

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 2147

STATE OF LOUISIANA

VERSUS

FRANKLIN D. BLACKWELL

**Judgment rendered June 8, 2012.**



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Appealed from the  
22<sup>nd</sup> Judicial District Court  
in and for the Parish of St. Tammany, Louisiana  
Trial Court No. 475636  
Honorable William J. Knight, Judge

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HON. WALTER P. REED  
DISTRICT ATTORNEY  
COVINGTON, LA  
AND  
KATHRYN W. LANDRY  
SPECIAL APPEALS COUNSEL  
BATON ROUGE, LA

ATTORNEYS FOR  
STATE OF LOUISIANA

BERTHA M. HILLMAN  
THIBODAUX, LA

ATTORNEY FOR  
DEFENDANT-APPELLANT  
FRANKLIN D. BLACKWELL

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**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

**PETTIGREW, J.**

The defendant, Franklin D. Blackwell, was charged by grand jury indictment with three counts of aggravated rape (counts I, II, and III), violations of La. R.S. 14:42, and pled not guilty on all counts. Following a jury trial, he was found guilty as charged on all counts by unanimous verdict. On each count, he was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The court also ordered that the sentences would run consecutively with each other. The defendant now appeals, contending the trial court erred in determining the victims were competent to testify. For the following reasons, we affirm the convictions and sentences on all counts.

**FACTS**

The State played the July 13, 2009 recorded interview of the victim of count I, C.S.,<sup>1</sup> at trial. C.S. stated "he spread out my legs." Using a piece of paper, she indicated "[h]e like my privet." She answered affirmatively when asked if she was stating that he had licked her private. She stated she was only wearing a shirt at the time of the incident because he had taken the rest of her clothes off. She stated the incident occurred at night. She stated he told her not to tell her mother or father. She also indicated he had shown her his private and told her to touch it, but she said "no." She stated it looked like a cow because it had the balls of a cow. She identified the person she was talking about as "Paw Paw Frankie Blackwell." She identified the vagina on a sketch of a naked girl as her private. She also identified the penis on a sketch of a naked boy as his private. She also stated she had seen the defendant take off E.W.'s underwear and lick her private.

The State also played the July 9, 2009 recorded interview of the victim of count II, E.W., at trial. E.W. stated she was nine years old. She stated there was a really bad man that tried to touch her body. She stated "when I'm asleep, he tries to suck my private." She stated the man was "Paw Paw Frankie Blackwell." She stated during the night, she had fallen asleep on the top bunk of a bed, and the defendant took off her pants and

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<sup>1</sup> We reference the victims only by their initials. See La. R.S. 46:1844(W).

panties and put his mouth on her private. She stated his tongue was "kind of" on the inside of her private. She woke up, and he told her to go back to sleep. She tried to slap the defendant, but he took her hand and tried to bite her hand. She indicated the incident occurred between June 6 and June 8, 2009. She identified the vagina on a sketch of a naked girl as her "private." She indicated C.S. was nine years old.

The State also played the July 13, 2009 recorded interview of the victim of count III, M.W., at trial. She was five years old. M.W. stated "old grandpa be mean to me." She indicated "old grandpa" was "Old Paw Paw Frankie." She stated he had made her touch his private and "put her head in it." She stated he almost made her eat it. She indicated the incident occurred when she was lying in bed with the defendant and he had his clothes off under the covers. Using anatomically correct dolls, she demonstrated what had happened to her by placing the head of the female doll on the groin area of the male doll.

The defendant testified at trial. He conceded he had previously been convicted of burglary. He testified C.S. was his granddaughter and E.W. and M.W. were his great-granddaughters. He stated he had babysat the victims when his granddaughter started working. He indicated that on one occasion, he found the victims sitting in the chicken house, so he "took their clothes off them" to bathe them. He claimed the victims had seen his granddaughter having sex with her boyfriend. He denied touching the victims in an inappropriate manner or for his sexual gratification.

### **COMPETENCY OF THE VICTIMS TO TESTIFY**

In his sole assignment of error, the defendant argues the trial court erred when it determined the victims were competent to testify. He argues, "It was clear that they did understand the difference between telling the truth and telling a lie. They also appeared to understand that it is bad to tell a lie. At that hearing[,] no one questioned them on whether they could remember what happened or whether they had proper understanding of any other issue."

Every person of proper understanding is competent to be a witness except as otherwise provided by legislation. La. Code Evid. art. 601. Preliminary questions

concerning the competency or qualification of a person to be a witness shall be determined by the court. La. Code Evid. art. 104(A). Understanding, and not age, is the test of whether a person shall be sworn as a witness. The determination by the trial court that a child is competent to testify as a witness is based not only upon the child's answers to questions testing his understanding, but also upon the child's overall demeanor on the witness stand. The determination as to whether a child has sufficient understanding to testify is entitled to great weight because the trial court has the advantage of seeing and hearing the witness. Therefore, the trial court is vested with wide discretion in determining the competency of child witnesses; and, on appeal, its ruling is entitled to great weight and will not be disturbed in the absence of manifest error. **State in the Interest of D.M.**, 97-0628, pp. 7-8 (La. App. 1 Cir. 11/07/97), 704 So.2d 786, 791.

Prior to voir dire, the trial court held a hearing on the defense motion in limine to test the competency of the minor victims. C.S. was in the fourth grade and answered questions indicating she knew the difference between the truth and a lie. The defense asked her if she believed in unicorns. She replied she did when she was approximately five years old. The defense asked her if she believed in them now. She replied, "A little. I'm still watching the Discovery channel to see." She indicated she was presently ten years old. The defense asked C.S. if she remembered how old she was when she stopped believing in unicorns. The victim indicated she was five when she stopped believing in unicorns. The defense then asked C.S. if she knew why she was "here today." C.S. answered affirmatively, and the defense asked, "Why are you here today?" The State objected, and the court sustained the objection. The defense stated, "That's all the questions I have."

E.W. also testified at the hearing. She was in the third grade and answered questions indicating she knew the difference between the truth and a lie. The defense questioned her about her classes in school, what she was learning about in school, and whether she could read and write. Thereafter, the defense stated, "That's all the questions I have."

M.W. also testified at the hearing. She was in the first grade and answered questions indicating she knew the difference between the truth and a lie. The defense questioned her about what she was learning about in school, and whether she could read and write. The defense asked what M.W. was holding in her hand, and she replied it was her bracelet. The defense asked, "Did you have a teddy bear or a blanket?" M.W. answered affirmatively, and the defense asked, "Why did you bring your blanket?" The State objected, and the court sustained the objection. Thereafter, the defense stated, "That's all the questions I heard [sic]."

The trial court ruled:

The Court finds that in conformity with the requirements of the Code of Evidence that the children, specifically, [M.W., E.W., and C.S.], all possess the competency to testify required by the Code of Evidence, and particularly 601 of the Code of Evidence. The Court finding that the children each know the difference between right and wrong; each are able to understand the seriousness of the matter before the Court; each are competent to testify, and will be allowed to do so if called.

The court asked the defense if it had "further motions," and the defense replied, "That's all."

In the instant case, the particular issues of whether the victims were incompetent to testify due to their lack of memory concerning the offenses, or due to their lack of "proper understanding of any other issue," were not preserved for review. The defendant failed to raise the issue of whether the victims were incompetent to testify due to their lack of memory concerning the offenses either in the motion in limine or during the hearing on the motion. While the motion in limine alleged, "[d]ue to the very young age of each of these witnesses, defendant alleges that each witness lacks the proper understanding to testify as defined in Code of Evidence, Article 601[,]" the defendant failed to develop that claim at the hearing on the motion. At the hearing, he cross-examined the victims concerning their competency and failed to object to any limitation of that cross-examination by the trial court. He concedes the victims "did understand the difference between telling the truth and telling a lie." He fails to specify which, if any, "other issue," made the victims incompetent to testify. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or

sought, the party made known to the court the action that he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. Code Crim. P. art. 841(A). Furthermore, a through review of the record indicates there was no error in the trial court's finding that M.W., E.W., and C.S. were competent to testify.

This assignment of error is without merit.

**CONVICTIONS AND SENTENCES ON ALL COUNTS AFFIRMED.**