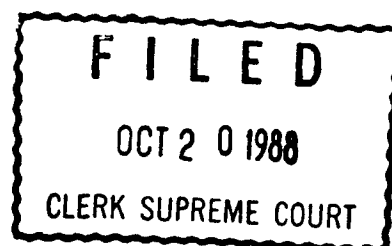


IN THE COURT OF APPEALS OF IOWA



|                      |   |                         |
|----------------------|---|-------------------------|
| STATE OF IOWA,       | ) |                         |
| Plaintiff-Appellee,  | ) |                         |
| vs.                  | ) | 232                     |
| JOHN R. MAYER,       | ) |                         |
| Defendant-Appellant. | ) | <u>8-348</u><br>87-1027 |

---

Appeal from the Iowa District Court for Polk County  
(No. 33997) - Theodore H. Miller, Judge.

The defendant appeals his conviction, following a jury trial, of third-degree sexual abuse for an incident involving several young mentally-retarded passengers in a bus he was driving. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie A. Halligan, Assistant Attorney General; and Scott Rosenberg, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

The defendant appeals his conviction, following a jury trial, of third-degree sexual abuse for an incident involving several young mentally-retarded passengers in a bus which he was driving. Defendant contends the trial court erred in finding three of the children competent to testify. Our scope of review is for the correction of errors at law. We affirm.

On the afternoon of December 8, 1986, defendant John Ray Mayer was the driver of a school bus taking mentally disabled children home from Meredith Junior High School in Des Moines. Near the end of the route the defendant allegedly involved himself in sexual acts among the children that led to charges being filed against him for third-degree sexual abuse of three of his passengers. There were four students riding the bus at the time. The district court, over Mayer's objections, found three of the children competent to testify. A jury returned two verdicts of not guilty and one verdict of guilty for which Mayer received a sentence of ten years imprisonment.

On appeal Mayer contends the trial court erred in finding the three children competent. The children range in age from twelve to fifteen years. All of them were described as mentally retarded and academically at the first grade level.

The rules for determining the competency of a witness in civil actions are extended to criminal proceedings. Iowa R. Crim. P. 19(1). Iowa Rule of Evidence 601 provides that "[e]very person of sufficient capacity to understand the obligation of an oath or affirmation is competent to be a witness except as otherwise provided in these rules." There are two aspects to the determination of a witness's competency to testify: "(1) the mental capacity to understand the nature of the questions put and to form and communicate intelligent answers thereto, and (2) the moral responsibility to speak to the truth, which is the essence of the nature and obligation of an oath." State v. Brotherton, 384 N.W.2d 375, 377 (Iowa 1986) (citing State v. Paulson, 265 N.W.2d 581, 586 (Iowa 1978)).

The trial court is afforded a wide latitude of discretion in ruling on the competency of witnesses. State v. Paulson, 165 N.W.2d 581, 586 (Iowa 1978). On appeal, we will reverse a trial court determination in this regard only on a showing that the court abused its discretion. Id.

#### I. H.M.

Defendant does not contest that H.M. was able to demonstrate her understanding of the concepts of truth and lies and the importance of telling the truth. The defendant, however, contends that H.M. lacked the mental capacity to understand the questions put to her and was

unable to communicate intelligent responses thereto. The defendant asserts that the victim gave inconsistent and conflicting answers. Defendant further contends that H.M. is not able to distinguish between reality and fantasy.

During the competency hearing, H.M. indicated she had "talked" to various characters of the Star Wars movies as well as fairy tale characters. H.M.'s testimony was clarified, however, when it was established that these conversations took place in her dreams. H.M. was also able to recall details of a vacation to Florida.

We find it was not error for the trial court to conclude that H.M. was competent to testify despite contradiction in her testimony and her difficulty in perceiving reality. The competency of a witness is not disproved by a witness's testimonial inconsistency. State v. Brotherton, 384 N.W.2d 375, 378 (Iowa 1986) (citing State v. Paulson, 265 N.W.2d 581, 586 (Iowa 1978)). This is a matter directed to the witness's testimony by the jury. Id. Therefore, we do not find H.M.'s inconsistencies in her testimony to be fatal to a finding of competency to testify. We further fail to find H.M.'s difficulty in perceiving reality to be a bar to a finding of competency.

It is noted that "the common law rules of incompetency have been undergoing a process of piecemeal revision by statutes for over a century, so that today most of the

former grounds for excluding a witness altogether have been converted into mere grounds for impeaching his credibility." McCormick on Evidence § 61, p. 155 (3d ed. 1984).

The Iowa courts have recognized several areas wherein a witness's credibility may be put to question. In State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974), the court noted:

The fourth recognized line of attack upon a witness's credibility is to show a defect in his capacity to observe, remember or recount the matters testified about.

Questions as to H.M.'s ability to distinguish between reality and fantasy go to the weight to be accorded her testimony by the jury. Accordingly, we fail to find an abuse of discretion by the trial court in allowing H.M. to testify.

## II. C.B.

Defendant contends C.B. lacked the moral responsibility to tell the truth because he did not understand that he could be punished for lying. Defendant's contention is based on the following exchange:

MR. OLVERA: Do you know that the judge can punish you if you would lie on the witness stand, did you know that?

C.B.: No.

MR. OLVERA: Okay. Well, the judge can punish you if you don't tell the truth. That is what is known as perjury. That means lying under oath, okay, you understand that?

C.B.: Yup.

MR. OLVERA: Okay. And you are going to tell the truth today?

C.B.: Yup.

However, other testimony by C.B. indicated he understood the concepts of truth and lies. C.B. also testified that he sometimes got confused but that he would let the judge know if he became confused and could not remember something clearly, he would not testify.

We find that in light of C.B.'s ability to understand the questions being put to him and to communicate intelligent responses and in light of his awareness and understanding of the distinction between truth and lies and his responsibility to tell the truth, the trial court did not abuse its discretion in ruling C.B. competent to testify.

### III. M.M.

Defendant contends M.M. had no understanding of her moral responsibility to tell the truth and was not able to communicate intelligent responses to the questions which were put to her.

M.M.'s testimony reveals that M.M. has a good understanding of the difference between the truth and a lie. The record also supports a finding of M.M.'s appreciation and understanding of her moral responsibility to tell the truth.

M.M.'s testimony covered a variety of subjects. Throughout the inquiry M.M. was able to formulate intelligent responses. There was a time during cross-examination in which M.M. became flustered. The

record reveals that when M.M. became confused by counsel's questions she asked him to slow down. A review of the entire record indicates that M.M. was able to understand and communicate intelligent responses. We find the trial court did not err in ruling M.M. was competent to testify.

We find that all three children, H.M., C.B., and M.M., were properly adjudged competent to testify. All three children satisfied the two elements necessary to make such a determination: the mental capacity to understand the nature of the questions put and to form and communicate intelligent answers to them and the moral responsibility to speak the truth. Problems such as inconsistency of statements and not being able to distinguish between reality and fantasy go to the weight to be accorded the testimony by the jury and not to the competency of the witness to testify.

**AFFIRMED.**