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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1671**

In the Matter of the Welfare of: T. J. H., Child

**Filed May 23, 2011
Reversed and remanded
Minge, Judge**

Beltrami County District Court
File No. 04-JV-10-664

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Considered and decided by Minge, Presiding Judge; Klaphake, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant T.J.H. challenges his adjudication of delinquency for committing first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2010), arguing that the district court abused its discretion by denying his motion for an adverse psychiatric evaluation and allowing the child victim to testify. Appellant also challenges the sufficiency of the evidence. Because there was a professional report stating that the

child victim had recall problems and the competency evaluation procedure was improper, we reverse and remand.

FACTS

In February 2010, A.W.'s mother found him in the bathtub with feces in the water and on his finger. She asked A.W. whether anyone had touched him inappropriately. A.W. replied yes. He initially said that it was a classmate who his mother did not know. When A.W.'s mother asked him if it was T.J.H., he replied yes.

A.W.'s parents reported the incident to the police. A.W. was interviewed by a forensic nurse. When asked if he ever received touches that did not feel good or right, A.W. stated that over a year earlier, T.J.H. inserted his finger into A.W.'s anus on multiple occasions. The incidents occurred in the men's bathroom at two hockey arenas while the boys' families watched hockey. A.W. indicated he had not told anyone of the abuse because T.J.H. threatened to beat him up if he disclosed what had happened. A.W. was five years old and T.J.H. was 11 years old when the conduct occurred.

T.J.H. was questioned about the alleged abuse. After initially answering questions evasively, T.J.H. admitted to having been in the bathroom alone with A.W., but denied digitally penetrating him. A delinquency petition was filed against T.J.H.

Prior to trial, the prosecutor moved for several limits on the conduct of the trial, including allowing A.W. to testify by interactive television (ITV). T.J.H. filed a motion regarding A.W.'s competency, requesting an adverse psychiatric evaluation of A.W. to assist the court in determining whether he was competent to testify at trial. T.J.H. pointed out that a professional diagnostic assessment had been done on A.W., that the

assessment was not done to determine competency, that the resulting report indicated A.W. displayed an “inability to recall important aspects of the trauma,” that this left the court with an incomplete competency evaluation, and that a separate evaluation should be conducted. The district court heard arguments on the motions at a pretrial hearing. T.J.H.’s counsel conceded use of ITV so A.W. did not have to testify in front of T.J.H. but urged that the attorneys and the judge view A.W.’s testimony in person. The prosecutor objected to an evaluation, characterizing it as harassment and a fishing expedition. The district court reviewed the recording of the investigatory interview and the diagnostic assessment, reserved ruling on the prosecution’s ITV motion until trial, granted its other motions, and denied T.J.H.’s motion all without explanation.

The case went to trial in June 2010. A.W. testified from a remote location by ITV. The judge, T.J.H., the prosecutor, and defense counsel were in the courtroom. The judge stated that the prosecutor should ask A.W. some competency questions and that A.W. would then be sworn in as a witness. The following questioning took place:

PROSECUTOR: [A.], can you tell me your name?

A.W.: [A.].

PROSECUTOR: What is your last name?

A.W.: [W.].

PROSECUTOR: How do you spell [W.]?

A.W.: [W.].

PROSECUTOR: How old are you, [A.]?

A.W.: Six and a half.

PROSECUTOR: When is your birthday?

A.W.: [A.W.’s birthday]

PROSECUTOR: So you have a birthday coming up, huh?

A.W.: Uh-huh.

PROSECUTOR: All right, [A.], what grade are you in at school?

A.W.: I’m going into the second.

PROSECUTOR: And, [A.], do you know the difference between a truth and a lie?

A.W.: Yes.

PROSECUTOR: Okay. What's the truth mean?

A.W.: Something that really did happen.

PROSECUTOR: What does a lie mean?

A.W.: Something that truly didn't happen.

PROSECUTOR: And do you get in trouble if you tell the truth?

A.W.: No.

PROSECUTOR: Do you get in trouble if you tell a lie?

A.W.: Yes.

PROSECUTOR: Okay. And you understand that everything you say to the Judge today needs to be the truth, right?

A.W.: Yep.

PROSECUTOR: Okay. And you're not going to get in trouble for telling the truth today?

A.W.: Nope.

The prosecutor then asked, "Your Honor, do you want more than that before you swear him in?" The district court replied no, swore A.W. in, and A.W. proceeded to testify. The district court never held a separate competency hearing or expressly ruled on A.W.'s competency.

On June 21, 2010, the district court found that T.J.H.'s actions constituted first-degree criminal sexual conduct, stating that A.W.'s testimony was credible and the allegations were proved beyond a reasonable doubt. An adjudication of delinquency was subsequently entered and this appeal followed.

DECISION

I. Determination of Child Competency

The first issue is whether the district court abused its discretion by allowing A.W. to testify at trial. By not explicitly ruling on A.W.'s competency, the district court implicitly found him competent. Generally, the determination of competency falls within the sound discretion of the district court. *State v. Sime*, 669 N.W.2d 922, 925 (Minn. App. 2003) (citing *State v. Berry*, 309 N.W.2d 777, 782 (Minn. 1981)). A district court's finding of competency will not be reversed absent a clear abuse of that discretion. *State v. Cermak*, 350 N.W.2d 328, 332 (Minn. 1984).

T.J.H. raised the question of A.W.'s competency in requesting the psychiatric evaluation in the pretrial motion. The request and argument on the request indicated that competency had to be evaluated by the district court. It was not necessary to further object to A.W.'s competency at trial. In this circumstance, we address the competency proceeding for abuse of discretion. *Sime*, 669 N.W.2d at 925.

By statute, a child under the age of ten is presumed competent to testify "unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined." Minn. Stat. § 595.02, subd. 1(n) (2010); *see also State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990) ("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."). To determine competency, the district court "must first conclude that the child has (1) the capacity to tell the truth; and (2) the ability to recall facts." *Sime*, 669 N.W.2d at 926. Because competency is determined prior to testifying, the customary

procedure is to make a competency determination before the trial begins, sometimes in chambers. *See, e.g., State v. Brovold*, 477 N.W.2d 775, 777 (Minn. App. 1991) (discussing a pretrial competency hearing), *review denied* (Minn. Jan. 17, 1992); *State v. Ross*, 451 N.W.2d 231, 233 (Minn. App. 1990) (noting a competency hearing held prior to trial), *review denied* (Minn. Apr. 13, 1990); *State v. Lau*, 409 N.W.2d 275, 277 (Minn. App. 1987) (noting that the district court conducted an in-camera hearing prior to trial to determine competency).

1. Judge Questioning

T.J.H. first argues that the district court abused its discretion when the judge relied on the prosecutor to ask the preliminary questions relevant to the competency inquiry instead of personally conducting the examination. Competency of a child witness is uniquely a judge-driven process. When reviewing a determination of competency, this court has noted that although no “legal authority . . . explicitly requires the district court to examine the proposed witness personally,” “this is the customary procedure.” *Sime*, 669 N.W.2d at 926 (declining to reach the issue of whether a personal examination by the district court is required in every case).

Other jurisdictions are split on the issue of who should conduct a competency examination. Some states have explicitly held that the judge must question a child to determine competency. *See, e.g., People v. Larry*, 412 N.W.2d 674, 679 (Mich. App. 1987) (“The burden of determining competency is placed squarely on the trial court and questions by counsel are not proper.”); *State v. Workman*, 471 N.E.2d 853, 859 (Ohio App. 1984) (“[I]t is the duty of the trial judge to immediately examine the child, without

the participation or interference of counsel, to determine the child's competency to testify." (citation omitted)). Conversely, several jurisdictions allow counsel to conduct the examination. *See, e.g., Hilson v. State*, 418 S.E.2d 784, 787 (Ga. App. 1992) (permitting child to demonstrate competency with preliminary questioning by prosecution); *Burbank v. State*, 800 So. 2d 540, 544 (Miss. App. 2001) (allowing the state to question child to determine competency); *State v. Aikens*, 607 A.2d 948, 949 (N.H. 1992) (rejecting the argument that voir dire of child witnesses must be solely conducted by the court). Under federal law, competency examinations are typically conducted by the court. 18 U.S.C. § 3509(c)(7) (2006) ("Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant . . .").

Here, the judge did not ask A.W. any question or rule on whether or not he was competent to testify. The preferred practice is for the judge to ask the questions. This makes the court a participant, not an observer. We conclude that although the judge is not required to personally ask the competency questions, the judge is responsible for carefully conducting the process for determining lack of competency.

2. Truthfulness

As part of a competency evaluation, the district court "must determine whether the child understands the nature and obligations of an oath" and "the importance of telling the truth in court." *Lanam*, 459 N.W.2d at 659-60. In *State v. Scott*, a nine-year-old child witness demonstrated the capacity to tell the truth by "show[ing] an appreciation for an understanding of the difference between a truth and a lie," by stating that it was "bad to

tell a lie” and answering “yes” to the question, “Is it good to tell the truth, do you think?” 501 N.W.2d 608, 613-14 (Minn. 1993). In *Brovold*, the district court went further and had a three-year-old child provide concrete examples of a truth and a lie. 477 N.W.2d at 778-79 (asking the child questions such as “I tell you that’s a paint brush, is that the truth or not the truth?”). *But see* Laurie Shanks, *Evaluating Children’s Competency to Testify: Developing a Rational Method to Assess a Young Child’s Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 Clev. St. L. Rev. 575, 597 (2010) (arguing that more extensive questioning should be used).

Here, the prosecutor did not ask for concrete examples of a truth and a lie as the district court did in *Brovold*, but her questioning on the capacity to tell the truth paralleled the questions found adequate in *Scott*. We conclude that, although taken alone this inquiry about understanding the importance of telling the truth is not error, the inquiry was minimal and invites closer scrutiny to the remainder of the proceeding.

3. Recollection

To show the ability to recall facts, “[c]hildren often are asked their names, where they go to school, how old they are, whether they know who the judge is” *Kentucky v. Stincer*, 482 U.S. 730, 741, 107 S. Ct. 2658, 2665 (1987); *see also State v. Scott*, 501 N.W.2d at 615 (quoting *Stincer* and noting that “these are precisely the types of questions judges should ask when questioning a child to determine competency to testify”). In *Scott*, the district court asked the child her age, where she went to school, what she was studying, and what activities she enjoyed during the summer. *Scott*, 501 N.W.2d at 613.

Here, the preliminary inquiry of A.W.'s recall ability consisted of the prosecutor asking A.W. how to spell his name, his age, his birthday, and what grade he was in school. However, at this pretrial stage, the district court was aware of the diagnostic assessment of A.W., which expressed concern over A.W.'s ability to recall facts of the incident. Given this concern, the limited inquiry by the prosecutor was not sufficient.¹

4. Judicial Presence and ITV

We also note that the judge viewed A.W. by ITV when the competency inquiry was made and when he testified. A child may testify in this manner. *Maryland v. Craig*, 497 U.S. 836, 860, 110 S. Ct. 3157, 3171 (1990). However, no caselaw explicitly states that a competency evaluation can or cannot be conducted through ITV, with the child and the judge in different locations. Determination of a child's competency is a challenging task. Having the judge and child in different locations during the competency evaluation increases the difficulty of impressing on the child the importance of the oath and truthfulness. Furthermore, using ITV for the competency inquiry is not a good practice because the court cannot carefully view the child's body movements and demeanor. Although we decline to conclude that use of ITV is error per se, absent a determination by the district court that competency is clear or that the use of ITV is appropriately suited to determine competency in the circumstances of a proceeding, reliance on such an arrangement is an abuse of discretion. Here, prior to trial, T.J.H. requested that counsel

¹ The state argues that because this was a bench trial, the district court could consider A.W.'s ability to recall facts in rendering its verdict. We note that it is error to determine competency primarily on ability to recall facts related to the incident that is the basis for the criminal charges. *Scott*, 501 N.W.2d at 615.

and the district court observe A.W.'s testimony in person. At trial, T.J.H.'s counsel agreed to A.W. testifying by ITV. There was no consideration of a separate process for the competency evaluation. At a minimum, if the competency questioning is not done by the district court, it should be done with the judge and the child in the same locations.

5. Summary

We do not reach the question of whether A.W. was competent to be a witness. However, we do conclude that based on the four elements of the competency-evaluation process previously discussed, the district court's competency-determination procedure was an abuse of discretion. We further note that A.W. was five years old when the reported sexual abuse occurred, the report of that abuse was between a year and a year and a half later, a professional diagnostic assessment expressed concern regarding A.W.'s recall of the facts, and A.W.'s testimony was the sole evidence of abuse. Although we are only concluding that the procedure for determining competency was error, a flawed competency-determination process undermines the fairness and integrity of the judicial proceeding. We reverse and remand for a new trial.

II. Adverse Psychological Examination Request

The district court, without comment, rejected T.J.H.'s request for an adverse psychiatric evaluation. Although neither the Minnesota Supreme Court nor this court has formulated a standard for allowing an adverse examination, we have noted that the presence of certain considerations, such as recanting testimony, lack of fear of the perpetrator, and suggestive interview methods, do not in and of themselves require that the district court allow an adverse examination. *State v. Cain*, 427 N.W.2d 5, 8-9 (Minn.

App. 1988). However, such factors require consideration of the request. Here, we do not reverse for refusal to order an adverse examination. Rather, because the professional assessment that was presented to the district court questioned A.W.'s recall ability, the district court's denial of the psychiatric evaluation without explanation leaves this reviewing court with the task of determining the basis for the district court's decision. We decline to do so. We direct that on remand the district court reconsider any request for an examination on the issue of competency and explain its decision.

III. Sufficiency of the Evidence

Finally, T.J.H. challenges the sufficiency of the evidence. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the fact-finder reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999); *see also Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999) (noting that the standard of review for bench trials is the same as for jury trials). In doing so, we view the evidence in the light most favorable to the verdict and assume that the fact-finder believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Chambers*, 589 N.W.2d at 477.

To support a conviction for first-degree criminal sexual conduct, the state must prove that a person engaged in sexual penetration with a person under the age of 13 when the actor is more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a). Had the district court concluded, following an adequate competency

determination, that A.W. was competent to testify, his testimony would have been sufficient to sustain the conviction. The record established that T.J.H. is more than 36 months older than A.W., A.W. testified to the sexual penetration, and the district court found A.W.'s testimony credible. "[A] conviction may rest on the testimony of a single credible witness." *State v. Miles*, 585 N.W.2d 368, 373 (Minn. 1998).

SUMMARY

We conclude that A.W.'s competency determination was invalid in this case because the combination of the district court's failure to participate in questioning and to have A.W. in its presence during the competency evaluation, together with the abbreviated inquiry into A.W.'s appreciation of truthfulness and ability to recall events constituted an improper competency procedure. We also direct that on remand, if the defense renews its motion for an adverse psychiatric evaluation, the district court consider the motion and state the reasons for its ruling.

Reversed and remanded.

Dated: