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IN THE COURT OF APPEALS OF INDIANA

IN THE MATTER OF: J.C.R.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A03-0612-JV-610
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Peter J. Nemeth, Judge
The Honorable Barbara Johnston, Magistrate
Cause No. 71J01-0604-JD-362

August 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

J.C.R. appeals his adjudication as a delinquent child for committing an act that would be child molesting as a Class B felony if committed by an adult and two acts that would be child molesting as a Class C felony if committed by an adult. J.C.R. argues that the juvenile court abused its discretion by determining that a nine-year-old victim[1] was competent to testify. Because the questioning of the child victim reveals that she understood the difference between the truth and a lie, knew that she was compelled to tell the truth, and knew what a true statement actually was, we conclude that the juvenile court did not abuse its discretion by determining the child victim to be a competent witness and affirm the juvenile court's adjudication of J.C.R. as a delinquent child.

Facts and Procedural History

During 2005, then five-year-old R.H. and seven-year-old V.H. visited their father ("Father") every other weekend at his house in Mishawaka. Father's stepson, J.C.R., who was thirteen years old at that time, lived with Father. On ten occasions, J.C.R. "touched [R.H.] in areas that he shouldn't have." Tr. p. 29. Specifically, J.C.R. touched the inside of R.H.'s "vagina" with his "penis" and touched her "butt" with his hands. *Id.* at 24-25. He also touched R.H.'s vagina with his hands. J.C.R. also touched the inside and outside of V.H.'s vagina or "private," the inside and outside of her "butt," and the

[1] The victim, V.H., was four days shy of her ninth birthday when the juvenile court determined that she was competent to testify, which was during the first day of the fact-finding hearing on October 23, 2006. V.H. also testified on the second day of the fact-finding hearing on October 30, 2006, and at that time, she was nine years old. For simplicity, we will refer to her as being nine years old.

We note that J.C.R. refers to V.H. as a "six-year-old girl." Appellant's Br. p. 6. V.H.'s birthday is October 27, 1997; thus, at the time of the October 2006 fact-finding hearing, V.H. was not six years old.

skin on her "upper chest" with his penis or "private." *Id.* at 104-06. Additionally, J.C.R. touched the inside of V.H.'s vagina with his hand.

Around October 2005, V.H.'s mother ("Mother") noticed that V.H. became "very anxious" on the days that she was going to visit her Father. *Id.* at 146. Specifically, V.H. would pace the floor, pull and bite her lip, and told her Mother that she did not want to go to her Father's house. V.H. also became "very disobedient" when she would return from visiting her Father. *Id.* at 147. Thereafter, V.H. told her Mother what had happened to her. Around January 2006, R.H.'s kindergarten teachers started to notice changes in R.H.'s behavior. Specifically, she was not as "outgoing and bubbly" as she had been, she started complaining about not feeling well, she wanted to be by herself, and she started to frequently urinate in her pants. *Id.* at 178. Thereafter, R.H. told her teachers what had happened to her.

The State filed a petition alleging that J.C.R. was a delinquent child for committing two acts that would be child molesting as a Class B felony[2] if committed by an adult and two acts that would be child molesting as a Class C felony[3] if committed by an adult.

During the October 2006 fact-finding hearing, the prosecutor questioned then nine-year-old V.H. to establish her competency as a witness. When V.H. got on the

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[2] Ind. Code § 35-42-4-3(a). The delinquency petition alleged, in part, that J.C.R. "did perform or submit to sexual intercourse with [V.H.], a child who was then . . . six to eight years of age" and "did perform or submit to deviate sexual conduct, by placing the mouth of [V.H.] on the penis of [J.C.R.] . . . ." Appellant's App. p. 12.

[3] Ind. Code § 35-42-4-3(b). The delinquency petition alleged, in part, that J.C.R. "did perform or submit to fondling or touching with, [V.H.], a child who was then . . . six to eight years of age, with intent to arouse or satisfy the sexual desire of [J.C.R.]" and "did perform or submit to fondling or touching with, [R.H.], a child who was then . . . three to five years of age, with intent to arouse or satisfy the sexual desire of [J.C.R.]." Appellant's App. p. 12-13.

witness stand, she was hesitant to testify, as she did not initially respond verbally to introductory questions regarding her name and age and instead wrote down the answers on a piece of paper. V.H. then began to respond verbally, and the prosecutor asked V.H. some questions regarding her ability to distinguish between telling the truth and telling a lie and her understanding of promising to tell the truth:

> [Prosecutor]: Can you tell me if you know the difference between telling the truth and telling a lie? . . . Is it the truth that you're wearing a blue shirt? Can you say it out loud for the Judge?
>
> [V.H.]: Yes.
>
> [Prosecutor]: Yes. You're saying yes it's the truth? Okay. Is it the truth that my suit is purple?
>
> [V.H.]: No.
>
> [Prosecutor]: Okay. What would be the truth if you were going to say what color my suit was?
>
> [V.H.]: Grey, white and black.
>
> [Prosecutor]: Okay. And do you know what it means to tell a – or to make a promise? What does it mean? . . . What's a promise that you made to one of your sisters?
>
> [V.H.]: To play with them.
>
> [Prosecutor]: You promised to play with them? And what do you have to do in order to fulfill that promise?
>
> [V.H.]: To make it happen?
>
> [Prosecutor]: Yeah, what do you have to do to make that happen? When you promise to play with [R.H.], what do you have to do so that that's the truth?
>
> [V.H.]: Make sure that I play with her.

[Prosecutor]: . . .I'm going to ask you questions today and I'm going to ask you to promise to tell the truth to the Court, when you answer those questions will you tell the truth? . . . .

[V.H.]: Yes.

Id. at 68-69. Thereafter, J.C.R.'s attorney questioned V.H. regarding the difference between telling the truth and telling a lie as follows:

[Defense]: Okay. [V.H.], can you tell me, give me an example, tell me something that is truthful? Anything you want, something about the carpet. Can you tell me something truthful about the carpeting?

[V.H.]: No audible response.

[Defense]: Do you see the carpeting? Can you tell me something truthful about the carpeting?

[V.H.]: No audible response.

[Defense]: Just yell it out.

[V.H.]: I see white.

[Defense.]: Okay. Are you still looking?

[V.H.]: I see, most that I see is blue-green.

* * * * *

[V.H.]: And like a yellow with like a tan color.

[Defense]: Okay. Now could you tell me something that's a lie about carpeting?

[V.H.]: No audible response.

[Defense]: It's okay to lie when I'm asking you this question, okay? It's not a trick question. Just tell me something that would be a lie about the carpet.

[V.H.]: That it's put on the floor.

[Defense]: Now is that the truth or a lie that the carpeting is put on the floor?

[V.H.]: That's a truth.

[Defense]: Okay, but can you tell me a lie about the carpeting?

[V.H.]: No audible response.

[Defense]: Do you want to write it?

[V.H.]: No audible response.

[Defense]: Can you read what you wrote?

[V.H.]: I wrote, it says, it isn't pink.

[Defense]: Okay. Well, now is that the truth or a lie?

[V.H.]: It's a lie.

[Defense]: That it isn't pink. I've got one, do you like horses?

[V.H.]: Yeah.

[Defense]: Do you – have you ever ridden a horse?

[V.H.]: Yeah.

[Defense]: So you know what horses look like, right?

[V.H.]: Yeah.

[Defense]: Can you tell me a lie about a horse? Or is that more difficult?

[V.H.]: It's more difficult.

[Defense]: All right. Well, again, the carpet isn't pink, is it? So that when you say there's no pink in the carpet that's the truth correct?

[V.H.]: No audible response.

[Defense]: That's tough I'll give you an other shot at it though. Do you want to try one more time? Something that's not the truth about the carpet.

[V.H.]: That it doesn't have green on it.

[Defense]: Does it have green on it?

[V.H.]: No.

Id. at 70–73. J.C.R.'s attorney stated that he had "an issue with competency" and V.H.'s ability to know the distinction between a truth and a lie. *Id.* at 73. The juvenile court agreed that they were "certainly kind of at an impasse" and allowed the prosecutor a chance to ask some follow up questions. *Id.* at 74. The prosecutor continued the competency questioning of V.H. as follows:

[Prosecutor]: [V.H.], if I asked you to tell me a lie about something, let's say I asked you to tell me a lie about the color of my hair, could you tell me something that's not true about the color of my hair?

[V.H.]: It's not yellow.

[Prosecutor]: It's not yellow. It's not yellow, right, so would that be the lie or would that be truth?

[V.H.]: A lie.

[Prosecutor]: It would be a lie for you to say that my hair is not yellow?

[V.H.]: No audible response.

[Prosecutor]: Okay. What would be the truth about my hair.

[V.H.]: The color is like a brownish/blackish.

[Prosecutor]: Okay. So, it's true that my hair's [sic] brown. The doll that you have with you -

[V.H.]: It's a bunny, not a doll.

[Prosecutor]: Is what, is a bunny.

[V.H.]: It's a build a bunny.

[Prosecutor]: Okay. If I told you that that is a frog, am I telling you the truth?

[V.H.]: No.

[Prosecutor]: Okay. So if I wanted you to tell me a lie about your build a bunny, I wanted you to lie about what it was, what would you tell me?

[V.H.]: That it's a bear.

* * * * *

[Prosecutor]: Okay. Now, if I asked you to tell me a lie as to whether or not you liked horses what would be the lie?

[V.H.]: That I've never ridden a horse.

Id. at 74-75. The prosecutor also asked V.H. if she could tell a lie about being at school, and V.H. responded, "I'm not at school." *Id.* at 77. When the prosecutor asked V.H. to clarify whether the statement that she was not at school was the truth or a lie, V.H. correctly stated, "That's the truth." *Id.*

The juvenile court asked V.H. some questions about whether it would be the truth or a lie to say that she and her mother owned a horse, and V.H. correctly responded that such a statement would be a lie. When the juvenile court asked V.H. to tell a lie about what day of the week it was—which happened to be Monday, October 23, 2006—and V.H. responded, "It's Friday." *Id.* at 77. The juvenile court determined that it would allow continued questioning of V.H. and specifically stated:

> But I also recall thinking it's getting difficult and it particularly has been difficult in this situation. I think the idea of describing a lie is a very abstract concept. I commend, particularly, juvenile's counsel for giving

> good examples . . . I don't know if there is a good example. I'm not sure that many of us has [sic] the perfect story or example. At this point, I'm going to allow [the State] to continue questioning based upon that difficulty in the abstract of all of this and we'll see where we go from there.

Id. at 78. The prosecutor then questioned V.H. about the consequences of lying, and V.H. explained that she would be in trouble and that her mother would send V.H. to her room if she told a lie. V.H. then stated that she would tell the truth to the court. When the prosecutor began to question V.H. regarding her Father and where he lived, V.H. began to write the answer on a piece of paper instead of verbally responding. J.C.R.'s attorney objected to V.H.'s competency, and the juvenile court overruled the objection and responded:

> Let me just briefly say that there have been particularly two comments. One response to [the prosecutor's] question about the bunny and particularly one response to the Court's question about telling a lie about the day of the week and while I agree, [J.C.R.'s attorney], that this, he's saying it's not a close call. I'm saying it's a close call. I'm finding that she is competent because she then went on to say what would happen if she didn't tell the truth. She talked and gave a very good example about fulfilling a promise and I believe that her demeanor is something that I need to consider as well. Her obvious reluctance and hesitancy makes perhaps it more difficult for her to formulate the kinds of answers that we're asking and I certainly understand counsel's objection. It is overruled.

Id. at 80-81. During V.H.'s testimony, she alternated between answering questions verbally and writing her answers on a piece of paper, and she had a tendency to write her answers to questions that the prosecutor asked regarding what J.C.R. did to her when she was at Father's house.

The juvenile court entered a true finding of delinquency for both Class C felony child molesting allegations and the Class B felony child molesting allegation pertaining to sexual intercourse but found that J.C.R. was not delinquent for the other Class B felony

child molesting allegation pertaining to deviate sexual conduct. Thereafter, the juvenile court placed J.C.R. on probation and recommended that he be placed in The Children's Campus, a private child caring facility. J.C.R. now appeals.

Discussion and Decision

J.C.R. argues that the trial court abused its discretion by determining that nine-year-old V.H. was competent to testify.[4] A determination as to a witness's competency lies within the sound discretion of the trial court and is reviewable only for a manifest abuse of that discretion. *Harrington v. State*, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001). Although a child under the age of ten was formerly presumed to be incompetent, the statute setting forth that presumption was repealed in 1990. *See Newsome v. State*, 686 N.E.2d 868, 871 (Ind. Ct. App. 1997). The applicable rule is now found in Indiana Evidence Rule 601, which provides, "Every person is competent to be a witness except as otherwise provided in these rules or by act of the Indiana General Assembly." When a child is called to testify at trial, the trial court has the discretion to determine if a child witness is competent based on the court's observation of the child's demeanor and responses to questions posed by counsel and the court. *Haycraft v. State*, 760 N.E.2d 203, 209 (Ind. Ct. App. 2001), *reh'g denied*, *trans. denied*. A child's competency to testify at trial is established by demonstrating that he or she (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under a compulsion to tell the truth, and (3) knows what a true statement actually is. *Harrington*, 755 N.E.2d at 1181.

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[4] J.C.R. does not challenge the juvenile court's determination that six-year-old R.H. was competent to testify.

J.C.R. argues that the juvenile court abused its discretion by determining that V.H. was competent to testify because V.H. did not know the difference between the truth and a lie and because she was only able to articulate an example of the truth. Nevertheless, J.C.R. acknowledges that V.H. was able to provide a "correct answer" on two occasions when asked to give an example of a lie. Appellant's Br. p. 12. The State counters that the juvenile court did not abuse its discretion because V.H. demonstrated that she understood the difference between the truth and a lie and what a false statement was. The State argues that the juvenile "court rightly concluded [V.H.] was competent to testify and concluded that any faltering was attributable to her reticence under the circumstances as well as the inherent difficulty of discussing abstracts concepts." Appellee's Br. p. 5. We agree with the State.

A review of the record indicates that V.H. was able to distinguish between telling the truth and telling a lie. She accurately distinguished examples of what was a lie and what was the truth and identified examples of true statements and lies. Although she initially had some difficulty giving examples of lies and had a tendency to make a negative statement instead of telling a lie, V.H. was able to give an example of what was a lie when she said that it would be a lie to say that her bunny was a bear and a lie to say that the day was Friday when it was really Monday. Additionally, V.H., who had told J.C.R.'s attorney that she has ridden a horse, gave another example of a lie when she told the prosecutor that a lie about a horse would be to say that she had never ridden a horse. Furthermore, V.H. demonstrated that she understood what it meant to make a promise and she promised to tell the truth during her testimony. The prosecutor also questioned

V.H. about the consequences of lying, and V.H. explained that she would be in trouble and that her mother would send V.H. to her room if she told a lie. It is evident from the record before us that the juvenile court carefully considered the issue of V.H.'s competency. The juvenile court acknowledged V.H.'s difficulties, noting that it was a "close call," but found—based on V.H.'s responses to questions posed by counsel and the court and taking into her consideration her demeanor—that she was competent to testify. *See* Tr. p. 81. We cannot say that the juvenile court's determination was an abuse of discretion.[5] *See, e.g.*, *Harrington*, 755 N.E.2d at 1181; *Haycraft*, 760 N.E.2d at 210.

Affirmed.

ROBB, J., and BRADFORD, J., concur.

[5] J.C.R. indicates that V.H. did not understand the difference between the truth and a lie because her testimony during the fact-finding hearing was inconsistent with the report that V.H. gave to a therapist at the CASIE Center. We disagree. The fact that V.H.'s testimony at trial could be interpreted as inconsistent goes to her credibility, not her competency, and the juvenile court was free to disregard her testimony if it felt that she was not a credible witness. *See Harrington*, 755 N.E.2d at 1181.

Additionally, to the extent that J.C.R. challenges the sufficiency of the evidence supporting his adjudications based on the fact that there were "no witnesses to the acts performed on both [V.H.] and [R.H.]," *see* Appellant's Br. p. 12, we conclude that such argument is without merit. *See Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002) ("It is well settled that a conviction may stand on the uncorroborated testimony of a minor witness."), *trans. denied*.