ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-022

FEBRUARY TERM, 2016

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Superior Court, Chittenden Unit
	}	Criminal Division
Mark Bergquist	}	
	}	DOCKET NO. 4622-12-15 Cncr
	}	
		Trial Judge: A. Gregory Rainville

In the above-entitled cause, the Clerk will enter:

The State appeals the Chittenden Criminal Division's order denying its motion to hold defendant without bail under 13 V.S.A. § 7553.

The State charged defendant with two counts of aggravated sexual assault on a minor in violation of 13 V.S.A. § 3253(a)(8), a crime that carries a potential life sentence. At arraignment, the State moved to hold defendant without bail pursuant to 13 V.S.A. § 7553. At an evidentiary hearing on the State's motion, the trial court considered the State's evidence, which consisted largely of a portion of a video recording of the seven-year-old victim's interview with a detective. The trial court admitted the video as a sworn statement under Rule 603 of the Vermont Rules of Evidence. Finding that the victim's statement was not supported by any specific medical evidence, and that it was made following questioning by the victim's mother and the mother's own conclusion that the child had been sexually assaulted, the trial court concluded that it could not find that the evidence of guilt was great "where there are uncorroborated statements by [a] child of tender years."

The State appeals, arguing that the trial court improperly made a credibility determination about the victim's statement, which was properly admitted as a sworn affidavit, and improperly considered mitigating evidence that was not admitted into evidence at the hearing. Defendant cross-appeals, arguing that the child victim's statement is inadmissible for two reasons. First, defendant argues that the State cannot proceed by affidavit in a hold without bail hearing. Second, defendant argues that substantively the statement does not qualify as sworn statements under Rule 603, and that the victim was not competent to testify. We address defendant's arguments as to the admissibility of the statement first.

The Vermont Constitution, implemented through 13 V.S.A. § 7553, specifically provides that "[a] person accused of an offense punishable by . . . life imprisonment may be held without bail when the evidence of guilt is great." Vt. Const. ch. II, § 40(1); see State v. Duff, 151 Vt. 433, 436 (1989). The trial court's discretion in determining whether to hold a defendant without

bail is extremely broad, but our review of the evidence relied on by the trial court is de novo. State v. Hardy, 2008 VT 119, ¶ 10, 184 Vt. 618, 620 (2008) (mem.).

In State v. Duff, 151 Vt. at 436, this Court adopted the standard in Rule 12(d) of the Vermont Rules of Criminal Procedure as the standard of review under 13 V.S.A. § 7553. Under that standard, the State must establish "substantial, admissible evidence legally sufficient" on each element of the crime charged "to sustain a verdict of guilty." State v. Turnbaugh, 174 Vt. 532, 534 (2002) (mem.). Defendant argues that because this Court imported the requirement that the State produce "admissible evidence," but did not expressly include affidavits, it thereby excluded the possibility of relying on affidavits to satisfy this evidentiary requirement. The Court disagrees. In applying the standard adopted in Duff, this Court has explicitly directed the State to establish the elements of the offense " 'by affidavits, depositions, sworn oral testimony, or other admissible evidence.' " State v. Blackmer, 160 Vt. 451, 454 (1993) (citing Duff, 151 Vt. at 439). Our focus in Duff was on what constitutes "admissible evidence," rather than on establishing an inclusive list of such items. As such, the only requirement imposed on the State is that the evidence offered in a hold without bail hearing be admissible. In service of this standard, we have repeatedly considered affidavits offered by both parties. Turnbaugh, 174 Vt. at 534. For that reason, the trial court's reliance on the victim's affidavit was without error.

Defendant also raises two substantive challenges to the State's evidence. First, defendant argues that the victim's statement is inadmissible. At the hearing, defendant argued that the victim's statement was inadmissible as hearsay because the child victim was available to testify. The State responded that it did not intend to introduce the statement under Rule 804(a) of the Vermont Rules of Evidence, but rather as a sworn statement under Rule 603. The trial court admitted the statement as a sworn statement. Defendant now argues that the victim's statement would not be admissible at trial unless under Rule 804(a), and that furthermore, the victim's statement is inadmissible as a sworn statement because the victim failed to make an express pronouncement that she was telling the truth.

The admissibility requirement in Duff refers to admissibility of the evidence at trial. This depends on (1) whether the State has shown evidence that can fairly and reasonably convince a factfinder beyond a reasonable doubt that defendant is guilty, and (2) whether the State has shown this evidence will be admissible at trial. Blackmer, 160 Vt. at 454. Here, defendant contends that the trial court ignored the second step, relying on the child victim's recorded statement, which was inadmissible under Rule 804(a). He contends that because the trial court admitted the statement as a sworn statement, the bail hearing record does not demonstrate whether the portion of the recorded statement will be admissible at trial. Again, the Court disagrees.

The trial court did consider both steps in determining whether the statement was admissible as a sworn statement for purposes of a weight of the evidence hearing. Rule 603 requires a witness to "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken [her] conscience and impress [her] mind with [her] duty to do so." V.R.E. 603. After reviewing the transcript, it is clear that the interview contains statements by the victim, a seven year old, that sufficiently approximate an oath.

When asked by the interviewing detective if she thought she could follow the rule "always tell the truth," the victim offered an honest response, stating, "I don't know." When the detective further explained the rule to her, offering an example of the truth, the victim

demonstrated the ability to differentiate between the truth and a lie. Following this demonstration, when asked by the detective what the number one rule was, the victim answered, "tell the truth." When asked what she would say if the detective made a mistake, like calling her by the wrong name, the victim responded that she would tell her, "no that's not right," and provide her correct name. Considering this conversation in its entirety, it is clear that the victim demonstrated that she was aware of the rules, which were that she tell the truth; that she demonstrated an understanding of the difference between a truth and a lie; and that she indicated that if she heard something that was not the truth, she would correct it. This is sufficient under Rule 603. See Commonwealth v. Amirault, 677 N.E.2d 652, 672 n.22 (Mass. 1997) (explaining that child witnesses "did not take the usual oath, but were instead asked to make a promise of truthfulness which was within the children's understanding"). For this reason, the trial court's admission of the statement as a sworn statement was not in error. The recorded statement itself may or may not ultimately be admitted at trial, depending upon the manner of proof, but the evidence contained therein, namely the testimony of the child, would be admissible at trial either from the child herself or by some other means.

Defendant also argues that the State failed to demonstrate that the alleged victim was competent to testify. In State v. Stacy, 104 Vt. 379 1932), abrogated by State v. Badger, 141 Vt. 430 (1982), this Court adopted a procedure to determine whether a child testifying demonstrates sufficient understanding and comprehension. In that case, we held that the question of the competency of a witness is a preliminary one for the court to decide, and will not be disturbed unless it appears to have been erroneous or founded upon an error in law. Id. Under Rule 601(a) of the Vermont Rules of Evidence, the presumption is that "[e]very person is competent to be a witness." This presumption applies to children of any age. See 27 Wright & Gold, Federal Practice and Procedure: Evidence, § 6005 (2d ed.) (explaining that modern law imposes no age restrictions on testimony of child witness). Here, the seven year old victim demonstrated an understanding of the difference between lying and telling the truth, and what to do if something is a lie. We find no error in the trial court's reliance on the victim's testimony.

Finally, we address the State's motion. The State argues that in characterizing the victim's statements as "uncorroborated statements by [a] child of tender years," the trial court improperly made a credibility determination about the evidence. Further, the State argues that the trial court improperly considered mitigating evidence that was not admitted into evidence when it considered the fact that the victim's statement was not supported by any specific medical evidence, and that it was made following questioning by the victim's mother.

Under the Rule 12(d) standard, the trial court must consider whether the evidence, taken in the light most favorable to the State, "can fairly and reasonably convince a factfinder beyond a reasonable doubt that the defendant is guilty." State v. Baker, 2015 VT 62, ¶ 2 (mem.). It is not the role of the trial court to judge the State's case, but rather to determine "whether the facts adduced by the State, notwithstanding contradiction of them by defense proof, warrant the conclusion that if believed by a jury they furnish a reasonable basis for a [guilty] verdict." Turnbaugh, 174 Vt. at 535 (citation omitted).

Here, defendant is charged with two counts of aggravated sexual assault on a minor in violation of 13 V.S.A. § 3253(a)(8). When reviewed in the light most favorable to the State, the victim's statements that defendant "put his gina" in her and her explanation of what that meant lead me to conclude that, if believed by a jury, the statements would be sufficient to support a conviction on this charge. Ultimately, any flaws in the interview process itself go to the weight

that evidence should be given at trial, and not whether it can be used to meet the State's burden in a bail review hearing. See Id. at 534, 811 A.2d at 665 (holding that court reviewing bail must not seek to weigh evidence, but rather must determine only if such evidence is sufficient to sustain guilty verdict). By describing the victim's statement as "an uncorroborated statement by a child," the trial court went beyond the appropriate Rule 12(d) analysis, which was to determine whether, without consideration of modifying evidence, the state had sufficient evidence by which the defendant could be found guilty. The court found the statement to be admissible, but then sought to discount it given the child's age and lack of corroborating evidence. Whether the State may ultimately obtain a conviction based only upon the evidence considered at a weight of the evidence hearing is not a proper consideration, once the State has introduced sufficient evidence by which the defendant could be found guilty when looking at that evidence in the light most favorable to the State. The court misapplied the standard applicable in a weight-of-the-evidence hearing. Once the court found the statement to be admissible, since it established the elements of the crimes charged, it was sufficient at this stage of the proceedings to meet the weight-of-the-evidence test. For this reason, the Court reverses the trial court's finding that the weight of the evidence was not great.

Even though the evidence of guilt is great, the trial court may nonetheless, in the exercise of its discretion, admit the defendant to bail. Blackmer, 160 Vt. at 458. "[I]n cases where the constitutional right to bail does not apply, the presumption is switched so that the norm is incarceration and not release." Id. In finding that the evidence of guilt was not great, the trial court did not reach the issue of whether, in the exercise of its discretion, and despite the presumption of incarceration, bail should be allowed.

Reversed and remanded for a hearing to consider whether, in light of the evidence of guilt being great, defendant should be admitted to bail in the exercise of the court's discretion.

FOR THE COURT:

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Harold E. Eaton, Jr.

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