 4 K F was born on August 8, 2000, and was therefore six and seven years old between
5 May 2007 and December 2007

6 5 While the respondent lived at the Renton home and the while parents were away from the
6 home running errands, the respondent would watch the two younger children He babysat
7 the younger children K F and C F a half a dozen times while Ms Forward ran errands or
7 left the house The children were in the sole custody of the respondent during the time
8 Ms Forward left the house

9 6 One day between September and October of 2007, K F was at home with her brothers,
9 C F and Antonio Cabine-Matthews

10 7 K F was in her parent's bedroom watching television while laying on the bed, when the
11 respondent entered the bedroom K F said hello and Antonio Cabine-Matthews did not
11 respond

12 8 The respondent walked over to K F where she was lying on the bed

13 9 The respondent took off his pants and underwear K F could see the respondent's penis

14 10 The respondent then put his penis inside of K F 's vagina Antonio Cabine-Matthews had
15 sex with K F

16 11 K F did not tell the respondent to stop, because she did not understand what he was
16 doing at the time

17 12 The respondent stopped having sex with K F and put his clothes back on He left the
18 room and K F went back to watching cartoons

19 13 A couple of days later, K F told the respondent that she was going to tell 'mommy' (Akia
19 Forward) The respondent told K F not to tell mommy K F did not disclose the incident
20 at that time

21 14 Both Christopher Forward and Ms Forward noticed a drastic change in K F 's demeanor
21 around age 6 and around the time of the abuse Prior to the change in her demeanor, K F
22 idolized the respondent They would often play video games together while they lived
22 together However, K F became very depressed and she was not acting like her usual
23 self Ms Forward and her husband took K F to therapy where she told the counselor that
23 she wanted harm herself Ms Forward asked K F about this statement and that was
24 when K F told Ms Forward about the sexual assault

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 2

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1 15 Mr Forward and Ms Forward noticed a change in K F 's demeanor in 2007 Although
 2 her demeanor appeared to completely change around the incident, she did not say
 3 anything to anyone, at first K F was sad and depressed, prompting her mother, Ms
 4 Forward, to ask if there was anything that K F wanted to talk about K F then told her
 5 mother in 2010, what the respondent had done to her when he lived with the family in
 6 Renton

7 16 In June or July 2010, K F and Ms Forward drove down to Portland, Oregon to see the
 8 respondent after he had been released from detention on an unrelated charge

9 17 After visiting the respondent in the summer of 2010, K F DOB 8/8/2000 told her mother,
 10 Ms Forward, that the respondent, Antonio Cabine-Matthews DOB 4/4/1993, had sex
 11 with her when he previously lived with them K F told her mother about the sexual
 12 assault, while Ms Forward was doing K F 's hair at home

13 18 K F and the respondent are brother and sister

14 19 On July 7, 2010 Akia called the K F 's doctor's office at Valley Children's Clinic to make
 15 an appointment and the clinic also told her to notify the police Ms Forward
 16 immediately notified the Renton Police Department

17 20 On July 7, 2010, Renton Police Officer Michael Thompson responded to Ms Forward's
 18 phone call and asked her to bring K F to the Renton Police Department Officer
 19 Thompson spoke with K F and Ms Forward was initially present Officer Thompson
 20 noticed that K F looked uncomfortable and asked her if she would be more comfortable
 21 if her mother left the room K F indicated that she would be more comfortable Officer
 22 Thompson asked Ms Forward if it would be all right to speak with K F alone After Ms
 23 Forward left the room, K F told the officer about the incident that occurred

24 21 K F told the officer that the respondent walked into the bedroom where K F was
 watching TV He then walked over to where she was lying on the bed The respondent
 took off his pants and underwear K F could see Antonio's private parts K F explained
 that the respondent's private parts were where his underwear covered his body She then
 said that the respondent started having sex with her When the respondent was done, he
 put on his clothes and left the room

22 22 Officer Thompson asked K F what having sex meant and she said that the respondent put
 his private parts inside her private parts The officer then asked where her private parts
 were and she said it is what her underwear covered K F said that her private parts were
 called her vagina and that the respondent's private parts were called the "D" word K F's
 use of the term "D" word means the same as penis *Officer Thompson also testified that the*
victim reported there was no pain or fluids as part of the incident

23 23 Ms Forward informed Officer Thompson that a couple of weeks prior the family went to
 visit the respondent when he was released from jail in Portland, Oregon K F was with
 her at the time, and immediately, K F became very clingy and shy while they were with
 the respondent

AMW

FINDINGS OF FACT AND CONCLUSIONS OF LAW
 PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 3

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1
2 24 On July 8, 2010, Ms Forward took K F to Valley Children's Clinic for an exam The
3 doctor did not do an internal exam at the time, because they thought it would be too
4 traumatic for K F
5 25 On October 10, 2010, Detective Catherine Citron spoke with the respondent and took a
6 telephonic statement from him
7 26 On October 14, 2010, K F met with Forensic Child Interviewer Michelle Neeb
8 Detective Citron watched the interview from the observation room K F said it was better
9 to tell the truth because if people lie you get into trouble and she promised to tell the
10 truth K F appeared very uncomfortable talking about the subject of sexual assault She
11 also indicated that what she told the officer was true and she remembered talking to the
12 officer
13 27 In July 2011, Ms Forward (victim's and respondent's mother) made multiple calls to the
14 State, defense counsel, and the victim's advocate indicating that the victim told her that
15 she dreamed the incident occurred *The victim testified she did not dream these events*
16 28 During a defense interview on July 26, 2011, the victim was asked about this dream The
17 victim said that she did not say anything to her mom about a dream and all her mom
18 wants to do is get her child out of jail The victim also indicated that what she previously
19 told Officer Thompson was true
20 29 K F's statement during her defense interview with Hollis Giffin and Iris Anderson was not
21 inconsistent with her testimony or prior disclosure K F's reports about sexual abuse were
22 consistent
23 30 The Court finds K F's testimony credible Although there was an apparent difficulty in
24 talking about the incident, K F was not dissuaded from saying what the respondent did to
25 her The Court also finds K F's reports to her mother and Officer Thompson credible
26 31 The Court finds that K F did not have any motive to make up a story about Antonio
27 Cabine-Matthews sexually assaulting her K F did not have a motive to lie
28 32 The Court finds that K F did not make up the incident, based on the observations of her
29 demeanor in the courtroom K F's demeanor on the stand was problematic and difficult at
30 times, but when she made the decision to speak up, K F never said that she made it all
31 up Her responses were restricted to silence and low volume at times
32 33 K F was consistent with her initial disclosure to multiple people and on the witness
33 stand
34 34 The Court finds Akia Forward is a credible witness Ms Forward wanted to believe that
the rape did not happen and may have worked harder than a neutral person to believe that

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 4

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it did not happen Ms Forward was candid in how she handled the situation and gave consistent testimony, even though it was difficult to do

35 The Court finds Christopher Forward, Sr is a credible witness

36 The Court finds that the respondent had sexual intercourse with K F at least once during the period of time intervening between August 8, 2005 and December 31, 2007

37 The respondent was 14 years old at the time of this incident and K F was only six or seven years old The respondent is seven years older than K F

38 Antonio Cabine-Matthews and K F , were not married to each other during the period of time intervening between August 8, 2005 and December 31, 2007

39 The sexual intercourse occurred in King County, Washington

40

And having made those Findings of Fact, the Court also now enters the following

CONCLUSIONS OF LAW

I

The above-entitled court has jurisdiction of the subject matter and of the Respondent, ANTONIO CABINE-MATTHEWS, who was born on 04-04-1993, in the above-entitled cause

II

The State has proven the following elements of Rape of a Child in the First Degree, contrary to RCW 9A 44 073 and as charged in Count 1 of the information, beyond a reasonable doubt

- a That during a period of time intervening between August 8, 2005 and December 31, 2007, the respondent had sexual intercourse with K F (DOB 8/8/2000) to wit Antonio Cabine-Matthews inserted his penis into K F 's vagina, causing penetration,
- b That K F was less than twelve years old at the time of the sexual intercourse and was not married to the respondent,
- c That K F was at least twenty-four months younger than the respondent at the time the sexual intercourse occurred,
- d The respondent was over the age of 12, and
- e That the acts occurred in King County, Washington

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 5

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III

In making these findings, the court relied upon testimony of witnesses and evidence introduced at trial

IV

The respondent is guilty of Count I, the crime of Rape of a Child in the First Degree

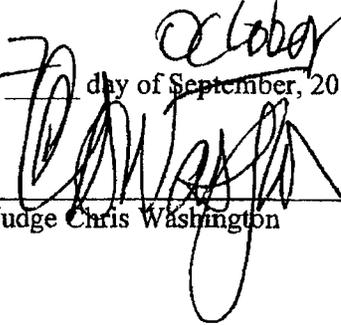
The respondent is not guilty of Count II, the crime of Rape of a Child in the First Degree

V

Judgment should be entered in accordance with Conclusion of Law IV

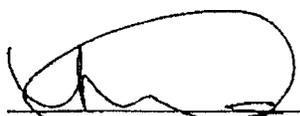
In addition to these written findings and conclusions, the Court hereby incorporates its oral findings and conclusions as reflected in the record

DONE IN OPEN COURT this ^{October} ~~7~~ day of ~~September~~, 2011



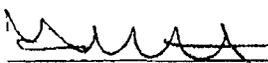
Judge Chris Washington

Presented by



Monique Cohen, WSBA #42129
Deputy Prosecuting Attorney

Respondent

COPY received


Hollie Giffin, WSBA #35015
Attorney for Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6 1(d) and JuCR 7 11 - 6

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
	)	NO. 67561-3-I
v.)	
)	
ANTONIO C-M.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] ANTONIO C-M. 7601 HEREFORD AVE. APT #4 PORTLAND, OR 97203	(X) () ()	U.S. MAIL HAND DELIVERY _____

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 21 PM 4:16

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MARCH, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
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