IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. A.C-M., DOB: 04/04/93, Appellant.	)	No. 67561-3-I DIVISION ONE UNPUBLISHED OPINION FILED: September 24, 2012

Becker, J. — C-M was convicted in juvenile court of one count of first degree child rape. On appeal, we conclude the court did not abuse its discretion in finding the child witness competent to testify and in admitting the child's hearsay statements. The evidence was also sufficient to support the conviction. We therefore affirm.

FACTS

The State charged C-M in juvenile court with two counts of first degree child rape. At the adjudication hearing in August 2011, the State presented evidence that in about June 2007, 14-year-old C-M moved into the Renton home where his mother Akia lived with her husband. C-M's half-sister KF, who was nearly 7, also lived in the home. In October 2007, after a fight with his mother, C-M returned to live in his aunt's home in Portland.

In the summer of 2010, Akia and KF traveled to Portland to visit C-M, who had

been arrested on an unrelated rape charge. While in Portland, Akia noticed that KF became more attached to her than usual, particularly after C-M was released from jail.

About a week after returning from Portland, Akia was helping KF with her hair when KF indicated that C-M had "molested" her. Akia hugged KF, who cried and seemed concerned that Akia would be mad at her. KF did not provide any further details about the incident.

After a day or two, Akia asked KF if she wanted "to stick by what she told me" and if she wanted to do anything about it. KF said she wanted to report the incident and get help for C-M.

On July 7, 2010, Akia called the Renton Police Department and brought KF to the station later that day. At the station, KF was generally shy and reluctant to talk. In Akia's presence, she started to tell Officer Michael Thompson about an incident two years earlier when her parents were away and she was watching cartoons in their bedroom. But KF stopped completely when she came "to the uncomfortable part."

At this point, Akia allowed Officer Thompson to speak with KF alone. According to Thompson, KF indicated that C-M came into the bedroom and removed his pants and underwear. KF said she could see C-M's "private parts," which she described as the "D word" and the area covered by his underwear. C-M then got on top of her and "had sex with her." Afterwards, C-M put his clothes back on and left. Several days later, C-M told KF not to tell their mother about the incident.

KF told Thompson that sex meant "putting private parts in . . . her private parts" and that her private parts were called her vagina. KF also indicated she did not experience pain or notice fluids. KF did not provide any further details.

In the fall of 2010, KF spoke with Michelle Neeb, an interviewer for the King County Prosecutor's Office. KF told Neeb she was five-years-old when "something" happened, but gave no further explanation.

Akia testified that KF had recently asked her whether it was possible she had been wrong about the incident and seemed adamant it might have been a dream. Akia acknowledged she was "torn" about having to testify:

> It's impossible for me to pick a side. I want to believe both of them, but that's not possible.

KF, who was nearly 11 at the time of the adjudication hearing, testified she was now living in Kent, but recalled attending school for 2 or 3 years while she lived in Renton. She confirmed she told her mother, Officer Thompson, and the deputy prosecutor the truth about what C-M had done to her, but remained silent when asked to describe the abuse or C-M's actions. She explained she did not want to talk about the incident and that "everything" about the incident made her "mad."

With difficulty, KF reviewed the statement she had given Officer Thompson and acknowledged telling him that C-M had taken off his pants and underwear, that she could see his private parts, that C-M put his privates in her privates, that she did not tell C-M to stop because she did not know what he was doing, that she resumed watching cartoons when C-M left, and that C-M later told her not to tell their mother. She insisted the abuse happened, was not a dream, and occurred multiple times.

At the conclusion of the adjudicatory hearing, the court determined that KF was competent to testify and that her hearsay statements to her mother and Officer Thompson were sufficiently reliable to be admitted under RCW 9A.44.120. The court

entered written findings of fact and conclusions of law supporting both rulings. The court found C-M guilty of one count of first degree child rape and acquitted him of the second count.

DECISION

KF's Competency

C-M contends the juvenile court erred in concluding that KF was competent to testify. In particular, he asserts the court failed to address whether KF had the mental capacity to receive an accurate impression at the time of the alleged abuse.

In Washington, all persons are presumed competent to testify regardless of their age. State v. S.J.W., 170 Wn.2d 92, 102, 239 P.3d 568 (2010). The party challenging the competency of a child witness bears the burden of rebutting the presumption with evidence establishing one of the statutory grounds for incompetency set forth in RCW 5.60.050, including an inability "of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2); see also S.J.W., 170 Wn.2d at 102. The following factors continue to guide the trial court's determination of a child witness's competency:

> "(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 he 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 his memory of the occurrence; and (5) the capacity to understand simple questions about it."

In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998), quoting State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). "The competency of a youthful witness is not easily reflected in a written record, and we must rely on the trial judge

who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). Consequently, an appellant court reviews the trial court's determination of competency for a manifest abuse of discretion. Woods, 154 Wn.2d at 617.

On appeal, C-M challenges only the second Allen factor. He contends the juvenile court failed to determine whether KF had the necessary mental capacity at the time of the alleged offense and improperly focused on KF's ability to perceive events at the time of her testimony. The record fails to support C-M's argument.

The juvenile court found "there was no evidence that KF did not have an accurate impression of what was occurring in the Renton home." In conjunction with this finding, the court also determined that KF had accurately testified in some detail about her former home.

By the time of the adjudicatory hearing, KF had moved to Kent and was attending a different school. But she was clearly able to differentiate the two residences. KF identified the occupants of the Renton home, including C-M, the general location of some of the rooms, and the specific number and location of the bedrooms and the television sets. KF also identified the school she attended and associated the grades she attended with the period that she lived in Renton. Several witnesses corroborated the accuracy of KF's testimony on these matters. KF's ability to recount contemporaneous circumstances supports an inference that she could accurately perceive the alleged abuse as well. See Dependency of A.E.P., 135 Wn.2d at 225.

Contrary to C-M's assertion, the court clearly determined that KF had the

necessary mental capacity at the time of the alleged offense. The evidence supports that determination. The court did not abuse its discretion in permitting KF to testify.

Child Hearsay

C-M contends the juvenile court erred in admitting KF's hearsay statements to her mother and Officer Thompson under RCW 9A.44.120(1). An out-of-court statement by a testifying child victim is admissible under RCW 9A.44.120(1) if the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." In determining the reliability of child hearsay, a court considers nine nonexclusive factors, including (1) whether the declarant had an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statement, (4) the spontaneity of the statement, (5) the timing of the declaration 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 possibility of the declarant's recollection being faulty, and (9) whether the circumstances suggest the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The court considers the foregoing factors as a whole; no single factor is decisive. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). We review the trial court's determination of reliability solely for a manifest abuse of discretion. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995).

(1) Motive To Lie

KF was clearly reluctant to talk about the incident. There is no evidence that she was in trouble, attempting to avoid punishment, or seeking to gain some other benefit from fabricating the charges. The record supports the juvenile court's finding that KF had no motive to lie about the abuse.

C-M suggests that KF lied because she was angry when he moved out in 2007 and that Akia's explanation of the unrelated rape charges "likely planted the idea in KF's head." Neither suggestion is persuasive or finds any support in the record. Given her mother's concerns about the incident, KF arguably had more to gain by withdrawing the allegations, which she declined to do at the adjudication hearing.

(2) Declarant's General Character

The court found KF did not have a history of deception or lying. The court noted she understood the importance of telling the truth and that there was no evidence she was generally dishonest or fabricated the abuse in order to gain attention.

C-M points to a single incident in which Akia suggested KF may have lied when she said a teacher hurt her while grabbing her arm. But Akia acknowledged the teacher had in fact grabbed KF's arm. At this point, the court determined that any further testimony on the incident was irrelevant, a ruling C-M does not challenge. Under the circumstances, the record supports the court's determination that KF had no meaningful history of deception. Contrary to C-M's contentions, the mere fact that portions of KF's testimony may have been inconsistent or contradicted does not support an inference she had a reputation for not telling the truth. See State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999).

(3) Statements Heard by More than One Person

C-M contends this factor was not established because only KF's mother heard the initial report. But KF made similar statements to her mother and Officer Thompson. This satisfied the third Ryan factor. See Lopez, 95 Wn. App. at 853 (similar statements to different people on different occasions satisfies this factor).

(4) Spontaneity of Statements

C-M acknowledges that KF's statement to her mother was spontaneous, but argues the evidence fails to support the court's finding that Officer Thompson used open-ended questions. See State v. Borland, 57 Wn. App. 7, 15, 786 P.2d 810 (1990) (spontaneous for purposes of the Ryan analysis includes responses to questions that are neither leading nor suggestive), review denied, 114 Wn.2d 1026 (1990). The record indicates Thompson generally asked opened-ended questions to elicit KF's understanding of what she saw and what C-M did. C-M presents no meaningful argument to the contrary.

(5) Timing of the Statement and the Relationship Between the Declarant and the Witness

C-M contends this factor does not support reliability because KF did not report the incident for three years. But the court reasonably concluded that KF's Portland visit with C-M under unusual circumstances could well have prompted the disclosure. Nor does the fact KF first disclosed the abuse to her mother undermine the statement's reliability. Akia was the mother of both the declarant and the alleged perpetrator, and she fully acknowledged the difficulty and conflict she faced in testifying. Under the circumstances, she was likely reluctant to convey inaccurate statements from the

declarant. See Borland, 57 Wn. App. at 15. KF's statement to Officer Thompson also bore indicia of enhanced reliability. Lopez, 95 Wn. App. at 853 (presence of professionals investigating child abuse enhances reliability of statements).

C-M acknowledges the remaining Ryan factors are either not significant under the specific circumstances of this case or are essentially encompassed within the first five Ryan factors. See Borland, 57 Wn. App. at 16-19; see also State v. Henderson, 48 Wn. App. 543, 551 n.5, 740 P.2d 329 (final four Ryan factors are often "not very helpful" in assessing the reliability of child hearsay), review denied, 109 Wn.2d 1008 (1987).

The relevant factors support the juvenile court's conclusion that the hearsay statements were reliable and admissible. We find no abuse of discretion.

Sufficiency of the Evidence

C-M contends the State failed to prove he had sexual intercourse with KF and the evidence was therefore insufficient to establish first degree child rape. See RCW 9A.44.073(1). We disagree.

KF's statements support an inference that C-M came into the bedroom where she was watching television, removed his pants and underwear, laid on top of her, and then placed his penis into her vagina. Viewed in the light most favorable to the State, the evidence was sufficient to permit the trier of fact to find beyond a reasonable doubt that C-M had sexual intercourse with KF. See RCW 9A.44.010(1)(a); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

C-M points to the lack of direct evidence of sexual intercourse, KF's delay in reporting the abuse, and inconsistencies or contradictions in the evidence. But these allegations all involve credibility issues that this court cannot review on appeal. They do not undermine the legal sufficiency of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (appellate court defers to the trier of fact on issues of credibility, conflicting testimony, and persuasiveness of the evidence), review denied, 141 Wn.2d 1023 (2000).

C-M also contends the State has conceded the insufficiency of the evidence because it failed to specifically address this assignment of error in its response brief. But we need not decide whether the State's omission constituted a concession, because even if it did, we would decline to accept it. See In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 875, 50 P.3d 618 (2002) (appellate court not bound by erroneous concession of legal error).

Affirmed.

Becker, J.

WE CONCUR: