



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00680-CR

Marcos Vincent **DELEON**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR5491
Honorable Lori I. Valenzuela, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 15, 2017

AFFIRMED

After a jury trial, Marcos Vincent DeLeon was found guilty of aggravated sexual assault of a child under the age of six and was sentenced to twenty-five years of imprisonment. On appeal, he argues that the complainant, M.D., was not competent to testify against him. We affirm.

BACKGROUND

On December 13, 2014, DeLeon, friends, and family members were at a birthday party for his four-year-old daughter, M.D. DeLeon's mother and M.D.'s grandmother, J.D., organized the party, which began around 6:00 p.m. and ended after 10:00 p.m. DeLeon and his mother, J.D.,

lived in the same apartment complex. According to J.D., she had “temporary custody” of M.D. and was M.D.’s primary caregiver. J.D. testified the party was in the yard in front of DeLeon’s apartment because it had room for the bouncy house. At the end of the party, some people wanted to take a picture with M.D. in front of the decorations, but J.D. could not find M.D. As she was looking for M.D., she was told that M.D. had gone to the restroom with DeLeon. J.D. went inside DeLeon’s apartment and saw one of DeLeon’s friends sitting on the sofa. J.D. knocked on the locked bathroom door three times. No one answered the first two knocks. J.D. testified when she knocked the third time she yelled loudly. She then heard M.D. crying and “broke the door.” J.D. pushed the door open and saw her son, DeLeon, standing by the commode “with his pants at his ankles [a]nd he had an erection.” J.D. testified, “And his face [was] all scared when he saw me.” J.D. grabbed M.D., who was crying, and left for her own apartment.

J.D. testified that M.D. cried and cried until she fell asleep at about 2:00 a.m. J.D. testified the next day, while she was giving M.D. a bath, M.D. told her DeLeon had inappropriately touched her:

[M.D. said,] “My Poppi touched my button.” And I was like, “Your button?” And I said, “What button?” And then that’s when she started crying again. And that’s when she sat down and then she pointed. She goes, “Right here, my Poppi touched me right here in my button.”

J.D. testified M.D. was pointing to her vagina. J.D. called the police.

M.D.’s great aunt, Shziel, testified that after receiving a call from J.D., she went to see M.D. M.D. was crying, and Shziel asked her what had happened. According to Shziel, M.D. said “that her Poppi touched her button.” Shziel asked M.D. what she meant by “button,” and M.D. replied, “[My] private.” M.D. said “that her Poppi took her to the restroom, and with his finger he touched her button.” Shziel testified that M.D. said “that he grabbed his fingers and put them inside her button.” Both J.D. and Shziel saw crusted blood on the outside of M.D.’s vagina.

The next day, M.D. was examined by a sexual assault nurse examiner, Nurse Betty Mercer of the Children's Hospital of San Antonio. Mercer noted that since the alleged incident, M.D. had urinated, bathed, and changed clothes. Nurse Mercer testified she saw "redness on the hymen and the labia majora." Nurse Mercer noted M.D. had a history of urinary tract infections, which could be consistent with the redness observed. According to Nurse Mercer, the redness "could be related to trauma or could be related to other causes," which "is a very common finding for a sexual assault examination of a child." Nurse Mercer testified that M.D. told her that "Poppi" touched her and then pointed to her genital area. There was evidence at trial that M.D. referred to DeLeon as "Poppi."

San Antonio Police Officer Antonio Martinez testified that he responded to a call on December 15, 2014 at J.D.'s apartment. He spoke with J.D., M.D., Shziel, and DeLeon. DeLeon told Martinez that during the party, he went to the restroom and M.D. followed him inside. According to Officer Martinez, DeLeon said he "kept trying to kick her out, [but] she kept walking back inside." DeLeon said that "he eventually just let her stay in the restroom with him," and he began to urinate while facing the commode. His mother "kind of walked in as he was using the restroom." On December 18, 2014, Jim Braun with Child Protective Services interviewed DeLeon. Braun testified that DeLeon said he had been in the restroom standing at the commode with the door partially opened when M.D. walked in. DeLeon told him he was urinating when his mother came in, saw M.D., and grabbed M.D. Braun testified DeLeon changed his story after Braun accused him of not being completely honest. DeLeon said he had not been standing at the commode but had been sitting on the commode "with his hands kind of covering himself" when M.D. came into the restroom looking for J.D. DeLeon "again told her that she needed to leave and the door was shut [at] that particular time And then [J.D.] forced the door opened, grabbed her and left." Almost a month after the alleged incident, Detective Reynaldo Montes interviewed

DeLeon. According to Montes, DeLeon said that he had been sitting on the commode, trying to pass a bowel movement, when J.D. entered the restroom and interrupted him. DeLeon said that M.D. had also been present in the restroom while he was using it. DeLeon admitted that he had originally said he had been urinating because he was nervous. Montes testified that at first, DeLeon denied having an erection but later admitted that when his mother entered the restroom, he was masturbating.

DeLeon called two witnesses. One witness testified that he had known DeLeon since childhood and had never known him to abuse children. The other, DeLeon's brother, testified that he was at the birthday party and did not believe what his mother, J.D., was saying.

After hearing all the evidence, the jury found DeLeon guilty. DeLeon appeals.

DISCUSSION

In his sole issue, DeLeon argues that the trial court erred in determining that M.D. was competent to testify. Texas Rule of Evidence 601(a)(2) places the power to determine a child's competency into the hands of the trial judge whose ruling will not be disturbed upon review unless an abuse of discretion is shown. *Broussard v. State*, 910 S.W.2d 952, 960 (Tex. Crim. App. 1995); see TEX. R. EVID. 601(a)(2) (explaining that “[a] child—or other person—whom the court examines and finds lacks sufficient intellect to testify concerning the matters in issue” is “incompetent” to testify). “A child is competent to testify unless it appears to the court that she does not possess sufficient intellect to relate the transactions with respect to which she is interrogated.” *De Los Santos v. State*, 219 S.W.3d 71, 80 (Tex. App.—San Antonio 2006, no pet.) (citing *Broussard*, 910 S.W.2d at 960). “The considerations in determining a child witness's capacity to narrate involve ‘both an ability to understand the questions asked and to frame intelligent answers and . . . a moral responsibility to tell the truth.’” *Id.* (quoting *Torres v. State*, 33 S.W.3d 252, 255 (Tex. Crim. App. 2000)). “There is no certain age below which a child is

automatically deemed incompetent to testify.” *Id.* Instead, in “evaluating a child witness’s competency, the court examines the child’s responses to qualification questions as well as the child’s entire testimony.” *Id.* at 80-81.

At trial, when the State called the complainant, M.D., to the witness stand, DeLeon objected and asked the judge to determine if M.D. was competent to testify. The trial judge proceeded to ask M.D. questions to establish her competency. The trial judge first asked M.D. her name. M.D. responded with her first name, but did not know her last name. The trial judge asked M.D. how old she was. M.D. held up five fingers, indicating she was five years old; however, M.D. did not know her birthday. The trial judge then asked questions to determine whether M.D. understood the difference between the truth and a lie. The trial judge asked M.D., “If I told you that this book is red, is that true?” M.D. replied, “Yes.” The trial judge then asked M.D. to look at the jacket the judge was wearing: “If I told you that it was red, is that the truth?” M.D. replied, “No.” M.D. testified that she was living with her “grandma.” When asked if she had lived with her grandmother a long time, M.D. nodded her head yes. The trial judge asked if M.D. ever got “into trouble” at her grandmother’s house. M.D. nodded her head again. The trial judge asked what she had gotten in trouble for, M.D. replied, “When I’m bad.” The trial judge asked if M.D. ever told her grandmother “something and it’s not really what happened?” M.D. shook her head no. The trial judge asked if M.D. knew “what it is to tell a lie?” M.D. nodded her head yes. M.D. then stated, “When you write it down and then you didn’t write it.” The trial judge continued by asking what would happen if M.D. lied to her grandmother. M.D. replied, “She will hit me.” The trial judge asked,

Okay. So if I told you that—do you know what earrings are? . . . Those are earrings, right? If I told you these were earrings, this was an earring, is that a truth or is that a lie?

M.D. responded, “It’s a lie.” The judge asked, “And if I told you that I had red hair, is that the truth or a lie?” M.D. responded, “Lie.” The judge asked M.D. what happens at school if she does not tell the truth. M.D. stated, “They don’t do anything.” The judge continued, “If something is truthful, tell me—tell me this: If I said your name was [M.J.], is that the truth or is that a lie?” M.D. replied, “It’s a lie.” The judge asked if she said [M.D.] is a boy, is that a truth or is that a lie?” M.D. responded, “It’s a lie.” When asked if her grandmother expected her to always tell the truth, M.D. nodded her head yes. The judge then asked if M.D. knew why she was in the courtroom. M.D. shook her head no. The judge asked if she knew she was expected to tell the truth today. M.D. shook her head no. The judge asked, “Is telling the truth telling somebody what really happened?” M.D. nodded her head yes.

The judge then noted that M.D. had just met her and was maybe a little intimidated. The judge allowed a prosecutor who was acquainted with M.D. to question her:

- Q: [M.D.], what’s your friend at school’s name?
 A: Sophia.
 Q: Sophia. What color is your shirt?
 A: Black.
 Q: Black. If I told you—and what color is your computer?
 A: Pink.
 Q: If I told you that this is green, is that the truth or is that a lie?
 A: That’s a lie.
 Q: A lie. Why is it a lie?
 A: Because that’s pink.
 Q: Because it’s pink. Right. That’s very good. If—what’s the truth, is this pink or is it true that this is green? What’s truth?
 A: Pink.
 Q: Can you promise to tell the truth as long as you’re in this room?
 A: (Moving head up and down)
 Q: Can you answer that with a yes or no? For the record she nodded her head slightly up and down. Can you say that?
 A: (Moving head from side to side.)

M.D. then testified about her earrings and her hair. She was able to distinguish between truths and lies. M.D. was then asked about her hair bow:

- Q: Do you know what color your bow is? What color is your bow?
A: It's black and white and it's pink.
Q: Okay. If somebody said that that bow was blue, is that the truth? What is that? Is that the truth?
A: (Moving head from side to side)
Q: I need you to answer. Use your voice. Use your words. Is that the truth?
A: Huh-uh.
Q: Huh-uh. For that record you said huh-uh and you shook your head side to side. Can you always tell the truth from here on out?
A: (Moving head from side to side)

The judge then asked M.D., "You said that at your house if you tell a lie, your grandma will hit you. Did you say that to me?" M.D. nodded her head yes. The judge asked, "So will you get in trouble then at your house if you tell a lie?" M.D. nodded her head yes. The judge asked if M.D. would get in trouble at home if she told the truth. M.D. replied, "Uh-huh" and appeared to nod her head. The judge asked, "So if you told your grandma something that did happen, it's the truth, will you get in trouble for that?" M.D. shook her head no. The judge continued, "But if you tell her something that is not the truth, something that didn't happen or a lie, will you get in trouble for that?" M.D. nodded her head yes. The judge said, "If you sit on that stand, see that chair that you're sitting in right now? No, the one you're sitting in. If you sit in there, you have to tell the truth. That's part of sitting in that chair. Would you be able to do that?" M.D. nodded yes. When asked if M.D. could say yes or no, M.D. shook her head no and refused to answer verbally.

During argument to the trial judge, the State admitted that M.D. "stumbled over the use of the word truth and lie," but that "she clearly demonstrated the ability to discern the difference between that which is actually true [and] that which is not, a lie." The defense noted that M.D. had testified she gets hit by her grandmother when she tells a lie. The defense argued, "Is the question that she knows what the truth is but she can't say it because she's afraid?" "Or is the question that she doesn't know what the truth is and she doesn't know how to express her answers truthfully." The State replied that the defense's argument "goes to credibility and believability." The State

noted that the ultimate issue was whether M.D. was “able to experience an event and then relate that event.” The trial judge stated, “I hear the defense’s concern, but I don’t—that’s a credibility issue. That’s not a competen[cy] issue.” The judge noted that the problem with a competency hearing at such a young age was that M.D. had not been exposed to a court before. The judge stated that M.D. understands “that there’s a consequence for telling a lie.” According to the judge, “[M.D.] appreciates the gravity of not telling the truth.” The judge concluded,

Based on what [M.D.] offered with regard to understanding the lie versus the truth, and based on her understanding that there was a consequence in her home if she did not tell the truth, I’m going to allow her to testify but I’m going to, outside the presence of the jury, explain to her once again that everything she says has to be the truth. And then I will give her the oath in front of the jury and we will proceed from there.

The trial judge then instructed M.D.:

I need you to look at me. All right. You’re sitting in a chair that requires you to tell the truth. Okay. Everything you say I need to be truthful. And I think Mr. Daryl [the prosecutor] is going to ask you some questions about truth and lies, and I think Mr. Robert [defense counsel] over there is probably going to do the same thing. Okay can you speak into that microphone? You can say anything you want. . . . I need you to speak a little bit louder and I need you to tell me the truth, okay?

M.D. nodded her head yes.

In evaluating M.D.’s competency, we do not consider only M.D.’s responses to qualification questions; we also consider her entire testimony. *De Los Santos*, 219 S.W.3d at 80-81. When M.D. began her testimony, she demonstrated again that she knew the difference between a truth and a lie. M.D. was then asked to look a picture and say what was happening. M.D. replied it was a picture of her at her birthday party. M.D. was asked if somebody touched her body the day of the birthday party. M.D. replied, “Yes.” When asked who touched her body, M.D. replied, “My Poppi.” The prosecutor touched M.D.’s foot and asked her what part of her body was the prosecutor touching. M.D. replied, “My foot.”

- Q: Your foot. Did Poppi touch your foot?
 A: (Moving head up and down)
 Q: Okay. You're nodding your head up and down yes. What other part of your body did Poppi touch?
 A: (Witness indicating)
 Q: And she pointed to her waste area. What do you call the part of your body Poppi touched?
 A: My hole.

* * *

- Q: What did Poppi touch your hole with?
 A: His hand.
 Q: His hand. Okay. Did you feel Poppi's hand inside your hole?
 A: (Moving head up and down)
 Q: I need you to use your words.
 A: Yes.

M.D. was asked whether she heard her grandmother calling for her when "Poppi touched your hole with his hand." M.D. said, "Yes." M.D. was then asked whether she saw "Poppi" in the courtroom. M.D. shook her head.

On cross-examination, M.D. was asked if she thought her "Poppi" wanted to hurt her. M.D. said, "Yes." She was asked if Poppi had hurt her on the day of her birthday party. M.D. replied, "Uh-huh." When asked where "Poppi" had hurt her, M.D. indicated again and said, "Right here." M.D. was then asked, "Did that really happen or did somebody tell you to say that?" M.D. replied, "It really happened." The defense asked again, "It really happened. Nobody told you to stay that?" M.D. shook her head no.

- Q: And where did it happen? Where? In the house or in the car?
 A: In the house.
 Q: In the house. Where in the house?
 A: In the restroom.

In looking at the totality of M.D.'s testimony, we find no abuse of discretion by the trial court in determining that M.D. was competent to testify. M.D. was able to demonstrate that she knew the difference between the truth and a lie, and that she knew of her obligation to tell the truth.

She established her ability to understand and narrate events that happened to her. She was able to give specific testimony about the location, timing, and details of what had happened to her. Any inconsistencies in her testimony went to her credibility. *See De Los Santos*, 219 S.W.3d at 81.

Moreover, even if the trial court had erred in finding that M.D. was competent, any error is harmless. *See* TEX. R. APP. P. 44.2(b). The erroneous overruling of an objection to evidence will not result in reversal when other such evidence is received without objection, either before or after the complained-of ruling. *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998); *see Zarco v. State*, 210 S.W.3d 816, 833 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (“[W]hen a court admits evidence over an objection, even if error, it is not reversible when the same evidence is subsequently admitted without objection.”). Here, J.D. testified about the specifics of what M.D. said DeLeon did in the restroom. M.D.’s great-aunt, Shziel, also testified that M.D. said DeLeon had touched her “button” or “her private” with his finger and put his fingers “inside her button.” Nurse Mercer testified M.D. told her that “Poppi” had touched her and then pointed to her genital area. Given all the cumulative evidence in the record, we find that any error would be harmless.

We affirm the judgment of the trial court.

Karen Angelini, Justice

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