

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

A.W.A.,<sup>†</sup>

Appellant.

No. 37852-3-II

UNPUBLISHED OPINION

Hunt, J. — AWA, a minor, appeals his juvenile court adjudication of first degree child rape. He argues that the trial court erred (1) in finding the minor victim, KA, competent to testify; and (2) in denying his motion to exclude KA’s testimony under the child hearsay rules. We affirm.

FACTS

I. Child Rape

In April 2007, Cynthia Armstrong received a telephone call about a rumor that her seven-year-old daughter, KA, had been sexually active with KA’s fifteen-year-old cousin, AWA. KA’s teenage brother Deandre had originated this rumor when he laughingly told a friend that KA was no longer a virgin. According to Deandre, while driving home from AWA’s house, KA told him (Deandre) that AWA “had been touching her, and in inappropriate places” that day. Armstrong asked KA whether anyone had touched her inappropriately. KA replied, “[Y]es,” explaining that AWA “threw her on the bed, and took her pants off, and stuck his ‘yuck yuck’ in her.”<sup>1</sup>

<sup>†</sup> Under RAP 3.4, this court may change the title of the case to the juvenile’s initials. Accordingly, this opinion uses initials to protect the juvenile’s right to confidentiality.

<sup>1</sup> According to Armstrong, KA’s word for “penis” is “yuck yuck.”

Armstrong took KA to her pediatrician's office. A physical examination revealed possible trauma to KA's hymen, consistent with a healed tear. During the medical examination, KA disclosed to licensed practical nurse Lisa Richards what had occurred: (1) KA had wanted to go to her Uncle Randy's (AWA's father) house to stay the night; (2) her sister, CA, was roller-skating that day, so KA was alone with Uncle Randy and AWA at the house; and (3) AWA said to KA, "[L]et's go into my room," picked up KA, put her on his bed, pulled down her pants, "and stuck his thing inside of her." Report of Proceedings (RP) at 272. While explaining this final detail to Richards, KA "pointed down below," gesturing to her genital area. RP at 279. When Richards asked how long it lasted, KA replied, "[T]wo minutes, or less." KA then told Richards "[t]hat it just stopped, and [AWA] pulled up his pants and left the room." RP at 272.

KA also stated AWA had threatened that if she told anyone what had occurred, "he [was] not going to be her friend anymore, and buy her anything." And during the sexual assault, Uncle Randy was tending to the family computer, unaware of what was occurring in AWA's bedroom.

Cheryl Hanna-Truscott, a nurse practitioner trained to evaluate children for possible sexual abuse, also evaluated KA and performed a physical examination. During this evaluation and examination, KA communicated verbally with Hanna-Truscott about the incident. KA told Truscott that "[AWA] put his 'yuck yuck' in [her]"; and when Truscott asked where a boy's *yuck yuck* would be, KA pointed to her genital area and made the sort of face a child would make "when describing something icky." KA also drew a stick-figure picture depicting herself lying down horizontally on a bed with her genitalia exposed and AWA standing vertically toward the foot of the bed with his penis protruding.

Two and a half weeks after KA's pediatric exam, child forensic interviewer Kim Brune spoke with KA and recorded the interview. During the interview, KA drew a virtually identical stick-figure picture depicting herself lying horizontally on a bed and AWA standing vertically toward the foot of the bed with a protruding penis.<sup>2</sup>

## II. Procedure

The State charged AWA with one count of first degree child rape and one count of second degree child rape on or about March 30, 2007. The State later amended count two to first degree child molestation. The State further amended the charging period for both counts to include December 6, 2006, through May 1, 2007.

### A. Pretrial Hearings

AWA moved to prevent KA from testifying at trial, arguing that she was not a competent witness. AWA also moved to exclude KA's hearsay statements as unreliable, arguing that her alleged incompetence rendered her "unavailable" to testify at trial.

#### 1. Competency

At the competency hearing, KA correctly recited her birth date, her home address, and the elementary school and grade she currently attended (third grade). She recalled the names of her second and first grade teachers, and that she had attended kindergarten at the same school, although she could not recall her kindergarten teacher's name.

KA also knew that she had lived in the same house from preschool until the present. She

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<sup>2</sup> The record does not show whether the investigators also attempted to interview AWA.

recalled that her biological father had died when she was seven years old, when she was in the second grade, closer to Christmas that year, and that she did not return to school regularly after his death.

KA demonstrated knowledge of truth versus a lie, for example, that it would be a “lie” to say that mice were running across the courtroom floor and that it would be “pretend” to say that she flew to court on an airplane that day. KA understood that they were in court to discuss AWA but that they were not going to talk about it that day of the pretrial hearing.

The trial court found that KA met the five *Allen*<sup>3</sup> factors required for competency of a child witness as follows:

1. KA understands her obligation to speak the truth on the witness stand;
2. KA had the mental capacity at the time of the incident to receive an accurate impression of it;
3. KA has sufficient memory to retain an independent recollection of the incident;
4. KA has the capacity to express in words her memory of the incident;
5. KA has the capacity to understand simple questions about the incident.

Clerk’s Papers (CP) at 32. The trial court found KA competent to testify.

## 2. Child hearsay

The trial court also ruled KA’s statements to her brother, mother, Pierce County child interviewer Kim Brune, and nurse practitioners Lisa Richards and Cheryl Hanna-Truscott admissible as child hearsay under RCW 9A.44.120. The trial court based this determination on finding that seven of the nine *Ryan*<sup>4</sup> reliability factors were met, as follows:

1. KA has no apparent motive to lie;
2. KA is generally of good character;

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<sup>3</sup> *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

<sup>4</sup> *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

3. KA made statements to De'Andre Smith, Cynthia Armstrong, Lisa Richards, Cheryl Hanna-Truscott, and Kim Brune and those statements, though at different times with different purposes, were generally consistent;
4. KA's statements were spontaneous as defined by the case law;
5. there is nothing about the timing of KA's statements that suggests an improper motive, nor does anything about the relationship between KA and the persons she talked to;
6. the possibilities KA's recollection is faulty is remote;
7. based on the totality of the circumstances surrounding the making of KA's statements, there is no reason to believe KA misrepresented the respondent's involvement.

CP at 36-37.

The trial court ruled KA's statements to nurse practitioners Richards and Hanna-Truscott also admissible as statements for medical diagnosis or treatment under ER 803(a)(4).

#### B. Inconsistencies in KA's Trial Testimony

At trial, KA testified for the State. When asked whether her mother had ever found out what AWA had done or whether she (KA) had ever discussed with her mother what had occurred, KA replied, "No," to both questions. When asked whether she had ever spoken with her brother Deandre about what had occurred, KA again replied, "No." And when asked whether she remembered talking with a nurse about what had occurred, KA replied, "I know for sure that I didn't talk to a nurse." When asked whether she had told anyone about what AWA had done, KA replied, "No."

KA also testified that while AWA raped her, her six-year-old brother Laterrian was next to her on the bed and had seen it happen, but that he continued to watch television. KA, however, had not included Laterrian in the drawings she had prepared during her two interviews. When asked on the stand why Laterrian was not included in her drawing, KA initially replied, "I

forgot to draw him.” Later, on redirect examination, with regard to whether Laterrian was present, KA testified, “I really don’t remember if he was or not.”

The trial court found KA to be “a credible witness, despite argued inconsistencies.”<sup>5</sup> The trial court found that AWA had committed first degree child rape and found him not guilty of having committed first degree child molestation. AWA appeals the first degree child rape adjudication.

## ANALYSIS

### I. KA’s Competency

AWA first argues that the trial court erred in finding KA competent to testify. More specifically, AWA argues that (1) KA lacked the ability to distinguish between truth and lies; (2) the trial court could not adequately gauge KA’s competency because KA was not asked during the competency hearing about her recollection of the sexual act; and (3) KA’s contradictions during trial of her prior accounts of the sexual act<sup>6</sup> demonstrated that she was incompetent to testify.

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<sup>5</sup> More specifically, the trial court noted:

[KA’s] demeanor and testimony, as well as the child hearsay admitted, does not lead me to conclude that she was coached, or that her testimony was tainted as a result of the contact she had, or as a result of the number of times she recounted the events. . . .

This Court does not need to resolve all inconsistencies, as the argued inconsistencies are not material to the elements of the crime charged, or material to the credibility assessment by this Court of the witnesses.

RP at 499.

<sup>6</sup> AWA focuses specifically on KA’s having not previously stated that her younger brother was present during the sexual act and her claim that she had not told anyone about what had occurred.

The State counters that the trial court properly deemed KA competent to testify because (1) at a competency hearing it is not necessary that a child be able to relate the actual event; and (2) inconsistencies in a child's testimony speak to the weight of the child's testimony, not to the competency of the child witness. The record supports the trial court's findings that KA was competent. We agree with the State that inconsistencies in KA's testimony bore on its weight, not on her competency.

#### A. Standard of Review

We review a trial court's competency determination for manifest abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). This standard of review is especially applicable to child witnesses<sup>7</sup> because “[t]he 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) (citing *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967); *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)). In reviewing a competency determination, we may examine the entire record below. *Woods*, 154 Wn.2d at 617 (citing *State v. Avila*, 78 Wn. App. 731, 737, 899 P.2d 11 (1995)).

#### B. *Allen* Factors

A witness must be competent to testify. RCW 5.60.050. A child witness is competent to

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<sup>7</sup> See *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (quoting *State v. Borland*, 57 Wn. App. 7, 11, 786 P.2d 810 (1990)) (“There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.”).

testify if she meets the five *Allen* factors, namely, that such 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 of her testimony, (3) has a memory sufficient to retain an independent recollection of the occurrence, (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. Although a child who has a “long-standing, often-observed inability to distinguish what was true from what was not” may be found incompetent,<sup>8</sup> inconsistencies in a child’s testimony do not necessarily call into question witness competency, as AWA contends. Rather such inconsistencies generally relate to the witness’s credibility and the weight to give her testimony. *State v. Carlson*, 61 Wn. App. 865, 874, 812 P.2d 536 (1991) (citing *State v. Stange*, 53 Wn. App. 638, 642, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989), *State v. McKinney*, 50 Wn. App. 56, 64, 747 P.2d 1113 (1987)).

Here, the trial court found that KA met each of the five *Allen* factors. AWA assigns error to the first, third, and fourth factors. In the body of his brief, however, he ultimately addresses and supports with argument only *Allen* factors No. 1 and No. 3. He fails to address *Allen* factor No. 4 specifically. Accordingly, although the record supports all of the trial court’s *Allen* factor findings, we address only factors 1 and 3.<sup>9</sup>

1. *Allen* factor No.1

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<sup>8</sup> *State v. Karpenski*, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), overruled on other grounds, *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003).

<sup>9</sup> Because AWA fails to support his assignment of error to factor No. 4, contrary to the requirements of RAP 10.3(g), we do not address it.



With respect to *Allen* factor No. 1, AWA argues that the trial court erred in finding KA competent to testify “when [KA] related as truth events that could not have occurred, demonstrating her inability to distinguish truth from fiction.” In support, AWA cites *State v. Karpenski*, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), *overruled on other grounds*, *State v. C.J.*, 148 Wn.2d 672, 63 P.3d 765 (2003), in which we reversed first-degree child rape and first degree child molestation convictions and remanded for trial on grounds that the child victim was incompetent to testify, despite the trial court’s finding of competency following a hearing. *Karpenski*, 94 Wn. App. at 80. But *Karpenski* is clearly distinguishable.

In *Karpenski*, despite taking an oath and promising not to “make up any stories,” moments later the child victim described in vivid detail how he and his younger brother had been born at same time, which was impossible because the victim was seven and his little brother was two. *Id.* at 95. Moreover, the victim apparently believed what he was saying, thus manifesting his long-standing, often-observed inability to distinguish what was true from what was not. *Id.* at 106. *Karpenski*’s child victim also had a propensity for telling imaginary tales, which he insisted had actually happened (e.g. vivid accounts of skydiving, his mother winning \$10,000, and a trip to Hawaii—all events that had never occurred). *Id.* at 83, 86.

KA, on the other hand, did not have history of telling such imaginary tales. Instead, she reported very simple true facts about events in her life: her classroom teachers’ names, the types of presents she had received on her eighth birthday, and the event of her father’s death, none of which contained embellished details and most of which her mother corroborated. KA also answered correctly all questions about whether the prosecutor was telling the truth or a lie when

asked, for example, whether it would be “pretend” to say that she flew an airplane to court.

AWA argues that inconsistencies in KA’s testimony in which she contradicted herself—such as whether her younger brother was present during the rape or whether KA told anyone else what occurred—renders the trial court’s finding of KA’s competency an abuse of discretion. We disagree. As we have already noted, inconsistencies in a child witness’s testimony do not necessarily lead to a finding of incompetency. *State v. Woodward*, 32 Wn. App. 204, 207-08, 646 P.2d 135 (1982) (affirming child-witness’s competency to testify since “[a]lthough the testimony of the child at trial was not entirely consistent on certain details, she was unwavering in her testimony that defendant had intercourse with her . . . [since] [a]ny inconsistencies in her testimony went to her credibility and not to admissibility). Furthermore, AWA’s chief complaint centers on minor inconsistencies, which are only tangentially related to the details of the charged sexual acts.

## 2. *Allen* factor No. 3

With respect to *Allen* factor No. 3, AWA argues, “[T]he trial court erred by finding without sufficient evidence that KA had sufficient memory to retain an independent recollection of the incident.” Br. of Appellant at 1. More specifically, AWA contends that the trial court abused its discretion in finding that KA held “sufficient memory to retain an independent recollection of the incident,” CP at 32, yet made this finding without KA’s having ever been asked about the actual event at any point during the competency hearing. Again, AWA’s contention is incorrect.

As Division One of this court explained, and contrary to AWA’s argument, it is not necessary at a competency hearing for the child to be able to relate the actual charged event.

*Avila*, 78 Wn. App. at 736 (quoting *Przybylski*, 48 Wn. App. at 665) (“A court is not required to ‘examine a child witness regarding the particular issues and facts of the case to determine competency.’”). Rather, “as long as the witness demonstrates the ability to ‘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.’” *Avila*, 78 Wn. App. at 736-37 (quoting *Przybylski*, 48 Wn. App. at 665). We find this reasoning persuasive.

We also find compelling Division One’s further explanation:

[W]e are persuaded that a witness’s memory and perception might be better tested *against objective facts known to the court, rather than disputed facts and events in the case itself*. 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. At trial, the defendant is then free to impeach the child witness’s credibility, like any other witness, by pointing out inaccuracies and inconsistencies in her testimony.

*Przybylski*, 48 Wn. App. at 665 (emphasis added).

Similarly, at the competency hearing here, KA more than adequately demonstrated her ability to relate events that had occurred contemporaneously with the incidents in question. She accurately recalled who her teachers had been for first, second (the year the abuse occurred), and third grades. She also accurately related that her father had died while she was in second grade, as well as the time of year his death had occurred. *See State v. Sardinia*, 42 Wn. App. 533, 537, 713 P.2d 122 (1986) (child’s testimony that she knew who her school teachers were and what her performance had been in school justified trial judge’s inferring that she had sufficient memory to permit her to retain independent recollection of occurrences leading to events described in

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criminal prosecution).

We hold, therefore, that the record supports the trial court's findings concerning the challenged *Ryan* factors and its determination that KA was competent to testify.

## II. Child Hearsay

AWA next argues that the trial court erred in finding KA's child hearsay admissible and in denying his motion to exclude it. More specifically, AWA argues that the hearsay was inadmissible because (1) KA was incompetent to testify at trial, (2) inconsistencies in KA's testimony about her brother's presence during the time of the rape demonstrate her inability "[to] distinguish between truth and fantasy," and (3) the trial court failed to make a finding that KA was competent at the time of the hearsay statements. But because KA was competent to testify, we need not address AWA's child hearsay argument.<sup>10</sup>

Affirmed.

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.

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Hunt, J.

We concur:

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Quinn-Brintnall, J.

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Penoyar, A.C.J.

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<sup>10</sup> AWA conceded at oral argument that his child hearsay challenge depends on a finding that KA was incompetent to testify and that if we affirmed the trial court's competency finding, we need not address his hearsay challenge. The State also agreed with this assessment. Nevertheless, we note that a physical examination revealed possible trauma to KA's hymen, consistent with a healed tear, which corroborates KA's child hearsay testimony.

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