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Washington State
Court of Appeals
Division Two

January 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. S.D., Appellant.	No. 46320-2-II UNPUBLISHED OPINION

SUTTON, J. — S.D.[1] appeals his adjudication of guilt on two counts of first degree child molestation. He argues that the juvenile court erred in finding that one of the two victims, six-year-old S.C., was competent to testify. Because substantial evidence supports the juvenile court's findings that S.D. challenges, the juvenile court did not abuse its discretion when it found S.C. competent to testify. According, we affirm.

FACTS

I. BACKGROUND

Angelique C. and Kassie D. and their families were close friends. S.C. and A.C. are Angelique's daughters; S.D. is Kassie's son.

[1] We use initials for the parents' last names and the juvenile children involved in this incident to protect their privacy. Pursuant to General Order 2011-1, the name of the minor[s] will be indicated with initials. Gen. Order 2011-1 of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.), http://www.courts.wa.gov/appellate_trial_courts/.

From January through May 2013, Kassie cared for S.C.,[2] A.C.,[3] and the girls' younger brother at her (Kassie's) house before and after school. On July 4, S.C. told Angelique that S.D.[4] had touched her and A.C.'s "privates." 2 Verbatim Report of Proceedings at 43 (VRP).

That evening and the following morning, Angelique questioned each girl separately about this disclosure. When she asked S.C. where S.D. had touched her, S.C. pointed to her genitalia and told her mother that S.D. had touched and moved his finger around her "privates"; showed her his "privates"; and asked her to put her mouth on his "privates," but she refused. 2 VRP at 46-47. S.C. was not specific about how many times this had happened, but she also told her mother that it had happened in S.D.'s bedroom and that S.D. had also touched A.C.

Similarly, A.C. told Angelique that S.D. had touched her "privates"; shown her his "privates"; and asked her to put her mouth on his "privates," but she refused. 2 VRP at 48. A.C. also told her mother that this had happened in S.D.'s bedroom and a tent and that it had happened more than one time.

[2] S.C. was five at the time.

[3] A.C. was seven at the time.

[4] S.D. was 14 at the time.

Angelique reported the allegations to the police and took the girls to medical exams and forensic interviews. Keri Jean Arnold, the child interview specialist for the Pierce County Prosecutor's Office, interviewed the girls several days later. Arnold recorded the interviews.[5]

During her interview, S.C., described being in S.D.'s bedroom, stated that S.D. had "put his finger in her 'private spot,'" and pointed to her vaginal area to show where her "private spot" was located. Clerks Paper's (CP) at 69. She also stated that S.D. had shown her his penis and asked her to put her mouth on it, but she refused. A.C. described similar events but provided greater detail.

During her medical exam, S.C. told Michele Breland, the nurse practitioner conducting the exam, that S.D.'s finger "went in [her] private spot." 3 VRP at 197. A.C. told Breland that S.D. had done "'something'" to her "'private spot.'" 3 VRP at 190.

II. PROCEDURE

The State charged S.D. in juvenile court with one count of first degree child molestation involving A.C. and one count of first degree child molestation involving S.C. S.D. moved to exclude S.C.'s testimony and her related hearsay statements on the ground that she was incompetent to testify. Because this was a bench trial, the juvenile court considered these motions throughout the course of the trial.

[5] Although the juvenile court heard these recordings at trial, they are not part of the record on appeal. Accordingly, we rely on the juvenile court's unchallenged findings of fact when describing these interviews. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (unchallenged findings of fact are verities on appeal).

During S.C.'s testimony, S.C. was able to recall several facts that were contemporaneous to the sexual conduct.[6] But as to the sexual conduct itself, S.C. testified that she had either forgotten or "[could not] remember anything" specific about the incidents. 1 VRP at 89-90. She was also unsure about why she was not allowed to see S.D.'s family anymore. In addition, although she testified that she had told her mother about some of the things S.D. had done to her and about S.D. also doing these things to A.C, S.C. testified that she did not remember whether she had told her mother about everything that had happened. She did, however, testify, that what S.D. had done was wrong and that he had asked her to touch his body, although she was not sure what part. S.C. did not appear to remember talking to Arnold, and she could not remember what she had told Breland. Counsel also questioned S.C. extensively about the concepts of the truth and a lie.[7]

Based on the trial testimony, the juvenile court found that S.C. was competent to testify and denied the motion to exclude S.C.'s testimony and hearsay statements. In its written findings

[6] Specifically, she was able to recall (1) she had gone to Chuck-E-Cheese's for her birthday, but she was unsure of what she had done there, (2) all of her family members and S.D.'s family members, (3) all of her siblings' ages, (4) a dog her family had owned that had passed away around the time of the incident, (5) her current teacher, (6) the fact she attended a different school for kindergarten, although she could not recall the teacher's name, (7) the fact she and her sister were always required to complete their homework immediately upon arriving at S.D.'s house after school, and (8) the fact S.D.'s bedroom was green.

[7] We set out this testimony in more detail below.

of fact and conclusions of law on the competency issue, the court addressed each of the five *Allen*[8] factors.[9]

Ultimately, the juvenile court adjudicated S.D. guilty of two counts of first degree child molestation. S.D. appeals.

ANALYSIS

S.D. argues that the juvenile court erred in finding that S.C. was competent to testify.[10] Specifically, he argues that the court erred when it found that S.C. had satisfied the first, third, fourth, and fifth, *Allen* factors.[11] We disagree.

I. LEGAL STANDARDS

Washington courts presume that all witnesses are competent until proved otherwise by a preponderance of the evidence. *State v. Brousseau*, 172 Wn.2d 331, 341, 259 P.3d 209 (2011). The "party challenging the competency of a child witness has the burden of rebutting [the] presumption [of competency] with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions

[8] *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

[9] We describe the relevant findings in more detail below.

[10] S.D. also argues that he was prejudiced by this error because S.C.'s out-of-court statements to Arnold would have been inadmissible under *Crawford v. Wash.*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), if the juvenile court had not allowed S.C. to testify. Because we hold that the juvenile court did not err in finding S.C. competent to testify, we do not reach S.D.'s prejudice argument.

[11] Although S.D. assigns error to the juvenile court's findings of fact I, II, III, IV, and V on the competency issue, which were the juvenile court's findings on each of the five *Allen* factors, we confine our analysis to those issues S.D. actually argues in his analysis.

of the facts, or incapable of relating facts truly." *State v. S.J.W.*, 170 Wn.2d 92, 102, 239 P.3d 568 (2010).

"The *Allen* factors continue to be a guide when competency is challenged." *S.J.W.*, 170 Wn.2d at 102. The five *Allen* factors the court considers examine whether the witness: (1) is capable of understanding the obligation to tell the truth, (2) has the mental capacity at the time of the incident and the ability to receive an accurate impression of the incident, (3) has sufficient memory to retain an independent recollection of the incident, (4) has the capacity to express in words her memory of the incident, and (5) has the capacity to understand simple questions about the incident. *Allen*, 70 Wn.2d at 692.

We review the juvenile court's child competency determination for manifest abuse of discretion. *State v. Leavitt*, 111 Wn.2d 66, 70, 758 P.2d 982 (1988) (citing *Allen*, 70 Wn.2d 692). In deciding whether the court abused its discretion, we examine the entire record. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005) (citing *State v. Avila*, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). The court abuses its discretion when the evidence does not support the court's findings of fact or the court's decision is contrary to law. *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

II. CHALLENGED *ALLEN* FACTORS

A. FIRST *ALLEN* FACTOR

The juvenile court made the following finding on the first *Allen* factor–the capacity to understand the obligation to tell the truth:

> S.C. understands her obligation to speak the truth on the witness stand[.] During her testimony, she mentioned several times the importance of telling the truth, including that it was the most important thing, that she would be in trouble if she

> did not tell the truth, that the judge would be angry if she did not tell the truth, that she got punished at home if she did not tell the truth, and that she did tell the truth during her testimony.

CP at 51. S.D. argues that the juvenile court erred in finding that S.C. understood her obligation to speak the truth because she twice testified she did not know the difference between the truth and a lie.

Although S.D. is correct that S.C. testified that she did not understand the difference between the truth and a lie, the record also shows that S.C. did, in fact, understand these concepts, but was just unable to articulate the difference. First, during the State's direct examination of S.C., the State specifically questioned S.C. about her obligation to tell the truth while testifying:

> Q [Prosecutor]. What's the most important thing for you to do today?
> A [S.C.]. Tell the truth.
> Q. What is it?
> A. Tell the truth.
> Q. No matter what?
> A. Yes.
> Q. When you are at home, do your Mom and Daddy want you to tell the truth?
> A. Yes.
> Q. What happens if you don't?
> A. I get in trouble.
> Q. What kind of trouble?
> A. Spanking or corner.
> Q. Spanking or corner?
> A. Yeah.
> Q. You have to stand in the corner?
> A. Yes.
> Q. Is the same thing true for [your sister]? Does she have the same rules that you do?
> A. I don't know if she has three rules or two rules.
> Q. Okay. Is telling the truth one of her rules, too?
> A. Yes.

Q. Is that an important rule at your house?
A. Yes.
Q. Do you think it's an important rule today?
A. Yes.
Q. The Judge up there in the robe, [S.C.], how do you think she will feel if you don't tell the truth?
A. Mad.
Q. Do you think she will be mad?
A. Yeah.
Q. Do you think it's important that you tell her the truth about everything?
A. Yeah.
Q. Will you promise to do that?
A. Yeah.

2 VRP at 79-80.

The State later recalled S.C. and questioned her about the difference between the truth and a lie:

> [Prosecutor]: Hi, [S.C.]. You know what, there's a couple questions I forgot to ask you. I'm really sorry I made you come back in here. Can I ask a couple more quick questions?
>
> [S.C.]: Yeah.
>
> . . .
>
> Q [Prosecutor]. Do you remember how we talked about your mom and dad telling you it's important to tell the truth?
>
> A [S.C.]. Yeah.
>
> Q. *Do you know the difference between a truth and a lie*?
>
> A. *No*.
>
> Q. No?
>
> A. No.
>
> Q. Are you sure?
>
> A. Yeah.
>
> Q. Let me ask you this: If you're telling somebody the truth, are you telling them something that really happened or something that's pretend?
>
> A. Really true.

Q. If you're telling them something that's pretend, is that something that really happened or didn't happen?
A. Didn't happen.
Q. Did not happen?
A. Yeah.
Q. Do you know your colors, [S.C.]?
A. Yes.
Q. What color is Ms. Trina's shirt?
A. Blue and red.
Q. Huh?
A. The one inside is blue, the one outside is red.
Q. What color is your sweatshirt?
A. Pink.
Q. So if I tell you that you're wearing a green sweatshirt, am I telling you the truth or am I telling you a lie?
A. Lie.
Q. If I tell you that you're wearing a pink sweatshirt, am I telling you the truth or am I telling you a lie?
A. Truth.

2 VRP at 117-18 (emphasis added). On cross examination, defense counsel asked S.C. if she knew "the difference between a truth or a lie." 2 VRP at 119. S.C. again responded, "No." 2 VRP at 119.

Although S.C. could not verbalize the difference between the truth and a lie, "[a] child's inability to express an understanding of the meaning of truth does not affect [her] competency as long as [s]he possesses a sufficient understanding of truth to insure [her] testimony is not the result of fabrication or imagination." *State v. Sims*, 4 Wn. App. 188, 190, 480 P.2d 228 (1971). Here, S.C. demonstrated that she possessed a sufficient understanding of the truth and a lie. She was able to identify a lie and the truth when the State questioned her about the color of her sweatshirt, and she testified that the truth was something that was real and not pretend. Additionally, S.C.

clearly articulated that she understood she was obligated to tell the truth in the court proceeding. Thus, substantial evidence supports the juvenile court's finding that S.C. met the first *Allen* factor.

B. THIRD *ALLEN* FACTOR

The juvenile court made the following finding on the third *Allen* factor–sufficient memory to retain an independent recollection of the occurrence:

> S C. has sufficient memory to retain an independent recollection of the incident[.] She was also able to testify about things that occurred before the charging period, and many of those details were confirmed by her mother. This factor does not require S.C. to actually testify about the details of the incidents with the respondent[.] Rather, it requires S.C. demonstrate a sufficient capability of remembering things that occurred during that time period, and she has done that during her testimony in this case.

CP at 52.

S.D. argues that because S.C. "could not 'remember anything'" about the alleged incidents, the juvenile court's finding on this factor was erroneous. Br. of Appellant at 13 (quoting 1 VRP at 86-90). Again, we disagree.

As the juvenile court acknowledged, to establish the third *Allen* factor, S.C. was not required to testify about the specific incident, an ability to relate contemporaneous events is sufficient to support an inference that the witness is also competent to testify about the charged incident. *State v. Przybylski*, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987); *see also Woods*, 154 Wn.2d at 620; *Avila*, 78 Wn. App. at 736-37. The juvenile court found that S.C. had the capacity to remember contemporaneous facts, and S.D. does not assign error to this finding, so it is a verity on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (unchallenged findings of fact are verities on appeal). Given S.C.'s ability to relate contemporaneous events, substantial evidence supports the juvenile court's finding that S.C. had satisfied the third *Allen* factor.

C. FOURTH AND FIFTH *ALLEN* FACTORS

The juvenile court made the following finding on the fourth and fifth *Allen* factors–having the capacity to express in words her memory of the occurrence and having the capacity to understand simple questions about the occurrence:

> 4. [S.C.] has the capacity to express in words her memory of the incident. [S.C.] frequently stated she did not remember or did not know details of any sexual incidents with the respondent[.] The issue in this factor, however, is only that she have the capacity to express her memory in words. [S.C.] testified about things that occurred at the same time period as the charged incidents, and she testified about things that occurred before then, so she had the capacity to express her memories in words[.] [S.C.] also gave answers that tracked the questions being asked of her, and answered them with words that made sense, both in content and grammar.
>
> 5. [S.C.] has the capacity to understand simple questions about the incident. She showed no difficulty in answering questions on both direct and cross-examination, and she demonstrated her ability to ask to have a question repeated or clarified for her if she did not understand it. There was no evidence that S.C. lacked the capacity to understand simple questions.

CP at 52.

S.D. argues that the juvenile court erred in finding that S.C. met these factors because she did not remember the details of the incident. Again, we disagree.

S.D. does not assign error to the juvenile court's findings that S.C. had the capacity to express her memories in words or that S.C. had the capacity to answer and understand questions about the incident, thus, these findings are verities on appeal. *Levy*, 156 Wn.2d at 733. And, as with the previous factor, that S.C. testified she did not remember the details of the specific incidents does not mean that she did not have the capacity to express in words her memory of what had happened or the capacity understand the questions about the incident. *See Avila*, 78 Wn. App. at 736 (upholding competency determination where child did not testify about abuse at the child

competency and child hearsay hearing); *Przybylski*, 48 Wn. App. at 665-66 (trial court need not examine the child witness about particular issues and facts in the case to determine competency). Accordingly, substantial evidence supports the juvenile court's finding that S.C. met the fourth and fifth *Allen* factors.

Because substantial evidence supports the juvenile court's findings on the *Allen* factors, S.D. fails to show that the juvenile court erred. Accordingly, we hold that the juvenile court did not abuse its discretion when it found that S.C. was competent to testify and affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J.

Melnick, J.
MELNICK, J.