IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, | ) | |
| | ) | NO. 66617-7-I |
| Respondent, | ) | |
| | ) | DIVISION ONE |
| v. | ) | |
| | ) | |
| JHONNY GODINEZ BASTIDA, | ) | UNPUBLISHED OPINION |
| | ) | |
| Appellant. | ) | FILED: June 4, 2012 |
| _____ | ) | |

Becker, J. — In this appeal of his convictions and sentence for child molestation in the first degree, Jhonny Godinez Bastida contends the child was incompetent to testify and the court's admission of her out-of-court statements describing the alleged abuse violated the child hearsay statute. We affirm.

## FACTS

Bastida was living with VO and her mother. On January 16, 2010, VO was six years old. According to her mother's trial testimony, she came home from work and VO told her that Bastida had touched her "butt" and "put his butt on my butt." VO generally referred to a male's genitals as a "butt." She "pointed to the front" of her body below her waistline to show her mother what she meant

by Bastida's "butt" and pointed to "her back" to indicate what she meant by her "butt."

VO's mother contacted police. The same day, VO told a nurse at the emergency room that Bastida had tried to put his butt "in" her butt. A week later, she told a child interview specialist during a videotaped forensic interview that Bastida had tried to touch her "on the inside" of her butt and had tried to take her pants and underwear off. She described two incidents, one occurring on her mother's bed and the other on the couch.

Bastida was charged with two counts of child molestation in the first degree. Bastida moved pretrial to prevent VO's mother, the nurse, and the child interview specialist from testifying about VO's hearsay descriptions of the alleged abuse. He also argued VO was incompetent to testify because irregularities and inconsistencies in her statements during two forensic interviews showed she was unable to distinguish truth from lies and unable to accurately recall events. A competency hearing was held on December 13, 2010. The court heard testimony by VO, her mother, the nurse, and the child interview specialist. Bastida cross-examined each witness. The court ruled that VO was competent to testify under the factors set forth in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967), and that the three hearsay statements were sufficiently reliable to gain admission at trial under the child hearsay statute, according to the factors set forth in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

A jury trial lasting six days was

held. VO testified, as did her mother, the nurse, and the child interview specialist. The videotaped recording of the January 22, 2010, forensic interview of VO was played for the jury. VO testified that when her mother was at work, Bastida had been "sticking his body to my body" using his "front butt," that he had taken her pants off, and that his hands had been "all covered . . . with pee or water." She testified that this had happened on more than one day, but that the day she told her mother was "the very last time" it happened. Bastida also took the stand and denied ever touching VO in a sexual manner. He was convicted as charged. He now appeals.

## WITNESS COMPETENCY

Bastida contends the trial court erred in concluding VO was competent to testify and that the jury's exposure to her unreliable testimony deprived him of his due process right to a fair trial.

An appellate court affords significant deference to the trial judge's competency determination and may disturb such a ruling only upon a finding of manifest abuse of discretion. State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

> There is probably no area of the law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness. The trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation but are not reflected in the written record.

State v. Borland, 57 Wn. App. 7, 11, 786 P.2d 810, review denied, 114 Wn.2d 1026 (1990), disapproved on other

grounds by State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997).

RCW 5.60.020 provides in pertinent part: "Every person of sound mind and discretion . . . may be a witness in any action, or proceeding." All witnesses, regardless of their age, are presumed competent to testify until proved otherwise by a preponderance of the evidence. Brousseau, 172 Wn.2d at 341, citing State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010). A person is not competent to testify if he or she is of unsound mind, intoxicated at the time of the examination, or if he or she appears "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050. The party challenging the competency of a child witness bears the burden of rebutting the presumption of competency with evidence showing that the child falls short of the statutory definition. S.J.W., 170 Wn.2d at 102.

A former version of the witness competency statute, RCW 5.60.050, created a special rule for determining the competency of children under 10 years of age. Under the former statute, the court had outlined the following test:

> The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692. These factors "continue to be a guide when competency is challenged." S.J.W., 170 Wn.2d at 102.

The trial court fully considered the Allen factors in determining that VO was competent to testify:

> [T]here is no question in my mind that the child is competent. She presented today as an intelligent, bright, articulate six, soon to be seven-year-old child. It was apparent to the court that she appreciated the difference between a lie and the truth by various questions that were being asked. It was apparent to the court that she appreciated the need to tell the truth on the witness stand.
>
> She was also able to express in her own words what she testifies about that occurred. She was able to follow the conversation in terms of the questions that were put to her and answer those in an articulate fashion for a seven year old.
>
> . . . .
>
> And it is true that she has to these various people, either her mother, the nurse, or the interview specialist, made somewhat inconsistent or other vague responses. But at least in this court's experience that is not unlike a child of this age, or for that matter, almost any victim of a sexual assault. That certainly should be something that the trier of fact can consider. But in terms of the competency of this witness, it is abundantly clear to this court that she is presently competent to testify.

At both the competency hearing and at trial, VO answered correctly every question designed to distinguish between truth and lies. Her descriptions of her school work, social activities, and the layout of her home all demonstrated her ability to understand questions, express ideas, and describe her memories of situations and events. She testified accurately as to her age, date of birth, full name, the name of her school, her friends' and teacher's names, and was able to specifically identify Bastida in the courtroom. Her descriptions of Bastida's actions were articulate and coherent.

Bastida challenges the court's determination that VO understood her obligation to speak the truth on the

witness stand, the first Allen factor. He argues VO's incorrect answers to two standardized test questions during her pretrial interview by the child interview specialist prove she was unable to distinguish truth from falsehood. Near the beginning of the interview, VO was asked four questions similar to the following: "This girl looks at the apple and says it's an apple. This girl looks at the apple and says it's a banana. Which girl told the truth?" She answered only two of the four correctly. These wrong answers given approximately 11 months before trial are not dispositive. At the competency hearing and at trial, VO was posed eight additional questions of this nature, and she answered each of them correctly. "Even where the court is reviewing a pretrial competency determination, the inquiry is always whether the child is competent to testify at trial. Thus, it is always appropriate to examine the child's trial testimony in making this determination." Brousseau, 172 Wn.2d at 341 n.5 (emphasis omitted). The interview specialist testified that the questions VO struggled with are no longer used because many children found them ambiguous and confusing. A child's incorrect responses to ambiguous questioning do not demonstrate testimonial incompetence. State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989).

Bastida contends VO also showed her incompetence to testify by responding "Mm, don't know" to a January 2010 interview question asking whether it is better to tell the truth or a lie. However VO was asked the same question at the competency hearing and at trial, and confidently replied both times that she understood it was better to

tell the truth. VO made promises to both the prosecutor and the trial judge that she would only tell the truth on the stand.

Bastida contends the following exchange on cross-examination at the competency hearing showed that VO did not understand her obligation to tell the truth:

> Q. . . . When [the prosecutor] asked you questions, do you think that there is a right answer and a wrong answer, or do you think you're just supposed to answer them?
> A. Answer them.
> . . . .
> Q. . . . Why did you change your answer after [the prosecutor] asked you several times?
> A. I don't know.
> Q. You don't know? Okay. Was it because you were giving – you thought you were giving the wrong answer?
> . . . .
> THE WITNESS: Yeah.

VO's answers do not clearly undermine the court's competency determination. She was not asked to explain her understanding of what it meant to give a "right answer" or a "wrong answer." The terms "right" and "wrong" are not unequivocal; a "wrong" answer could just as easily refer to an untrue or inaccurate answer as to an answer the questioner did not wish to hear. Indeed, Bastida himself employs both meanings of the concept in his brief on appeal.[1]

[1] Bastida contends VO's agreement that she was "just supposed to answer" the questions showed that she "did not understand the difference between 'right answers' and 'wrong answers,' i.e., truth and falsehood." Apparently without appreciating any conflict, he then contends VO's statement that she changed an answer because she thought she was "giving the wrong answer" meant that VO was acknowledging giving "answers that she thought that the people questioning her wanted to hear." In the first usage, Bastida assumes "wrong" equates with "false"; in the second usage, he assumes "wrong" refers to "undesirable."

Bastida contends VO is like the child witness in State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), abrogated on other grounds by, State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003), where the Court of Appeals reversed a trial court's competency determination. She is not. The child witness in that case swore to tell only the truth on the stand, and then described "in vivid detail" how he and his brother five years younger than him "had been born at the same time." Karpenski, 94 Wn. App. at 106. Evidence before the court showed that the witness had a "long-standing, often-observed inability to distinguish what was true from what was not," and the trial court explicitly found the child was "confused regarding dream versus reality." Karpenski, 94 Wn. App. at 106 (internal quotation marks omitted). No such evidence exists in this case. None of VO's statements evince fantasy or confusion regarding the boundaries of reality.

Bastida contends inconsistencies in VO's various statements show she did not retain a memory sufficient to provide an independent recollection of the occurrence (Allen factor 3) and that her poor memory of events was corrupted by improper questioning by the State.

Many of the purported inconsistencies are illusory. For example, VO said at different times that Bastida's pants and her pants were both "on" and "off." These statements are not inherently in conflict; she explained at trial that her pants had been on, but that Bastida had taken them off, and that although Bastida's pants remained on, she had felt him taking them off "just a little." Bastida also contends VO was

inconsistent about the number of times the touching occurred, where the touching took place, and how many times VO spoke to her mother about it. But the existence of inconsistencies and contradictions in a witness's testimony do not render the witness incompetent. Stange, 53 Wn. App. at 642. Such contradictions go to the weight of a witness's testimony, not to its admissibility. Stange, 53 Wn. App. at 642.

CHILD HEARSAY

Bastida next argues that the court's admission of VO's out-of-court declarations to her mother, the nurse, and the child interview specialist violated the child hearsay statute, RCW 9A.44.120. The statute provides that a hearsay statement by a child "describing any act of sexual contact performed with or on the child by another" is admissible at trial if the child testifies at trial and if the court finds, after conducting an evidentiary hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120.

As a threshold matter, we reject the State's invitation to ignore Bastida's child hearsay arguments on appeal under RAP 2.5(a). Although Bastida did not argue the child hearsay issues with crystal clarity to the trial court, his trial memo and cross-examination of witnesses at the child hearsay hearing were adequate to preserve his right to appellate review on this issue.

We nevertheless reject Bastida's challenge. He first contends the hearsay statements were improperly admitted given the constitutional requirements set forth in Crawford v.

Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because VO's incompetence to testify made her an "unavailable" witness and rendered his cross-examination of her a "nullity." This argument rests on a theory we have already rejected. VO was competent to testify and was therefore "available" at trial. Bastida's cross-examination of VO satisfied his right to confrontation.

Bastida next contends the hearsay statements did not meet the statutory requirement of reliability. In determining whether this requirement is satisfied, the court should consider nine factors:

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.

State v. C.J., 148 Wn.2d 672, 683-84, 63 P.3d 765 (2003), citing State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). No single factor is decisive; rather, reliability is based on an overall evaluation of the factors. State v. Young, 62 Wn. App. 895, 902, 802 P.2d 829 (1991). If the factors are substantially met, the statement is sufficiently reliable. Borland, 57 Wn. App. at

20.

In issuing its oral ruling, the trial court considered each of the nine Ryan factors and concluded each factor favored admission of the three witnesses' testimony.

Bastida contends, under Ryan factor 1, that VO had a motive to fabricate the accusations as a way of deflecting her mother's anger about Bastida's and VO's failure to clean the house while she was away at work. This theory is purely speculative and has no support in the record. And it is contradicted by VO's testimony that she disclosed the abuse by Bastida despite believing that her mother would be angry with her when she found out: "I thought my mom was going to be mad at me that I told him to do it, but I didn't tell him to do it. He just wanted to do it. . . . but she wasn't. She was mad at Jhonny."

Bastida contends under Ryan factor 4 that VO's statements to the nurse and child interview specialist were not spontaneous. The trial court reasoned that although these statements by VO "were not spontaneous in the sense of someone simply blurting them out, there is nothing to show that any of those statements were rehearsed or programmed in any fashion whatsoever." The record supports the court's reasoning.

Bastida contends under Ryan factors 8 and 9 that the inconsistencies in VO's statements provide proof of her suggestibility and flawed memory. The trial court perceived her statements as "essentially the same" despite minor inconsistencies:

> [A]lthough the statements differ from maybe person to person, they nevertheless retain the same

> central core . . . . Certainly the general description of the language in terms of her referring to her body part as "butt" and referring to his genitalia as "butt" is consistent throughout all of these interviews. Again, there may be some vagueness and inconsistencies even within those statements, but the core remains essentially the same throughout.

Determining the admissibility of child hearsay lies within the discretion of the trial court. State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994), review denied, 126 Wn.2d 1002 (1995). We find no abuse of discretion.

Affirmed.

Becker, J.

Kleinfelder, J.

Ellington, J.