IN THE SUPREME COURT OF THE STATE OF DELAWARE

OLIVER RANDOLPH,	§	
	§	No. 510, 2004
Defendant Below,	§	
Appellant,	§	Court Below: Family Court
	§	of the State of Delaware, in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	No. 0308002436
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: April 13, 2005
Decided: June 30, 2005

Before **HOLLAND**, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 30th day of June 2005, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Oliver R.,[1] appeals from his convictions following a juvenile delinquency adjudication in the Family Court of rape in the second degree and unlawful sexual contact in the second degree. In support of his direct appeal, the defendant argues that there was insufficient evidence for the Family Court to find him competent to stand trial and that the Family Court

[1] Pursuant to the provisions of DEL. SUP. CT. R. 7(d), this Court has *sua sponte* selected pseudonyms to identify all family members involved in the action, in addition to the parties use of a pseudonym to refer to the defendant.

erred in admitting the alleged victim's out-of-court statements. We conclude that there was sufficient evidence in the record for the Family Court to find by a preponderance of the evidence that the defendant was legally competent to stand trial. We also conclude that the Family Court's admission of the out-of-court statements at issue did not constitute reversible error. Accordingly, we affirm.

(2) At the time of the incident the defendant was thirteen years old. The alleged victim, Marilyn A., was the defendant's five-year-old sister. The defendant was later arrested and charged with rape in the second degree and unlawful sexual contact in the second degree. Defense counsel then filed a motion for competency to stand trial in the Family Court. Following a hearing, the Family Court determined that the defendant was competent to stand trial.

(3) At the trial conducted in the Family Court, Marilyn A. was unable to implicate the defendant. However, Marilyn's mother, Brenda R., and the mother's boyfriend, Steven S., testified at trial concerning incriminating admissions made by the defendant. In addition, Marilyn's out-of-court statements to her mother, an interviewer at the Child Advocacy Center, Kendra Malloy, and a sexual assault nurse at the Christiana Hospital, Karen Dougherty, were admitted pursuant to 11 *Del. C.* § 3507. In these statements, Marilyn

indicated that the defendant had sexually assaulted her. These out-of-court statements were admitted into evidence despite the fact that Marilyn could not acknowledge that the defendant sexually assaulted her or what statements she previously made to her mother, or to Ms. Malloy or Ms. Dougherty.

(4) Juveniles in delinquency proceedings are entitled to the same essential and fundamental due process rights as adult criminal defendants.[2] The prosecution bears the burden of proving a defendant's legal competency by a preponderance of the evidence.[3] The test for competency is set forth in 11 *Del. C.* § 404(a), which provides in relevant part:

> Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial.[4]

Put another way, "the test of legal competency ... is ... [w]hether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual

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[2] *In re Winship*, 397 U.S. 358, 366 (1970); *In re Gault*, 387 U.S. 1, 55 (1967).
[3] *Diaz v. State*, 508 A.2d 861, 864 (Del. 1986).
[4] DEL. CODE ANN. tit. 11, § 404(a) (2005).

understanding of the proceedings against him."[5] The United States Supreme Court has also added the requirement that a defendant be able to "assist in preparing his defense."[6]

(5) When the Family Court decides a juvenile's competency to stand trial, that determination is entitled to deference by this Court.[7] The evidence in the present record supports the Family Court's conclusion that the defendant was legally competent to stand trial. We highlight only some of the facts that support the Family Court's conclusion. The prosecution's expert witness testified that the defendant was not mentally retarded. In fact, his IQ of 77 is higher than that of others who have been judged competent to stand trial.[8] The defendant was also aware that he had a lawyer and that his lawyer was there to help him. The prosecution's expert further testified that the defendant somewhat understood the nature of the proceedings and charges against him and that he was able, to a limited extent, to assist in his defense. Because there was evidence to support the conclusion that the defendant had the ability to

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[5] *State v. Shields*, 593 A.2d 986, 1004 (Del. Super. Ct. 1990) (citing *Dusky v. United States*, 362 U.S. 402 (1960)).

[6] *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[7] *Bailey v. State*, 490 A.2d 158, 167 (Del. 1983).

[8] *See, e.g., State v. Reed*, 2004 WL 2828043 (Del. Super.) (finding the defendant competent even though he had an IQ of 64); *Sullivan v. State*, 636 A.2d 931 (Del. 1994) (finding the defendant competent even though he had an IQ of 75).

understand the nature of the proceedings and to assist in his own defense, we conclude that the Family Court did not abuse its discretion by deciding that the defendant was competent to stand trial.

(6) We now consider the defendant's argument that the complaining witness' prior out-of-court statements were improperly admitted. The defendant's argument is two-fold. First, he claims that the admission of these statements violated his constitutional confrontation rights. Second, he contends that the Family Court abused its discretion in determining that the foundational requirements of Section 3507 were satisfied.

(7) A trial court's decision to admit or exclude evidence is generally reviewed for abuse of discretion.[9] We thus use this standard to review the defendant's argument that the foundational requirements of Section 3507 were not satisfied. Alleged violations of the United States or Delaware Constitutions are reviewed *de novo*.[10] The defendant's allegation that his constitutional confrontation rights were violated is, therefore, reviewed *de novo*.[11] We next address the defendant's arguments in turn.

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[9] *Capano v. State*, 781 A.2d 556, 586 (Del. 2001).

[10] *Hall v. State*, 788 A.2d 118, 123 (Del. 2001), *(*citing *Warren v. State*, 774 A.2d 246, 251 (Del. 2001)).

[11] *Id.*

(8) The defendant first cites *Crawford v. Washington*[12] to support his constitutional argument. In *Crawford*, the United States Supreme Court determined that under the Sixth Amendment, out-of-court testimonial statements by witnesses are inadmissible if the witness is unavailable and there is no opportunity to cross-examine the witness.[13] The defendant maintains that although Marilyn testified, she was unavailable and not subject to cross-examination because she had difficulty answering questions and most of her responses on direct examination were nonsensical.

(9) The defendant's argument is not persuasive. In *Crawford*, the United States Supreme Court did "not expressly require any specific quality of cross-examination...."[14] All that is required is that a defendant have the opportunity for effective cross-examination of the declarant, not effective cross-examination in whatever way and in whatever manner a defendant may wish.[15] In the present case, Marilyn was available for cross-examination and defense counsel made a strategic decision not to pursue cross-examination. Moreover, the mere fact that Marilyn had difficulty answering questions and

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[12] 541 U.S. 36 (2004).

[13] *Id.* at 59.

[14] *Burke v. State*, 484 A.2d 490, 494 (Del. 1984) (citing *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975)).

[15] *See United States v. Owens*, 484 U.S. 554, 560 (1988) (indicating that "successful cross-examination is not the constitutional guarantee.").

provided nonsensical responses on direct examination does not make her unavailable for confrontation clause purposes.[16] Based on the foregoing, we conclude that there was no denial of the defendant's confrontation rights.

(10) The defendant next challenges the procedural requirements for admission of a Section 3507 statement. The foundational requirements of Section 3507 have evolved since the statute's inception in 1970. These foundational requirements can be summarized as follows: First, the offering party must call the declarant as a witness and the direct examination of the declarant "should touch both on the events perceived and the out-of-court statement itself."[17] Second, the offering party must prove the voluntariness of the out-of-court statement during direct examination or, if the witness denies that the statement was made voluntarily, on *voir dire*.[18] The trial court "must be satisfied that the offering party has shown by the preponderance of the evidence that the statement was voluntarily made, ... and must render an explicit determination on the issue ... before admitting it for the jury's consideration."[19]

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[16] *See id.* (holding that the defendant's confrontation rights were not violated when the prosecution witness had a loss of memory). *See also Hall v. State*, 788 A.2d 118, 124-25 (Del. 2001) (holding that the witness' memory lapses did not deprive the defendant of his right of cross-examination).

[17] *Keys v. State*, 337 A.2d 18, 23 (Del. 1975).

[18] *Hatcher v. State*, 337 A.2d 30, 32 (Del. 1975).

[19] *Id.* (citations omitted).

Third, there must exist an opportunity to cross-examine the declarant about the out-of-court statement.[20] As a result, the statement must be offered into evidence prior to the conclusion of the direct examination of the declarant.[21] Finally, the declarant must be present during the admission of the out-of-court statement.[22]

(11) We find that the procedural requirements of Section 3507 were not satisfied in this case. The record clearly shows that Marilyn was not even asked about the statements she made to Ms. Malloy, Ms. Dougherty or her mother. However, after a careful review of the record, we conclude that the Family Court's error in admitting Marilyn's Section 3507 statements was harmless beyond a reasonable doubt. There was direct evidence, apart from the Marilyn's out-of-court statements, that supported the defendant's convictions. Significantly, the defendant himself admitted that he sexually assaulted his sister. In particular, the Family Court directly asked the defendant's mother if he admitted to her that he had "put his penis on the private parts between the legs [of Marilyn]" and she answered in the affirmative. Given the defendant's own admissions of delinquency, we conclude that any errors in the admission

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[20] *Smith v. State*, 669 A.2d 1, 8 (Del. 1995).
[21] *Id.*
[22] *Barnes v. State*, 858 A.2d 942, 946 (Del. 2004).

of the Section 3507 statements were harmless beyond a reasonable doubt.[23]

NOW, THEREFORE, IT IS SO ORDERED that the judgments of delinquency entered against the defendant in the Family Court are AFFIRMED.

By the Court:

/s/ Henry duPont Ridgely
Justice

[23] *Id.* at 946-47*; Van Arsdall v. State*, 524 A.2d 3, 25 (Del. 1987).