714660-0

714660-0

NO. 71466-0-I

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

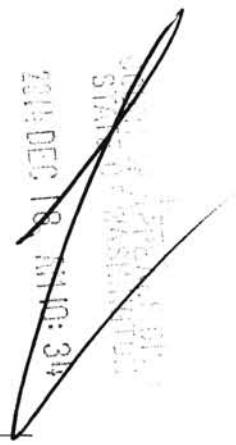
STATE OF WASHINGTON,

Respondent,

v.

K.L.G. (DOB: 01/26/2001),

Appellant.



BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

MARA J. ROZZANO
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATUTES

COURT RULES

OTHER AUTHORITIES

I. ISSUES

1) Did the trial court abuse its discretion in determining that the victim was competent to testify?
2) Was the victim placed under oath when he promised to tell the truth?
3) Where the victim testified and was subjected to cross-examination, did admission of his out-of-court statements violate the Confrontation Clause?
4) Can the admission of the victim's statements be challenged on statutory grounds that were not raised in the trial court?
5) If the issue can be raised, did the statements satisfy statutory requirement of reliability and corroboration?

II. STATEMENT OF THE CASE

In September of 2013, the twelve year old defendant was living in the same residence with five year old C.S. On September 28, 2013, the defendant ran away from home. While the defendant was gone, C.S. disclosed to his mother that the defendant had stuck his penis in C.S.'s bottom. C.S.'s mother reported this to the police when they had located the defendant. The state charged the defendant by amended information with one count of first degree

child rape and one count of first degree child molestation. The matter proceeded to trial on December 16, 2013.

During motions in limine there was a discussion about the service dog, Harper, who was present in the courtroom. The parties noted some concern with C.S. having been previously distracted by Harper during the child interview. The court noted Harper's extensive training, her use in other cases the court had presided over, and that Harper was very quiet and well-behaved. 1RP 8-11.

The court allowed the state to elicit testimony from C.S. one time to address his competency and his testimony at trial. 1RP 16-17.

The court administered the following oath to C.S.:

> THE COURT: Okay. Good morning. We are going to ask you to raise your right hand. Can you do that for me? The other right hand. That's right. Put it back up.
>
> Do you swear that the testimony you will give in this proceeding today will be the truth, the whole truth, and nothing but the truth?
>
> MS. GINA COSLETT: Do you promise to tell the truth?
>
> THE WITNESS: Yes.

There was no objection to this oath. 1RP 33-34.

C.S. testified about the incident. He clearly indicated the defendant was "doing gross stuff" and explained that the

gross stuff meant the defendant was touching his butt. When asked what part of the defendant's body was touching his butt, C.S. clearly indicated, "His wiener. Ick, gross." C.S. was further able to explain that both his clothes and the defendant's clothes were off and that he had taken his own clothing off when the defendant told him to. C.S. also described how he felt having this done to him. C.S. also testified to telling his mom that the defendant was touching his butt and that this conversation took place while they were in the bathroom on the day the defendant ran away.

After C.S. testified, the defendant's trial attorney made these comments about C.S.'s competency.

> With regard to competency, he clearly testified. I know he is presumed to be competent. There were some questions that were questionable how he answered them. I don't know if that amounts to him being incompetent...there were several questions that caused alarm, and some of his responses also called into question his competency, as well. I will just leave it at that.

1RP 66.

This was the only time the defendant called into question C.S. being competent to testify.

Although C.S. was reluctant to testify and he did at times divert to other topics, he remained on topic and responsive to questions. C.S.'s testimony amounted to 30 pages of transcript, 19 of which represent cross-examination. 1RP 34-64. During the course of his testimony the five year old C.S. mentioned lunch 3 times[1], and the service dog twice. After the court used the word "recess", C.S. mentioned recess once more. He was subject to cross-examination including impeachment with the transcript of his forensic interview with the child interview specialist and the recording of his interview with the defense investigator. 1RP 35, 38, 41, 44, 49, 54, 55-57, 60-61.

The trial court made the following observations before finding C.S. competent to testify.

> Well, [C.S.] testified as a typical five-year-old. He is five years old. That factor was clear when he was on the witness stand that he did understand that he was being asked to tell the truth. He understands he meant to tell the truth. He clearly has the mental capacity to receive an accurate impression of the occurrence, which was only three months ago. He has memory sufficient to retain an independent recollection of the occurrence. He had

[1] The record indicates the trial court was concerned about breaking for lunch before C.S. took the stand and the noon recess took place before C.S. was cross-examined. 1RP 32, 44.

> the capacity to express in words a memory of the occurrence and the capacity to understand simple question about the occurrence.

1 RP 66.

The court also entered written findings with regard to C.S.'s competency.

> 1. C.S. understands his obligation to speak the truth.
> 2. C.S. had accurate recollection at the time of the occurrence and the ability to retain the recollection.
> 3. C.S. had the ability to describe the events and understand simple questions about them.

CP 29-30.

The defendant did not object to the entry of these findings of fact.. "---I'm okay with the competency findings. I'm okay with the child hearsay findings." He did object to the entry of other proposed findings 3RP 286.

III. ARGUMENT

A. BASED ON ITS OBSERVATIONS OF THE VICTIM'S DEMEANOR, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE DEFENDANT HAD FAILED TO ESTABLISH HIS INCOMPETENCY.

1. In Applying The Witness Competency Statute, The Trial Court Exercises Its Discretion In Light Of Its Observations Of The Witness.

Although it is not a constitutional requirement, witness competency is required by statute. Witnesses are not competent to

testify 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 ¶ 18, 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. ¶ 20.

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; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). These factors "continue to be a guide when competency is challenged." S.J.W. ¶ 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).

2. In The Present Case, None Of The Purported Inconsistencies In the Victim's Statements Mandated A Conclusion That He Was Incompetent.

The defendant claims that the victim's incompetence was shown by his answers in a particular portion of the forensic

interview. Near the beginning of the interview, prior to being asked to tell the truth, C.S. was asked if he remembered what he had for breakfast. He responded that he didn't remember. When asked if he had breakfast, he then responded that he had eaten cereal. When the interviewer pointed out the inconsistency, C.S. volunteered that he was tricking her. The interviewer then went over the importance of not tricking her in this interview and the further importance of telling her the truth. C.S. then promised to tell her the truth. CP 80-83. C.S. was told to correct the interviewer if she misstated something and not to guess at the answers. The interviewer then went through a series of questions to confirm C.S.'s promise. C.S. correctly responded to questions designed to test his compliance. C.S. also corrected the interviewer when she later made a mistake by calling him the wrong name. CP 82-83, 92. The trial court was entitled to conclude that these responses showed his understanding of the necessity of telling the truth.

The defendant also points to a number of purported inconsistencies in the victim's testimony. Some of these "inconsistencies" are illusory. For example, the defendant represents that during the forensic interview the victim responded to the interviewer's attempt to get him to speak about the incident in

a way that did not provide details of the incident. "It was only then, when Coslett told C.S. that she heard he went to the doctor, that C.S. responded by saying 'and that's gross'". Defendant Brief 23-24. However, C.S.'s response was actually much more detailed:

> CIS Coslett: I heard that you went to see the doctor.
> C.S.: oh yeah, then um (unintelligible) was humping me and doing that stuff.
> CIS Coslett: Something what.
> C.S. [the defendant] was humping me and doing that stuff.

C.S. went on to explain that the defendant was doing gross stuff and that 'gross stuff' was touching his butt. CP 88-89 (forensic interview transcript at pp. 10-11).

The defendant claims that during his testimony C.S. couldn't even say what part of his body got touched. However, in the portion of C.S.'s testimony that is cited to support this assertion C.S. was responding to a question about humping in general, not about what happened to him. Defendant's brief pp. 25-26; 1RP 40. The defendant further asserts that the victim's incompetency was shown when he was being cross-examined about his prior statements to the forensic interviewer and the separate defense interview.

> Q. When we asked you what "humping" meant, did you say: 'It means you are touching my butt?'

A. No, I said it was like being gross.
Q. Did you say that to [the forensic interviewer] that humping means you're touching my butt?
A. Yeah.
Q. You did.
A. And then I said it's being gross.
Q. Okay. When she asked you about that, did you say: "With his hands?"
A. Yeah, but sometimes I don't.

1RP 58-59.

This answer could be consistent with C.S.'s testimony during the competency hearing. C.S. had testified to the defendant touching his butt with his hands and his 'wiener'. From a five year old child's perspective sometimes he says with his hands and sometimes he doesn't, he says with his wiener.

This course of questions and answers also shows that C.S. was paying attention to the details of the questions. He distinguished his answers between when the defendant attorney said "we" asked from when the forensic interviewer asked him.

The defendant further contends that C.S. was not competent because he was inconsistent about where the abuse took place but C.S. testified that the defendant had humped him a lot of times, but only once with their clothes off. C.S. could well have meant that the particular kind of touching he had described happened in that one location, but other kinds happened in another.

Inconsistencies in the child's testimony or reluctance to testify do not go to the question of competency. State v. Carlson, 61 Wn. App. 865, 874-75, 812 P.2d 536, 541 (1991). Many witnesses are unclear about details. Many witnesses can be badgered into changing their answers. Normally, such problems merely affect the witness's credibility. Whether they rise to a level that renders the witness incompetent is a matter within the discretion of the trial court.

The defendant cites State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999). There, a child witness described in detail being born at the same time as his brother. The witness was seven years old; his brother was two. The trial court said that the witness was not able to distinguish between dream and reality – but nonetheless ruled that he was competent. This court concluded that "the *only* reasonable view of this record is ... that [the witness] lacked the capacity to distinguish truth from falsehood." Id. at 106 (court's emphasis).

No such situation occurred in the present case. The witness did not testify to anything that was clearly fantasy. Although he may have been reluctant to testify and unclear about some details, this is not uncommon for witnesses. Nor is it uncommon for

witnesses to change their answers in response to repeated questioning. 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). The court has upheld a finding of competency with a child witness when the witness testified he knew the defendant had committed the offense because he dreamt about it and the witness had admitted to making up part of his story. State v. Kennealy, 151 Wn. App. 861, 878-79, 214 P.3d 200, 208 (2009), review denied, 168 Wn.2d 1012, (2010). The trial court did not abuse its discretion in ruling that the victim was competent to testify.

B. THE LACK OF FORMALITY IN SWEARING WITNESSES CANNOT BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

1. The Witness' Promises To Tell The Truth Constituted Adequate Oath.

The offender claims that due process was violated by the trial court's failure to swear C.S. This argument is based on the erroneous premise that the witness was not sworn. In fact, an adequate oath was administered.

The law does not prescribe any set form of oath. State v. Collier, 23 Wn.2d 678, 694, 162 P.2d 267 (1945). When a child testifies, a formal oath is not required. State v. Johnson, 28 Wn. App. 459, 461, 624 P.2d 213 (1981), aff'd on other grounds, 96 Wn.2d 926, 639 P.2d 1332 (1982). For example, it is sufficient to have the child "promise" to tell the truth. Collier, 23 Wn.2d at 693.

Here, C.S. testified that he promised to tell the truth. A comparable line of questioning was held adequate in State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984). There, a child witness stated, in response to the prosecutor's questions, that he knew it was important to tell the truth in court and that he would tell the truth. The court held that the requirement of an "oath" is satisfied "when a child demonstrates an understanding of the difference between truth and falsity, is adequately apprised of the importance of telling the truth and declares that he will do so." Id. at 876. Courts in other jurisdictions have reached similar results. See, e.g., Spigarolo v. Meachum, 934 F.2d 19, 24 (2nd Cir. 1991) (child witness sufficiently sworn when judge asked, "Are you going to tell the truth here today?"); State v. Mosby, 450 N.Wn.2d 629, 633 (Minn. App. 1990) (witness sufficiently sworn when prosecutor asked, "You know that here you're supposed to tell the truth?")

Similarly here, the examination of the witnesses satisfied the requirement of an "oath."

2. By Failing To Object, The Offender Waived Any Requirement Of An Additional Oath.

If any further oath was required, the offender's failure to request it constituted a waiver. The offender cites to one case where none of the witnesses testified under oath. In re M.B., 101 Wn. App. 425, 470, 3 P.3d 780, 804, review denied, 142 Wn.2d 1027 (2000). The court was proceeding as though the Rules of Evidence did not apply to juvenile civil contempt proceedings. Id.

In Dixon, this court held (as an alternative ground) that the defendant's failure to object constituted a waiver of the right under ER 603 to have the witness sworn. Dixon, 37 Wn. App. at 876. Courts in other jurisdictions agree:

> It is well settled that the swearing of a witness is waived by failure to raise the point during the witness' testimony, thus denying the trial court an opportunity to correct what has been characterized as an "irregularity". . . [There are] two justifications for the rule: First, the defect or failure could have been corrected if a timely objection had been made; second, in the absence of a waiver rule counsel might deliberately avoid objecting to a witness being unsworn in order to have a ground of appeal.

United States v. Odom, 736 F.2d 104, 114-15 (4th Cir. 1984); see 6 J. Wigmore, Evidence § 1819(b) (Chadbourn rev. 1976). Here, the

offender did not object to the absence of a formal oath at any time during the trial. His failure to do so waived any right to an additional oath. "Although the trial court's failure to administer an oath was error, [the defendant] has waived it because he did not object to NT's testimony on this basis at trial." State v. Avila, 78 Wn. App. 731, 738, 899 P.2d 11, 15 (1995).

3. Since There Is No Reason To Believe That A Formal Oath Would Have Changed The Witnesses' Testimony, Its Absence Is Not A "Manifest Error Affecting A Constitutional Right."

Finally, even if the absence of an additional oath constituted constitutional error, and even if the error was not waived, it is not a "manifest error affecting a constitutional right" that can be raised for the first time on appeal under RAP 2.5(a)(3). To establish that an error "affected" his rights, a defendant must make "[s]ome reasonable showing of a likelihood of actual prejudice." An error that is purely abstract and theoretical is insufficient. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992); see State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, the consequences of failing to administer a formal oath are purely abstract and theoretical. There is no reason to believe that the witness' testimony would have been any different if such an oath had been administered. Nor is there any reason why the

judge would have considered him less credible if he had been formally placed under oath. The possibility that his testimony might change is purely abstract and theoretical. It would be tragic to put this young boy through the ordeal of testifying a second time about being anally raped, simply because no one considered a formal oath important. Any error does not rise to the level that can be raised for the first time on appeal.

C. THE VICTIM'S OUT-OF-COURT STATEMENTS WERE PROPERLY ADMITTED.

1. Since The Victim Testified And Was Subjected To Cross-Examination, The Admission Of His Statements Satisfied Constitutional Requirements.

The defendant claims that admission of the victim's out-of-court statements violated the requirements set out in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Under Crawford, testimonial statements of witnesses absent from trial are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. Id. at 59. On the other hand, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Id. at 9.

The defendant argues that because the victim was allegedly incompetent to testify, his statements were inadmissible under

Crawford. This argument is faulty in both its premise and its conclusion. With regard to the premise, the prior section of this brief demonstrates that the victim was in fact competent. Since he appeared at trial and was subject to cross-examination, the use of his prior statements did not violate the Confrontation Clause. State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006).

Furthermore, even if the victim were in fact incompetent as a witness, that would not render his statements constitutionally inadmissible. Even if a witness has a complete absence of memory with regard to the facts at issue, cross-examination of that witness is sufficient to satisfy the Confrontation Clause. Indeed, simply demonstrating the witness's poor memory is a prime objective of cross-examination. United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).

In the present case, cross-examination of the victim was effective in demonstrating inconsistencies in his statements and problems with his memory. In no sense was this cross-examination a nullity. Because the witness appeared at trial and was cross-examined, admission of his statements did not violate any constitutional requirements.

2. The Victim's Out Of Court Statements Were Properly Admitted Under The Child Hearsay Statute.

The defendant also claims on appeal that admission of these statements violated the requirements of the child hearsay statute, RCW 9A.454.120.

The defendant claims that the statements were inadmissible because of lack of corroboration. Again, this argument rests on the faulty premise that the victim was incompetent to testify. Additionally, there was in fact substantial corroboration. The victim's mother testified Finally, the defendant claims that the statements did not meet the statutory requirement that "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1). In determining whether this requirement is satisfied, the court should consider nine 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) whether the statements were made spontaneously; ... (5) the timing of the declaration and the relationship between the declarant and the witness; ... [6] the statement contains no express assertion about past fact, [7] cross-examination could not show the declarant's lack of knowledge, [8] the possibility of the declarant's faulty recollection is remote, and [9] the circumstances surrounding the statement ... are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

Determining the admissibility of child hearsay lies within the discretion of the trial court. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 125 Wn.2d 1002 (1995). No single factor is decisive; rather, reliability is based on an overall evaluation of the factors. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829, 817 P.2d 412 (1991). If the factors are substantially met, the statement is sufficiently reliable. State v. Borland, 57 Wn. App. 7, 20, 786 P.2d 810 (1990).

The defendant attacks the trial court's findings on all the Ryan factors but his argument is focused on the victim's supposed dishonest character. This opinion appears to be based on one incident where the victim admitting to tricking the forensic interviewer prior to promising to tell her the truth. There is no evidence that C.S. has a reputation for dishonesty or is prone to lying. The defendant asserts that C.S. may have fabricated the accusation to resolve a sibling rivalry. The defendant does not explain how or why a five year old child would jump to sexual assault allegations to resolve the issue of sibling rivalry. There is no explanation as to how C.S. would understand the long term implications of such allegations. In fact, during the forensic interview, it was clear C.S. was concerned he was in trouble for

what had taken place. CP 88. The trial court could properly conclude that the victim had no motive to lie.

C.S. was consistent in telling multiple people about what had occurred. He told his mother, the forensic interviewer, and the defense investigator that the defendant had sexually assaulted him. He provided more detail to some than to others but consistently indicated the defendant had humped him. He defined humping as putting his hands on his butt. To his mother he admitted the defendant put soap and his wiener in his butt. At trial he testified that the defendant touched his butt with his hands and his wiener. To all he described the action as "doing gross stuff."

The defendant challenges the spontaneity of the statements. The initial statement was a response to C.S.'s mother tickling him and asking him what was going on because he looked down. C.S. just came out and told her the defendant had pulled his pants down and put soap in his bottom and put his wiener in and out. After the initial disclosure there were attempts to get more details, but these attempts were made without leading questions. The statements were spontaneous under the law. In re Dependency of S.S., 61 Wn. App. 488, 497, 814 P.2d 204, 210 (1991), review denied, 117 Wn.2d 1011 (1991). The defendant is the victim's half-brother and

was known to him. There is no indication C.S.'s recollection of the events or the identity of the perpetrator are faulty. Admission of the statements was not an abuse of discretion.

IV. CONCLUSION

The finding of guilt and disposition order should be affirmed.

Respectfully submitted on December 17, 2014.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: _____
MARA J. ROZZANO, WSBA #22248
Deputy Prosecuting Attorney
Attorney for Respondent