STATE OF MINNESOTA
IN COURT OF APPEALS
A11-226

State of Minnesota,
Respondent,

vs.

Lloyd Irwin Johnson, Jr.,
Appellant.

Filed February 21, 2012
Affirmed
Worke, Judge

Steele County District Court
File No. 74-CR-09-1385

Lori Swanson, Attorney General, Matthew G. Frank, Assistant Attorney General, St. Paul, Minnesota; and

Daniel McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges his first-degree criminal-sexual-conduct conviction, arguing that (1) the district court abused its discretion by determining that the alleged victim was competent to testify and (2) his Confrontation-Clause rights were not vindicated because the victim could not remember any details of the alleged crime while testifying. We affirm.

FACTS

In June 2009, appellant Lloyd Irwin Johnson, Jr. was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342 (2008). According to the complaint, on February 24, 2009, appellant's four-year-old grandson, H.H., informed his mother, K.J., that appellant had placed H.H.'s penis in his mouth while H.H. was staying overnight at appellant's house. H.H. told his mother that appellant "sucked on his weenie," appellant's whiskers were "scratchy and tickly," appellant asked H.H. to pee in appellant's mouth, and appellant told H.H. to keep the interaction secret. K.J. believed that the incident occurred either on January 3 or January 4, 2009.

On February 27, 2009, K.J. reported H.H's accusations to police. H.H. was interviewed about the allegation at the local police station according to the customary "CornerHouse" interview protocol for children suspected to have been sexually abused. H.H. stated that he slept in appellant's bed while staying overnight at his house. H.H. stated that he woke up in the middle of the night and informed appellant that he needed to go to the bathroom. H.H. stated that appellant sucked on his "pee pee" and that he peed

in his underwear or in appellant's mouth. H.H. stated that appellant had a beard and that the beard scratched his groin area. H.H. stated that appellant told him that the incident was a secret.

Prior to trial, appellant moved to prohibit H.H., then six years old, from testifying on the grounds of incompetency. The district court questioned H.H., and H.H. initially failed to provide answers to basic questions about his name, address, and schooling. The district court then allowed the prosecutor and appellant's counsel to question H.H. After H.H. confirmed that he knew the difference between telling the truth and telling a lie, the prosecutor questioned:

> Q. If I said that I have blue hair, is that [the] truth or a lie?
> A. Lie.
> Q. . . . If I said that you were wearing a blue shirt with a Tasmanian devil on it, is that the truth or a lie?
> A. Truth.
> Q. . . . If I said that today is Christmas, is that the truth or a lie?
> A. Lie.
> Q. . . . You think if we ask you some more questions you can tell the truth?
> A. (Indicating.)
> Q. Is that a yes?
> A. (Indicating.)
> Q. Can you say yes?
> A. Yes.
> Q. . . . Do you know that when you're in a courtroom like this and we have [a] Judge . . . that you can tell the truth?
> A. (Indicating.)
> Q. Is that a yes? Can you tell me yes or no out loud?
> A. Yes.
> Q. Yes, okay. Do you understand that it's important to tell the truth?
> A. (Indicating.)
> Q. Is that a yes?
> A. (Indicating.)

H.H. then answered questions about where he attended school, what grade he was in, and playing with friends.

The district court next permitted appellant's counsel to question H.H.:

> Q. . . . So if I were to tell you that I know Spiderman and he's a real person, would I be telling the truth?
> A. No.
> Q. What would I be telling?
> A. A lie.
> Q. Okay. And . . . is it ever right to . . . tell a lie? . . .
> A. I don't know.
> Q. You don't know? How come you don't know?
> A. (No response.)
> Q. Do you ever have dreams, [H.H.]?
> A. Yes.
> Q. And . . . are dreams . . . real things that happen?
> A. No.

Based on H.H.'s responses to questioning by appellant's counsel and the prosecutor, the district court concluded that the state "established a basic level of competency." However, the district court expressed "great concern" about H.H.'s ability to testify about the underlying facts of the case.

H.H. testified at appellant's court trial the following day. H.H testified that he was six years old and lived with his mother, father, sisters, and brother. H.H. stated that he was in kindergarten and was able to name the school that he attended. H.H. also stated again that he enjoyed playing with friends. H.H. testified that he recalled discussing the importance of telling the truth the day before with the prosecutor, appellant's counsel, and the judge. H.H. also testified that he remembered meeting with investigators during the CornerHouse interview, drawing a picture of himself, looking at pictures of a boy and a girl, and looking at dolls. H.H. first indicated that he remembered what he was

interviewed about, but could not specifically recall what he said during the CornerHouse interview. H.H. nodded when asked if he remembered speaking with K.J. around this time, but again testified that he could not remember what he said to police officers. Appellant did not question H.H. at trial.

The district court issued findings of fact, conclusions of law, and an order convicting appellant following the court trial. Although H.H. was deemed competent to testify, the district court found that he was unable to recall any of the events he initially reported to K.J. or during the CornerHouse interview. The district court noted that K.J. testified that H.H. told her about the abuse, and that appellant testified and denied any misconduct. The district court determined that H.H., K.J., and appellant all had "credibility issues." But the district court found that K.J.'s testimony of H.H. reporting appellant's abuse was more credible than appellant's denial of sexual misconduct for the following reasons: the specificity of H.H.'s report to K.J., including the detail that appellant's beard was scratchy; the fact that H.H. communicated the same specific details during the CornerHouse interview; H.H.'s overall demeanor during the CornerHouse interview, which indicated that he was not coached and had no motive to falsely describe appellant's conduct; and "Saliva and [Appellant's] DNA was found in the crotch area of H.H.'s underwear." Accordingly, the district court found that: (1) appellant intentionally placed H.H.'s penis in his mouth; (2) appellant instructed H.H. to urinate in his mouth; and (3) appellant instructed H.H. to keep the incident a secret. Based on these findings, the district court convicted appellant of first-degree criminal sexual conduct. This appeal follows.

D E C I S I O N

Competency

Appellant first asserts that the district court abused its discretion by determining that H.H. was competent to testify. Minn. Stat. § 595.02, subd. 1(n) (2008) establishes a rebuttable presumption that children are competent to testify:

> A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.

In assessing whether a child is competent to testify, a district court is to make a "general" determination unrelated to the subject matter of the case. *State v. Scott*, 501 N.W.2d 608, 613 (Minn. 1993). Instead, the district court makes the determination based on (1) the child's capacity to tell the truth and (2) the child's ability to recall facts. *State v. Sime*, 669 N.W.2d 922, 926 (Minn. App. 2003). "Where the court is in doubt as to the child's competency, it is best to err on the side of determining the child to be competent." *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990). We review a district court's decision regarding the competency of a child witness for an abuse of discretion. *State v. Brovold*, 477 N.W.2d 775, 778 (Minn. App. 1991), *review denied* (Minn. Jan. 17, 1992).

Appellant first argues that the district court abused its discretion because H.H. demonstrated no ability to recall facts in this case. Appellant asserts that the district court expressed "great concern" about whether H.H. was able to recall any fact about the abuse. Appellant further claims that the district court based its assessment of H.H.'s competency on his responses to questions from the prosecutor, which constituted a

departure from the customary procedure of the judge asking the child questions during a competency proceeding.

Appellant's arguments are unavailing. H.H.'s ability to recall the specific facts underlying the case is irrelevant to the district court's competency determination. *See Scott*, 501 N.W.2d at 613. In fact, the supreme court has declared that "a child is *not* to be questioned about the specifics of the anticipated testimony" during a competency hearing. *Id.* at 615 (emphasis added). Rather,

> [Q]uestions at a competency hearing usually are limited to matters that are unrelated to the basic issues of the trial. Children often are asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie.

Id. (quotation omitted).

Appellant fails to note that many of the inquiries identified by the supreme court in *Scott* were posed to H.H., and H.H. successfully answered questions about his age, the school he attended, the grade he was in, playing with friends, and the clothes he was wearing. H.H was also able to successfully identify each member of his family. Moreover, appellant's concerns about the prosecutor questioning H.H. overlook the reality that H.H. gave similar responses when questioned by appellant's counsel. *See also In re Welfare of T.J.H.*, No. A10-1671, 2011 WL 1938262, at *5 (Minn. App. May 23, 2011) (stating that the district court "is responsible for carefully conducting the process for determining a lack of competency" but noting that "the judge is not required to personally ask the competency questions"). Thus, the district court's decision to allow both parties to question the child had no material effect on the court's competency

determination. Based on H.H.'s ability to answer basic questions about his background and the importance of truth-telling posed by both the prosecutor and appellant's counsel, the district court did not abuse its discretion by determining H.H. was competent to testify.

Appellant next argues that the district court abused its discretion by failing to ensure that H.H. testified competently during the court trial. Appellant acknowledges that H.H was able to answer basic questions about his life during the beginning of his testimony. But appellant asserts that H.H. was unable to recall any information pertaining to the alleged incident, including any report he made during the CornerHouse interview about appellant's abuse. Accordingly, appellant claims that the district court abused its discretion by summarily denying his renewed motion to exclude H.H.'s testimony on the grounds of incompetency.

But, again, the competency determination is not based on the child's ability to remember facts pertaining to the subject of the proceedings. *See Scott*, 501 N.W.2d at 613-615. And there simply is no support for the process advocated for by appellant, which would allow a district court to declare a child competent the day before trial and then reverse the determination after the child testified the following day. Indeed, the competency assessment is a "threshold determination," after which the "evaluation of the [child's] credibility" and weight to be given to the testimony are questions for the fact-finder. *State v. Fitzgerald*, 382 N.W.2d 892, 894 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986). Appellant's argument is unconvincing; thus, the district court did not abuse its discretion by deeming H.H. competent to testify at trial.

Confrontation Clause

Appellant also argues that the admission of H.H.'s CornerHouse statements violated his rights under the Confrontation Clause because H.H. did not testify about the underlying facts of the crime at trial. Appellant's argument is flawed from the outset, however, because H.H. testified at trial and appellant chose not to cross-examine him. In *State v. Holliday*, the Minnesota Supreme Court concluded that:

> Language from the [United States] Supreme Court's *Crawford* decision indicates that the admission of a witness's prior statements does not violate the Confrontation Clause where the witness appears for cross-examination and claims that he or she cannot remember either making the statements or the content of the statements.

745 N.W.2d 556, 565 (Minn. 2008). Appellant correctly points out that the supreme court noted in *Holliday* that "the Supreme Court's conclusion [in *Crawford*] that the Confrontation Clause does not bar admission of a prior testimonial statement 'so long as the declarant is present at trial to defend or explain it,' could be interpreted to require that the declarant actually defend or explain the statement." *Id.* (citation omitted). However, appellant neglects to address the supreme court's very next sentence:

> But such an interpretation both ignores the fact that the Court's language still focuses on presence and ability to act without requiring that the record show the declarant actually did defend or explain the statement, and is at odds with the Court's more explicit assertion that '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 565-66 (quotation and citation omitted).

Thus, despite appellant's best efforts at distinguishing *Holliday*, supreme court precedent unambiguously establishes that there is no Confrontation-Clause violation when a declarant testifies and is available for cross-examination. Because H.H. testified in this case and appellant elected not to cross-examine the child, the admission of the CornerHouse interview did not violate appellant's rights under the Confrontation Clause.

Affirmed.