

[Cite as *State v. Wells*, 2003-Ohio-3162.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JEROME WELLS

Appellant

C.A. No. 21149

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 02 02 0304

DECISION AND JOURNAL ENTRY

Dated: June18, 2003

This cause was heard upon the record in the trial court. Each error assigned
has been reviewed and the following disposition is made:

Per curiam.

{¶1} Appellant, Jerome Wells, appeals from his conviction in the Summit County Court of Common Pleas of one count of gross sexual imposition. This Court reverses and remands for a new trial.

{¶2} Wells was indicted on one count of rape, in violation of R.C. 2907.02(A)(1)(b). He allegedly engaged in sexual conduct with a child under thirteen years of age on or about December 9, 2001. The alleged victim of his crime, T.V., was five years old at the time the case proceeded to trial during May 2002. Prior to trial, because T.V. was less than ten years old, a hearing was held to determine whether she was competent to testify. Following an examination by the trial judge, the prosecutor and defense counsel, the trial court determined that T.V. was competent to testify.

{¶3} Following a jury trial, Wells was convicted of the lesser included offense of gross sexual imposition. Wells appeals and raises five assignments of error.

FIRST ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING A FIVE (5) YEAR OLD CHILD COMPETENT TO TESTIFY PURSUANT TO EVID.R. 601 WHERE SHE CLEARLY WAS INCAPABLE OF RECEIVING JUST IMPRESSIONS OF FACTS AND DID NOT COMPREHEND THE CONCEPT OF A LIE OR ITS CONSEQUENCES.”

{¶4} Wells contends that the trial court erred in determining that five-year-old T.V., the alleged victim, was competent to testify because she was not

capable of receiving just impressions of fact and did not understand the concept of a lie or the consequences of lying. Evid.R. 601(A) provides:

“Every person is competent to be a witness except * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.”

{¶5} The burden falls on the proponent of the witness to establish that the witness exhibits “certain indicia of competency.” *State v. Clark* (1994), 71 Ohio St.3d 466, 469. In *State v. Frazier* (1991), 61 Ohio St.3d 247, syllabus, the Supreme Court of Ohio set forth five factors that the trial court “must take into consideration” when determining whether a child under the age of ten is competent to testify:

“(1) the child’s ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child’s ability to recollect those impressions or observations, (3) the child’s ability to communicate what was observed, (4) the child’s understanding of truth and falsity and (5) the child’s appreciation of his or her responsibility to be truthful.”

{¶6} These factors “are aimed at protecting the accused by ascertaining that a child witness is trustworthy.” *State v. Ulch* (Apr. 19, 2002), 6th Dist. No. L-00-1355.

{¶7} At the hearing to determine whether T.V. was competent to testify in this case, the State failed to meet its burden of presenting sufficient evidence of T.V.’s competency. Specifically, there was not a sufficient inquiry into the fourth or fifth *Frazier* competency factors: the child’s understanding of truth and falsity

and the child's appreciation of his or her responsibility to be truthful. "[A] child may be competent to testify even though the child *** initially does not recognize the concept of truth, so long as the voir dire continues on to demonstrate that the child *** generally *** understands the concept of truthfulness." *State v. Brooks* (Oct. 26, 2001), 2nd Dist. No. 18502, quoting *State v. Boyd* (Oct. 31, 1997), 2d Dist. No. 97 CA 1.

{¶8} In this case, however, after T.V. initially demonstrated that she did not understand the concepts of truth and falsity, the further voir dire on this issue was not sufficient to demonstrate that T.V. did, in fact, generally understand the concept of truthfulness or that she appreciated her responsibility to tell the truth. The trial court errs in finding a child witness competent without sufficient evidence before it to consider each of the five *Frazier* factors. See *State v. Wilson* (Feb. 18, 2000), 4th Dist. No. 99CA672. Because there was not an adequate demonstration on the fourth and fifth *Frazier* factors, the trial court erred in finding T.V. competent to testify.

{¶9} It has been held that such a deficiency in the hearing on the child's competency can be cured if the child's subsequent testimony at trial demonstrates that the trial court was justified in finding the child competent to testify. See *State v. Wilson*, citing *State v. Lewis* (1982), 4 Ohio App.3d 275. At the time T.V. testified at trial, however, the State failed to elicit any further testimony regarding

her understanding of the concept of truthfulness. Consequently, the error could not have been cured by her later testimony.

{¶10} Because there was insufficient evidence before the trial court to demonstrate that T.V. had an understanding of the concepts of truth and falsity or that she appreciated her responsibility to be truthful, the trial court exceeded the scope of its discretion by finding that she was competent to testify. See *Frazier*, 61 Ohio St.3d at 247, syllabus. The first assignment of error is sustained and the judgment is reversed and remanded for a retrial.

{¶11} The remaining assignments of error have been rendered moot and will not be reached. See App.R. 12(A)(1)(c). The judgment of the trial court is reversed and the cause is remanded for a new trial.

Judgment reversed and
the cause remanded.

LYNN C. SLABY
FOR THE COURT

SLABY, P. J.
CONCURS

BATCHELDER, J.
CONCURS, SAYING:

{¶12} Although I agree with the reasoning of the principal opinion, I write separately to emphasize the lack of the evidence before the trial court regarding T.V.'s competency to testify. There was almost no evidence on the fourth *Frazier*

factor, “the child’s understanding of truth and falsity” and there was a complete lack of evidence on the fifth factor, “the child’s appreciation of his or her responsibility to be truthful.” See *Frazier*, 61 Ohio St.3d at 247, syllabus. As indicated above, the trial judge had an mandatory obligation to consider all five factors. See *id.*

{¶13} At the competency hearing, the testimony elicited by the prosecutor from T.V. regarding her understanding of truth and falsity and her appreciation of her responsibility to be truthful was the following:

“Q. Okay. [T,] do you know what it means to have to tell the truth?

“A. (Witness shook head.)

“Q. Okay. You are shaking your head. Which do you mean? If you tell the truth, what do you have to do? Let me ask you a different way. You are wearing a jump suit today, aren’t you?

“A. (Witness nodded.)

“Q. Is that a yes?

“A. Yes.

“Q. Okay. If I said your jump suit was green, is that right?

“A. (Witness shook head.) No.

“Q. No? What color is your jump suit?

“A. Pink.

“Q. It is pink. You are right, it is pink.

“A. Pink and white.

“Q. Pink and white, you are right. Yes, it is. And who is this right here?”

“A. My bear.

“Q. That’s a bear. If I told you that this was a kitty cat; is that right?”

“A. No.

“Q. No, it is not right, is it. Did you talk with me about having to come to the courtroom today?”

“A. Yes.

“Q. Okay. And did I tell you that you would have to tell the truth when you came here?”

“A. Yes.

“Q. Okay. And did your mom tell you that, too?”

“A. Yes.

“Q. Okay. Did we tell you that that means that you have to tell us what happened and you can’t make it up?”

“A. Yes.

“Q. Yes, okay.”

{¶14} After T.V. indicated that she did not understand what it meant to have to tell the truth, the prosecutor did not ask any follow-up questions on that specific issue. Instead, the prosecutor asked T.V. questions about what is “right” and “not right,” never linking those two concepts to truth and/or falsity. Equating right and not right with truth and falsity is not necessarily something that a five-year-old child is able to do and, absent some demonstration to that effect, the trial court had no reason to presume that this child was able to do so. Further

questioning of T.V. failed to even suggest that this child had such an understanding. Although, at the conclusion of the prosecutor's questioning, T.V. agreed that she had been told to tell "the truth" when she came to court, there had been no demonstration that she understood what "the truth" was.

{¶15} Defense counsel's subsequent questioning of the child only served to demonstrate that the child remained confused:

"Q. [T,] do you remember when [the prosecutor] asked you if you understood what telling the truth was?

"A. Yes.

"Q. Did you shake your head back and forth like a no?

"A. (Witness nodded.)

"Q. You did shake your head back and forth from side to side?

"A. Yes.

"Q. [T.,] do you know what a lie is?

"A. No.

"Q. No? Is that what you are saying?

"A. (Witness nodded.)"

{¶16} T.V. again indicated a lack of understanding of the concepts of truth and falsity. After these responses by T.V. to direct questions on the issue, there was no follow-up questioning by defense counsel or anyone else to demonstrate that the child was not, in fact, completely confused about the issue.

{¶17} The trial judge concluded with the following line of questioning:

“Q: [T.,] I am going to ask you a question right now. What you said to me and to [the prosecutor] so far today, have you been telling the truth? She asked you about what the truth is. You have told the truth in this court to this Judge?

“A: Yes.

“Q: Everything you said now is the truth?

“A: (Witness nodded.)

“Q: Is there any question about that in your mind as to whether it is true or not?

“A: Yes.

“Q: There is a question?

“[Prosecutor]: I don’t think she understood the question, Judge.

“Q: Okay. You told the truth as far as what happened?

“A: Yes.

“Q: All the questions you answered are -- were the truth, right?

“A: Yes.

“Q: And you know what it is to tell the truth, you already answered that.

“A: Yes.

“Q: It is something that really happened, right?

“A: Yes.

“Q: Not something you make up, right?

“A: Yes.

“Q: So you are going to keep telling the truth now from here on, and what you are going to say is what really happened, right?

“A: Yes.”

{¶18} T.V.’s answers to the trial judge’s questions might seem appropriate, if viewed in isolation. Given the confusion that T.V. had already demonstrated, however, her answers to the judge’s questions failed to demonstrate that she did, in fact, have a general understanding of the concepts of truth and falsity.

{¶19} Moreover, even if the judge’s questioning somehow cured the shortcomings of the confused testimony elicited from T.V. on the fourth Frazier factor, there was absolutely no testimony elicited from T.V. on the fifth mandatory *Frazier* factor, an appreciation of her responsibility to be truthful.

{¶20} The trial judge had the discretion to find the child competent to testify only upon a consideration of all five of the Frazier factors. Because there was not adequate evidence before the trial court on all five factors, I agree with the principal opinion that the trial judge exceeded the scope of his discretion by finding that this child was competent to testify and I would reverse the judgment of the trial court on that basis.

CARR, J.
DISSENTS, SAYING:

{¶21} I respectfully dissent. As we are to give deference to the trial court’s determination of competency, I cannot say the trial court clearly abused its discretion. Although the trial court could have conducted a more extensive voir dire, T.V.

specifically stated on the record that she knew the difference between real and make-believe and she would testify as to what really happened and not make-believe.

{¶22} Moreover, the reason we give deference to a trial court's determination of competency is because the trial judge is in the best position to determine whether a child is "capable of receiving just impressions of facts and events and to accurately relate them." *State v. Krzywkowski*, 8th Dist. No. 80392, 2002-Ohio-4438, at ¶94. "It is very difficult to ascertain the way *** was responding via a written transcript. The demeanor and attitude of the child can only be judged by the individuals who were present." *State v. Snell*, 5th Dist. Nos. 2002CA00181 and 2002CA00190, 2003-Ohio-975, at ¶63. I would affirm.

APPEARANCES:

THOMAS A. SHUMAKER, Attorney at Law, 265 S. Main Street, 1st Floor, Akron, Ohio 44308, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney and RICHARD S. KASAY, Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue, 6th Floor, Akron, Ohio 44308, for Appellee.