

**CHALLENGING
THE COMPETENCY OF
A CHILD WITNESS IN
SEXUAL ASSAULT CASES**

*Presented by
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THINGS TO TAKE AWAY

- How to Prepare
- How to Argue
- How to Research Experts & Witnesses
- Developing the Right Attitude
- Drafting the Right Motions
- Case Law Summary
- Statutes Summary

CASE SUMMARY

- On May 13, 2009 the client was charged with super Aggravated Sexual Assault of a Child under 22.021(a)(2)(B), in Karnes County, TX
- The alleged victim was a three (3) year old child
- The first (1st) outcry witness was the child's mother
- The second (2nd) outcry witness was the SANE nurse during a video taped interview

Our Argument

- The State of Texas cannot show that the Child has the ability *to intelligently observe* the events in question at the time of the occurrence, the capacity *to recollect* the events, and the capacity *to narrate* the events, and cannot show that the Child understands the *obligation of the oath*, and based on such the Court must find the Child incompetent to testify at any future hearing or trial.

Procedure for Competency Hearing

- Arraignment
- Pretrial Motions
- Pretrial Hearing or Hearing before Trial
- Have a hearing as soon as you can!
- Find out your Judge's local policy/procedure

Developing the Right Attitude

- Play it smart, act dumb!
- Keep your ears open
- Client Control
- Keep Client Involved

How to Argue

- Draft/File Motions, Set a Hearing on the Record, Get a Ruling and Signed Order, Set Discovery Timeline
 - REMEMBER TO FILE AND SET ALL MOTIONS FOR A HEARING SO AS TO ESTABLISH A RECORD AND MAKE SURE TO GET SIGNED ORDERS
- Do not do anything by agreement with the State...
 - ADA's will make & break agreements absent a court order
- Argue the Case on the Record

How to Prepare

- GET HELP!
 - These cases are difficult, time-consuming...too much to know!
 - Do not be too proud to ask other professionals
 - You need to enlist a solid, reliable second-chair
- SUBPOENA THE RECORDS OF ALL HEALTH CARE PROFESSIONALS

How to Prepare

- GATHER INFORMATION!
- Video = #1 piece of information
 - There is always a Video! The Video will help to establish the inconsistencies you will need for cross-examination

WATCHING THE VIDEO

- Watch and Re-Watch
 - Set aside the time to watch the video in its entirety
 - Analyze the video multiple times → alone, with other counsel, and with your investigator
- Ask these questions:
 - *Can the Child answer the questions asked?*
 - *Can you hear the Child?*
 - *Can you understand the Child?*
 - *What persons are in the room with the Child?*
 - *What persons are off-screen watching the interview with the Child? Who is observing?*
 - *Does the Child ever leave the interview or is the Child ever removed?*

PROBLEMS WITH OUR VIDEO

- OFF-CAMERA STATEMENTS
 - CHILD LEFT ROOM ON AT LEAST TWO OCCASIONS
- INAUDIBLE STATEMENTS
- POOR VIDEO
 - COULD NOT SEE ON CAMERA WHERE CHILD WAS POINTING TO DIAGRAMS
- CONFUSING CHILD COLLOQUIALISMS
 - PAPA, GRAKER, TEACHER, TITTI, BOOTY, SECRET
- MULTIPLE PERSONS IN INTERVIEW ROOM
- PARAPHRASING BY THE SANE EXAMINER

How to Prepare

- Analyze all alleged Outcry Witnesses & Outcry statements
- Limitations & Exceptions to Outcry W
- Ask...
 - *Who can be an outcry witness?*
 - *What if child changes or adds to his or her initial "outcry"?*
 - *Who can be a potential "new" outcry witness?*

How to Prepare

- Obtain & Review all types of Medical Records including Psychological, Psychosocial, Physicals, and Play Therapy.
- Determine if Sexual Assault Nurse Examiner involved
- Always analyze the licensures and professional designations of a potential witness/expert witness

How to Research Experts & Witnesses

- Useful websites for determining verification & licensing...
- Texas Board of Nursing
- <http://www.bon.state.tx.us/olv/>
- Texas Medical Board
- <http://www.tmb.state.tx.us/>
- Texas Department of State Health Services
- <http://www.dshs.state.tx.us/counselor/>

How to Research Experts & Witnesses

- M.D. - Medical Doctor.
- Ph.D. - Doctor of Philosophy.
- Psy.D. - Doctor of Psychology.
- D.O. - Doctor of Osteopathy.
- D.S.W. - Doctor of Social Work, Ed.D. - Doctor of Education, DCM - Doctor of Chiropractic Medicine -
- D.Min./Th.D./D.Div- A minister or a doctoral level pastoral counselor
- D.C.H. - Doctorate of Clinical Hypnotherapy.
- M.S.W. - Master's in Social Work.
- M.Ed. - Master's in Education.
- L.P.C. - Licensed Prof. Counselor.
- C.P.C. - Cert. Professional Counselor
- M.F.C.C. - Marriage, Family, and Child Counselor.
- M.S. or M.A. - Masters of Science or Masters of Arts.
- Ed.S. - Educational Specialist.
- M.Div. - Master's of Divinity
- CSAC - Certified Substance Abuse Counselor.
- CAC - Certified Alcoholism Counselor.
- A.B.P.P. - American Board of Professional Psychology
- F.A.C.P. - Fellow, American College of Physicians
- B.C.F.E. - Stands for American Board of Forensic Examiners.
- RPT - Registered Play Therapist

Case Law Summary on Experts

- Initial Points:
 - Distinguish between what an Expert can and cannot testify to
 - You want to force the Expert to say that he never treated the Child, never met the Child, based his entire testimony on a review of the record
- Know the Experts Limitations
 - Remember: DO NOT OPEN THE DOOR
 - Ultimate Question: Was Child telling the truth?
- Watch for "Back Door Hearsay"
- Melendez-Diaz v. Massachusetts, 557 U.S. ____ (2009).

Case Law Summary on Experts

- Expert can testify concerning the competency of a child witness in two (2) areas:
 - #1 PARROTING
 - #2 REHEARSAL

How to Prepare

- Draft the Right Motions
- Types of Motions you must file
 - *Motion for Discovery*
 - *Motion to Quash*
 - *Motion for Pretrial Evidentiary Hearing to Determine Competency and Qualification of Child Witness*
 - Brady Motions
 - *Motion to Designate Primary Offense*
 - *Motion to Elect...*
 - ...Count(s)
 - ...Act(s)

Case Law Summary on Competency

- The trial court has no duty to conduct a preliminary competency examination on its own motion.
 - McGinn v. State, 961 S.W.2d 161, 165 (Tex.Crim.App. 1998).
- Whether a witness is competent rests within the sound discretion of the trial court.
 - Broussard v. State, 910 S.W.2d 952, 960 (Tex.Crim.App. 1995); Garcia v. State, [573 S.W.2d 12](#) (Tex.Crim.App.1978); Fields v. State, [500 S.W.2d 500](#) (Tex.Crim.App.1973); TEX.R.EVID. 601(a)(2).

Case Law Summary on Competency

- Once the competency of a child witness is challenged, the trial court must assure itself that the child is competent.
 - Torres v. State, 33 S.W.3d 252, 255 (Tex.Crim.App.2000)(quoting Watson v. State, 596 S.W.2d 867, 870 (Tex.Crim.App.1980); Davis, 268 S.W.3d at 699; Hollinger v. State, 911 S.W.2d 35, 38-39 (Tex.App.-Tyler 1995, pet. ref'd).

Case Law Summary on Competency

- A trial court's determination of whether a child witness is competent to testify and its ruling on the issue will not be disturbed on appeal absent an abuse of discretion.
 - Broussard v. State, 910 S.W.2d 952, 960 (Tex.Crim.App. 1995), cert denied, 519 U.S. 826, 117 S.Ct.87 (1996); De Los Santos v. State, 219 S.W.3d 71, 80 (Tex.App.-San Antonio 2006, no pet.); Woods v. State, 14 S.W.3d 445, 450 (Tex.App.-Fort Worth 2000, no pet.).
- An appellate court will review the child's responses to qualification questions as well as the child's entire testimony to determine whether the trial court's ruling constituted an abuse of discretion.
 - De Los Santos, 219 S.W.3d at 80-81; Fox v. State, 175 S.W.3d 475, 481 (Tex.App.-Texarkana 2005, pet. ref'd); Woods, 14 S.W.3d at 451; Clark v. State, 558 S.W.2d 887, 890 (Tex.Crim.App. 1977); Davis v. State, 268 S.W.3d 683, 699 (Tex.App.-Fort Worth, 2008).

Case Law Summary on Competency

- To determine whether a person is competent to testify, whether adult or child, we turn to Texas Rule of Evidence 601. Under Texas Rule of Evidence 601, there is a presumption that all persons are competent to testify.
 - Tex.R.Evid. 601
- However, this rule delineates that children and other persons may be deemed incompetent to testify unless they meet minimum threshold requirements.
 - Id.

Case Law Summary on Competency

- It is established, that "to be competent to testify, a witness must 'possess sufficient intellect to relate transactions with respect to which they are interrogated' as well as *understand the obligation of an oath.*"
 - Watson, 596 S.W.2d at 870-71 (quoting Bielecki v. State, 140 Tex.Cr.R. 355, 145 S.W.2d 189, 190 (1940)).

Case Law Summary on Competency

- Texas courts determine whether a “witness possesses the sufficient intellect to relate transactions with respect to which they are interrogated” by determining whether the proposed witness has:
 - (1) the ability to *intelligently observe* the events in question at the time of the occurrence,
 - (2) the capacity to *recollect* the events, and
 - (3) the capacity to *narrate* the events.
 - *Id.*; Davis, 268 S.W.3d at 699; Hollinger, 911 S.W.2d at 38-39.

Case Law Summary on Competency

- The third element, *narration*, involves the:
 - (a) capacity to narrate,
 - (b) requires that the witness is able to understand the questions asked and frame intelligent answers to those questions, and
 - (c) understand the *moral responsibility* to tell the truth.
 - Watson, 596 S.W.2d at 870; Hollinger, 911 S.W.2d at 39; Davis, 268 S.W.3d at 699.

Case Law Summary on Competency

- Texas courts must also determine competency by adducing whether a witness understands the obligation of the oath.
 - Provots v. State, 514 S.W.2d 269 (Tex.Crim.App. 1974); Fields v. State, 500 S.W.2d 500 (Tex.Crim.App.1973)
- Even though witnesses are dutifully cautioned and sworn to tell the truth, there must be a showing that the witness understands the oath.
 - *Id.* at 871-872, fn.4.
- It is not required that a child witness know the meaning of the words obligation or oath, or even the phrase obligation to tell the truth.
 - Rhea v. State, 705 S.W.2d 165, 170 (Tex.App.-Texarkana, 1985).

Case Law Summary on Competency

- However, a “child must recognize a requirement to tell the truth and know that some penalty attaches when the truth is not told.”
 - Id.
- There are many examples of displaying this affirmation to the truth.
 - Id. (quoting Mason v. State, 2 Tex. App. 192 (1877) (“the obligation may be that if a witness lies, the bad man or devil will get him”)); Smith v. State, 164 S.W. 838 (1913) (“he can be sent to prison”); Powell v. State, 271 S.W. 915 (1925) (“it is wrong to lie”).

Case Law Summary on Competency

- If a child cannot understand the obligation of the oath, the child may be deemed incompetent to testify as a witness.
 - Jimenez v. State, 103 Tex.Cr.R. 163, 280 S.W.829 (1925); Mays v. State, 127 S.W. 546 (1910); Williams v. State, 12 Tex.App. 127 (1882); Rhea, 705 S.W.2d at 170.

Relevant Statutes on Competency

- Art. 38.071. TESTIMONY OF CHILD WHO IS VICTIM OF OFFENSE.
 - Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable to testify in the presence of the defendant.
 - Sec. 7. In making any determination of good cause under this article, the court shall consider the rights of the defendant, the interests of the child, the relationship of the defendant to the child, the character and duration of the alleged offense, any court finding related to the availability of the child to testify, the age, maturity, and emotional stability of the child, the time elapsed since the alleged offense, and any other relevant factors.
 - Sec. 8. (a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:
 - (1) of emotional or physical causes, including the confrontation with the defendant; or
 - (2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.
 - Sec. 8. (b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.
 - Sec. 10. In ordering a child to testify under this article, the court shall take all reasonable steps necessary and available to minimize undue psychological trauma to the child and to minimize the emotional and physical stress to the child caused by relevant factors, including the confrontation with the defendant and the ordinary participation of the witness in the courtroom.

Relevant Statutes on Competency

- Art. 38.072. HEARSAY STATEMENT OF CHILD ABUSE VICTIM
 - Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child younger than 14 years of age:
 - Sec. 1 (a) This article applies only to statements that:
 - (1) describe:
 - (A) the alleged offense; or
 - (B) if the statement is offered during the punishment phase of the proceeding, a crime, wrong, or act other than the alleged offense that is:
 - (i) described by Section 1;
 - (ii) otherwise committed by the defendant against the child who is the victim of the offense or another child younger than 14 years of age; and
 - (iii) otherwise admissible as evidence under Article 38.37, Rule 404 or 405, Texas Rules of Evidence, or another law or rule of evidence of this state;
 - (2) were made by the child against whom the charged offense or extraneous crime, wrong, or act was allegedly committed; and
 - (3) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense or extraneous crime, wrong, or act.
 - Sec. 1 (b) A statement that meets the requirements of Subsection (a) of this article is not inadmissible because of the hearsay rule if:
 - (1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:
 - (A) notifies the adverse party of its intention to do so;
 - (B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and
 - (C) provides the adverse party with a written summary of the statement;
 - (2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, context, and circumstances of the statement; and
 - (3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Relevant Statutes on Competency

- TRE 601. (a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules. The following witnesses shall be incompetent to testify in any proceeding subject to these rules:
 - (2) Children. Children or other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated.

Relevant Statutes on Competency

- RULE 801. DEFINITIONS. The following definitions apply under this article:
 - 801. (a) Statement. A "statement" is (1) an oral or written verbal expression or (2) nonverbal conduct of a person, if it is intended by the person as a substitute for verbal expression.
 - 801. (b) Declarant. A "declarant" is a person who makes a statement
 - 801. (c) Matter Asserted. "Matter asserted" includes any matter explicitly asserted, and any matter implied by a statement, if the probative value of the statement as offered flows from declarant's belief as to the matter.
 - 801. (d) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Relevant Statutes on Competency

- **RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE**
- **804. (a) Definition of Unavailability.** "Unavailability as a witness" includes situations in which the declarant:
 - (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
 - (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
 - (3) testifies to a lack of memory of the subject matter of the declarant's statement;
 - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means.
- A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

So the Child has been found incompetent... what next?

- If case is dismissed on a finding of incompetency...the case is finished, *kind of*
- An ADA will most likely wait to refile once the Child is of an age to testify competently
- However, the longer the ADA waits, the more important the video becomes
- If the case is ever refiled, the ADA will have to rely on a video that was recorded prior to the hearing where the Child was deemed incompetent...
- Simply put, if the Child was incompetent at the competency hearing, then she was more than likely incompetent at the time of the video interview
