FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

518

STATE OF IOWA,	)	Filed August 29, 1985
Plaintiff-Appellee,	)	
vs.	)	5-316 84-919
GUILLERMO RODRIGUEZ,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Warren County - Van Wifvat, Judge.

Defendant appeals from his conviction for sexual abuse in the second degree. AFFIRMED.

Charles Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant Attorney General, for the plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant Rodriguez was found guilty and convicted of two counts of sexual abuse in the second degree. Rodriguez contends the trial court abused its discretion by ruling that the eight-year old victim, Shane Martz, was competent to testify. We affirm the trial court.

Our review of this action is on assigned error. Iowa R. App. P. 4. A trial court's ruling on a competency question is discretionary and will be reversed only if an abuse of discretion is shown. State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982).

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. . . ." Competency of a witness to testify has been defined to involve two aspects: (1) the mental capacity to understand the nature of the questions and to form and communicate intelligent answers, and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of the oath. State v. Harvey, 242 N.W.2d 330, 336 (Iowa 1976).

The record reflects that the trial court and counsel thoroughly questioned Shane outside the presence of the jury regarding his recollection of the events in question and his understanding of telling the truth. Shane promised to tell the truth and understood that those who do not tell the truth "get in trouble." The trial court found him competent to testify.

Defendant's main contention is that Shane could not recall and communicate his testimony without the assistance of his mother or the county attorney. In testifying before the jury, Shane conceded that he did not know the names of all the months and that his mother had told him the names of the months into which Halloween and Thanksgiving fell (the two time periods in which the

assaults allegedly occurred). Additionally, defendant argues Shane is incompetent, or at least not credible, since Shane testified in deposition that the alleged acts of sexual abuse had not occurred in the fall of 1983, but then at trial testified that the acts did occur in 1983.

The competency of a witness ". . . is not refuted by mere testimonial inconsistency, [the inconsistency] going more to the weight to be accorded his evidential statements by the fact finding body." State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978) (quoting State v. Cartee, 202 N.W.2d 93, 96 (Iowa 1972)). Shane testified that he knew what had happened and had a present memory of the events.

> DEFENSE COUNSEL: Do you know what happened between Guillermo and you?
> SHANE: Yep.
> Q. Do you remember that? A. Yep.
> Q. Do you know when it happened? A. Between Halloween and Thanksgiving day.
> Q. Did you mom tell you that? A. No.
> Q. Did Mr. Criswell tell you that? A. No.
> Q. Are you telling the Court that you remember that? A. Yep.
> Q. What month is Thanksgiving on? A. November.
> Q. How many months in a year? A. I don't know.
> Q. Was Thanksgiving this year? A. No.

We believe that Shane had the mental capacity to understand the nature of the questions and was able to form and communicate intelligent answers. Any inconsistency in Shane's testimony regarding the year of the event was for the jury to assess in determining Shane's credibility. Similarly, any help that Shane's mother or the county attorney gave Shane in order to remember the events was not improper and was fully presented to the jury for their evaluation. Shane was found competent to testify by the trial court, and no abuse of discretion has been shown.

Appellee notes that although the defendant moved for a hearing to determine Shane's testimonial competency, defense counsel failed to object

following the trial court's determination of competency. Appellee asserts that the alleged error was not preserved at trial and is therefore waived. However, since we find no abuse of discretion and no reversible error by the trial court, we need not address the issue of preservation of error.

AFFIRMED.