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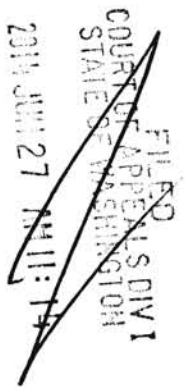
NO. 70561-0-I

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



STATE OF WASHINGTON,

Respondent,

v.

T. Y., (DOB: 4-29-1997)

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) Can a challenge to a witness's competency be raised for the first time on appeal?

(2) If the issue can be raised, did the trial court abuse its discretion in finding the victim competent to testify, where she clearly described the abuse and answered questions about it?

(3) In closing argument at a bench trial, the prosecutor argued that there was no reason to disbelieve the victim's testimony. Was this argument so prejudicial that it had a substantial likelihood of affecting the judge's adjudication?

II. STATEMENT OF THE CASE

From the time she was 14 months old, D.B. attended a day care in Bothell run by Chrissy Manhalter. The juvenile respondent, T.Y., is Ms. Manhalter's son. D.B. and T.Y. often played together. According to D.B's mother, the two had "a closer bond than any of the other kids." 5/20 RP 31-33.

By the summer of 2012, D.B. was four years old. One day in July, she told her mother that she "hurt down there," pointing to her "private area." The mother saw that D.B. was red, so she applied lotion. D.B. then said, "that's because [T.Y] keeps touching me down there." 5/20 RP 36.

On July 23, D.B. was interviewed by Corrie Hayes, an investigator with Child Protective Services. To establish rapport, Ms. Hayes started talking with D.B. about her stuffed animals. During this conversation, D.B. asked Ms. Hayes if she knew who T.Y. was. Ms. Hayes said she didn't and asked D.B. to tell about him. D.B. said that he was a friend and they liked to play together. Ms. Hayes asked her to tell more about what they did. D.B. "picked up her dress and patted the front of her panties in her vaginal area and said he touches me here." 5/20 RP 58.

On December 5, D.B. was examined by Paula Skomski, a forensic nurse examiner. During the examination, Ms. Skomski asked D.B. if anyone had touched her private area. "First she said, no, and then she said, but yeah, [T.Y] did at Chrissy's." When asked if it happened one time or more than one time, she said more than one. When asked where it happened, she said she was downstairs in the living room. 5/20 RP 100-01.

On December 11, D.B. was interviewed by Gina Coslett, a child interview specialist with the Dawson Place Child Advocacy Center. The interview was videotaped. During the interview, D.B. said that T.Y. "touched my pee pee at down here and I can't go to

Chrissy's anymore." She said that this happened one time. When it happened, they were downstairs in the living room sleeping. Ex. 2.

T.Y. was charged in juvenile court with first degree child molestation. 1 CP 88. The bench trial began with an examination of D.B. to determine her competency to testify. The prosecutor then asked the court to find that she was competent. When asked for his position, defense counsel responded, "I will defer to the court." The court determined that D.B. was competent. 5/20 RP 12-21.

D.B. testified that T.Y had "tickled her." She was reluctant to tell what part of the body he tickled. When asked to point to it, she touched her vaginal area. She said that he had done this "two times, every time." When asked what part of the house it happened in, she said "bedroom part." When asked where she was sitting at the time, she said "on the floor, and on the couch, in the living room." 5/20 RP 23-27. Although D.B. became restless during her testimony, she answered all the questions on both direct and cross-examination. 5/27 RP 12-29.

T.Y denied that he had ever touched D.B. inappropriately. He said that he had played games with her and tickled her on the tummy. 5/27 RP 139-40, 142-44.

At the conclusion of trial, the court found T.Y. guilty. The court gave a lengthy oral decision explaining the basis for this finding. 5/29 RP 13-35. The court also entered formal findings of fact and conclusions of law. 1 CP 2-5.

III. ARGUMENT

A. THE VICTIM'S TESTIMONY WAS PROPERLY ADMITTED.

1. Since The Juvenile Did Not Object To The Victim's Competency, And Her Testimony Did Not Violate Any Constitutional Right, The Issue Cannot Be Raised For The First Time On Appeal.

T.Y. claims that the trial court erred in finding the victim competent to testify. At trial, he did not challenge the victim's competency. Since the issue was not raised at trial, it can be raised on appeal only if it establishes "manifest error affecting a constitutional right." RAP 2.5(a)(3).

The U.S. Supreme Court has held that that "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Specifically, the court held that admission of unreliable identification testimony does not violate due process, if the unreliability did not result from any improper government conduct. Perry v. New Hampshire, __ U.S. ___, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694 (2012). "The Constitution ... protects a defendant against a

conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Id. at 723. Under this reasoning, the admission of testimony from an incompetent witness is not a constitutional violation. Rather, the defendant's remedy is to expose the unreliability of the testimony through cross-examination.

Prior to Perry, one Washington Supreme Court decision had applied a contrary rule: "Due process protects a criminal defendant against a conviction based upon incompetent evidence." State v. Brousseau, 172 Wn.2d 331, 335 ¶ 4, 259 P.3d 209 (2011). The court did not set out any analysis or cite any authority for this statement. If it was based on the federal constitution, it does not survive the U.S. Supreme Court's contrary decision in Perry.

Nothing in Brousseau indicates that it rests on any independent interpretation of the state constitution. Any difference between state and federal due process requirements must be analyzed in the context of a specific issue. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 711 ¶ 20, 257 P.3d 570 (2011). "Absent controlling precedent, a party asserting a provision of the state constitution offers more protection than a similar provision in the

federal constitution must persuade the court this is so by means of [a Gunwall] analysis." State v. Ladson, 138 Wn.2d 343, 347-48, 979 P.2d 833, 837 (1999); see State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Brousseau neither engaged in any Gunwall analysis nor cited any precedent under the state constitution. Absent any controlling precedent or Gunwall analysis, the requirements of the federal and state constitutions are considered to be the same.

Under the federal constitution, the admission of unreliable evidence is not a due process violation. T.Y. has provided no authority or analysis to demonstrate that the state constitution imposes greater requirements. Consequently, even if the victim in the present case is considered incompetent, her testimony did not violate any constitutional right. A party who challenges a witness's competency should raise the issue in the trial court. Absent a timely objection, the issue should not be considered on appeal.

2. If The Issue Can Be Considered, The Trial Court Properly Exercised Its Discretion In Determining That The Victim Was A Competent Witness.

By statute, witnesses are incompetent if they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW

5.60.050(2). All witnesses, regardless of their age, are presumed to be competent. State v. S.J.W., 170 Wn.2d 92, 100 ¶ 17, 239 P.3d 568 (2010). "A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly." Id. at 102 ¶ 20.

A determination of competency "rests primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review." Allen, 70 Wn.2d at 690. Consequently, the trial court's determination will not be disturbed on appeal absent abuse of discretion. S.J.W. ¶ 11.

> Although the exercise of the trial judge's discretion must be based on the entire testimony, the court is entitled to select which portions have the greater persuasive value on the ultimate issue. There is probably no area of the 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. The trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation but are not reflected in a written record.

State v. Borland, 57 Wn. App. 7, 10-11, 786 P.2d 810, review denied, 114 Wn.2d 1026 (1990).

A former version of the competency statute created a special rule for determining competency of children under ten years of age. Former RCW 5.60.050. Under the former statute, the court had outlined the following test:

> The true test of the competency of a young child as a witness consists of the following: (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.

Allen, 70 Wn.2d at 692. These factors "continue to be a guide when competency is challenged." S.J.W. ¶ 20. T.Y. claims that the victim's testimony did not satisfy some of these factors. The record does not support this claim.

a. The Record Does Not Show That The Victim Failed To Understand The Obligation To Speak The Truth.

T.Y. claims that the victim's contradictory answers demonstrate that she did not understand the obligation to speak the truth. Most of the supposed contradictions are illusory.

For example, T.Y. claims that the victim gave contradictory answers about her activities at day care. Initially, she was asked what kind of things she did during the day at day care. She answered, "Just played with toys." 5/20 RP 17. In response to later questions, she testified to watching movies, sleeping, and eating. 5/20 RP 17-20. Most witnesses would have difficulty answering a vague question like "what kind of things did you do during the day?" Few would respond with a detailed list of every activity that they engaged in. Most would probably answer with one or more activities that they considered particularly significant. That the victim answered in this manner does not demonstrate her incompetency.

T.Y. next claims that the victim contradicted herself about whether it made her sad to leave daycare. Her testimony on this point was as follows:

Q. You had to stop going there [Chrissy's day care]?

A. Uh-hum.

Q. Did that you make you sad?

A. No.

Q. It didn't?

A. Uh-hum.

Q. It did make you sad? Okay.

...

Q. And you liked going to that day care, right?

A. Uh-hum.

...

Q. You miss going to Chrissy's?

A Uh-hum.

Q Did you have fun at Chrissy's?

A. Uh-hum.

5/20 RP 16-17, 20, 29.

The victim first testified that it did not make her sad to stop going to the day care. Then she agreed that it did *not* make her sad. It was the prosecutor, not the victim, who said that it did. Later, the victim testified that she liked going to that day care, had fun there, and missed going there. This does not, however, equate to being sad about not going there. There is no contradiction.

T.Y. claims that the victim contradicted herself about where the abuse occurred. Her testimony on this point was as follows:

> Q So when [T. Y.] touched you down there, where were you in the house?
>
> A. Part of the house.
>
> Q. Part of the house?

A. Uh-hum.

Q. Was it in the living room part or the bedroom part or the kitchen?

A. Bedroom part.

Q And were you sitting on a chair, on a couch, on the bed?

A. On the floor, and on the couch, in the living room.[1]

5/20 RP 27.

The victim testified that the abuse occurred more than twice. 5/20 RP 25. In a pre-trial statement she described abuse that occurred in the "living room" when they were sleeping. Ex. 2. When she testified that it occurred in the "bedroom part," she may have meant the area where *she* slept. The abuse may have occurred on the floor *and* on the couch.

T.Y. has thus identified only two answers that are truly inconsistent with other testimony. At one point, the victim was asked "who is [T.Y.]"? She answered, "I can't remember." When asked if T.Y. was at her day care, she answered "Uh-hum. No." 5/20 RP 22. She then went on to talk about the things T.Y. did to her at day care. 5/20 RP 23-26. She may have misunderstood the

[1] The commas in the transcript were of course inserted by the court reporter. The testimony could also have been "On the floor, and on the couch in the living room."

questions, or been reluctant to implicate a person that she still considered a friend.

A witness may *understand* the obligation to speak the truth, and yet choose not to do so. If a witness has testified falsely on some subject, the fact-finder *may* disregard the remainder of the witness's testimony, but it is not *required* to do so. State v. Carothers, 84 Wn.2d 256, 261 n. 1, 525 P.2d 731 (1974). The existence of inconsistencies and contradictions in a witness's testimony do not render the witness incompetent. State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989). It was for the trial judge to determine whether any inconsistencies were so significant as to indicate failure to understand the obligation to speak the truth.

T.Y. points out that the victim became restless towards the end of her testimony. 5/22 RP 25-27. She nonetheless continued to answer questions, both on direct and cross-examination. A witness's desire to leave does not demonstrate any failure to understand the obligation to speak the truth. This incident does not demonstrate incompetency.

As T.Y. correctly notes, the trial court's oral ruling does not precisely reflect the language of Allen. The first Allen factor is "an

understanding of the obligation to speak the truth on the witness stand." Allen, 70 Wn.2d at 692. The trial court said that the victim "had the ability to distinguish between the truth and a lie." 5/29 RP 3. On this record, there is no reason to distinguish between these two articulations of the standard. There is no reason to believe that the victim understood the difference between the truth and a lie, but thought that she had no obligation to tell the truth. Moreover, as already pointed out, the Allen factors are simply guidelines. The real test is whether "the child is of unsound mind, ... incapable or receiving just impressions of the facts, or incapable of relating facts truly." S.J.W., 170 Wn.2d at 102 ¶ 20. The court's imprecise articulation of the first Allen factor does not establish that the court abused its discretion in finding the victim competent.

b. The Record Does Not Show That The Victim Lacked Adequate Memory Of The Occurrences.

T.Y. next claims that the victim did not have an accurate memory of the occurrences. In her testimony, the victim provided a number of details concerning her activities at day care around the time of the crime. 5/20 RP 17-20. She also provided several details concerning T.Y's actions. These included that he tickled her, she sat on his lap, and her mother "freaked out" when she was told.

5/20 RP 23-26. T.Y himself confirmed that he sometimes tickled T.Y. and she sometimes sat on his lap. 5/20 RP 144. The victim's mother testified that she was "hysterical" after she learned about the abuse. 5/20 RP 45. The trial court could reasonably conclude that the victim had an accurate memory of the events.

T.Y. claims that "[t]here is little evidence that what [the victim] perceived and related about the past events ... was accurate." Brief of Appellant at 14. This argument mistakes the burden of proof. As already pointed out, the party who challenges a witness's competency bears the burden of showing that the witness was incompetent. S.J.W., 170 Wn.2d at 102 ¶ 20. Nothing in the record demonstrates that the trial court abused its discretion in determining that the victim had adequate memory of the occurrences.

c. The Record Does Not Show That The Victim Lacked The Ability To Understand Questions And Describe The Incident.

Finally, T.Y. argues that the victim lacked the ability to express her memory of the incident in words and to understand simple questions about it. In arguing this point, he relies on the same supposed inconsistencies that were discussed above. As already pointed out, most of these inconsistencies are illusory.

The victim described the abuse in clear language. 5/20 RP 23-25. She gave responsive answers to numerous questions concerning the incident and the surrounding circumstances. 5/20 RP 22-29. The record supports the trial court's determination that she had the capacity to describe the incident and answer questions about it. T.Y. has not established that the court abused its discretion in finding the victim competent.

B. THERE WAS NO MISCONDUCT WARRANTING REVERSAL.

1. A Prosecutor Can Properly Argue That There Is No Reason To Doubt The Defendant's Guilt.

Finally, T.Y. claims that the adjudication should be reversed because of misconduct in closing argument. The prosecutor argued that "[t]he only reasonable explanation for [the victim's] repeated disclosures of what happened is that what she said is what happened." 5/21 RP 2. This argument was proper. A prosecutor is entitled to argue that there is no reasonable explanation for the events other than the defendant's guilt:

> The prosecutor did not argue or imply that the defense had failed to offer other reasonable explanations... Rather, he simply argued that the evidence did not support any other reasonable explanation. A prosecutor is entitled to argue inferences from the evidence and to point out improbabilities or a lack of evidentiary support for the defense's theory of the case.

State v. Killingsworth, 166 Wn. App. 283, 291-92 ¶ 18, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012).

T.Y cites cases in which prosecutors told jurors that they had to disbelieve the State's witnesses in order to acquit the defendant. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, 213 (1991). He also cites a case in which the prosecutor told jurors that to acquit the defendant, they had to provide a reason for doubting his guilt. State v. Emery, 174 Wn.2d 741, 759-60 ¶ 35, 278 P.3d 653, 663-64 (2012). The argument in the present case is significantly different from these arguments. The prosecutor here never said that the judge had to find *anything* in order to convict the juvenile. She simply asserted that there was no reason to disbelieve the victim's testimony. 5/21 RP 2-10. It is hard to imagine how a prosecutor can argue that the case has been proved beyond a reasonable doubt, without arguing that there is no reason for doubt. There was no misconduct.

2. Even If The Prosecutor's Argument Is Considered Improper, There Is No Reason To Believe That It Misled The Court in A Bench Trial.

Even if this argument is somehow considered improper, there is no basis for a new trial. If no objection was raised at trial,

reversal is only warranted if a defendant can show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." Emery, 174 Wn.2d at 760-61 ¶ 37.

The present case involves a bench trial, not a jury trial. In a bench trial, a different standard of review is applied to occurrences that are potentially prejudicial. For example, "[a] trial judge is presumed to be able to disregard inadmissible evidence, thus avoiding any prejudice to the defendant." State v. Melton, 63 Wn. App. 63, 68, 817 P.2d 413, 416 (1991). Similarly, "a trial judge, due to his or her experience and training, is in a better position than jurors to identify and focus on the probative quality of evidence." State v. Jenkins, 53 Wn. App. 228, 236-37, 766 P.2d 499, 504 (1989).

The same standards should be applied to allegedly improper arguments. A trial judge is, of course, well familiar with the burden of proof. There is no reason to believe that judges will be misled by subtle (or even blatant) mis-statements concerning that burden. Nor is there any reason to believe that a judge would be unable to follow *his own* instruction to disregard such arguments.

Consequently, it is highly unlikely that any improper statements in closing arguments would be so prejudicial in a bench trial that they could be challenged for the first time on appeal.

In the present case, the court made a detailed oral decision, explaining why the juvenile's guilt has been proved beyond a reasonable doubt. 5/29 RP 13-35. There is no indication that the court failed to apply the proper burden of proof. Consequently, even if the prosecutor's closing argument was somehow improper, T.Y. has failed to establish any likelihood that the adjudication was affected by any such impropriety.

IV. CONCLUSION

The adjudication and order of disposition should be affirmed.

Respectfully submitted on June 26, 2014.

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