

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28987-7-III

Respondent,

)

)

) **Division Three**

v.

)

)

JAVIER R. LOBOS,

) **UNPUBLISHED OPINION**

)

Appellant.

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)

Kulik, C.J. — Javier R. Lobos appeals his conviction for first degree child molestation. He assigns error to several decisions made at the competency hearing, the juvenile adjudication, and the motion for revision. We affirm the orders of the juvenile court and superior court in all respects.

FACTS

In early April 2009, six-year-old A.K.T. spent the weekend with her father, Jered Taylor. During the visit, A.K.T. and Mr. Taylor stayed overnight at the home of Rodrigo Lobos (Rod Lobos) and his son, 14-year-old Javier Lobos (Mr. Lobos). At the end of the weekend, A.K.T. returned to her mother's home. A.K.T.'s mother, Terri Taylor, noticed

that A.K.T. slept for several hours after she came home. That evening, A.K.T. refused to allow Ms. Taylor to wipe A.K.T. after a bowel movement. Ms. Taylor considered both of these events to be unusual behavior for A.K.T.

On the following Wednesday morning, April 8, 2009, Ms. Taylor was getting A.K.T. ready to take a bath. A.K.T. asked Ms. Taylor to shut the door because she did not want her brother to hear her conversation. A.K.T. told her mother that she thought she (A.K.T.) had a boyfriend. Ms. Taylor questioned A.K.T. as to who A.K.T. thought was her boyfriend. A.K.T. responded that it was Mr. Lobos. Ms. Taylor asked A.K.T. what Mr. Lobos did that made her think he was her boyfriend and A.K.T. replied that he picked her up and carried her into his bed. Ms. Taylor became nervous and upset. She dropped the matter, intending to discuss it further after work and school.

That evening, Ms. Taylor asked A.K.T. to come sit with her. Ms. Taylor reminded A.K.T. of the conversation that morning and asked if anything else happened after Mr. Lobos put her into his bed. A.K.T. said that Mr. Lobos had put his hand up her shirt and touched her boobies, he kissed her, he touched her butt, and made her get on top of him. A.K.T. also told her mother that Mr. Lobos asked A.K.T. to touch his penis, but she refused. The following day, Ms. Taylor reported the matter to law enforcement.

On April 15, Ms. Taylor took A.K.T. to the Sexual Assault Response Center

(SARC) to be interviewed by a trained specialist, Mari Murstig. A.K.T. told Ms. Murstig that she knew the difference between a truth and a lie. A.K.T. promised to tell the truth. She told Ms. Murstig that Mr. Lobos had forced her into his room. He told her to sit on top of him, he put his hands under her clothes and touched her bottom and her boobies, kissed her on the lips, and put his tongue in her mouth. A.K.T. also told Ms. Murstig that Mr. Lobos's penis was touching her bottom and it felt weird. Mr. Lobos asked A.K.T. to touch his penis but she did not.

In the week following A.K.T.'s initial conversation with her mother, A.K.T. made two other disclosures to Ms. Taylor. The first disclosure came after A.K.T. put her tongue in her mother's mouth during a kiss. A.K.T. never kissed her mother with her tongue before. Ms. Taylor asked if this was something that Mr. Lobos had done and A.K.T. replied yes.

In the second disclosure, A.K.T. was sitting on the couch and Ms. Taylor was standing in the dining room. A.K.T. told Ms. Taylor that there was something she forgot to tell Ms. Taylor. A.K.T. said that Mr. Lobos was doing stuff to her when the adults got home and that is when he got off the bed. A.K.T. also told her mother that Mr. Lobos told her not to tell anyone.

Competency and Child Hearsay Hearing (Juvenile Court). Mr. Lobos was

charged with first degree child molestation. The juvenile court held a hearing to determine if A.K.T. was competent to testify at trial, if A.K.T.'s hearsay statements were admissible, and if the digital video disc (DVD) recording of the interview with Ms. Murstig was admissible. The juvenile court determined that A.K.T. knew the difference between a truth and a lie, had no motive to lie, made consistent statements regarding the abuse to multiple people, and was generally an honest person. The juvenile court deemed A.K.T. competent to testify.

The juvenile court also determined that four of the five statements made by A.K.T. were either spontaneous or the result of nonleading questions and, therefore, were admissible. These statements included (1) A.K.T.'s initial disclosure, (2) the comments A.K.T. made to her mother the same evening, (3) the interview with Ms. Murstig, and (4) A.K.T.'s comment about Mr. Lobos telling her not to tell anyone. The juvenile court also determined the DVD interview was admissible. However, the juvenile court found that the conversation between A.K.T. and her mother when A.K.T. kissed her mother with her tongue was not spontaneous. The juvenile court declined to admit this hearsay statement.

Trial in Juvenile Court (Juvenile Adjudication). A.K.T. testified at Mr. Lobos's juvenile adjudication. Both parties and the court agreed that A.K.T. would be situated so

A.K.T. could not see Mr. Lobos's face, but still be in a position where the juvenile court commissioner could observe A.K.T. during testimony. The juvenile court also allowed Mr. Lobos's attorney to relocate to a position where she could see A.K.T.'s face.

The juvenile court found Mr. Lobos guilty of first degree child molestation. The findings of fact recounted A.K.T.'s testimony, which corresponded to A.K.T.'s earlier pretrial statements. The juvenile court also found that Mr. Lobos's actions were considered sexual contact, but did not specifically include a finding that Mr. Lobos's motive for the contact was sexual gratification. Mr. Lobos sought revision of the juvenile court's ruling.

Revision Hearing in Superior Court. A motion for revision places the superior court in the position of the appellate court. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999). The superior court determined that a finding of sexual gratification was an ultimate fact needed to support the charge of first degree child molestation. Because the juvenile court's findings from the juvenile adjudication inferred that sexual gratification existed, the superior court remanded the case back to the juvenile court for clarification of the findings. The juvenile court amended the findings to include a finding of sexual gratification. The superior court then denied Mr. Lobos's motion for revision.

Appeal. Mr. Lobos appeals, asserting: (1) A.K.T. was not competent to testify, (2) admission of the DVD interview violated the confrontation clause, article I, section 22 of the Washington Constitution, (3) A.K.T.'s hearsay statements were inadmissible, (4) a mistrial was appropriate because an inadmissible statement was introduced at the juvenile adjudication, (5) the State failed to prove the ultimate fact of sexual gratification so remand to clarify the findings was not appropriate, (6) the State failed to prove that Mr. Lobos was 36 months older than A.K.T., (7) Mr. Lobos received ineffective assistance of counsel, and (8) the placement of A.K.T. while testifying at the juvenile adjudication violated the confrontation clause.

ANALYSIS

Competency. Appellate courts give great deference to the trial court's determination of a child's competency to testify, and the trial court's findings will not be disturbed absent proof of a manifest abuse of discretion. *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The entire record may be examined when a competency determination is appealed. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

A child witness is competent to testify if the child (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 the matter, (3) has a memory sufficient to

retain an independent recollection of the matter, (4) has the capacity to express in words her memory of the occurrence, and (5) has the capacity to understand simple questions about the occurrence. *Allen*, 70 Wn.2d at 692.

A child who has a “long-standing, often-observed inability to distinguish what was true from what was not” may be found incompetent. *State v. Karpenski*, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), *overruled on other grounds by State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003). But inconsistencies in a child’s testimony do not necessarily call into question witness competency. *State v. Carlson*, 61 Wn. App. 865, 874, 812 P.2d 536 (1991). Rather, such inconsistencies generally relate to the witness’s credibility and the weight to give to her testimony. *Id.*

In *Carlson*, the trial court did not abuse its discretion by finding that a three-year-old witness was competent where the child demonstrated her ability to distinguish between the truth and a lie, gave consistent testimony about the defendant’s acts, was able to testify accurately about her age and her friend’s names, and identify people in the courtroom. *See id.* at 874-75.

Mr. Lobos does not challenge any of the factual findings from the juvenile court’s competency hearing. Instead, he contends the juvenile court erred by not applying the *Allen* factors. He primarily challenges the court’s failure to properly apply the second

and third factors, contending that A.K.T. did not have the mental capacity to receive an accurate impression of the matter and that she lacked a sufficient memory to independently recall the incident. Mr. Lobos alleges that A.K.T.'s erroneous testimony that she played in the snow and that she carved pumpkins the day after the abuse means that A.K.T. could not accurately identify when the abuse occurred. Therefore, she should not have been deemed competent to testify.

Mr. Lobos relies heavily on *In re Dependency of A.E.P.*, 135 Wn.2d 208, 956 P.2d 297 (1998) to support his contentions. In *A.E.P.*, the court decided that it could not determine if A.E.P. had the mental capacity at the time of the alleged sexual abuse because the record did not establish the date or time period for the abuse. *Id.* at 223. A.E.P.'s hearsay statements did not indicate when the abuse happened, and she was never asked in the most general of time frames when the abuse took place. *Id.* at 223-24. The court stated that it could not begin to determine whether a child had the mental ability at the time of the alleged event if she had no idea of when the alleged event occurred. *Id.* at 225. Additionally, A.E.P. gave confusing testimony as to who was her babysitter contemporaneous with the abuse. *Id.* at 224. The court stated that the confusing testimony showed that A.E.P. was unable to narrow the time frame for the abuse and raised questions concerning her capacity at the time of the abuse. *Id.* at 224-25. In

contrast, the court also noted that “[i]f the child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well.” *Id.* at 225 (citing *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987) (“So long as the witness demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well.”)).

Mr. Lobos misunderstands the holding in *A.E.P.* to mean that the time of abuse must be set forth in the record and “that record can only be established through the child’s testimony as to when the alleged abuse occurred.” Appellant’s Br. at 17. “While *A.E.P.* did state that the trial court must have a ‘time period’ during which the abuse occurred, *A.E.P.* does not require a young child to provide a specific date of the abuse in order for the court to make a determination of competency. Rather, *A.E.P.* reaffirms that a child’s ability to receive just impressions at the time of the abuse may be demonstrated by the child’s ability to recall events or circumstances occurring before the abuse or during the time period of the abuse.” *Woods*, 154 Wn.2d at 619.

In *Woods*, the Washington Supreme Court addressed a child’s inconsistent testimony. The child victim in *Woods* could not establish a specific time that the abuse

occurred. But she could describe that the abuse took place on an orange chair while her sister was at school, that some of the abuse happened when she was three years old, that her mother had moved out, and that she had to take the bus in order to visit her mother. *Id.* at 620-21. The court in *Woods* ruled that the child witness had the mental capacity at the time of the event to receive an accurate impression of the matter because the child could identify contemporaneous events and circumstances. *Id.* Both the child witness and her sister gave clear and consistent answers regarding the abuse and a general time frame could be established from the record. *Id.* The child's inconsistent testimony that her bedroom in her father's apartment was on the second floor, even though he lived in a single-story unit, went to the child's credibility and not to admissibility. *Id.* at 621.

In contrast to *A.E.P.*, and more like *Woods*, the date of the abuse between A.K.T. and Mr. Lobos can be established from the record. Based on her conversations with A.K.T., Ms. Taylor testified the abuse happened in April 2009, on the Saturday night prior to the Wednesday that A.K.T. made her first disclosure. Additionally, A.K.T. gave a time frame for the abuse by testifying that the abuse happened on her last visit to Mr. Lobos's residence. Therefore, a date of the abuse can be established from the record. At the competency hearing, the juvenile court used this timeline to judge A.K.T.'s mental capacity at the time of the abuse.

Additionally, as in *Woods*, A.K.T. gave accurate testimony regarding contemporaneous events. She testified that her father left her at Mr. Lobos's house with Mr. Lobos, A.K.T.'s cousin named Myles, and other children. She testified that Mr. Lobos carried her to his room, the same place where Mr. Taylor found A.K.T. on the evening of the abuse. A.K.T. also testified Myles and Mr. Lobos shared a bedroom. A.K.T. recalled events during the time period of the abuse and, therefore, showed she had the mental ability to receive an accurate impression at the time of the abuse.

The juvenile court found that the evidence supported the four other *Allen* factors. A.K.T. answered several questions showing she was able to distinguish the truth from a lie. She correctly indicated the questioner's shirt was black and green. She said it would be a lie to say the shirt was purple. She also said it would be a lie to say the day of the hearing was Christmas. She knew that Hannah Montana is a singer. When asked if Hannah Montana is a friend of hers or is on television, she replied that she is on television.

A.K.T. also told Ms. Murstig in the interview at SARC that it was better to tell the truth than a lie, so you would not get in trouble. Ms. Murstig showed A.K.T. a picture of a bear that A.K.T. correctly identified as a bear. When Ms. Murstig told A.K.T. that one boy said it was a bear and another boy said it was a book, A.K.T. correctly indicated that

the boy who said it was a book told a lie. A.K.T. promised to tell the truth. The juvenile court properly found that “A.K.T. knew the difference between the truth and a lie and there was no reason to question her character in relation to honesty.” Clerk’s Papers (CP) at 9.

The juvenile court also found that A.K.T. gave consistent accounts of the abuse to multiple people. The questions asked to A.K.T. were not misleading or suggestive. She also showed an ability to discuss unrelated events in her own words by testifying to her grade in school, her friend’s name and age, and events surrounding her latest birthday party.

A reviewing court places heavy reliance on the trial court’s judgment in assessing the competency of a child witness because the trial judge sees the witness and notices mannerisms that cannot be reflected easily in a written record. *Woods*, 154 Wn.2d at 617. At the competency hearing, A.K.T. demonstrated an ability to distinguish the truth from a lie, gave consistent testimony, and accurately recalled events contemporaneous with the abuse. The juvenile court did not abuse its discretion by determining that A.K.T. was competent to testify.

Child Hearsay. Admission of child hearsay statements is reviewed for an abuse of discretion. *Woods*, 154 Wn.2d at 623 (quoting *State v. Jackson*, 42 Wn. App. 393, 396,

711 P.2d 1086 (1985)).

RCW 9A.44.120 allows for the admission of child hearsay statements when the declarant is under the age of 10 and is the victim of sexual abuse, as long as the court conducts a hearing and finds that the statements provide sufficient indicia of reliability and the child testifies at the trial.

In determining the reliability of child hearsay statements, the court considers the nine *Ryan* factors: (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (quoting *State v. Parris*, 98 Wn.2d 140, 146, 654 P.2d 77 (1982)). Not every factor needs to be satisfied; it is enough that the *Ryan* factors are "substantially met." *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).

The juvenile court made several findings that directly satisfy the *Ryan* factors.

“The trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability.” *Id.* at 648.

(1) Apparent motive to lie. The juvenile court found that there was no apparent motive for A.K.T. to lie. “[A.K.T.] stated she liked [Mr. Lobos] and showed no ill will towards him.” CP at 9. Additionally, Ms. Taylor testified that A.K.T. always had a good time when visiting Mr. Lobos’s house.

(2) The general character of the declarant. The juvenile court found that A.K.T. knew the difference between the truth and a lie and there was no reason to question her character in relation to honesty. The juvenile court based this finding on Ms. Taylor’s testimony that A.K.T. does not lie or make up stories.

(3) Whether more than one person heard the statements. The juvenile court found that the statements were made to multiple people and that A.K.T.’s statements had been consistent throughout the number of times she had spoken about the incident. The juvenile court also made factual findings about A.K.T.’s conversations with her mother and the interview with Ms. Murstig at SARC. These findings show A.K.T. reported the same conduct to more than one person.

(4) The spontaneity of the statements. The juvenile court found that most of A.K.T.’s statements were spontaneous. Ms. Taylor’s general questions to A.K.T.

regarding the abuse did not inherently remove the spontaneity from A.K.T.'s statements.

In *State v. C.M.B.*, the child's mother pressured the child to have a conversation about the alleged abuse. *State v. C.M.B.*, 130 Wn. App. 841, 849, 125 P.3d 211 (2005). Then, instead of asking clarifying questions, she just let the child talk to her. *Id.* In addition, the mother did not ask questions that suggested any particular type of conduct, but the child gave a specific description of the abuse. *Id.* In allowing the child's statements, the court determined the mother's questions were instigated out of concern for the child's well being and were not suggestive or leading. *Id.*

Ms. Taylor and Ms. Murstig asked questions similar to the questions in *C.M.B.*, which prompted A.K.T. to discuss the abuse. The questions allowed A.K.T. to recall the events in her own words. A.K.T.'s responses to these questions were spontaneous. The juvenile court correctly found that four of the statements made by A.K.T. were spontaneous or given in response to a nonleading question.

(5) The timing of the declaration and the relationship between the declarant and the witness. The juvenile court found that A.K.T. made her disclosures between April 8 and 15. Ms. Taylor testified that A.K.T. said the abuse occurred the Saturday before April 8. Therefore, the juvenile court properly found that the timing of the declaration indicated reliability because the declarations were made close to the abuse.

A.K.T. made consistent statements to her mother, with whom she had a close relationship, and Ms. Murstig, a counselor at SARC, who did not have a previous relationship with A.K.T. Because A.K.T. made disclosures to a person she had a personal connection to and a person who was neutral, an inference can be made that A.K.T.'s relationship to the witness did not factor into her statements.

(6) Whether the statement contained express assertions of past fact. Child hearsay statements regarding sexual abuse usually contain statements about past fact. *State v. Leavitt*, 111 Wn.2d 66, 75, 758 P.2d 982 (1988). The juvenile court found that the statements were of past fact but that this finding was not particularly relevant to whether they were reliable.

(7) Whether the declarant's lack of knowledge could be established through cross-examination. The juvenile court found that the possibility of inconsistencies in A.K.T.'s statements would be remote because A.K.T. had given consistent statements numerous times. A.K.T.'s statements were reliable because her consistent recall was a good indication that cross-examination would not bring out her lack of knowledge.

(8) The remoteness of the possibility of the declarant's recollection being faulty. Again, the juvenile court found that A.K.T. made consistent statements about the abuse. Although she may have been confused whether it snowed the day after the event, her

testimony regarding the abuse was consistent.

(9) Whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. The juvenile court found no reason to believe that A.K.T. misrepresented Mr. Lobos's involvement. A.K.T. stated that she liked Mr. Lobos. A.K.T. thought Mr. Lobos was her friend. The juvenile court's finding that there did not appear to be any misrepresentation by A.K.T. was within its discretion.

The evidence in the record supports the juvenile court's factual findings regarding all of the *Ryan* factors. These findings support the conclusion that the "time, content, and circumstances of the statements made by A.K.T. . . . provide sufficient indicia of reliability." CP at 10. The juvenile court did not abuse its broad discretion by admitting A.K.T.'s statements.

Confrontation Clause and DVD Testimony. Alleged violations of the confrontation clause are reviewed de novo. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

RCW 9A.44.120 provides for the admission of child hearsay statements when the declarant is under the age of 10 and is the victim of sexual abuse, as long as the court conducts a hearing that finds the statements provide a sufficient indicia of reliability and the child testifies at the trial. Properly admitted child hearsay may include videotaped

interviews of the child conducted as part of the investigation. *State v. Dunn*, 125 Wn. App. 582, 588-89, 105 P.3d 1022 (2005).

If the child hearsay declarant is deemed competent and available for cross-examination, no constitutional confrontation concerns arise. *State v. Price*, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006).

A.K.T. was six years old at the time the statements were made. The juvenile court held a hearing before Mr. Lobos's juvenile adjudication to determine the competency of A.K.T. At the competency hearing, the juvenile court found A.K.T. competent and her hearsay statements reliable. A.K.T. testified at the juvenile adjudication and was subject to a lengthy cross-examination. The admission of the hearsay statements on the DVD does not violate the confrontation clause.

Mistrial. A trial court's denial of a mistrial is reviewed for an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002).

In a bench trial, the judge is presumed not to consider inadmissible evidence in reaching the verdict. *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970).

Additionally, if substantial admissible evidence remains to otherwise support the trial court's findings, a new trial ordinarily will not be granted when inadmissible evidence is presented. *Id.*

At the competency hearing, Ms. Taylor's question to A.K.T. asking whether Mr. Lobos had put his tongue in her mouth and A.K.T.'s corresponding response were deemed inadmissible. However, the inadmissible statement accidentally came in at trial. There is no evidence that the juvenile court considered this one inadmissible statement in its juvenile adjudication decision. None of the 24 findings of fact made by the juvenile court refer to the inadmissible hearsay statement, supporting the presumption that the juvenile court did not consider the hearsay statement in its decision. In addition, A.K.T.'s four other statements regarding the abuse provided substantial admissible evidence for the juvenile court commissioner to use in forming a decision in the juvenile adjudication. The juvenile court did not abuse its discretion by refusing to grant Mr. Lobos's request for a new trial.

Sexual Gratification and Remand. A trial court's findings are reviewed to determine if the findings are supported by substantial evidence, meaning the evidence is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. *State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486 (2000) (quoting *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). Unchallenged findings of fact of the trial court are accepted as verities on appeal. *Id.*

The superior court conducts a de novo review of a court commissioner's ruling.

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RCW 2.24.050. A superior court judge acts in an appellate capacity when considering a motion to revise a commissioner's decision. *Moody*, 137 Wn.2d at 992.

JuCR 7.11(d) requires the court to enter written findings and conclusions in a case that is appealed. "The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision."

JuCR 7.11(d).

For the crime of first degree child molestation, a person is guilty when:

[T]he person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1).

"'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

RCW 9A.44.010(2). The definition clarifies that sexual contact excludes inadvertent touching or contact as criminal conduct. *State v. Lorenz*, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). Sexual gratification is not an essential element of first degree child molestation. *Id.* at 35. Had the legislature intended to include the definition of sexual gratification as an element of first degree child molestation, it would have incorporated it in RCW 9A.44.083 rather than putting it in a wholly separate section entitled

“definitions.” *Lorenz*, 152 Wn.2d at 34.

Still, sexual gratification must be established by the State in order to prove sexual contact. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). A finding of sexual gratification is appropriate as an ultimate fact to the essential element of sexual contact. *Lorenz*, 152 Wn.2d at 32. Remanding for revision of written findings of fact and conclusions of law is appropriate where the findings do not meet the requirements of JuCR 7.11(d) and the revision is based on evidence already heard. *State v. Alvarez*, 128 Wn.2d 1, 18-20, 904 P.2d 754 (1995).

In its initial findings of fact and conclusions of law, the juvenile court did not state that Mr. Lobos acted with the purpose of sexual gratification. However, the juvenile court found that “[t]he contact described by A.K.T. (DOB 9/27/02) was sexual contact.” CP at 14.

Mr. Lobos relies heavily on *State v. BJS* to demonstrate that the absence of a finding of sexual gratification results in reversal and dismissal. *State v. BJS*, 72 Wn. App. 368, 372-73, 864 P.2d 432 (1994), *abrogated by Lorenz*, 152 Wn.2d at 35 (sexual gratification is not an essential element of first degree child molestation). In *BJS*, the trial court set out many operative facts, but failed to enter ultimate facts as to the elements of the crime. *Id.* at 372. “Adequate written findings are essential to permit meaningful

appellate review.” *Id.* at 372-73. Even though sexual gratification was highly probable, the court ruled that the limited findings did not support the judgment. *Id.* at 373.

The court’s findings in *BJS* differ greatly from the findings here. Whereas *BJS* had only five findings of fact, the juvenile court in Mr. Lobos’s case made 24 findings of fact and five conclusions of law that give both operative and ultimate facts. Within the 24 findings of fact, the juvenile court recited instances where A.K.T. said Mr. Lobos touched A.K.T.’s bottom, her boobies, and made her sit on top of him so her bottom touched his penis. In contrast, the *BJS* court only described the conduct as oral sex. *Id.* Additionally, in *BJS*, the findings did not address the element of sexual conduct. However, the initial findings in Mr. Lobos’s case specifically stated that the contact described by A.K.T. was sexual contact. The juvenile court in Mr. Lobos’s case made adequate written findings permitting a meaningful appellate review.

Even with the extensive findings and conclusions, the juvenile court was still required to find sexual gratification as an ultimate fact. The superior court properly remanded the matter back to the juvenile court to clarify whether Mr. Lobos acted with the purpose of sexual gratification. The defect was not based on the State’s failure to prove its case but, rather, incomplete findings and conclusions. *See State v. Hescoek*, 98 Wn. App. 600, 606-07, 989 P.2d 1251 (1999).

Proof of Age. On a challenge to the sufficiency of the evidence, the relevant question is whether a rational trier of fact could have found the essential elements of the crime with all reasonable inferences drawn in favor of the State. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

One element of first degree child molestation is that the offender is at least 36 months older than the victim. RCW 9A.44.083(1). The State bears the burden of proving each element of the crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987).

In its case-in-chief, the State questioned Mr. Taylor about Mr. Lobos. Mr. Taylor testified that he knew Mr. Lobos because Mr. Lobos was the son of his sister's boyfriend. Mr. Taylor said he was first introduced to Mr. Lobos over one year before the incident and that Mr. Taylor and A.K.T. hung out at Mr. Lobos's residence every other weekend. Mr. Taylor also testified that Mr. Lobos was between 13 and 14 years old. Mr. Lobos did not object to this testimony regarding his age. Mr. Taylor also testified that his daughter A.K.T. was six years old at the time of the occurrence.

In a related issue, Mr. Lobos complains that evidence of his age should not have been permitted during cross-examination of Mr. Lobos's father, Rod Lobos. Under

ER 611(b), cross-examination should be limited to issues discussed in direct examination; however, the trial court may allow questioning into other matters. “The scope of cross examination is within the broad discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.” *Miller v. Peterson*, 42 Wn. App. 822, 827, 714 P.2d 695 (1986).

Rod Lobos testified that Mr. Lobos was left in charge of the younger children on the night of the abuse. On cross-examination, the State asked Rod Lobos to state the date of birth of his son. Mr. Lobos objected, stating the question was outside the scope of direct. After the State contended that the issue was already established in its case-in-chief and that the admission of the statement was within the court’s discretion, the juvenile court overruled the objection and allowed the question. The juvenile court was within its discretion in allowing the question.

The juvenile court found that, at the time of the abuse, A.K.T. was 6 years old, and Mr. Lobos was 13 to 14 years old. These findings can be supported by the testimony of Mr. Taylor, who was a family friend of Mr. Lobos as well as A.K.T.’s father. The evidence in the record supports the juvenile court’s conclusion that A.K.T. was at least 36 months younger than Mr. Lobos.

Ineffective Assistance of Counsel. Ineffective assistance of counsel is “a mixed

question of law and fact.” *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because claims of ineffective assistance present mixed questions of law and fact, this court reviews them de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

In order to prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel’s performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant. *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). For performance to be deficient, the defendant must show that the representation fell below an objective standard of reasonableness and the result probably would have been different if counsel had not erred. *Id.* at 843-44. A legitimate strategic or tactical decision made by counsel does not serve as a basis for an ineffective assistance of counsel claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Strategic decisions are evaluated with exceptional deference in favor of counsel and with a strong presumption that performance was adequate. *Id.*

Mr. Lobos’s counsel acted appropriately on behalf of Mr. Lobos by requesting dismissal at the end of the State’s case-in-chief. The juvenile court then denied the motion after the State contended that it had proved Mr. Lobos’s age through the testimony of Mr. Taylor. Based on the juvenile court’s apparent acceptance of the State’s

contention, it can be inferred that Mr. Lobos's counsel made a tactical decision to present a defense on behalf of Mr. Lobos. This tactical decision does not make counsel's representation deficient. *McNeal*, 145 Wn.2d at 362.

While counsel's decision may have waived Mr. Lobos's right to appeal the sufficiency of the evidence concurrent with that point in the trial, the decision did not preclude Mr. Lobos from challenging the sufficiency of the evidence as a whole to support the criminal conviction. *State v. Young*, 50 Wn. App. 107, 111, 747 P.2d 486 (1987). Mr. Lobos's counsel did not perform ineffectively because the decision to present a case in defense of Mr. Lobos was tactical and still allowed an opportunity to appeal.

Confrontation Clause and A.K.T.'s Trial Testimony. Alleged violations of the confrontation clause are reviewed de novo. *Medina*, 112 Wn. App. at 48.

A party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). However, RAP 2.5(a)(3) does not open the door to all appeals where the criminal defendant can find some constitutional issue not raised at trial. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The court first must determine if the alleged error is of constitutional magnitude. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Then the court determines if the alleged error is manifest,

meaning the error actually affected the defendant's rights in the context of the trial.

McFarland, 127 Wn.2d at 333. The record of the trial court must contain facts necessary to adjudicate the claimed error; otherwise, there is no prejudice to the defendant and the error is not manifest. *Id.* The defendant must show that but for the manifest constitutional error, the outcome would have likely been different. *Id.*

In *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that a defendant's right to confrontation under the Sixth Amendment is violated where testimonial hearsay is admitted at trial and the defendant has not been afforded the prior opportunity to cross-examine the witness. Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." The confrontation rights under the Washington Constitution and the United States Constitution are the same when a child witness confronts the defendant in a courtroom. *Price*, 158 Wn.2d at 639 n.4.

The right to face-to-face confrontation can be described as a preferred right of physical presence of a witness. *See State v. Foster*, 135 Wn.2d 441, 457, 957 P.2d 712 (1998). Face-to-face confrontation should not be read literally to require the defendant and the witness to be physically face to face in the courtroom. *State v. Foster*, 81 Wn.

App. 444, 459, 915 P.2d 520 (1996), *aff'd*, 135 Wn.2d 441. The crucial confrontation rights to be preserved “are the rights of cross-examination and the ability of the trier of fact to see, hear, and assess the credibility of the witness.” *Foster*, 81 Wn. App. at 461.

Mr. Lobos’s right to confront A.K.T. was not violated because he was unable to see A.K.T.’s face. A.K.T. was physically present in the courtroom with Mr. Lobos. Mr. Lobos’s counsel extensively cross-examined A.K.T. During the juvenile adjudication, both Mr. Lobos’s counsel and the juvenile court commissioner had the ability to see and hear A.K.T. in order to assess her credibility. The fact that Mr. Lobos personally could not see A.K.T.’s face did not violate his constitutional right to confront A.K.T. because the fundamental rights of the confrontation clause were met. The placement was not a manifest error.

Even if Mr. Lobos’s inability to see A.K.T.’s face resulted in a manifest constitutional error, the error was likely harmless and did not prejudice Mr. Lobos. Confrontation clause errors will be forgiven where the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005). An error is harmless if the untainted evidence is so overwhelming that it would lead to a finding of guilt. *Id.* at 305.

Ms. Taylor and Ms. Murstig both testified to the details of the abuse based on their

conversations with A.K.T. The juvenile court at the competency hearing deemed these hearsay statements admissible. At the juvenile adjudication, the juvenile court relied heavily on the hearsay statements given through the testimony of Ms. Taylor and Ms. Murstig in the findings of fact. Therefore, even without the courtroom testimony of A.K.T., the evidence used by the juvenile court in determining Mr. Lobos's guilt was overwhelming. Therefore, a violation of the confrontation clause due to the placement of A.K.T. would be harmless. The result of Mr. Lobos's juvenile adjudication would have remained the same.

As for Mr. Lobos's communication with his counsel, article I, section 22 of the Washington Constitution provides that a defendant has a constitutional right to assistance of counsel, including the opportunity for private and continual discussions between a defendant and his attorney during trial. *State v. Hartzog*, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). Except for a limited instance when the defendant is testifying, any interference with the defendant's right to continually confer with counsel during trial results in reversible error without a showing of prejudice. *State v. Ulestad*, 127 Wn. App. 209, 214-15, 111 P.3d 276 (2005).

In *Ulestad*, the court ruled that Mr. Ulestad was denied his right to continual communication with his attorney because he was not provided with two-way

communication when his attorney was located in another room. *Id.* at 215.

Unlike *Ulestad*, Mr. Lobos and his counsel were located in the same room during the juvenile adjudication. Mr. Lobos would have to signal to his counsel in order to confer, but proceedings would not have to be stopped any more than if Mr. Lobos wanted to speak to his counsel while counsel was questioning a witness. Additionally, Mr. Lobos would have been separated from his counsel while counsel was questioning A.K.T., regardless of whether counsel stood at the podium or sat next to A.K.T. Mr. Lobos's right to constant communication with counsel at juvenile adjudication was not affected.

Even if the placement of A.K.T. violated a constitutional right, Mr. Lobos's counsel invited the error. The doctrine of invited error "'prohibits a party from setting up an error at trial and then complaining of it on appeal.'" *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). In *Henderson*, the defendant proposed, and the trial court gave, jury instructions that violated the defendant's due process rights. *Id.* at 868-69. The court refused to allow Mr. Henderson to raise this constitutional issue for the first time on appeal because the error was made by Mr. Henderson's invitation. *Id.* at 870.

The same analysis applies here. Mr. Lobos asked for specific positioning of

A.K.T. and now cannot complain that the placement violated his confrontation clause rights or his right to assistance of counsel. Mr. Lobos's counsel specifically requested that she position herself closer to A.K.T. so counsel would be the least intimidating as possible. Mr. Lobos's counsel also asked that A.K.T. be placed in a position where the juvenile court and defense counsel could see her face. The juvenile court agreed and placed A.K.T. so she did not have to look at Mr. Lobos directly but could still be viewed by the juvenile court commissioner and defense counsel. Mr. Lobos's counsel agreed to the placement. Mr. Lobos invited the positioning of his counsel and cannot claim that his constitutional right was violated.

Conclusion. We affirm the decision of the juvenile court that A.K.T. was competent to testify and that A.K.T.'s hearsay statements were admissible. We also affirm the decision of the superior court to remand the case back to the juvenile court and to deny the motion for revision. Finally, we affirm the juvenile court's order of disposition that Mr. Lobos committed first degree child molestation.

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

Kulik, C.J.

No. 28987-7-III
State v. Lobos

WE CONCUR:

Brown, J.

Siddoway, J.