
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Four year old competent to testify in sexual assault allegation.[In the Matter of M.M.L.](06-4-3)

On July 31, 2006, the Amarillo Court of Appeals held that trial court did not abuse its discretion in ruling four year old complainant competent, in that potential that she would testify falsely was an issue of the weight to be afforded the testimony at trial rather than evidence of her incompetence as a witness.

¶ 06-4-3. **In the Matter of M.M.L.**, No. 07-05-0240-CV, 2006 Tex.App.Lexis 6783 (Tex.App.—Amarillo, 7/31/06).

Background: Appellant is a twelve-year-old male accused of engaging in delinquent conduct by committing the offense of indecency with a child. The adjudication trial was to a jury, who found the allegation to be true. After the disposition hearing, appellant was placed on probation. Appellant has appealed, alleging error by eleven issues.

Facts: Hilda Sanchez, the mother of M.V., the complaining witness, employed appellant's mother, Juana Mejia, as a baby sitter. On July 22, 2004, Sanchez picked her daughter up at the Mejia apartment and found her daughter crying and Mejia not in the apartment. Sanchez was met at the door by appellant, whom she described as acting hurriedly. After leaving the apartment, Sanchez questioned M.V. about why she was crying. M.V. told her that appellant touched her in her private area with his private area. As a result of M.V.'s outcry to Sanchez, Sanchez notified the police in McKinney about appellant's actions.

By eleven issues, appellant appeals his conviction and sentence. By ten of these issues, appellant contends that the trial court committed reversible error by:

1. limiting appellant's cross-examination of M.V. during the competency hearing;
2. finding M.V. competent to testify;
3. limiting appellant's cross-examination of M.V. during the trial before the jury;
4. admitting the testimony of the SANE nurse;
5. admitting the testimony of the "outcry " witness;
6. denying the appellant's motion for mistrial;

7. commenting on the evidence;
8. allowing evidence of an extraneous offense;
9. limiting the testimony at the motion for new trial hearing; and,
10. denying the motion for new trial.

Further, by his ninth issue, appellant contends that the evidence was factually and legally insufficient to sustain the finding of true to the allegations in the State's petition.

Held: Affirmed

Opinion: Appellant's first two contentions were briefed together and both concern the competency of M.V. to testify and will, therefore, be addressed together. M.V. was three-years old at the time of the incident and was four-years old at the time of trial. Appellant contested M.V.'s competency as a witness and requested a hearing on the matter. See *TEX. R. EVID. 601(a)(2)*. The trial court held a hearing on the issue of competency out of the presence of the jury and ruled that she was competent to testify. We review that ruling under an abuse of discretion standard. *Broussard v. State, 910 S.W.2d 952, 960 (Tex.Crim.App. 1995), In re A.W., 147 S.W.3d 632, 635 (Tex.App.-San Antonio 2004, no pet.)* (applying the same standard of review to juvenile cases).

At the hearing on the competency of M.V., the State conducted an examination of M.V. during which she testified as to her complete name, age and that she was able to distinguish between the truth and a lie by identifying the color of a pen (blue) the attorney was holding. When asked if she was told the pen was black would it be the truth or a lie, she testified it would be a lie. M.V. further acknowledged that she understood that she would be required to tell the truth in court. Upon cross-examination by appellant, M.V. answered "yes" to a series of questions about having met appellant's attorney before, playing with puppies belonging to appellant's counsel and hunting for Easter eggs with the attorney. Each of these questions were designed to show that the witness would agree whenever leading questions were asked. Based upon this exchange, appellant contends that M.V. was not competent to testify. While appellant's point is that M.V. did not know the difference between the truth and a lie, during appellant's own cross-examination of M.V., she was asked what the word "lie" means. M.V. answered, "That it's not the truth and it's a lie." This statement demonstrates that M.V. knew the difference between the truth and a lie. In determining whether the trial court abused its discretion, we are not to focus only on the questions asked during the hearing on competency but rather to review the entire record of her testimony. *Clark v. State, 558 S.W.2d 887, 890 (Tex.Crim.App. 1977)*. The record reveals that, during both the competency hearing and the trial on the merits, M.V. was able to communicate the actions of appellant and the events surrounding the incident in question. From this review, we conclude that M.V. had the ability to intelligently observe the events, the capacity to recollect and narrate them, and, from the competency hearing, the moral responsibility to tell the truth. *Upton v. State, 894 S.W.2d 426, 429 (Tex.App.-Amarillo 1995, writ ref'd)*. Accordingly, we find no abuse of discretion in the ruling that M.V. was competent to testify.

Appellant also contends that the court impermissibly limited his right to cross-examine M.V. during the competency hearing. Specifically, appellant contends that the following colloquy demonstrates an attempt by the court to limit cross-examination. After asking a series of leading questions designed to show that M.V. would say "yes" whenever asked a leading question, the following exchange occurred:

The Court: I'm not going to allow you to do any more of that.

Trial Counsel: I have no other way, Judge, to show that she'll say stories.

The Court: You have-you've made your point. You said you wanted to call yourself. Go ahead.

At that time, appellant's counsel took the witness stand and testified that M.V.'s cross-examination testimony was untruthful.

Appellant complains that the court impermissibly limited his cross-examination of M.V., yet the exchange clearly demonstrates that the court was aware of the potential for false testimony from the witness but, based upon all of the factors, found the witness competent. It appears that the trial court felt that the potential that M.V. would testify falsely was an issue of the weight to be afforded the testimony at trial rather than evidence of M.V.'s incompetence as a witness. We do not find the court abused its discretion in ruling M.V. competent or in limiting appellant's cross-examination at the competency hearing. *Broussard*, 910 S.W.2d at 960; *In re A.W.*, 147 S.W.3d at 635. Appellant's first two issues are overruled.

Other Issues Omitted.

Conclusion: Having overruled appellant's issues, the judgment of the trial court is affirmed.