IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65332-6-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
M.G.H. (DOB: 12/29/93),	)	UNPUBLISHED
	)	
Appellant.	)	FILED: June 13, 2011
	)	
	)	

Cox, J. — M.G.H. appeals his juvenile adjudication for first degree child molestation, contending that the court abused its discretion in admitting the testimony of complaining child witness M.P. Specifically, M.G.H. contends that M.P. was not competent to testify and that admission of M.P.'s hearsay statements violated his right to confrontation because she was not "available" for cross-examination. M.G.H. also argues that the hearsay statements were inadmissible because they were uncorroborated and unreliable. He contends that the court abused its discretion in admitting his statement to a police detective because he was in custody and was not given Miranda[1] warnings and that insufficient evidence supports his conviction.

We hold that M.G.H. failed in his burden to show that M.P. was not

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

competent to testify. Accordingly, she was available to cross-examine. Moreover, her statements were corroborated and reliable. The trial court's decision to admit M.G.H.'s statement to the detective was based on its resolution of competing testimony and was not an abuse of discretion. Finally, the evidentiary record supports M.G.H.'s conviction. We affirm.

In early October 2008, 14-year-old M.G.H. and his parents visited his aunt, uncle, and seven-year-old cousin, M.P. After M.G.H. and his family left, M.P. told her mother that M.G.H. touched her vaginal area and chest. Two days later, after M.P.'s mother spoke with M.G.H.'s mother about the incident, M.P.'s parents brought her to the Monroe Police Department. There, M.P. told Officer Kenneth Sahlstrom that M.G.H. rubbed her vaginal area and kissed her chest. M.P.'s mother reported that M.P. said that she and M.G.H. were playing "doctor" in a bedroom closet when this occurred and that M.G.H. warned M.P. not to tell anyone. M.P.'s father reported that M.P. said the abuse occurred in her brother's closet.

Monroe Police Officer LaDonna Whalen interviewed M.P. M.P. told Officer Whalen that M.G.H. touched her vaginal area over her clothes and with her pants off and kissed her chest and mouth. She claimed that the incident occurred in her brother's closet and that M.G.H. told her not to tell anyone.

Nurse Practitioner Caryn Young interviewed M.P. in conjunction with a sexual assault examination. M.P. told Young that M.G.H. touched her vaginal area with his hand and told her not to tell anybody.

Monroe Police Detective Barry Hatch interviewed M.G.H. at school. Detective Hatch waited in the office while school officials retrieved M.G.H. and brought him to the office. Hatch, who was in plain clothes, told M.G.H. that he was not under arrest and that he was free to leave whenever he wanted. He did not give M.G.H. Miranda warnings. M.G.H. admitted playing "doctor" with M.P., but claimed it happened in the presence of three other children. He denied any inappropriate touching and claimed he was never in a closet. He also claimed that M.P.'s mother was biased against him.

The State charged M.G.H. with first degree child molestation. Defense counsel interviewed M.P. at the prosecutor's office. During the interview M.P. repeatedly stated that she did not remember what had happened between her and M.G.H.

A bench trial followed. At trial, M.P. testified that M.G.H. touched her vaginal area and chest with his hand while the two were in her brother's closet, that this happened under her clothes, and that her pants were off. She also testified that he told her not to tell anyone. She recalled that she spoke about the incident with her mother, father, and Officer Whalen. She also had been to see a doctor. She recalled that she had not been able to remember the incident during the defense interview at the prosecutor's office. The defense did not offer any evidence. The court found M.G.H. guilty.

M.G.H. appeals.

WITNESS COMPETENCY

M.G.H. first argues that M.P. was not competent to testify. We disagree.

This court begins with the presumption that all witnesses are competent to testify.[2] "A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly."[3] The Allen factors[4] continue to be a guide when a child's competency is challenged.[5]

The determination of competency rests primarily with the trial court judge who sees the witness, notices his or her manner, and considers his or her capacity and intelligence.[6] An appellate court will not disturb a trial court's conclusion as to the competency of a witness to testify except for abuse of discretion.[7] A trial court abuses its discretion when its decision is "manifestly

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[2] RCW 5.60.050; ER 601; CrR 6.12(a).

[3] State v. S.J.W., 170 Wn.2d 92, 102, 239 P.3d 568 (2010).

[4] State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967) (admitting testimony of a six-year-old witness). The court in Allen concluded that the test of the competency of a "young child" consists of: (1) an understanding of the obligation to tell the truth, (2) the mental capacity at the time of the occurrence concerning the testimony, (3) sufficient memory to retain an independent recollection of the occurrence, (4) the capacity to express in words her memory of the occurrence, and (5) the capacity to understand simple questions about the occurrence. Allen, 70 Wn.2d at 692.

[5] S.J.W., 170 Wn.2d at 102.

[6] State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990); Allen, 70 Wn.2d at 692.

[7] Faust v. Albertson, 167 Wn.2d 531, 545-46, 222 P.3d 1208 (2009).

unreasonable, or exercised on untenable grounds, or for untenable reasons."[8]

Here, the trial court based its competency determination on its observation of M.P.'s demeanor and a careful consideration of the Allen factors. The court concluded that M.P. understood the obligation to be truthful, had the capacity to have an accurate impression of what happened, had an independent recollection of the events, and had the capacity to express her memory of the events. The trial court recognized that M.P. made several inconsistent remarks. However, inconsistencies and contradictions in testimony do not necessarily render a witness incompetent and may affect the weight of evidence, rather than its admissibility.[9] The trial court found persuasive M.P.'s testimony that she was scared during the defense interview, and that was why she claimed she was unable to remember the events. The trial court was not persuaded that M.P.'s inability to remember details unrelated to the molestation demonstrated she lacked the ability to recall that incident. And the trial court found that whether M.P. had been "coached" was more relevant to her credibility than her competency.

The trial court properly exercised its discretion in finding M.P. competent and admitting her testimony.

Because M.G.H. fails to demonstrate that M.P. was incompetent, his contention that her testimony violated his Sixth Amendment confrontation rights

[8] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[9] State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873 (1989).

is also unavailing. The Sixth Amendment guarantees that a person accused of a crime shall enjoy the "right ... to be confronted with the witnesses against him."[10] A witness who is incompetent to testify is unavailable for purposes of the confrontation clause.[11] Because M.P. testified and was cross-examined regarding her testimony, there was no confrontation clause violation.

Our determination that M.G.H. has not demonstrated that M.P. was incompetent also disposes of his argument that her hearsay statements were not corroborated as required by RCW 9A.44.120(2)(b).[12] That statute requires

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[10] U.S. Const. amend. VI. See, e.g., Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). For purposes of Sixth Amendment analysis, the Crawford court classified out-of-court statements as either testimonial or nontestimonial:

> Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception. Testimonial statements do implicate the confrontation clause, and are admissible only if the witness testifies at trial, or is unavailable and the defendant has had a prior opportunity to cross-examine.

State v. Saunders, 132 Wn. App. 592, 601, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007).

[11] See Swan, 114 Wn.2d at 645.

[12] Under RCW 9A.44.120, a statement by a child under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings, including juvenile offense adjudications, if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is

separate determinations of reliability and corroboration when the child is unavailable to testify.[13] Because M.P. testified at trial, RCW 9A.44.120(2)(b) does not apply.

CHILD HEARSAY

M.G.H. next argues that the trial court abused its discretion by admitting hearsay statements attributed to M.P. because the statements were unreliable. We disagree.

Under the child hearsay statute, statements made by a child who testifies are admissible if "the time, content, and circumstances of the statement provide sufficient indicia of reliability."[14] In determining the reliability of child hearsay, the court considers the nine Ryan factors.[15] Absent a manifest abuse of discretion, we will not reverse a trial court's determination that statements are admissible under the child abuse hearsay exception.[16] The trial court is in the

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corroborative evidence of the act.

[13] State v. Ryan, 103 Wn.2d 165, 174, 691 P.2d 197 (1984).

[14] RCW 9A.44.120(1).

[15] These factors are: (1) Whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement. Ryan, 103 Wn.2d at 175-76.

[16] State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).

best position to make such a determination.[17]

Here, the court made a detailed oral ruling applying the Ryan factors to M.P.'s statements and entered the following written findings of fact:

> 1) The Court found no apparent motive for M.P. to lie about events in the closet. 2) There is nothing in the evidence to suggest that it is in M.P.'s character to lean toward misperception or misstatement. 3) Generally people heard the statements separately. The 10/9/08 interview with Whalen was recorded. Because of that audio recording, this factor favors admissibility. 4) The initial disclosure by M.P. to her parents was clearly spontaneous. The subsequent disclosures involved M.P.'s responses to questions. As the questions were non-leading, M.P.'s answers were spontaneous. 5) The timing of the declaration and the relationship between M.P. and the witness do not weigh against admissibility. There is no evidence of improper motive or bias on the part of M.P.'s parents. In fact, M.P.'s mother delayed notifying the police until she received a response to the disclosure from the respondent's mother. 6) The statement did contain assertions about past facts. Since most (if not all) disclosures concerning sexual abuse contain assertions of past fact, the Court did not give this factor any weight. 7) The cross-examination of M.P. did reveal several inconsistencies in M.P.['s] statements concerning the incident. This Court did take note that M.P. did consistently state that the respondent touched her vaginal area with his hand and did tell her not to tell anyone. The Court did take into account the many inconsistencies in reaching its conclusion. 8) The Court does find the possibility that M.P.'s recollection is faulty is remote. 9) The Court finally finds that, considering all of the circumstances surrounding the statements made by M.P., there is not sufficient concern that M.P. misrepresented the relevant facts.[18]

M.G.H. first contends that M.P. had a motive to lie when initially disclosing the abuse to her mother and was forced to repeat her allegations to others. But

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[17] State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995).

[18] Clerk's Papers at 136-38; Report of Proceedings (Mar. 31, 2010) at 192-200.

the only evidence M.G.H. identifies to establish M.P.'s motive to lie was M.G.H.'s own statement to detective Hatch that M.P.'s mother was biased against him. The court was entitled to determine that M.P. did not have a motive to lie and reject M.G.H.'s assertion as not credible on this point.

Second, M.G.H. contends that M.P.'s character was not trustworthy because her mother testified that M.P. had previously lied to her. But her mother testified that M.P. was generally truthful and only lied occasionally about minor things, like claiming to have cleaned her room when she had not. The trial court's finding that M.P. was generally truthful was supported by this substantial evidence.

Third, M.G.H. argues that except for M.P.'s first statement to her parents, her statements were not spontaneous. But the trial court found that her responses to Officer Whalen's "non-leading" questions were detailed narratives and were spontaneous. Information volunteered by children in response to non-suggestive questions is "spontaneous."[19] Substantial evidence supports the trial court's ruling on this factor.

Fourth, M.G.H. contends that M.P.'s recollection was likely faulty. However, the trial court observed that M.P. first disclosed the molestation the day it occurred and consistently alleged that the acts occurred in a closet, that M.G.H. touched her vaginal area and chest, and that he warned her not to tell anyone. Moreover, the trial court concluded that instances like the assault were

[19] State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987).

a type of occurrence that an individual was likely to remember. The record supports the trial court's finding regarding this factor.

The challenged findings are supported by substantial evidence, and M.G.H. fails to demonstrate an abuse of discretion in admitting M.P.'s hearsay statements.

INTERROGATION

M.G.H. next argues that his statement to Detective Hatch should have been suppressed because he was in custody. We disagree.

Miranda warnings are required when a defendant is interrogated by a state agent while in custody.[20] Whether a defendant was in custody for Miranda purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed."[21] The trial court's determination of whether a defendant was in custody is reviewed de novo.[22]

During the 3.5. hearing,[23] Detective Hatch testified that he told M.G.H.

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[20] State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); State v. D.R., 84 Wn. App. 832, 835-37, 930 P.2d 350, review denied, 132 Wn.2d 1015 (1997); State v. Pejsa, 75 Wn. App. 139, 146, 876 P.2d 963 (1994), review denied, 125 Wn.2d 1015 (1995).

[21] State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). Here, it was undisputed that M.G.H. was interrogated, that Detective Hatch was a state agent and that Miranda warnings were not given. The only dispute was whether M.G.H. was in custody.

[22] Lorenz, 152 Wn.2d at 36. In this context, "de novo review" means applying the legal standard to the facts found by the trial court. State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), review denied, 149 Wn.2d 1025 (2003).

[23] "When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." CrR 3.5(a).

that he was not under arrest and was free to leave. M.G.H. testified that Detective Hatch never told him he was free to leave, and that he did not believe he could leave. The trial court found Detective Hatch credible. The trial court's credibility determinations will not be overturned on appeal.[24]

The circumstances of this case are distinguishable from the circumstances in D.R., the case M.G.H. primarily relies upon in claiming error. The D.R. court held that a juvenile defendant who was interrogated while at school was in custody, because he was not told that he was free to leave.[25] Here, the trial court explained why the facts of this case differ from the relevant facts in D.R.:

> I'm looking at . . . [D.R.] . . and in part the quote that I'm referring to is the conclusion that special precaution should be taken to ensure that children understand that they're not required to stay or answer questions asked of them by a police officer.
>
> [. . .]
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> [B]ut I think here the officer did take those very precautions to ensure that [M.G.H.] did not feel compelled to stay or answer questions.[26]

Because M.G.H. was not in custody when he made his statement, it was properly admitted.

BURDEN OF PROOF

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[24] Swan, 114 Wn.2d at 666.

[25] D.R., 84 Wn. App. at 838.

[26] Report of Proceedings (Mar. 31, 2010) at 177-78.

M.G.H. next contends that the trial court applied the incorrect burden of proof in determining his guilt. We disagree.

The State has the burden of proving each element of a criminal charge beyond a reasonable doubt, and it may not shift that burden to the defendant.[27] Whether the trial court applied the correct burden of proof is a question of law we review de novo.[28]

Here, the trial court's written findings of fact and conclusions of law demonstrate that the trial court applied the proper burden of proof. The trial court found "beyond a reasonable doubt" that M.G.H. intentionally touched M.P. on her vaginal area for purposes of his sexual gratification.

In its oral ruling announcing its guilty verdict, the trial court detailed its rationale for finding that M.G.H.'s exculpatory statements were not credible:

> Oddly, in the respondent's statement to police, he indicates that he was never in any closet. If these children were playing and nothing happened, why deny that it occurred in a closet? It would be a benign disclosure to acknowledge that they were playing doctor in a closet. And so it seems that he's taken a step that impairs his credibility by denying something about which he could have admitted had it occurred without in any way incriminating himself.
>
> I thought it more significant that in his statement he indicates that he and [M.P.] were playing doctor with [three other children]. Three witnesses who could have corroborated him, who could have been called to testify. And I think that that statement is significant, because it not only is clearly at variance with all the other evidence in the case that I've heard and that's been presented, but if that had been corroborated, the circumstance under which five children

[27] See, e.g., State v. Finley, 97 Wn. App. 129, 136, 982 P.2d 681 (1999) (quoting State v. R.H., 86 Wn. App. 807, 812, 939 P.2d 217 (1997)), review denied, 139 Wn.2d 1027 (2000).

[28] State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

> playing doctor together would certainly make the likelihood of sexual misconduct far less likely in my view than if it is simply he and [M.P.] playing together in a closet.[29]

M.G.H. argues that this ruling indicates that the trial court improperly shifted the burden of proof by requiring the defendant to produce evidence. However, the trial court's remarks, when read in context, demonstrate only that the trial court considered M.G.H.'s credibility relevant to its decision. "[A]ppellate courts ought not infer from ambiguous expressions that [a judge has] contravened the basic norms of the legal system," such as the "beyond a reasonable doubt" standard of proof in a criminal trial or juvenile adjudication.[30]

The trial court applied the proper burden of proof to this adjudication.

SUFFICIENCY OF THE EVIDENCE

Finally, M.G.H. contends that if M.P. was incompetent and her statements inadmissible, the remaining evidence was insufficient to support his conviction. Because M.P. was competent and her statements admissible, this argument fails.

We affirm the adjudication and disposition.

Cox, J.

WE CONCUR:

[29] Report of Proceedings (Mar. 31, 2010) at 222-23.

[30] U.S. v. Van Fossan, 899 F.2d 636, 638 (7th Cir. 1990).

Leach, A.C.J. Ellington, J.