

ARKANSAS COURT OF APPEALS

DIVISION I
No. CACR12-846

JIMMY DON TURNBOUGH
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered April 17, 2013

APPEAL FROM THE JOHNSON
COUNTY CIRCUIT COURT,
[NO. CR-2011-154]

HONORABLE WILLIAM M.
PEARSON, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Chief Judge

Jimmy Don Turnbough was convicted of rape on April 20, 2012, in the Johnson County Circuit Court. On appeal he argues that the trial court erred by failing to hold (1) a competency hearing for the child victim (2) a hearing to determine whether a child witness had been influenced and (3) a hearing pursuant to Arkansas Rule of Evidence 803(25) (2012). We affirm.

At the trial, Amanda Contreras testified that she lived in a house with her husband, their eight-year-old son, M.C., and their seven-year-old daughter, K.C. In late 2010, appellant, her husband's relative, came to live with them. Amanda testified that she evicted appellant from their home in May 2011 after he told her that he had touched M.C.'s "butt." The next day, M.C. told Amanda what had taken place, and Amanda called the police.



M.C. testified that, during the time appellant lived there, appellant took off M.C.'s clothes and "started sucking my private part." Further, that appellant "stuck his private in my back private" and "made me put my mouth on his private." M.C. stated that "several" such encounters took place, during which, M.C. saw "white stuff" come out of appellant's "private."

M.C.'s sister, K.C., testified that she saw appellant sucking "Bubba's privates" in her bedroom. Amanda testified that her daughter K.C. did not say that she had seen anything until about two weeks before trial.

Three days before his trial began, appellant filed a motion to "determine the testimonial competency" of both M.C. and K.C. The motion asked that a "voir dire examination" be scheduled to make that determination. At a hearing before the trial began, appellant asked the court to make a pretrial determination of whether the child's mother had unduly influenced K.C.'s testimony and whether M.C. was competent to testify. The trial judge ruled that he could make the competency determination when M.C. testified, and, that unless appellant could point to some particular problem with M.C., there was no reason or requirement that the court make the competency determination prior to trial.

When M.C. testified at trial, the prosecutor asked him if he understood the difference between telling the truth and telling a lie. M.C. replied that he did, stating that a person is supposed to tell the truth. M.C. stated that it was true that the prosecutor was holding a blue pen and that it was a lie that the prosecutor was wearing an orange shirt. M.C. said that he



was able to tell the jury the truth about what had happened. Based on those responses and responses M.C. gave to other questions before the competency inquiry began, the trial court found that M.C. had the ability to understand the obligation of the oath and the consequences of false swearing, that he had the ability to receive and retain accurate impressions, and that he had the capacity to “transmit a reasonable statement of what he has seen, felt, or heard.” Appellant did not object to the court’s finding or request to question M.C. further about the matter.

After K.C.’s testimony that she had witnessed the abuse, the prosecutor asked her if she were telling the truth. K.C. said that she was. Defense counsel cross-examined K.C., and she admitted that at first she told her mother that she had not seen anything, but had recently decided that she did see something. The prosecutor then asked if anyone had told her what to say or if she was describing something she had actually seen. K.C. said that she was describing something she had seen. She denied that her mother had coaxed her or told her what to say.

The jury convicted appellant of rape and sentenced him to a term of 480 months in the Arkansas Department of Correction. He filed a timely notice of appeal, and this appeal followed.

I. *Applicable Law*

The competency of a child, in a case involving a sexual offense, is a matter primarily for the trial court to decide, as the trial judge is best able to assess the child’s intelligence and understanding of the necessity for telling the truth. *Laughlin v. State*, 316 Ark. 489, 872



S.W.2d 848 (1994). The question of a witness's competency is a matter lying within the sound discretion of the trial court, and in the absence of clear abuse of that discretion, the appellate courts will not reverse such a decision on appeal. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001).

The trial court must begin with the presumption that every witness is competent to be a witness; the party alleging that a witness is incompetent has the burden of persuasion. *Id.* Competency, as referred to in Arkansas Rule of Evidence 601 (2012), is not to be confused with reliability. *Byndom, supra.* Testimony by competent witnesses may be presented to the finder of fact. *Id.* The jury then evaluates the evidence, considers the credibility of the witness, and arrives at its conclusion. *Id.* The criteria for determining whether a witness is competent is (1) the ability to understand the obligation of an oath; (2) an understanding of consequences of false swearing; (3) the ability to transmit a reasonable statement of what has been seen; and (4) the capacity to transmit a reasonable statement of what has been seen, felt, or heard. *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). Mere inconsistencies or hesitation in testimony may affect credibility but not the competency of a witness. *Id.*

II. *Competency to Testify*

Appellant first argues that the trial court erred by denying his motion to have a pretrial determination of the complainant's competency. He argues on appeal that children as a class are more susceptible to suggestion than adults, and he contends that he is concerned because of a child's immaturity, vulnerability, and impressionability. He cites *State v. Michaels*, 642



A.2d 1372 (N.J. 1994), where the New Jersey Supreme Court set forth a method of challenging children's statements and their reliability. Finally, he asserts that the trial court ruled that M.C. was competent to testify before defense counsel had the opportunity to voir dire the witness. He claims that he was, therefore, denied the opportunity to pursue the issue and was denied the right to a fair trial and due process.

Appellant cites no authority that requires the court to make a competency determination before trial, and appellant did not object to the competence of the victim's testimony at trial, so no error occurred. When appellant failed to object to the trial court's finding regarding M.C.'s competency, the issue was not preserved for appellate review. *Rye v. State*, 2009 Ark. App. 839, 373 S.W.3d 354. Even though appellant argues on appeal that the trial court ruled before he had an opportunity to voir dire the witness, appellant never asked at trial to do so and did not object to the trial court making its ruling without his having a chance to question M.C. This court will not address the competence of a child witness for the first time on appeal when no objection was made below. *See Rye, supra*.

III. *Undue Influence over Child's Testimony*

Appellant next argues that the trial court erred by failing to grant his motion for a "taint" hearing before trial. Appellant sought a hearing because the anticipated witness, K.C., had made no statements about the issues in the case for two years and had only recently come forward to her mother. Appellant contends that the reliability of the testimony of children of such an age, particularly in light of the possibility of coaching or improper influencing of testimony, should be established prior to trial. He cites *Michaels, supra*, where



the New Jersey court noted that conversation with parents was a concern. He contends that failure to hold a pretrial hearing to determine whether the child's testimony was tainted was an abuse of discretion.

We hold that there was no error because the trial court was not required to hold a pretrial hearing to determine whether a child witness's testimony might be reliable. Competency is not to be confused with reliability. *Byndom, supra*. Credibility determinations are within the jury's province. *Id.*

IV. Hearsay

Finally, appellant argues that the trial court abused its discretion by allowing Amanda Contreras, M.C.'s mother, to testify about the statements M.C. had made to her. Defense counsel objected at trial, citing hearsay. The trial court overruled the objection after the prosecutor argued that the testimony was an exception to the hearsay rule as either an excited utterance or a present-sense impression.

Appellant argues that the trial court overruled the objection, relying on the present-sense-impression exception. He maintains that the trial court abused its discretion in so ruling because no testimony was given or obtained to set the time of the statements made to Amanda Contreras in relation to the time of the events to which the statements related. He also contends that under Arkansas Rule of Evidence 803(25)(A), before the statement made by a child under ten years of age that involves a sexual offense, the trial court must find in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness.



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Regardless upon which exception the trial court relied, any error in admitting the testimony was harmless because M.C. testified at trial, was subject to cross-examination, and his testimony was consistent with what Amanda said he told her. The right of confrontation is not violated where testimonial hearsay is admitted against the defendant and the declarant is present at trial and available as a witness. *Davis v. State*, 2011 Ark. 373. Further, the availability of a declarant for cross-examination renders harmless any error caused by the admission of hearsay. *Dixon v. State*, 2011 Ark. 450, 385 S.W.3d 164.

Finally, noting the child's consistent testimony, Amanda's testimony is not encompassed within Rule 803(25), as it was not "inconsistent with the child's testimony." Moreover, appellant never requested a hearing under Rule 803(25); thus, his claim that the trial court erred by not holding a hearing pursuant to that rule cannot be considered for the first time on appeal. *Buford v. State*, 368 Ark. 87, 243 S.W.3d 300 (2006).

Affirmed.

VAUGHT, J., agrees. PITTMAN, J., concurs.

John Burnett, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.