[Cite as *In re J.M.*, 2006-Ohio-1203.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
No. 85546

IN RE:	:	
J. M.	:	JOURNAL ENTRY
	:	AND
	:	OPINION
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION		MARCH 16, 2006
	:	
	:	
CHARACTER OF PROCEEDING	:	Civil appeal from Common Pleas Court -
	:	Juvenile Division Case No. DL 03107589
JUDGMENT	:	REVERSED & REMANDED
DATE OF JOURNALIZATION	:	

APPEARANCES:

For J.M./Appellant:

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MARY EILEEN KILBANE, J.:

{¶ 1} Sixteen-year-old J.M.[1] appeals from his conviction in juvenile court of one count of rape and claims the court erred in finding the alleged victim competent to testify, in admitting hearsay evidence, and in denying him access to exculpatory evidence. He further alleges that his conviction was supported by insufficient evidence, that it was against the manifest weight of the evidence, and that he was denied the effective assistance of counsel. We reverse and remand for a further competency hearing.

{¶ 2} The record reveals that in early October 2004, eleven-year-old B.D. went to her school nurse to be treated for head lice. While a student nurse was examining her, B.D. reportedly told her about sexual activity between her and her stepbrother, then fifteen-year-old J.M. When the school nurse, Ms. Hernandez, entered the room, the student nurse prompted B.D. to repeat what she had just said. Ms. Hernandez then asked B.D., "[h]as anyone ever touched your private parts?" (Tr. Sept. 30, 2004, at 97) Although B.D. at first responded "no" when questioned, she then reportedly claimed that J.M. had been touching her private parts and had been squeezing and touching her chest. (Tr. Sept. 30, 2004, at 9) Ms. Hernandez contacted the Cuyahoga County Department

[1]This Court protects the identity of all juvenile parties.

of Children and Family Services and reported what she had been told.

{¶ 3} An investigation commenced, and on October 17, 2003, J.M. was charged with two counts of what would be rape if committed by an adult, in violation of R.C. 2907.02(A)(1)(b), and R.C. 2907.02(A)(1)(a).

{¶ 4} Following a bench trial, J.M. was found delinquent on the first count of rape and the second count was dismissed. He was sentenced to a minimum of one year in juvenile detention, with a maximum sentence to his twenty-first birthday. He appeals from this conviction in the assignments of error set forth in the appendix of this opinion.

{¶ 5} In his first assignment of error, J.M. contends that the juvenile court erred in finding B.D. competent to testify. We find this assignment of error dispositive because of the incomplete nature of the competency hearing.

{¶ 6} Evid.R. 601(A) provides that "[e]very person is competent to be a witness except: [t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." The rule favors competency and confers it even on those who do not benefit from the presumption, such as children under the age of ten, provided they are shown to be capable of receiving just impressions of the facts

and transactions respecting which they are examined and capable of relating them truly. See *Turner v. Turner*, 67 Ohio St.3d 337, 343, 1993-Ohio-176.

{¶ 7} In *State v. Clark*, 71 Ohio St.3d 466, 469, 1994-Ohio-43, the Supreme Court of Ohio stated as follows:

> **"The presumption established by Evid.R. 601(A) recedes in those cases where a witness is either of unsound mind or under the age of ten. In such cases, the burden falls on the proponent of the witness to establish that the witness exhibits certain indicia of competency. This court established a test for determining competency in *State v. Frazier* (1991), 61 Ohio St.3d 247, 574 N.E.2d 483, syllabus, certiorari denied (1992), 503 U.S. 941, 112 S.Ct. 1488, 117 L.Ed.2d 629. There, we held that in determining whether a child under ten is competent to testify, the trial court must take into consideration: the child's ability to receive accurate impressions of fact, the child's ability to recollect those impressions, the child's ability to communicate what is observed, the child's understanding of truth and falsity, and the child's appreciation of his or her responsibility to tell the truth. Once a trial judge concludes that the threshold requirements have been satisfied, a witness under the age of ten will be deemed competent to testify."**

{¶ 8} In *State v. Said*, 71 Ohio St.3d 473, 476, 1994-Ohio-402, the Ohio Supreme Court again cited its decision in *State v. Frazier* (1991), 61 Ohio St.3d 247, and held:

> **"Competency under Evid.R. 601(A) contemplates several characteristics. See *State v. Frazier* ***. Those characteristics can be broken down into three elements. First, the individual must have the ability to receive accurate impressions of fact. Second, the individual must be able to accurately recollect those impressions. Third, the individual must be able to relate those impressions truthfully."**

{¶ 9} It is well-settled that, as the trier of fact, trial judges are required to make a preliminary determination as to the competency of all witnesses, including children, and that absent an abuse of discretion, competency determinations of the trial judge will not be disturbed on appeal. *Clark*, supra, at 469; *Frazier*, supra, at 251.

{¶ 10} A court conducting a voir dire to determine competency is not chained to a ritualistic formula to ask specific questions, but the court must satisfy itself of the elements enumerated in *Frazier*, supra. See *State v. Swartsell,* Butler App. No. 2002-06-151, 2003-Ohio-4450. After conducting the voir dire examination, the trial court may rule on the competency of the witness, keeping in mind whether the witness's mental impairment substantially negates the trustworthiness of his or her testimony. See *Huprich v. Paul W. Varga & Sons, Inc*. (1965), 3 Ohio St.2d 87, 91, overruled in part on other grounds.

{¶ 11} As long as a witness understands the oath, or has the mental capacity sufficient to receive just impressions of the facts and transactions relating to what he or she is being questioned upon, then he or she is competent to testify at trial. *State v. Bradley* (1989), 42 Ohio St.3d 136, 140-141. See, also, *State v. Wildman* (1945), 145 Ohio St. 379, paragraph three of the syllabus.

{¶ 12} The second count of the complaint against J.M. alleged rape, in violation of R.C. 2152.02(F). It charged J.M. with

engaging in sexual conduct with B.D. when "her ability to resist or consent was substantially impaired because of a mental or physical condition ***." Although this second count was dismissed following the bench trial, it showed an early indication questioning B.D.'s physical or mental condition.

{¶ 13} The issue of competency also arose prior to trial, and, before allowing B.D.'s testimony, the trial court proceeded to conduct a voir dire examination to clarify any remaining competency issues. At this hearing, B.D. was asked a series of questions where the court used two stuffed animals to illustrate the questions. The stated purpose of the questions was to determine B.D.'s capacity to differentiate between the truth and a lie.

{¶ 14} Following this questioning, the court found that B.D. did in fact understand the difference between the truth and a lie, but continued to question her capacity for understanding. The following exchange took place:

"THE COURT: * * * [B.D.], do you know what month it is?

THE WITNESS: Not really.

THE COURT: Not really. Do you know what year it is?

THE WITNESS: Like the 30th.

THE COURT: The 30th?

THE WITNESS: Um-humm.

THE COURT: The day is the 30th. All right. Do you know what month it is?

THE WITNESS: 2004.

THE COURT: 2004 is the year. Okay. Do you know what month it is? Is it May or June or September or December?

THE WITNESS: I forget.

THE COURT: You forget. Okay.

THE WITNESS: Um-hmm.

THE COURT: All right. Do you know what country this is?

THE WITNESS: Cleveland, Ohio

THE COURT: That's the city and the state. Do you know what country this is? Is it China?

THE WITNESS: No.

THE COURT: Where are we?

THE WITNESS: In Cleveland.

THE COURT: Cleveland. That's true. We are in Cleveland."

(Tr., Sept. 30, 2004, at 27-28)

{¶ 15} Counsel for J.M. then requested that the court question B.D. as to the difference between real and imaginary. The court again used the stuffed animals for illustration and asked B.D. a series of questions relating to real and imaginary statements made about the animals. B.D. appeared to answer all questions correctly. The court then found B.D. competent and allowed the prosecution to question her. We find that such a hearing, in light of the trial court's failure to further question B.D. regarding her capacity for understanding, was insufficient to determine the

competency of a vital witness.

{¶ 16} The limited nature of the competency hearing was further called into question by contradictory statements that B.D. made at trial. B.D. testified that in October 2003, she had just come home from school when J.M. asked her to go to her room and think of a game that the two of them could play together. (Tr. Sept. 30, 2004, at 44) Shortly thereafter, J.M. came to her room, naked, and told her that he had thought of a game called "sex" that they could play. (Tr., Sept. 30, 2004, at 44) B.D. testified that she had never heard of this game before and told her stepbrother that she did not want to play. Instead of listening, she claimed that J.M. pulled off her clothes and covered her mouth to prevent her from screaming and then raped her. (Tr. Sept. 30, 2004, at 45-47) B.D. then used anatomically correct dolls to describe what J.M. had done, specifically stating that J.M. put his "private" into her "private." (Tr. Sept. 30, 2004, at 50)

{¶ 17} Under cross-examination at this same hearing, counsel for J.M. attempted to illustrate B.D.'s incapacity to relate basic information, and the following exchange took place:

> **Q: Okay. Did you know that the month that we're in is December? Have you ever heard of that month before?**
>
> **A: Yeah.**
>
> **Q: Are we in the month - - we're in the month of December, aren't we?**[2]

[2]The record reflects that the date of the questioning was

A: Yeah, I think so.

Q: Okay. And Christmas is coming up in a couple weeks, right?

A: Yep.

Q: Okay.

*** * ***

Q: Who was your teacher last year?

A: I think it - - I'm not real good with my teacher's name.

Q: You're not?

A: No.

Q: You don't remember your teacher's name?

A: No.

Q: Do you remember telling somebody that her name was Mrs. Washington last year?

A: No. That might be the name. I just don't remember my teacher's name being Mrs. Washington.

Q: Washington?

A: No.

Q: Was it Miss Jones?

A: No, I don't think so."

(Tr. Sept. 30, 2004, at 57-58)

{¶ 18} When counsel then asked her to refer to her trip to the

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hospital for an examination following her allegations, B.D. stated the following:

"Q: Did your friend Brittany go with you?

A: No, she had to watch her little sisters.

Q: What's [sic] their names?

A: Their names is [sic] Maggie and Allison.

*** * ***

Q: Why don't you tell me a little more about your friend Miss Brittany.

A: Well, she was imaginary.

Q: She what?

A: She was my pretend friend for a while because I didn't have many friends in school.

Q: Okay. And is that who you were talking about when you were talking about your friend Brittany?

A: Um-hmm. (Tr. Sept. 30, 2004, at 59)

Q: You used the word "rape" before.

A: Yes.

Q: Where have you heard that word before?

A: No where.

Q: You don't remember hearing the word "rape" before?

A: Uhn-uhn.

Q: It just came to you in the middle of the night while you were sleeping? You go, Ah, that's a good word?

A: I just thought it meant what [J.M.] did to me, and I

guess I should make up - - I thought, well, I'll use a make-believe word to clarify what he did to me.

Q: Oh, so rape is a made-up word?

*** * ***

A: Um-hum.

Q: So it's like an imaginary word?

A: Yes."

(Tr. September 30, 2004, at 81-82)

{¶ 19} Further testimony regarding B.D.'s ability level came first from the testimony of the school nurse, Ms. Hernandez, who stated that B.D. was a special education student who was included in a fourth grade regular education class. (Tr. Sept. 30, 2004, at 94) B.D.'s mother then testified as to her daughter's imaginary friends and her previous medical diagnosis:

"Q: Can you tell me about [B.D.'s] imagination?

A: I was the one actually who brought it to the school's attention about the imaginary friend. I made the statement to [sic] Social Workers and to school personnel that it's normal to have an imaginary friend. My next-to-oldest son had one until his brother was born, somebody to play with. But Brittany had several, and it struck me as very strange, and that she probably needed help, and I've continuously had requests to help from schools, counselors, teachers from about - -

Q: Was she diagnosed - -

A: Her first diagnosis was schizophrenic.

*** * ***

Q: And what was any subsequent findings?

> **A: Counselor - - another therapist had taken over. She said she wasn't sure if that was a correct diagnosis, because it was an imaginary friend, or several imaginary friends, and if one is normal, maybe several are, and they continued the counseling, and I don't know what their findings were after that.**
>
> **Q: Was she ever placed on medication?**
>
> **A: [B.D.] was placed on Zoloft, yeah."**

(Tr. Sept. 30, 2004, at 153-154)

{¶ 20} Further, according to the medical report prepared by Dr. Curt D. Meinecke, M.D., an interview with B.D. revealed that B.D.'s recollection of the "sex" game included J.M. kissing her mouth, breasts and "private area," but goes on to state that "she denies that he has put his privates [sic] parts in her, but says that she thinks he might have done this at some point when she was sleeping as he has been threatening to do that to her." The report continued that, "The patient notes that this game called sex has occurred up to 4 times a week since she was in the second grade. She is now in the fifth grade."

{¶ 21} Prior case law establishes that a twelve-year-old with average cognitive abilities is presumed competent to testify, however, due to the limited nature of the competency hearing, this Court cannot conclude that an adequate determination of B.D.'s competency was made. Evidence in the record is replete with indications that B.D. was in special education classes, that she had and continues to have imaginary friends, that she had at least

one past diagnosis of schizophrenia, and that her ability to recollect even routine information such as the day, month, and year was severely limited.

{¶ 22} There is no indication in the record that the court questioned B.D. regarding her capacity to recount the events accurately or even that she understood the nature of the proceedings. After the trial court questioned B.D. regarding routine questions such as the day, month, and year and received inaccurate or confusing responses from her, the court merely proceeded to the next set of questions without delving further into the key issue of competency.

{¶ 23} The lack of more detailed evidence supporting or refuting B.D.'s competency should be clear on the record. Since such evidence is lacking, we find that the trial court abused its discretion in failing to conduct a more complete competency hearing.

{¶ 24} Although the dissent takes issue with the majority opinion's use of *State v. Clark*, supra, and contends that it stands for the proposition that a child witness who is ten years or older at the time of trial is presumed competent to testify, the holding in *Clark* actually states:

> **"A trial judge, in the exercise of his or her discretion, may choose to conduct a voir-dire examination of a child witness who is ten years of age *or older if the judge has reason to question the child's competency*. The decision not to voir dire a child witness under such circumstances**

> **will be viewed under an abuse-of-discretion standard. In such circumstances, *absent a compelling reason to act otherwise*, the failure to conduct a voir-dire examination of a child witness who is ten years of age or older at the time of trial will not constitute reversible error."**

Clark, supra, paragraph two of the syllabus. (Emphasis added.)

{¶ 25} It is therefore evident from a full citation of the syllabus that a child's competency, regardless of age, may also be at issue and therefore necessitate a voir dire examination. This was precisely the case with B.D. The record is replete with indications questioning B.D.'s competency, which is first indicated by the preliminary request for a competency hearing. Based on our determination as to J.M.'s first assignment of error, we find the remaining assignments of error moot.

{¶ 26} We therefore reverse the decision of the trial court and remand this case to the trial court to conduct a complete competency hearing.

It is ordered that the appellant recover from appellee costs herein taxed.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas, Juvenile Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE
JUDGE

ANTHONY O. CALABRESE, JR., P.J., CONCURS

KENNETH A. ROCCO, J., DISSENTS (SEE SEPARATE DISSENTING OPINION ATTACHED).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E), unless a motion for reconsideration with supporting brief, per App.R. 26(A) is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED WHEN IT FOUND [B.D.] COMPETENT TO TESTIFY. EVID.R. 601(A); STATE V. CLARK, 71 OHIO ST.3D 466,471, 1994 OHIO 43, 644 N.E.2D 331 FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; ARTICLE I, SECTION 16, OHIO CONSTITUTION. (SEPT.30, 2004), T.PP. 33, 36).

II. THE TRIAL COURT VIOLATED [J.M.'S] RIGHT OF CONFRONTATION BY ALLOWING HEARSAY EVIDENCE IN VIOLATION OF OHIO RULES OF EVIDENCE 801(C) AND 802, THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION.

III. THE TRIAL COURT VIOLATED [J.M.'S] RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION, AND JUV.R. 29(E)(4) WHEN IT ADJUDICATED HIM DELINQUENT OF RAPE ABSENT PROOF OF EVERY ELEMENT OF THE CHARGE AGAINST HIM BY SUFFICIENT, COMPETENT AND CREDIBLE EVIDENCE.

IV. THE TRIAL COURT VIOLATED [J.M.'S] RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT ADJUDICATED HIM DELINQUENT OF RAPE, WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

V. [J.M.] WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. SIXTH AND FOURTEENTH AMENDMENT TO THE UNITES STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

VI. [J.M.] WAS DENIED HIS RIGHTS TO DUE PROCESS OF THE LAW AND TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION; CRIMINAL RULE 16(E); AND JUVENILE RULE 24(C) WHEN HIS COUNSEL WAS DENIED ACCESS TO EXCULPATORY INFORMATION."

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85546

IN RE:	:	
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J. M.	:	
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DATE: MARCH 16, 2006

KENNETH A. ROCCO, J., DISSENTING:

{¶ 27} I respectfully dissent from the majority opinion, since I believe its analysis with regard to appellant's first assignment of error is incorrect.

{¶ 28} The majority opinion's quote from *State v. Clark*, 71 Ohio St.3d 466 at 471, 1994-Ohio-43, is noteworthy. Therein, the supreme court stated that a child witness who is ten years or older at the time of trial is presumed competent to testify. The victim in this case was twelve years old. Therefore, pursuant to Evid.R. 601(A), the juvenile court was not required to conduct a voir dire. Nevertheless, aware of the fact that the victim in this case had developmental problems, the court took the initiative to do so. This is hardly an abuse of discretion.

{¶ 29} Similarly, a review of the transcript demonstrates that the trial court's voir dire was not "limited" but was actually quite extensive.

{¶ 30} As the majority opinion acknowledges, after ascertaining that the victim understood the difference between the truth and a lie, the juvenile court "continued to question her capacity for understanding." During this exchange, the victim consistently interchanged her "months" with her "years." This did not render

her incapable of receiving just impressions. In fact, after the victim demonstrated she understood the difference between "real" and "imaginary," appellant's trial counsel did not object when the court ruled the victim competent to testify. Thus, the entire voir dire reveals no abuse of discretion occurred.

{¶ 31} The major weakness in the majority opinion's analysis is this: "contradictory" statements made by the victim during trial may have been pertinent to the weight to be given to her testimony, but they cannot be applied retrospectively by this court in order to call into question the original determination of competency. *In re: Waldrop*, Athens App. No. 04CA27, 2004-Ohio-5351, ¶11. Mentally-challenged persons seldom make the most compelling witnesses, but they do often make easy victims. This court must presume that the juvenile court considered the victim's credibility before arriving at its final adjudication. In other words, the adjudication itself cannot serve as a basis to render the court's original competency determination an abuse of discretion.

{¶ 32} The flawed analysis set forth in the majority opinion further renders its disposition of this case extremely problematic. The juvenile court simply is instructed to "conduct a more complete competency hearing." What precisely constitutes a "more complete hearing" than the original? Moreover, does the instruction mean that if the court again determines the victim is competent, another complete trial is in order, or may the court,

based upon that determination, protect the victim's interests and simply renew the delinquency adjudication?

{¶ 33} In my view, the juvenile court in this case committed no abuse of its discretion; therefore, appellant's first assignment of error lacks merit, and should be overruled. Similarly, none of appellant's four other assignments of error presents any basis for this court to reverse his adjudication of delinquency.

{¶ 34} I, accordingly, dissent. I would affirm the juvenile court's decision.