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66617-7

NO. 66617-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JHONNY GODINEZ-BASTIDA,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

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

FILED
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2011 SEP 12 AM 11:33

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I. ISSUES

(1) Did the trial court abuse its discretion in determining that the victim was competent to testify?

(2) Where the victim testified and was subjected to cross-examination, did admission of her out-of-court statements violate the Confrontation Clause?

(3) Can the admission of the victim's statements be challenged on statutory grounds that were not raised in the trial court?

(4) If the issue can be raised, did the statements satisfy statutory requirement of reliability and corroboration?

II. STATEMENT OF THE CASE

The defendant, Jhonny Godinez-Bastida, lived with E.O. from early 2005 until January, 2010. Also living with them was E.O.'s daughter V.O. (born January, 2004). 2 RP 221-23.

On January 6, 2010, E.O. went to work, leaving V.O. in the care of the defendant. When E.O. returned home, she found that the house had not been cleaned. She asked V.O. what she had been doing. V.O. said that she had been playing. E.O. asked what she had been playing. V.O. said, "I'm not going to tell you because you're going to be mad at me." E.O. said that she would be mad if

V.O. didn't tell. She asked why E.O. thought that she would be mad. V.O. answered, "Because my dad told me to don't tell you." 2 RP 231-34.'

E.O. then asked V.O. what he had done. V.O. responded, "he put his butt on my butt." E.O. asked what she meant by her "butt." V.O. pointed to "her back." E.O. then asked what she meant by his "butt," and V.O. pointed "to the front." V.O. generally referred to a penis as a "butt." 2 RP 234-36.

E.O. asked her daughter why she hadn't told this before. V.O. answered, "Because my dad told me to don't tell you because you're going to get mad at me and spank me." E.O. confronted the defendant. He denied doing anything to V.O. and claimed that she was lying. E.O. ordered him out of the house. She also contacted police. 2 RP 235-38.

On January 22, V.O. was interviewed by Amanda Harpell-Franz, a child interview specialist with the Snohomish County Sheriff's Office. 1 RP 73-78. At trial, a videotape of the interview (ex. 6) was played for the jury. 2 RP 177-78. A transcript was introduced at the pre-trial hearing. Pre-trial ex. 1.

In the interview, V.O. said, "My dad was trying to touch my butt and he was trying to pull my pants off and he was trying to pull

my underwear off.” On a diagram, she identified her buttocks as her “butt.” She then said that he had touched her butt with his hand. Her shirt was on but he took her pants off. Ex. 1 at 13-15.

V.O. also talked about what happened the day that her dad left. She said that he touched her crotch area with his crotch area. She didn’t know the name for that part of the body. By this point in the interview, E.O. was sighing a lot and answering “don’t know” to most questions. She said that it was hard to talk about. Ms. Harpell-Franz terminated the interview shortly afterwards. Ex. 1 at 25-29; 2 RP 219-20.

In March or April, 2010, the defendant made a phone call to E.O. He said that he was sorry “for what happened with” V.O. He was crying and screaming. E.O. asked what he was doing. He said, “I’m cutting myself and I’m going to pay with my life for what I did.” She told him to stop. She asked him to meet her at her apartment parking lot. 2 RP 244-26. When they met, he had blood on his shirt and his arms. She asked him why he did that. He again said that he was going to pay with his life for what he did. 2 RP 249.

At trial, V.O. testified that the defendant had been “sticking his body to my body.” She identified the part of her body as her

“back butt” and the part of his body as his “front butt.” She pointed out these areas on a doll. She also testified that she smelled “pee or water” on his hand. The defendant had told her that she couldn’t tell her friend or her mom. When she told her mom, the defendant stopped doing it. 3 RP 297-305.

The defendant testified that on January 16th, V.O. was playing with her toys while he watched a movie. She jumped on him and her knee hit his genitals. He moved her to the side “with force and fast.” When E.O. got home, she asked what he had done to V.O. She did not tell him what she thought he had done. She then told her to leave, and he did. 4 RP 461-67.

The defendant also testified to an occasion when he had met E.O. in a parking lot. They talked about problems, and he said he was sorry. He did not cut himself and had no blood on him. He had once attempted suicide by cutting his wrists, but that was many years ago. 4 RP 470-72.

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 HER INCOMPETENCY.

1. The Constitution Does Not Establish "Reliability" Requirements Beyond Those Set Out in Evidentiary Rules And Statutes.

The defendant claims that the victim was incompetent to testify. He seeks to characterize this as a constitutional claim. According to him, the constitutional right to a fair trial "includes the guarantee that evidence used to convict [a defendant] will meet baseline requirements of fairness and reliability." Brief of Appellant at 14, citing Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 34 L. Ed. 2d 297 (1973). In fact, Chambers places no constitutional restrictions on evidence offered by the State. Instead, it *authorizes* (but does not require) evidentiary rules that exclude unreliable evidence offered by the *defense*. Id. at 302. The reliability of evidence is governed by evidentiary rules, not the Due Process Clause. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Colorado v. Connelly, 479 U.S. 157, 166, 107 S. Ct. 515, 93 L. Ed. 2d 473

(1986); see State v. McCullough, 56 Wn. App. 655, 658, 784 P.2d 566, review denied, 114 Wn.2d 1025 (1990).

2. 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).

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

The defendant claims that the victim's incompetence was shown by her answers in a particular portion of the forensic interview. Near the beginning of the interview, she was asked four questions similar to the following:

This girl looks at the apple and says its an apple.
This girl looks at the apple and says it's a banana.
Which girl told the truth?

Pre-trial ex. 1 at 9-10. The witness answered only two of the four questions correctly. 2 RP 195.

The interviewer testified that this portion of the interview was no longer used, because children found it confusing. She gave an example of one child who said "they're both telling the truth because of apple pie." 2 RP 173. At the child hearsay hearing, the victim correctly identified various false statements as lies. 1 RP 19-20. She also said at both the interview and the hearing that telling lies was bad and could get you in trouble. Ex. 1 at 11; 1 RP 20; 2 RP 215. The trial court was entitled to conclude that these

responses showed her 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 claimed that the victim was inconsistent about the number of times that the abuse occurred. In the forensic interview, she described two occasions in different parts of the house, which involved different kinds of touching. Ex. 1 at 13-20, 25-28. In her trial testimony, she described an incident in the bedroom. She was then asked if "he did it in any other place in the apartment," to which she answered no. 3 RP 306. Unfortunately, the question did not indicate what "it" was. The victim could well have meant that the particular kind of touching she had described only happened in that one location, but other kinds happened in other places.

Similarly, in a defense interview, the victim was asked how many times she had talked to her mom "about this." She said 30 times. 4 RP 429. In cross-examination at the child hearsay hearing, she was asked how many times she had talked to her mom "about the bad things that you said Jhonny was doing to you." She said four times. When asked if it was four times or 30 times,

she answered “four times and 30 times.” 1 RP 43-44. These responses could all be correct – if she understood “this” as meaning something different than “the bad things that Jhonny was doing.”

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 she may have been 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 trial court did not abuse its discretion in ruling that the victim was competent to testify.

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

1. Since The Victim Testified And Was Subjected To Cross-Examination, The Admission Of Her 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, her 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 she appeared at trial and was subject to cross-examination, the use of her prior statements did not violate the Confrontation Clause.

Furthermore, even if the victim were in fact incompetent as a witness, that would not render her statements constitutionally inadmissible. The defendant claims that cross-examination of her was “only formal” and a “nullity.” Brief of Appellant at 29. He cites no authority in support of these claims. 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 her statements and problems with her memory. In no sense was this cross-examination a “nullity.” Because the witness appeared at trial and

was cross-examined, admission of her statements did not violate any constitutional requirements.

2. The Defendant Cannot Raise An Alleged Violation Of The Child Hearsay Statute For The First Time On Appeal.

The defendant also claims on appeal that admission of these statements violated the requirements of the child hearsay statute, RCW 9A.454.120. This argument is raised for the first time on appeal. At trial, the defendant raised no such argument. In his pre-hearing memo, he set out the statutory requirements but raised no argument on whether they were satisfied. CP 75-77. Similarly, at the pre-trial hearing, the defendant raised no argument with regard to the admissibility of child hearsay. 1 RP 97. Since issues under the child hearsay statute are not constitutional in nature, they should not be considered for the first time on appeal. See RAP 2.5(a).

3. Even If The Issue Could Be Raised, Statutory Requirements Were Established By The Defendant's Admissions And The Lack Of Any Motive For The Victim To Falsify Her Accusations.

If these arguments can be considered, they should be rejected. 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 that the defendant called her to say that he was sorry for what happened with V.O. He said that he was going to pay with his life for what he did. 2 RP 145. It is hard to imagine what the defendant could have done to the victim that made him feel that he deserved death, other than sexually abusing her. His statements cannot be realistically viewed as anything other than a confession that the victim's accusations were substantially true.

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's argument focused on the victim's supposed motive to lie. According to the defendant, she may have fabricated the accusation to prevent her mother from being angry about her failure to clean the house. Brief of Appellant at 32-33. This suggestion has no support in the record. To the contrary, the mother testified that the victim believed that revealing the abuse would *make* her mother angry. 2 RP 233-34. The trial court could properly conclude that the victim had no motive to lie – particularly when no one had even suggested that such a motive existed. Admission of the statements was not an abuse of discretion.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 9, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By:  #19354 for
SETH A. FINE, #10937
Deputy Prosecuting Attorney
Attorney for Respondent



**Snohomish County
Prosecuting Attorney**

Criminal Division
Joanie Cavagnaro, Chief Deputy
Mission Building
3000 Rockefeller Ave., M/S 504
Everett, WA 98201-4046
(425) 388-3333
Fax (425) 388-3572

September 8, 2011

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

**Re: STATE v. JHONNY GODINEZ-BASTIDA
COURT OF APPEALS NO. 66617-7-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

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Sincerely yours,

SETH A. FINE, #10937
Deputy Prosecuting Attorney

cc: Christopher R. Black
Attorney(s) for Appellant

I hereby enclosed a properly stamped envelope addressed to the attorney for the defendant that contains a copy of this document. I am under penalty of perjury under the laws of the State of Washington that this is true.

Snohomish County Prosecutors Office

9/11
Sept

Administration
Bob Lenz, Operations Manager
Admin East 7th Floor
(425) 388-3333
Fax (425) 388-7172

Civil Division
Jason Cummings, Chief Deputy
Admin East 7th Floor
(425) 388-6330
Fax (425) 388-6333

Family Support Division
Admin East 6th Floor
(425) 388-7280
Fax (425) 388-7295

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

THE STATE OF WASHINGTON,

Respondent,

v.

JHONNY GODINEZ-BASTIDA,

Appellant.

No. 66617-7-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 9th day of September, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
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CHRISTOPHER R. BLACK
ATTORNEY AT LAW
119 FIRST AVENUE SOUTH, SUITE 500
SEATTLE, WA 98104-3400

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 9th day of
September, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit