

Children's Law Center of Indiana



Delinquency

4/13/11

In **D.G. v. State**, 947 N.E.2d 445 (Ind. Ct. App. 2011), the Court reversed the trial court's finding that the child was a delinquent child for committing what would be Class B felony child molesting if committed by an adult. The Court remanded the case for the trial court to determine Alleged Victim's competency to testify. On July 12, 2009, the thirteen-year-old child spent the night at the house of his friend. The friend, the friend's mother, the mother's male friend, and the friend's four younger siblings, including the six-year-old legally blind Alleged Victim, were also at the house. Alleged Victim claimed that the child, whose nickname was "Pooder," came into her room that night and put his penis in her mouth. On December 3, 2009, the State alleged that the child was a delinquent child for committing what would be Class B felony child molesting and Class C felony child molesting if committed by an adult. At the April 14, 2010, fact-finding, Alleged Victim was called as a witness. Immediately after Alleged Victim was sworn in and stated her name, defense counsel objected and an unrecorded sidebar was conducted. Alleged victim then testified without any assessment of her competency. The trial court entered a true finding on the Class B felony allegation and a not true finding on the Class C felony allegation. On May 24, 2010, the trial court held a dispositional hearing and placed the child on probation. The child was discharged from probation on October 8, 2010, at the request of the probation department, and the trial court closed the case. The child appealed.

In preparing the appeal, the child's appellate counsel filed a motion to certify the verified statement of the sidebar pursuant to Indiana Appellate Rule 31 because the sidebar was inaudible and could not be transcribed. The motion included defense trial counsel's statement that he seemed to recall objecting to Alleged Victim's competency as a witness due to her responses and alleging that she was coached. On November 10, 2010, the trial court held a hearing at which the State objected to the trial court certifying the content of the sidebar based on the lack of an audible transcript. The trial court's sworn statement indicated no recollection of what was discussed or decided during the sidebar. Defense trial counsel's and the trial court's statements were eventually made part of the record on appeal.

The Court found that the trial court erred by failing to assess the competency of six-year-old Alleged Victim to testify. *Id.* at 451. The child argued that the trial court improperly admitted Alleged Victim's testimony without determining whether she was competent to testify.

The State argued that the child had waived his claim that Alleged Victim was not a competent witness. The Court, stating that it must decide whether the issue was properly preserved, noted that it is undisputed that the nature of the child's initial objection was not recorded and could not be adequately recreated. *Id.* at 448. The Court, citing *Ben-Yisrayl v. State*, 753 N.E.2d 649, 661 (Ind. 2001), *cert. denied*, 536 U.S. 918, 122 S. Ct. 2382 and *Steinberg v. State*, 941 N.E.2d 515, 530-31 (Ind. Ct. App. 2011), gave the child "the benefit of the doubt as to what may have been discussed during the unrecorded sidebar." *D.G.* at 448. The Court could not agree with the State that the competency issue is waived because the failure to record the sidebar was not the child's fault. *Id.* The Court assumed that the child raised the issue of Alleged Victim's competency and addressed the child's claim on the merits. *Id.*

The Court quoted Indiana Evidence Rule 601, which provides, "Every person is competent to be a witness except as otherwise provided by these rules or by act of the Indiana General Assembly." The Court quoted *Kien v. State*, 866 N.E.2d 377, 385 (Ind. Ct. App. 2007), *trans. denied*, which states that a child's competency to testify at trial is established by demonstrating that the child (1) understands the difference between telling a lie and telling the truth, (2) knows he or she is under compulsion to tell the truth, and (3) knows what a true statement actually is. *D.G.* at 448. The Court also cited *Harrington v. State*, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2011), which states that it is within the sound discretion of the trial court to determine whether a child is competent to testify based on the trial court's observation of the child's demeanor and responses to questions posed to him or her by counsel and the court. *D.G.* at 449. The Court found that neither the trial court nor counsel conducted any inquiry as to whether Alleged Victim understood the difference between telling a lie and telling the truth, knew she was under a compulsion to tell the truth, or actually knew what a true statement was. *Id.* Given the Court's assumption that the child raised the issue during the unrecorded sidebar, the failure to assess the child's competency was error. *Id.* The Court, after reviewing Alleged Victim's testimony, questioned the veracity of her testimony. *Id.* The Court was not convinced that the trial court's failure to assess Alleged Victim's testimony was harmless error. *Id.* at 449-50.

The Court found that the State's proposed after-the-fact assessment of Alleged Victim's competency was not an adequate remedy, and reversed the delinquency finding. *Id.* at 450. The Court was not persuaded by the State's claim that the proper remedy is to remand for a hearing at which the trial court can make the competency hearing. *Id.* The State asserted that, if Alleged Victim is found to be competent, "there would be no problem with her having testified at the earlier proceeding, and she should not be made to go through the trauma of testifying about her molestation a second time at another delinquency hearing." The Court opined that the proposed remedy is inadequate because it does not account for the passage of nearly a year since the April 2010 fact-finding hearing, and Alleged Victim's ability to appreciate the difference between the truth and a lie today is irrelevant to whether she could do so a year ago. *Id.*

The Court found that there is sufficient evidence to permit another hearing on the allegations. *Id.* at 451. The Court, quoting *A.A. v. State*, 706 N.E.2d 259, 264 (Ind. Ct. App.

1999), said that, in deciding whether retrial is permissible, the Court considers all the evidence admitted by the trial court. D.G. at 450. “If that evidence as a whole would have been sufficient to sustain the judgment, no double jeopardy question is presented.” A.A. at 264-65. D.G. at 450. The child alleged that the State failed to prove his identity as the perpetrator because Alleged Victim was blind and did not know him well. The Court was not persuaded by the child’s argument, noting that: (1) the child referred to himself as “Pooder” during his own testimony; (2) Alleged Victim testified that “Pooder” stuck his penis in her mouth; (3) Alleged Victim described “Pooder’s” tummy as a circle and her brother’s tummy as a rectangle, which is consistent with other evidence suggesting the child’s stomach was “overweight” compared to her brother’s; (4) Alleged Victim testified that she recognized “Pooder’s” voice because she had heard him talk before. Id. at 451. The Court found that this evidence was sufficient to establish the child’s nickname was “Pooder” and that “Pooder,” not someone else, put his penis in Alleged Victim’s mouth. Id. The Court also found that the child has not established that Alleged Victim’s testimony was incredibly dubious because, acknowledging that her testimony had shortcomings, Alleged Victim’s testimony that “Pooder” put his penis in her mouth was unequivocal. Id.