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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1213**

State of Minnesota,
Respondent,

vs.

Cody James Wutzke,
Appellant.

**Filed June 11, 2018
Affirmed
Rodenberg, Judge**

Becker County District Court
File No. 03-CR-15-2741

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Cleary, Chief Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Cody James Wutzke appeals from his conviction for second-degree criminal sexual conduct, after the district court allowed the seven-year-old sexual-assault victim to testify at trial. We affirm.

FACTS

In December 2014, appellant babysat R.S., who was then five years old. Appellant asked R.S. to go into her mother's bedroom and told her to take off her pants and underwear. R.S. complied. Appellant touched her vagina.

Almost one year later, R.S. reported the incident to a family member. R.S. demonstrated what had happened by lying on the floor, removing her panties, and describing how appellant touched her vagina. After the family member reported the incident to the police, R.S. met with a social worker. R.S. told the social worker the same story she told her family member. R.S. said that she lay down on her mother's bed and appellant continued to touch her until "he wanted to stop." On an anatomically-correct diagram of a young girl, R.S. circled the groin area to indicate where appellant touched her. The state charged appellant with second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2014).

The case was tried to a jury. The state called six witnesses, including R.S., who was then seven years old. After R.S. took the stand, and outside the hearing of the jury, the district court asked her to spell her name, and asked her about her age, where she attends school, whether she enjoys school, and whether she has any pets. R.S. answered each

question. The district court asked R.S. to define a lie and whether it is good or bad to tell a lie. R.S. explained that a lie is “when you don’t tell the truth.” She said that it is important to tell the truth “[s]o you don’t get in big trouble.” R.S. understood that it is “very important to tell the truth.” At the request of defense counsel, the district court also asked R.S. to “promise that everything that [she would] tell the lawyers when they ask . . . questions will be true.” R.S. answered, “Yes.” The district court found that R.S. “was able to recall information and did express a fundamental understanding of the necessity of telling the truth and was able to differentiate between a true statement and a false statement.” The district court concluded that R.S. was qualified as a competent witness. R.S. testified at trial without further questioning or objection.

During summation, the state argued that the jury should believe R.S.’s testimony and find appellant guilty of second-degree criminal sexual conduct. Defense counsel stated, “This case is not about whether or not a now seven-year-old girl is maintaining a lie. It is about her memory, it’s about her recall, it’s about influences that may have set into her recollection.” Defense counsel suggested that the jury should not believe R.S.’s testimony because it was elicited by repeat questions that hinted at the intended answers.

The jury found appellant guilty. The district court sentenced appellant to 36 months, stayed, with supervised probation for up to 25 years, and imposed a \$1,000 fine, staying \$500 pending completion of treatment or after-care.¹

This appeal follows.

¹ The district court granted appellant a downward dispositional departure from the sentencing guidelines that is not challenged on appeal.

DECISION

Appellant argues that the district court failed to adequately determine R.S.'s competency to testify because "she lacked a full understanding of the concept of the truth and the ability to recall facts [and] she lacked any understanding of the consequences of providing false testimony."

"A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined." Minn. Stat. § 595.02, subd. 1(n) (2014). In determining whether a child is competent to testify, a district court must determine "whether the child remembers or can relate events truthfully." *State v. Scott*, 501 N.W.2d 608, 613 (Minn. 1993) (quoting *State v. Lanam*, 459 N.W.2d 656, 659-60 (Minn. 1990)). The district court must ask questions of the child to ascertain "whether the [child] understands the obligation of the oath and is capable of narrating the events about which the [child] will testify." *State v. Sime*, 669 N.W.2d 922, 926 (Minn. App. 2003). Such an inquiry might include questions about her name, where she goes to school, her age, who is the judge, whether she knows what is a lie, and whether she knows what happens when one tells a lie. *Scott*, 501 N.W.2d at 615 (citing *Kentucky v. Stincer*, 482 U.S. 730, 741-42, 107 S. Ct. 2658, 2665-66 (1987)). "Where the court is in doubt as to the child's competency, it is best to err on the side of determining the child to be competent." *Lanam*, 459 N.W.2d at 660. We apply an abuse-of-discretion standard of review to a district court's competency determination. *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013). A district court abuses its discretion if it does

not conduct the two-step analysis of whether the child has “(1) the capacity to tell the truth and (2) the ability to recall facts.” *Sime*, 669 N.W.2d at 926.

Minnesota appellate courts have considered “the inquiries trial courts may make when determining whether children are competent to testify in trials.” *Scott*, 501 N.W.2d at 610. When a child expresses her understanding of the oath and of the need to testify truthfully, the child “show[s] an appreciation for an understanding of the difference between a truth and a lie.” *Id.* at 613. In *Scott*, the court determined that the district court adequately questioned the child before finding her competent to testify. *Id.* at 613-14. A district court may pose a series of examples demonstrating the difference between the truth and a lie, such as a paintbrush is not a pen, the judge is a man and not a woman, and the child’s shirt is green and not red. *See State v. Brovold*, 477 N.W.2d 775, 778-79 (Minn. App. 1991), *review denied* (Minn. Jan. 17, 1992). A district court should also ask the child about the consequences of telling a lie. A child is competent to testify provided that she knows that it is good to tell the truth, it is bad to tell a lie, and there are consequences to telling a lie. *See id.* at 779.

Here, the trial court questioned R.S. outside the presence of the jury to determine her competency to testify. R.S. said that she understood lying to be “when you don’t tell the truth” and that a person should not lie “[s]o you don’t get in big trouble.” The district court also offered a hypothetical to allow R.S. an opportunity to show an appreciation for understanding a lie by asking her whether it was snowing outside. R.S. agreed that it was

not snowing and that saying so would be a lie.² R.S. demonstrated an understanding of the difference between the truth and a lie, and the importance of telling the truth to the attorneys who would ask her questions in court. After questioning R.S., the district court found that R.S. was competent to testify. By asking R.S. to define the difference between the truth and a lie, demonstrate her understanding of a lie through the discussion of a hypothetical, and explain that there are consequences to telling a lie, the district court created a record sufficient to demonstrate that it did not abuse its discretion by finding that R.S. was competent to testify.³ Although the district court could have developed a more thorough record by asking more questions or discussing more examples to elicit R.S.’s “appreciation for an understanding of the difference between the truth and a lie,” *see Scott*, 501 N.W.2d at 613, we see no abuse of the district court’s discretion.

Appellant also argues that the district court erred by failing to ask R.S. to take an oath that she would give testimony that “shall be the whole truth, and nothing but the truth. So help [her] God,” Minn. Stat. § 358.07(7) (2016), and that even if the district court

² This particular line of questioning by the district court was not as artful as it might have been, because the form of the district court’s questions concerning whether it was snowing suggested the negative answer. But the district court appears from the record to genuinely connect with R.S. at an age-appropriate level, and assured itself that R.S. truly understood the difference between telling the truth and not telling the truth.

³ Appellant also challenges R.S.’s competency to testify, arguing that the inconsistencies in her testimony indicate a diminished cognitive ability to remember basic details of the incident. A “competency hearing is not a credibility hearing. . . . Whether a child is easily led goes more to credibility than to competency. . . . It is the jury’s province to sort out the inconsistencies [of testimony] and determine credibility, the court’s province to determine competency.” *Lanam*, 459 N.W.2d at 660. We do not consider this argument on appeal.

administered a sufficient oath, R.S. did not fully understand it so her testimony is inadmissible.

A witness who testifies at trial is required to take an oath or affirm her intent to testify truthfully. Minn. R. Evid. 603. The purpose of taking an oath is to “awaken the witness’ conscience and impress the witness’ mind with the duty to” testify truthfully. *Id.* When the witness is a child, it is sufficient for a district court to impress the importance of telling the truth upon the child, rather than administer an oath using the specific statutory language of Minn. Stat. § 358.07(7), because “the absence of an oath [is] not prejudicial given the child’s recognition of the difference between truth and falsity,” *State v. Ross*, 451 N.W.2d 231, 236 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990).

Because appellant did not challenge the district court’s failure to administer an oath to R.S. below, we apply a plain-error standard of review. *See State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007). A plain-error analysis considers four factors. *Id.*; *see* Minn. R. Crim. P. 31.02. A plain-error appeal requires proof of “(1) an error, (2) that was plain, and (3) that affected appellant’s substantial rights.” *Id.* “An error is plain if it was clear or obvious.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002) (quotations omitted). Generally, such an error “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If these three factors are satisfied, the appellate court then considers a fourth factor: “whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (citing *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)).

The circumstances of *State v. Mosby*, 450 N.W.2d 629 (Minn. App. 1990), *review denied* (Minn. March 16, 1990), are instructive here. In *Mosby*, the district court asked the child to explain the difference between the truth and a lie. *Id.* at 633. The child responded, “The difference . . . is *when you lie* you’re not telling the truth, *you’re not saying what really happened, and the truth is when you’re saying what really happened.*” *Id.* The child said that a person would “*get in big trouble for*” telling a lie. *Id.* The child also explained that she knew she should tell the truth. *Id.* On appeal, Mosby challenged “the verbal formula by which [the child] was sworn,” arguing that the district court did not administer an oath to the child so the testimony could not be admitted. *Id.* We relied on a committee comment to the rules of evidence, that, “Rule 603 is designed to afford the flexibility required in dealing with . . . children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.” *Id.* (emphasis omitted). We concluded in *Mosby* that the child clearly understood her obligation to tell the truth and the district court did not err. *Id.*

Here, like in *Mosby*, the district court asked whether R.S. knew the difference between the truth and a lie, and why it is important to tell the truth. *See id.* R.S. testified that telling a lie is “when you don’t tell the truth.” She also said that it is important to tell the truth “[s]o you don’t get in big trouble.” Finally, the district court asked R.S., “[D]o you promise that everything that you tell the lawyers when they ask you your questions will be true?” R.S. answered, “Yes.” R.S. demonstrated an understanding of “the difference between truth and falsity.” *Ross*, 451 N.W.2d at 236. She expressly promised

to give truthful answers to questions. This was sufficient. The district court did not err by not administering the oath in the precise language provided by Minn. Stat. § 358.07(7).

Affirmed.