NO. 23700

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, Plaintiff-Appellee, v.
CALEB JONES, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-Cr. No. 00-1-1668)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe, and Lim, JJ.)

Defendant-Appellant Caleb Jones (Caleb) appeals from the July 28, 2000 Judgment of the Family Court of the First Circuit (the family court),[1] which, based on a July 27, 2000 jury verdict, convicted and sentenced Caleb for two counts of Abuse of a Family or Household Member, in violation of Hawaii Revised Statutes (HRS) § 709-906 (Supp. 2001). Caleb's only argument on appeal is that the family court committed plain error when it allowed Caleb's fourteen-year-old stepson to testify at trial without first having him qualified to testify pursuant to Hawaii Rules of Evidence (HRE) Rule 603.1, HRS chapter 626 (1993).

We disagree with Caleb and, accordingly, affirm the judgment below.

[1] The Honorable Michael D. Wilson presided.

BACKGROUND

On the evening of April 20, 2000, a telephone call was placed to the Honolulu Police Department from an apartment unit at Waikalani Place (the Waikalani apartment) in Mililani, reporting an incident of domestic abuse at a residence on Kuahelani Avenue. Officer Stephen Silva, Jr. (Officer Silva) and Officer Carroll Shifflett (Officer Shifflett) (collectively, the officers) responded to the call, and when they arrived at the Waikalani apartment at about 11:00 p.m., they met the two complainants in this action: Mary Jones (Mary), who was Caleb's wife; and Joshua Monoski (Joshua), Caleb's stepson.

The officers testified at trial that upon their arrival at the Waikalani apartment, they noticed that Mary had several fresh scratches and bruises on "her arms, her neck, and her back" and Joshua "had a swelling and abrasion on his face." Mary seemed "to be upset and a little bit angry" and "appeared to have been crying earlier." Similarly, Joshua was acting "[u]pset, distraught" and appeared "to have been crying[.]" Photographs of Mary's and Joshua's injuries that were taken by Officer Shifflett were introduced into evidence.

Officer Silva testified at trial that Mary and Joshua orally explained to him the circumstances that led to their injuries and also filled out separate HPD-252 statement forms in their own handwriting, describing what had happened. Officer Shifflett stated that Mary filled out her statement form

"on the railing" and Joshua filled out his statement "on the other side of the building." Both wrote their statements at the same time and without "talking to each other or collaborating[.]" Both signed their statements after reviewing them and being afforded an opportunity to make changes to their statements.

Mary wrote in her statement that she and Caleb got into an argument after Caleb came home from work at around 5:45 p.m. They "wrestled around" and Caleb "pinched [her] left boob" and "[l]eft a mark." Caleb also repeatedly pushed and threw her around, kicked her numerous times while she was "laying down[,]" and choked her "throat several times cutting off [her] air supply." According to Mary, while all this was going on, Joshua and his friend "came in[,]" and Caleb told Joshua to get out. When Joshua said that he was going to call 911, Caleb "went to Josh[ua] and grabbed the phone. Then [Caleb] picked [Joshua] up and threw [Joshua] on the floor. [Caleb] kicked [Joshua] in the face at least 2 times."

In his handwritten statement, Joshua stated that he was thirteen years old and a student at Mililani Middle School. Also included in his statement were the following unedited paragraphs:

> Me and my friend were out-side skateboarding we heard a scream so I went to check to see if it came from my house. When I walked in he was pushing her into the living room. I picked up the skateboard like I was going to hit him and he came charging at me yelling at me. He went back to my mom yelling at her and pushing her into the wall I said I was going to call 911 he said give him the phone and I wouldn't give it to him he picked me up and through me on the ground. I still didn't give It to him so he kicked me in the face. He picked me up and through me again and told me to get out the house. He wouldn't let me get anything he just pushed

> me and my mom out. So my mom, my friend and I walked to my aunty patties house.
>
> The person that did this to me was Caleb. He is my step-dad.

At trial, both Mary and Joshua recanted their written statements and testified that while there had been an argument with Caleb on the day in question, neither of them had been physically abused by Caleb. Both Mary and Joshua explained that they had made up the statements because they were mad at Caleb at the time; they were now telling the truth. Both also admitted that they still lived with Caleb and did not want Caleb to get into trouble.

Joshua testified that he had turned fourteen years old the month before trial began. He was in the eighth grade at Mililani Middle School and would be entering Mililani High School the following week. He had "pretty good grades"--"A's, B's and C's[,]" planned on going to college, and wanted to be a marine biologist. Joshua explained that on the day in question, he had been skateboarding prior to entering his residence to use the bathroom. When he entered the residence, Mary and Caleb were arguing, but there was no physical contact between them. Because Joshua wanted to prevent the argument from escalating to a physical fight, he grabbed the phone, intending to call the police. However, Joshua testified, Caleb "came towards me to where I couldn't get the phone." Then, according to Joshua:

> We both struggled for the phone, and then we both grabbed it and then it slipped out of [Caleb's] hands and hit me in the forehead. . . . I fell on the ground, and [Caleb] tried to

> pick me up to where I was standing, and I wouldn't let 'em, and then I fell again and I hit my cheek on the computer.

Joshua denied that he had been picked up, thrown onto the ground, or kicked in the face by Caleb. Joshua admitted, however, that he and Mary had been angrily told by Caleb to get out of the house, and, as a result, they left and went to a friend's house, where an "uncle" called the police.

There was no objection by defense counsel throughout Joshua's testimony. Nevertheless, Caleb now argues that the family court committed plain error by allowing Joshua "to testify without having been qualified by the State." Caleb points out that

> [a]t trial, the State asked Joshua general questions about his age, school and background. However, at no point during Joshua's testimony was he asked regarding his ability to tell the truth. Given the State's knowledge beforehand of the [recanting] position that Mary and Joshua had taken, it was incumbent upon the [family] court to ensure that Joshua, as a minor, knew the difference between the truth and a lie. The qualification of a witness is a preliminary question that shall be established by the court prior to testimony.
>
> As a result of the [family] court's error in failing to determine Joshua's competency, Caleb . . . was unfairly convicted and the error was not harmless because in the absence of a competency hearing, the jury simply did not know whether Joshua lied either in his statement, or at trial, or was being unduly influenced by Mary and his credibility herein was crucial. Indeed, without a competency hearing, the jury would naturally assume that he was being subjected to his mother's influence, and conclude that he was lying at trial, instead of having lied in the HPD 252 statements.

Opening Brief at 7-8 (citations omitted, emphasis in original).

DISCUSSION

According to HRE Rule 601 (1993), entitled "General rule of competency[,]" "[e]very person is competent to be a

witness except as otherwise provided in these rules." One exception to the foregoing rule is HRE Rule 603.1 (1993), which states as follows:

> **Disqualifications**. A person is disqualified to be a witness if the person is (1) incapable of expressing oneself so as to be understood, either directly or through interpretation by one who can understand the person, or (2) incapable of understanding the duty of a witness to tell the truth.

The Commentary to HRE Rule 603.1 states, partly, that

> [t]he intent of this rule, which is similar to Cal. Evid. Code § 701, is to complement Rule 601 supra, and to require disqualification of witnesses whose incapacity either to articulate in an understandable fashion or to understand the truthtelling obligation renders their testimony valueless.
>
> Under this rule the competency of a witness is a matter for determination by the court. Competency has traditionally embodied a level of threshold capacity "to understand the oath and to perceive, recollect, and communicate that which he [or she] is offered to relate." Law Revision Comm'n Comment to Cal. Evid. Code § 701. Capacity to perceive and to recollect are implicit in Rule 602's personal knowledge requirement. This rule covers the oath and the ability to communicate, matters which may be of concern in cases of youthful or mentally infirm witnesses.

In State v. Kelekolio, 74 Haw. 479, 849 P.2d 58 (1993), the Hawai‘i Supreme Court held that HRE Rule 603.1 "is not a discretionary disqualification." Id. at 526, 849 P.2d at 79 (quoting Hawaii Rules of Evidence Manual § 603.1-2, at 213). "[A] witness is either qualified or disqualified, and it is not a matter of degrees." Id. at 527, 849 P.2d at 80 (italicized format omitted; quoting Sen. Conf. Comm. Rep. No. 80-80, in 1980 Senate Journal, at 996). Accordingly, where the issue of a witness's competency to testify "[i]s reasonably called into question[,]" the supreme court said a trial court's failure to

conduct a competency hearing as to the witness is reviewed on appeal under the "right/wrong" standard. Id. at 528, 849 P.2d at 80.

In Kelekolio, it was undisputed that the complaining witness had an intelligence quotient of 43 and operated at the cognitive level of a four- to seven-year-old child. Her testimony revealed confusion about whether truth was good or bad, she could not identify the defendant, and she did not have an apparent understanding of terms she employed in her testimony. After reviewing the record de novo, the supreme court concluded that the witness's competency to testify was reasonably called into question and, therefore, "the trial court committed plain error in failing to engage in an independent inquiry and make an express finding as to whether the complainant was competent to testify before allowing her substantive testimony to be exposed to the jury." Id. at 528-29, 849 P.2d at 80.

Professor Bowman has noted that "the criterion of 'incapability' [under HRE Rule 603.1] suggests a narrow spectrum of incompetency. The rule 603.1 commentary points out that disqualification is appropriate only when the proffered testimony is 'valueless.'" A. Bowman, Hawaii Rules of Evidence Manual § 603.1-2, at 320 (2d ed. 1998). Professor Bowman also remarked, with respect to child witnesses, as follows:

> While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his [or her] appreciation of the difference between truth and falsehood,

> as well as of his [or her] duty to tell the former. . . . Although the cases suggest that the line of competency is usually drawn between the ages of three and five, there is no special rule for children.

Id. § 603.1-2A at 321 (citations and internal quotation marks omitted). With respect to whether competency screening should be conducted for child witnesses, Professor Bowman also commented:

> Competency screening needs to be conducted only in cases of very young children. Children below eight years of age, for example, could be considered presumptively eligible for this procedure. Witnesses not screened preliminarily whose testimony raises competency concerns can be treated as if they were adults. The best approach in borderline cases is to admit the testimony, rely on adversary presentation and cross-examination, and exercise judicial control in testing the sufficiency of the evidence.

Id. § 603.1-2A(1) at 323.

In this case, our de novo review of the record does not raise any reasonable question as to the capability of Joshua to express himself so as to be understood, or to understand his duty to tell the truth. On the contrary, the record reveals that Joshua was quite mature, intelligent, and articulate, both orally and in writing. His HPD-252 statement and his oral testimony indicate that he was able to clearly communicate his recollections and observations of the events that occurred on the evening in question and able to understand his duty to tell the truth. Although Joshua recanted his written statement at trial, such inconsistency did not raise questions as to his competency to testify; instead, the inconsistency went to his credibility, which could be and was tested through direct and cross-examination of Joshua.

Additionally, the Hawai‘i Supreme Court has embraced the common law rule that a child fourteen years of age or older is presumed to be competent as a witness. See 81 Am. Jur. 2d Witnesses § 218 (1991). In State v. Ponteras, 44 Haw. 71 (1960), the supreme court held:

> With a child under fourteen years of age the common-law requirement is that the competency must be shown to the satisfaction of the court. Over fourteen years of age a child is presumed to be competent to testify without inquiry into his qualification. Under this presumption, evidence of a minor over fourteen years of age may be received, at least in the absence of objection, upon the taking of an oath without further qualification.

Id. at 78 (citations omitted).

In this case, Joshua was fourteen years old when he testified at trial. He was thus presumed to be competent to testify without further qualification.

CONCLUSION

In light of the foregoing discussion, we affirm the July 28, 2000 Judgment entered by the family court.

DATED: Honolulu, Hawai‘i, April 12, 2002.

On the briefs:

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