

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE,)	
)	
)	
)	
v.)	
)	
CYNTHIA G. BAKER)	ID #0302013230
)	
Defendant.)	
and)	
)	
GREGG M. BURTON)	ID #0303000975
)	
Defendant.)	

ORDER

This 7th day of August 2003, the Court having reviewed several submissions relating to the competency of Jane Kilroy as a witness and having concluded an evidentiary hearing on the matter, it appears that:

1. At the hearing Ms. Kilroy was able to state her name and her daughter's name. She was further able to state her parent's names, and her former husband's names, but was unable to recall her mother's maiden name or correctly identify her ex-husbands last names. Ms. Kilroy was also unable to correctly recall the number of siblings she had. She was able to identify the current day of the week, the month and the season. However, she was unable to identify the correct year. Ms. Kilroy exhibited substantial confusion regarding temporal relationships. She did not know her age and incorrectly believes that she is presently 40 years old. She also did not know the year she was born or how long she has

been residing in the Berlin nursing facility. Ms. Kilroy also believed that her exhusband died before she became divorced from him.

2. Ms. Kilroy appeared to possess the essential awareness necessary to take an oath at trial. She stated that she understood that difference between a truth and a lie and promised that she would tell the truth upon taking an oath. After determining that Ms. Kilroy was able to identify colors, the court tested whether she could distinguish between a truthful statement and an untruthful statement. Ms. Kilroy correctly observed that my statement “The color of my suit is red” was a lie when in fact, I was wearing a gray suit at the hearing. She stated that she understood the importance of telling the truth and the potential negative consequences that might arise from the failure to testify truthfully.
3. Ms. Kilroy displayed basic literacy skills. She was able to write a coherent sentence and then read the sentence that she had just written. Her speech was clear and she exhibited the proper mood for the occasion. She further appeared to be oriented and was responsive to questioning. She also seemed to comprehend the questions that were asked, even if she was not able to recall the answer to the question asked.
4. Ms. Kilroy also displayed confusion regarding her environment. She incorrectly believed that she was living in Selbyville and was unable to identify the town where the nursing home is located. She also erroneously thought that she was not currently residing in the Berlin facility. She further improperly identified her place of birth as New England instead of Jersey City, New Jersey. She was however, able to differentiate between her left and her right.
5. Ms. Kilroy had considerable trouble identifying individuals and the nature of her

relationship with those individuals. She knew that the current president of the United States is Bush, but was unable to identify past presidents. She appeared to recognize the defendant, Cynthia Baker who was present at the hearing, but was unable to recall her name. She further incorrectly identified defense counsel, Teresa Hayes as Cynthia Baker. She also believes that Cynthia Baker currently visits her at the nursing home twice a week. Although Paula Ryan, the prosecutor had never met Ms. Kilroy prior to the hearing, Ms. Kilroy stated that she had seen Ms. Ryan on a number of occasions in the past. Ms. Kilroy also erroneously believed that William Wilgus, defense counsel was a frequent visitor. Ms. Kilroy recognized the State's investigator Lester Johnson, who was present at the hearing, but believed that he visited her on holidays and that they discussed the news during his visits. Ms. Kilroy was also unable to identify who Gregg Burton is, the co-defendant in this matter.

6. While Ms. Kilroy was generally able to answer questions about her personal life, she often became confused and was unable to recall the answers to some basic questions. Ms. Kilroy was aware that she had graduated from high school and taken some college courses in drawing, but could not recall where she had taken these courses. She correctly identified her past employment as well as the past employment of her parents. She was aware that she had a social security number, but could not provide that number. Although she complained of pain in her right foot throughout the hearing and recalled a fall in which she suffered a serious hip fracture, she did not believe that she had any medical problems. She further believed that she was in nursing home care because her daughter was upset about something. She stated that she was religious but misidentified her

religious preference. Although she had previously indicated that crossword puzzles were her favorite activity, she stated that she hates crossword puzzles but frequently does them with her friend.

7. Ms. Kilroy appeared to be generally aware of the subject matter of the litigation. She was aware that her funds deposited at the bank had been depleted. She speculated that someone spent the money but didn't know who had spent it. She further stated that she knew Cynthia Baker, but refused to discuss how she knew Cynthia Baker. Ms. Kilroy seemed to have some recollection of past events regarding Cynthia Baker, but seemed uncomfortable discussing these matters in the presence of Cynthia Baker.
8. The court determines preliminary questions regarding the qualification of a person to be a witness. *D.R.E.* 104. Unless otherwise provided in the rules, every person is competent to be a witness. *D.R.E.* 601. A witness may testify to any matter so long as he has personal knowledge of the matter. *D.R.E.* 602. Prior to testifying, every witness shall be required to take an oath or affirmation that he will testify truthfully. *D.R.E.* 603.
9. As the commentary to the rules notes, the Delaware Uniform Rules of Evidence track the federal rules. Thus, the court is directed to refer to the federal notes and comments in construing these rules. *D.R.E.* 601, *cmts.* The federal commentary to Rule 601 provides: “[n]o mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. . . Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question of one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.”

F.R.E. 601, *cmts.*

10. Generally, the Delaware courts exercise a presumption in favor of competency of a witness. *Ricketts v. State*, 488 A.2d 856, 857 (Del. 1985). Thus, “concerns of mental or moral capacity go to the issues of credibility or weight given to the evidence.” *Id.* Thus, a person suffering from a mental defect of illness is competent to testify as a witness so long as “the witness is able to distinguish truth from falsity and to understand his obligation to tell the truth in his testimony.” *In re Asbestos Litig. Carter Trial Group*, Del. Super., C.A. No. 91C-07-061, Gebelein, J. (Oct. 26, 1992) (Mem. Op.) (finding that the presumption of competency had been overcome where the witness suffered from dementia). *But cf. State v. Delgado*, Del. Super., Cr. No. IK91-07-0882-R1, Terry, J. (Oct. 5, 1994) (Mem. Op.) (finding that the witness’ status as a former mental patient did not preclude her testimony as a witness).
11. The federal courts also exercise a presumption in favor of finding a witness competent to testify. *United States v. Phibbs*, 999 F.2d 1053, 1068 (6th Cir. 1993). *Accord United States v. Odom*, 736 F.2d 104, 112 (4th Cir. 1984). The federal courts have also noted that “[b]ecause a witness’s mental state during the period about which he proposes to testify is a matter which affects his credibility, it is a jury determination and thus not germane to competency to testify.” *United States v. Martino*, 648 F.2d 367, 384 (5th Cir. 1981).
12. The majority of states addressing this issue have also favored finding the witness competent to testify despite an allegation of mental incapacity. *See State v. Calliham*, 57 P.3d 220, 226 (Utah 2002) (finding witness suffering from hallucinations competent); *State v. Jackson*, 2002 WL 83247 (Ohio Ct. App.) (jury permitted to consider testimony

of schizophrenic witness); *Byndom v. State*, 39 S.W.3d 781, 786 (Ark. 2001) (finding that witness was not incompetent despite her inability to speak since she could communicate by other means); *State v. Hueglin*, 16 P.3d 1113, 1117 (N.M. Ct. App. 2000) (witness suffering from mild mental retardation was competent to testify); *State v. Arlington*, 875 P.2d 307, 327 (Mont. 1994) (trial court did not err in permitting witness with mental problems to testify); *Zimmer v. Peters*, 861 P.2d 1188, 1193 (Ariz. Ct. App. 1993) (finding that witness was competent to testify despite her partial memory loss stemming from her head injury); *State v. Merritt*, 396 S.E.2d 871, 878 (W. Va. 1990) (trial court did not err in permitting witness with low IQ to testify); *State v. Weinberg*, 575 A.2d 1003, 1010 (Conn. 1990) (finding that witness suffering from severe chronic paranoid schizophrenia was competent to testify); *Rodriguez v. State*, 772 S.W.2d 167, 170-71 (Tx. Ct. App. 1989) (witness was competent to testify even though she suffered from Alzheimer's disease); *State v. Brown*, 400 N.W.2d 74, 76 (Iowa Ct. App. 1986) (permitting witness with Down's syndrome to testify). *But see State v. Washington*, 506 S.E.2d 283, 286 (N.C. Ct. App. 1998) (finding that witness who could not effectively communicate due to her mental retardation was incompetent to testify).

13. In the present matter, defendants allege that Ms. Kilroy is incompetent to testify. Ms. Kilroy is competent to testify a witness unless she is unable to distinguish between truth and falsity or lacks personal knowledge of the matter. The evidence at the hearing clearly establishes that Ms. Kilroy is able to distinguish between truth and falsity. It also appears that Ms. Kilroy has at least some personal knowledge of the matter, even if she unable to completely recall all of the prior events. The jury will be able to assess whether or not

they find Ms. Kilroy credible after hearing her testimony at trial. *See Zimmer v. Peters*, 861 P.2d at 1191 (“There is a notable distinction between competency and credibility. Competency, a question of law for the court, inquires into the witness’ capacity or ability to observe, recollect, and communicate with reference to the event in question. Credibility is a question for the fact finder and examines the reliability of the witness’ testimony.”) While Ms. Kilroy may also be incompetent if she is so mentally disabled so as to be unable to effectively communicate by any means, Ms. Kilroy displayed an ability to effectively communicate at the hearing. Competency to be a witness at trial is a legal determination, not a medical one. A witness may be found incompetent to stand trial, yet competent to testify as a witness. *See United States v. Phibbs*, 999 F.2d at 1068 (witness previously found incompetent to stand trial, yet competent to testify as a witness).

14. Jane Kilroy’s medical records will be designated as exhibit one and made a part of the record. Jane Kilroy’s written statement will be designated as exhibit two and made a part of the record. The defense may use these records to cross-examine Ms. Kilroy at trial. *See United States v. Phibbs*, 999 F.2d at 1070 (“As long as a witness appreciates his duty to tell the truth, and is minimally capable of observing, recalling and communicating events, his testimony should come in for whatever it is worth. It is then up to the opposing party to dispute the witness’ powers of apprehension, which may well be impaired by mental illness or other factors.”).
15. Having been able to observe Ms. Kilroy’s demeanor and responsiveness to questioning, I find that she is competent to testify as a witness. Therefore, this 7th day of August 2003, for the reasons set forth herein, it is hereby ordered that Jane Kilroy meets the minimal

standards of competency to testify at trial. The videotape of the examination will be designated as Exhibit 3 and made a part of the record.

IT IS SO ORDERED.

Richard F. Stokes

Original to Prothonotary

cc: Paula T. Ryan, Esquire
William B. Wilgus, Esquire
Theresa M. Hayes, Esquire