

NO. 66617-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JHONNY GODINEZ BASTIDA,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Ronald L. Castleberry, Judge

APPELLANT'S REPLY BRIEF

Christopher R. Black
Attorney for Appellant

LAW OFFICE OF CHRISTOPHER BLACK, PLLC
119 First Avenue South, Suite 500
Seattle, WA 98104
Phone: 206.623.1604
Fax: 206.682.3002

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A. ARGUMENT

1. AN ERRONEOUS FINDING OF COMPETENCY IS AN ERROR OF CONSTITUTIONAL MAGNITUDE, AS IT VIOLATES A DEFENDANT'S DUE PROCESS RIGHT TO BE FREE FROM A CONVICTION BASED ON INCOMPETENT EVIDENCE.

The State argues that Mr. Godinez's claim that V.O. was not competent to testify is not of constitutional magnitude. Brief of Respondent at 5. The recent Washington Supreme Court case, State v. Brousseau, --Wn.2d --, 259 P.3d 209 (2011), squarely rejects the State's position. Brousseau involved a due process challenge to the procedures the trial court used to determine competency, specifically whether the court could determine a child witness to be competent without examining her at the competency hearing. While the Court ultimately denied Brousseau's claim, it stated that "[d]ue process protects a criminal defendant against a conviction based upon incompetent evidence." Brousseau, 259 P.3d at ¶ 4. The Court agreed that "a criminal defendant's right to be free from a conviction based on incompetent evidence" is an interest that is implicated by the due process clause. Id., at ¶¶ 33-35. The Court, however, held that the procedures utilized in that case met the requirements of due process. Id., at ¶ 53. While Mr. Godinez has raised a different argument than that in Brousseau, the interest at the base of his claim, the right to be protected against a conviction based upon

incompetent evidence, is identical. This right implicates due process.

Because of the constitutional magnitude of the claim, any error regarding the competency determination is presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). As such, on appeal, the State bears the burden of proving beyond a reasonable doubt that the result would have been the same absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The State has not even attempted to do this.

2. THIS COURT SHOULD NOT DEFER TO THE TRIAL COURT'S EVALUATION OF COMPETENCY BECAUSE THE RECORD BEFORE THIS COURT IS SUFFICIENT TO ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING A CHILD WITNESS COMPETENT TO TESTIFY.

The State's argument against this Court determining that the trial court erred in finding V.O. competent relies heavily on the fact that the cases require that the Court find abuse of discretion in the trial court's finding, and the verbiage in many cases regarding the trial court's unique position to observe the non-verbal evidence that does not become part of the record for a reviewing court. See, e.g., State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967), State v. S.J.W., 170 Wn.2d 92, 239 P.3d 568 (2010); Brief of Respondent at 6-8. While the State correctly points out

the standards applicable to this Court's review of the trial court's ruling, it bears noting that the cases do not require that this Court completely defer to the trial court simply because it is in a better position to observe witnesses. This would obviously abrogate the role of an appellate court.

If there is enough evidence in the record before this Court to show an abuse of discretion, then the fact that this Court has not observed the witness's demeanor becomes significantly less relevant. This is the case, for example, where the record affirmatively establishes that one of the Allen factors was not met. See In re Dependency of A.E.P., 135 Wn.2d 208, 223-26, 956 P.2d 297 (1998) (finding an abuse of discretion where the record contained nothing establishing the date or time period of the alleged sexual abuse).

In this case, the record that is before this Court is more than sufficient to affirmatively establish that the trial court in fact abused its discretion in finding V.O. competent to testify. As such, the fact that this Court did not observe V.O.'s testimony does require any undue deference to the trial court's conclusions.

The record of V.O.'s testimony in this case affirmatively establishes that she did not understand the obligation to speak the truth on the witness stand, and that she did not have memory sufficient to retain an independent recollection of the occurrence. See Allen, 70 Wn.2d at 692.

The State has framed the case as one that simply involved a few inconsistencies in V.O.'s testimony. See Respondent's Brief, at 6. This is fundamentally not the case. V.O.'s testimony at the competency hearing and at trial comprised far more than a few mere inconsistencies and contradictions.

The record shows far more pervasive incongruities in V.O.'s statements, both in court and out of court, than the State suggests. Appellant previously set these forth in detail, and will not repeat them herein. See Appellant's Opening Brief at 21-25. The variations in V.O.'s statements in this case are extensive and pertain to important details at the very core of the case. While a minor inconsistency, or even a few, in a witness's testimony will not necessarily render that testimony incompetent, this is not the case when the testimony is replete with inconsistencies and contradictions, as in this case. These inconsistencies and contradictions in this case, which the record plainly reveals, are of a magnitude that shows that, at the time of V.O.'s testimony, she did not actually remember what had happened. Because one of the preconditions for a finding of competency is that the child have memory sufficient to retain an independent recollection of events, and because the record shows that V.O. did not have such an independent recollection, the trial court erred in finding V.O. competent to testify. Allen, 70 Wn.2d at 692.

Perhaps even more important, however, in demonstrating V.O.'s lack of competency to testify in this matter was the fact that she acknowledged changing her answers to questions on the basis of what she believed the questioner wanted to hear. The State inexplicably seemingly ignored this fact in its response. It is difficult to imagine a fact that better shows that that a child she did not understand the obligation to speak the truth on the witness stand. See Allen, 70 Wn.2d at 692.

During the competency hearing V.O., explicitly and on the record, acknowledged that during that on the witness stand, and in regard to details crucial to the case, she changed her answers to questions because she thought she was giving the "wrong" answers. Because it is such a critical exchange, it is here reproduced again:

Q. When Mr. Okoloko asked you questions, do you think that there is a right answer and a wrong answer, or do you think you're just supposed to answer them?

A. Answer them.

Q. Answer them? Okay. When he -- when Mr. Okoloko was just asking you about whether your pants were on or off when were you on the bed, do you remember that?

A. Yeah.

Q. Okay. And you told him that your pants were on; right?

A. Yeah.

Q. And then he asked you more times the same question; right?

A. Uh-huh.

...

Q. Why did you change your answer after he asked you several times?

A. I don't know.

Q. You don't know? Okay. Was it because you were giving --

you thought you were giving the wrong answer?

A. Yeah.

RP 46-47.

The act of changing answers to questions on the witness stand in response to one's perception about what the questioner wants to hear, i.e. to avoid giving the "wrong" answer, is completely incompatible with an understanding of the duty to tell the truth. The only conclusion that can be drawn from this exchange is that V.O. either did not understand the difference between "right answers" and "wrong answers," i.e. truth and falsehood, or did not understand her obligation to give only truthful answers.

The ability to understand the obligation to speak the truth on the witness stand is one of the preconditions for a finding of competency. The record before this Court affirmatively and clearly demonstrates that V.O. did not understand that obligation. Because the record contains information sufficient to show that the trial court erred in finding V.O. competent, this Court should conclude that the trial court abused its discretion in finding V.O. competent to testify. Allen, 70 Wn.2d at 692.

3. RAP 2.5(a) DOES NOT PRECLUDE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING EVIDENCE IN VIOLATION OF WASHINGTON STATE'S CHILD HEARSAY STATUTE.

The State has argued that Mr. Godinez may not challenge the

admission of evidence under the child hearsay statute, RCW 9A.44.120, on appeal because he did not raise the issue at trial. Respondent's Brief, at 13. The State's argument is unavailing. While it has long been the law in Washington that an "appellate court may refuse to review any claim of error which was not raised in the trial court," RAP 2.5(a); State v. Lyskoski, 47 Wn.2d 102, 108, 287 P.2d 114 (1955), the State's argument rests on a hyper-technical, and incorrect, reading of Rule 2.5(a). The State's interpretation of the rule, as applied to the facts of this case, comports with neither the plain language nor the rationale of the rule.

Essentially, the State interprets the words in the rule, "claim of error which was not raised," as instead reading "position that was not formally argued." The State seems to believe that because Mr. Godinez did not formally style his challenge to the evidence a motion, or did not argue the issue extensively or persuasively enough, he therefore did not raise the claim. Because the rule does not require what the state proposes, and because Mr. Godinez did raise in the trial court the claim that he is currently advancing, this Court should not find that RAP 2.5(a) precludes his challenge.

Mr. Godinez raised the issue of child hearsay with the trial court. He filed a brief with the court called a "Defense Child Competency and Hearsay Memo." CP 55. This brief included, under the heading

“Argument,” a discussion of the pertinent standards regarding the admission of evidence under the child hearsay statute. Id. The State filed a brief entitled a “State’s Memorandum Re Child Competency and Child Hearsay.” CP 54. The Court held a hearing regarding the contested issues of both child competency and child hearsay. RP 3-5. During the contested hearing, the defense proceeded in a manner consistent with challenging the admissibility of child hearsay evidence, most notably including engaging in extensive examination of the witnesses in regard to the questions underlying the dual purposes of the hearing. See generally RP 3-101. At the end of the hearing, the trial court made an extensive oral ruling on the admissibility of evidence under the child hearsay statute. RP 99-101. The only reasonable conclusion that can be drawn from this record is that both parties, as well as the trial court, understood the issue of the admissibility of child hearsay evidence to be a contested issue. The defense communicated to the trial court that it was challenging the admissibility of the evidence, thereby raising the claim that Mr. Godinez continues to press on appeal.

The manner in which Mr. Godinez raised the issue of the admissibility of evidence under the child hearsay statute comports with the requirements of RAP 2.5(a). “The underlying policy of the rule is to ‘encourag[e] the efficient use of judicial resources. The appellate courts

will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010) (quoting State v. Scott, 110 Wn. 2d 682, 685, 757 P. 2d 492 (1988)). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. O'Hara, 167 Wn.2d at 98; City of Seattle v. Harlaon, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).

In this case, Mr. Godinez raised the issue of the admissibility of child hearsay. The parties and the trial court expended significant time and resources on the issue. This is not a situation where the defense laid in the weeds about something, simply to preserve an issue for appeal. The defense complied with both the letter and the spirit of the rule, and the Court should therefore not find that his claim is barred by RAP 2.5(a).

B. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Appellant's opening brief, this Court should reverse Mr. Godinez Bastida's convictions for child molestation in the first degree and vacate his sentence.

DATED this 26th day of October, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC

A handwritten signature in black ink, appearing to be 'CB', written above a horizontal line.

Christopher Black, WSBA No. 31744
Attorney for Jhonny Godinez Bastida

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed this brief in accordance with RAP 18.6(c), by mailing an original and one copy to the court on October 26, 2011.

I hereby further certify that a copy of the foregoing was served on October 26, 2011, via U.S. Mail, upon the parties required to be served in this action:

Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave., M/S 504
Everett, WA 98201

Jhonny Godinez Bastida, DOC No. 346354
Airway Heights Correction Center
11919 W. Sprague Avenue
P.O. Box 1899
Airway Heights, WA 99001-1899

DATED this 26th day of October, 2011.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



Christopher Black, WSBA No. 31744
Attorney for Jhonny Godinez Bastida