IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. T.T., Appellant.	No. 38636-4-II UNPUBLISHED OPINION

Penoyar, J. — TT appeals his adjudication of guilt in juvenile court for one count of first degree child rape. The count involved SJS, who was six years old at the time of trial. SJS disclosed the alleged sexual abuse to his foster mother and then to a child abuse investigator, both of whom testified about SJS's disclosures. TT argues that SJS did not "testify" under RCW 9A.44.120 because the State failed to ask SJS about his prior out-of-court statements; thus, TT contends, the admission of testimony about SJS's out-of-court statements violated TT's rights under the confrontation clause of the state and federal constitutions. We agree, reverse TT's conviction, and remand for further proceedings.

FACTS

The State charged TT with one count of first degree child rape.[1] Before trial, the court found six-year-old SJS competent to testify. At trial, the State called SJS to the stand and asked him several questions. The State asked SJS questions about the underlying event, but SJS did not describe the act of alleged sexual contact that he had described in his prior out-of-court statements. The State did not, however, ask SJS about these prior out-of-court statements to his

[1] RCW 9A.44.073.

foster mother, Jennifer Coombs, or to the child abuse investigator, Shellee Stratton.

Coombs's and Stratton's testimony constituted the sole evidence implicating TT as the perpetrator. The trial court admitted the hearsay under the child hearsay statute, RCW 9A.44.120. The trial court found TT guilty of first degree child rape. The trial court imposed a manifest injustice disposition of 88 to 104 weeks. TT timely appeals.

ANALYSIS

TT argues that admitting Coombs's and Stratton's testimony about SJS's out-of-court statements violated the confrontation clauses of the federal and state constitutions. Because the State did not ask SJS about his out-of-court statements to his foster mother or the child abuse investigator, we agree.

Whether the admission of testimony about SJS's statements violated TT's confrontation rights is a constitutional question that we review de novo. *See State v. Price*, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006). The Sixth Amendment's confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Article I, section 22 of the Washington State Constitution also protects the right of the accused to confront witnesses against him.

The admissibility of a child's statement to others relating to alleged sexual abuse is also governed by statute:

> 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 . . . not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
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> (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.

There is no confrontation clause violation where the declarant (here SJS) is a witness at trial, be asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross-examination. *State v. Clark,* 139 Wn.2d 152, 159, 985 P.2d 377 (1999). "[W]hen a witness is asked questions about the events at issue and about his or her prior statements, but answers that he or she is unable to remember the charged events or the prior statements, this provides the defendant sufficient opportunity for cross-examination to satisfy the confrontation clause." *Price*, 158 Wn.2d at 650. The opportunity for cross examination, however, "requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses." *State v. Rohrich*, 132 Wn.2d 472, 478, 939 P.2d 697 (1997).

In *Price*, the State asked the victim questions about the underlying events and what she had told her mother and a detective about the defendant. 158 Wn.2d at 635-36. The victim answered "[m]e forgot" when asked about the sexual contact and shrugged when asked about her out-of-court statements. *Price*, 158 Wn.2d at 635-36. Our Supreme Court applied the rule from *Clark* because the prosecutor did not shield the child victim from questions about the alleged sexual acts or the prior statements. *Price*, 158 Wn.2d at 648. To satisfy the *Clark* test, the prosecutor must ask the witness about both the underlying events and his prior statements. *Price*, 158 Wn.2d at 648. Further, the defendant must have an opportunity for full cross-examination.

Price, 158 Wn.2d at 648.

Here, the State did not ask sufficient questions about SJS's prior statements to satisfy the *Clark* test. The State did ask SJS questions about the underlying event, but SJS did not describe the act of alleged sexual contact that Coombs and Stratton reported. SJS testified on direct examination that TT babysat him at Ocean Shores and did something while they were alone to make him angry. SJS testified that he "forgot" what TT did, but he also testified that something happened in the room where he stayed at Ocean Shores. Report of Proceedings (RP) (Sept. 23, 2008) at 108. SJS said that TT did not ask SJS to take any clothing off nor did TT take any of SJS's clothing off, but TT removed his own clothing. SJS testified that he did not remember seeing any part of TT's body that he did not normally see, and TT did not tell SJS not to tell anybody anything after "whatever happened." RP (Sept. 23, 2008) at 109.

The juvenile court then asked SJS if he went to Ocean Shores with his mom and TT, and SJS responded yes. The juvenile court asked SJS what happened at Ocean Shores. SJS responded, "I forgot." RP (Sept. 23, 2008) at 123. The juvenile court said, "Tell me everything you remember about Ocean Shores on that trip. I want you to tell me everything you remember. Tell me the truth, now." RP (Sept. 23, 2008) at 123. SJS answered, "I played at the beach, and I went in the water and I threw rocks in the water, and I played in the sand, and that's all I can remember." RP (Sept. 23, 2008) at 123. The juvenile court then stated, "Tell me everything you remember about when you were in your room at Ocean Shores in the hotel." RP (Sept. 23, 2008) at 123. SJS replied, "I went to sleep, and I ate food and lunch and breakfast." RP (Sept. 23, 2008) at 123. SJS then denied ever being alone in the room with TT.

The foregoing examination was sufficient to allow TT to examine SJS on the facts of the

abuse itself. However, the State never asked SJS about his prior statements to Stratton or Coombs.[2] Because SJS was not asked about and did not testify about his prior out-of-court statements, we hold that he did not "testify" as to them as required under RCW 9A.44.120(2)(a). Accordingly, admitting SJS's statements to Coombs and Stratton violated RCW 9A.44.120 and TT's rights under the confrontation clauses of the federal and state constitutions.

TT argues that "[b]ecause there was no other evidence, other than the improperly admitted hearsay, the conviction should be reversed and the charge dismissed with prejudice." Appellant's Br. at 56. If the evidence, including that erroneously admitted, was insufficient as a matter of law, the double jeopardy clause entitles TT to dismissal with prejudice. *See State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Otherwise, he is entitled only to a new trial. *Stanton*, 68 Wn. App. at 867. Evidence is sufficient when any rational trier of fact could find the elements of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). We hold that the evidence at the first trial, including the erroneously admitted hearsay, was sufficient to find the elements of first degree child rape beyond a reasonable

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[2] The trial court and defense counsel also did not ask SJS about his out-of-court statements. At one point, defense counsel asked SJS if his foster mother had ever asked him about TT; however, defense counsel did not directly ask SJS about his prior statements to Coombs.

> Q [Defense Counsel]: Did your mommy Jennifer [Coombs] say bad things about [TT]?
> A [SJS]: No.
> Q: Has she talked to you about [TT]?
> A: No.
> Q: Has she asked you any questions about [TT]?
> A: No.

RP (Sept. 23, 2008) at 115. The State must elicit testimony from the hearsay declarant regarding the prior statements. *Rohrich*, 132 Wn.2d at 478.

doubt. Accordingly, we reverse and remand for further proceedings.

TT raises other issues that we do not address because, based on the violation of TT's confrontation rights, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Van Deren, J.