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MAY 2 1985

JAMES A. ROCHE, JR.

CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

STATE OF MISSOURI,  
Plaintiff-Respondent

v.

RODNEY LEE LINCOLN,  
Defendant-Appellant

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No. 47955

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APPEAL TO THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT FROM THE CIRCUIT COURT  
OF THE CITY OF ST. LOUIS, DIVISION NO. 23  
HONORABLE JACK L. KOEHR, JUDGE

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APPELLANT'S ADDITIONAL BRIEF

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## STATEMENT OF FACTS

This is an additional brief on the issue of the competency of a child witness, Melissa Davis, eight years of age. In this additional brief, the legal file will be designated (L.F.); the transcript of the trial proper will be abbreviated (T.) and (Supp.T.); and the transcript of the competency hearing (Comp.H.T.).

This issue was preserved for appellate review in defendant's motion for new trial. Relevant portions of the new trial motion read as follows:

24. That the Learned Trial Court erred in permitting 8 year old witness Melissa Davis to testify in this cause, in adopting the ruling of the court in a prior mistrial as to competency, and in finding this child to be competent, credible witness.

(L.F. 42).

POINT RELIED ON

THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT AN EIGHT-YEAR OLD CHILD WITNESS, MELISSA DAVIS, WAS COMPETENT TO TESTIFY AT TRIAL BECAUSE SAID CONCLUSION WAS IMPROPER AND PREJUDICIAL TO DEFENDANT IN THAT DAVIS' MEMORY WAS INSUFFICIENT TO RETAIN AN INDEPENDENT RECOLLECTION OF OBSERVATIONS MADE.

Hildreth v. Key, 341 S.W.2d 601 (Mo.App. Spfld.D. 1960);

State v. Parton, 487 S.W.2d 523 (Mo. 1977);

State v. Robertson, 480 S.W.2d 845 (Mo. 1972);

State v. Young, 477 S.W.2d 114 (Mo. 1972);

Benjamin v. Benjamin, 370 S.W.2d 639 (Mo.App. S.L.D. 1963).

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DETERMINING THAT AN EIGHT-YEAR OLD CHILD WITNESS, MELISSA DAVIS, WAS COMPETENT TO TESTIFY AT TRIAL BECAUSE SAID CONCLUSION WAS IMPROPER AND PREJUDICIAL TO DEFENDANT IN THAT DAVIS' MEMORY WAS INSUFFICIENT TO RETAIN AN INDEPENDENT RECOLLECTION OF OBSERVATIONS MADE.

At the first trial, which ended in a mistrial, the trial court conducted a voir dire of Melissa Davis (Comp.H.T. 1-10). Its findings were adopted by the second trial court (Supp.T. 80-81).

After the competency hearing, the court asked the prosecutor and defense counsel if there were other questions that needed to be addressed before determining whether Melissa Davis was competent to stand trial. The following discussion was held at the bench:

THE COURT: I've conducted the examination to this point. If you gentlemen have any suggested questions that you wish to ask?

\* \* \*

[Defense Counsel]: Judge, I think you would need to ask her why a lie is bad and truth is good. I think you need to ask her if she thinks any consequences will fall upon her if she does tell a lie. Why she would be motivated to tell the truth.

THE COURT: Anything else?

[Defense Counsel]: I would also suggest that with all of the social history

of the child, the psychological and psychiatric background and studies of the child, the fact that there is a [sic] verified in the records some suicidal indication and other problems which the child may have had which may or may not be attached to the trauma, I think all of those things which the court has to consider.

THE COURT: For purposes of this hearing?

[Defense Counsel]: Yes, sir.

THE COURT: And how do you propose that I consider those, or that I get into those?

\* \* \*

[Defense Counsel]: I think you would need to look to sources in addition to the child.

THE COURT: All right. In other words, you're not suggesting that I ask a series of questions of this witness here in order to delve into that.

[Defense Counsel]: No. I suppose none of us are trained in that area.

THE COURT: I certainly am not. . . .

\* \* \*

. . . I believe that I've asked sufficient questions with regard to the witness here, and I have asked questions with regard to whether or not she understands the obligation to speak the truth. I believe that she clearly understands that obligation, is aware of that obligation and is attempting to speak the truth in regard to her answers. I have also covered her ability to observe at the time of the incident. She was aware of what went on apparently. She was able to describe the room in short detail. I did not get into great detail as to who was there; that a man was present and she knew him. She has memory to recall the events as to where she lived, the nature of the

residence, where she lived, her mother, her sister and so forth; where she went afterwards, that she was treated by a doctor named Tom Alkirk. I believe, therefore, she has memory sufficient to retain the events that she experienced back last year and I believe it's quite obvious that this witness has the capacity to translate that memory into words and that she has done so. I believe that she clearly comports and complies with the four elements that are necessary in determining the competency of a witness, particularly under [Hildreth v. Key]. . . It's my responsibility to make the determination and I believe that this witness here is a competent witness to testify.

(Comp.H.T. 10-13).

Under Missouri law, an accused must be protected from testimony by a child witness who may have lacked the mental capacity to observe an event and later truthfully relate what, in fact, was observed. State v. Parton, 487 S.W.2d 523, 525 (Mo. 1977). The effect of Section 491.060 (2), R.S.Mo., is to create a presumption that a child under the age of ten is not competent to testify. Benjamin v. Benjamin, 370 S.W.2d 639, 642 (Mo.App. S.L.D. 1963). Similarly, a person over ten years of age is presumed competent to testify. Id. Both presumptions are rebuttable. State v. Young, 477 S.W.2d 114, 117 (Mo. 1972).

The task of determining the competency of a person of tender years is left to the sound discretion of the trial court. Id. The court must establish the child's:

(1) 'present understanding of or intelligence to understand, an obligation to speak the truth';

(2) 'mental capacity at the time of the occurrence in questions truly to observe and to register such occurrence';

(3) 'memory sufficient to retain an independent recollection of the observations made'; and

(4) 'capacity truly to translate into words the memory of such observations.'

State v. Robertson, 480 S.W.2d 845, 846-47 (Mo. 1972). The burden of proving capacity and competency of any such witness rests upon the party offering the witness. Id. The Robertson test is applied to the instant case.

First, defendant does not challenge the trial court's finding as to the first element under Robertson, concerning Davis' understanding of or intelligence to comprehend, on instruction, an obligation to speak the truth. Second, defendant does not question the court's conclusion on the second element, the witness' mental capacity at the time of the occurrence truly to observe and to understand the event. Third, neither does defendant challenge the trial court's belief, on the fourth element, that Davis had the capacity to translate into words the memory of such observation.

Defendant does, however, question the lower court's conclusion as to the third element, in that Davis' memory was insufficient to retain an independent recollection of the observations made:

. . . '(t)hings are told to persons, till they verily believe that they witnessed them; and we repeat events until we are ready to swear in the utmost sincerity, that

we are spectators of their occurrence.' A fortiori, '(t)he force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood'; and, 'without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in any actually existing fact.'

Hildreth v. Key, 341 S.W.2d 601, 610 (Mo.App. Spfld.D. 1960)

(Citations omitted) (Emphasis supplied). The absence of independent recollection presents a special problem with children witnesses:

'In children of tender age no reasonable person would expect a complete power of discriminating between his means and sources of knowledge; and more or less undesigned coloring and miscoloration is almost inevitable.' Thus, with respect to the third element in the quoted test of competency, it becomes eminently proper, in fact necessary, to ascertain whether the child has an independent recollection of the occurrence; and, the longer the time interval between the occurrence and the trial, the more extensive and the more penetrating the judicial inquiry appropriately may be.

Id. (Emphasis supplied).

In the instant case the first trial court did not question Melissa Davis, age eight, to determine whether her recollection of the event was independent. At the competency hearing, where identity was the key issue, the court admitted that it "did not get into great detail as to who was there; that a man was present and she knew him." (Comp.H.T. 12). The tragic event occurred a year and one-half prior to the date of the hearing. Under Hildreth the longer the time between the occurrence and



trial "the more extensive and the more penetrating their judicial inquiry." 341 S.W.2d at 610. There was credible evidence negating defendant's responsibility which obviously created reasonable doubt since the first jury was unable to reach a verdict (T. 2).

At the second trial, the court failed to examine Davis at all to determine whether she was competent to testify. If there had been any corroborating identification testimony, the court's failure to explore the independentness of Davis' testimony may not have been so seriously prejudicial. On the contrary, Davis was the only eyewitness (her younger sister, Renee Tate, age four, was incompetent to testify). Davis' testimony was the sole evidence that linked defendant to the crime.

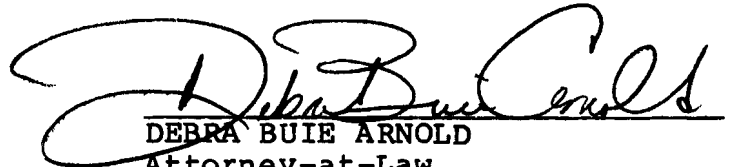
This is certainly not a case involving overwhelming evidence against the accused. As pointed out in defendant's initial brief, even at the second trial, where Davis' well-rehearsed memory was "much clearer", the jury deliberated more than six hours before returning a verdict of guilty of a lesser homicide (T. 962-64). Because neither the first trial court nor the second trial court adequately explored Davis' memory to determine whether it was sufficient to retain an independent recollection of observations made, a new trial is required.

CONCLUSION

The trial court's action denied defendant his right to a fair trial. The trial court, by failing to adequately explore the child witness' ability to independently recollect the event, denied defendant his right to a fair trial.

WHEREFORE, defendant respectfully prays this Honorable Court to set aside and hold for naught the finding and verdict of the jury and grant a directed verdict of acquittal, or in the alternative, a new trial or such other relief as may be appropriate.

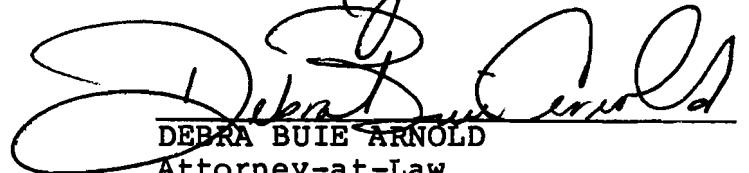
Respectfully submitted,

  
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AFFIDAVIT OF SERVICE

Two copies of the foregoing Appellant's Additional Brief were mailed to the Attorney General, State of Missouri, Jefferson City, Missouri 65102 on this 2nd day of May, 1985.

  
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Subscribed and sworn to before me this 2<sup>nd</sup> day of May, 1985.

  
Notary Public

MARJORIE BOTTERMULLER  
NOTARY PUBLIC STATE OF MISSOURI  
ST. LOUIS CO.  
MY COMMISSION EXPIRES NOV 6 1985

NO. 47955

S/R  
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**JAMES A. ROCHE, JR.**  
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STATE OF MISSOURI,

Respondent,

vs.

RODNEY LEE LINCOLN,

Appellant.

Appeal from the Circuit Court of the City of St. Louis, Missouri  
Division No. 23  
Honorable Jack L. Koehr, Judge

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COUNTY OF COLE )

FAYE BERRY, duly sworn and deposed, states that she/he is an employee of the Office of the Attorney General of Missouri and has mailed, FIRST CLASS POSTAGE PREPAID, the following number of copies of respondent's brief in

State vs. Rodney L. Lincoln

NO. 47955, to the following persons on  
June 4, 1985.

10 copies to: Missouri Court of Appeals, Eastern District, 111 North 7th St., St. Louis, Mo. 63101

2 copies to: Debra Buie Arnold, 1320 Market St., St. Louis, MO 63103

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*Faye Berry*

Subscribed and sworn to before me this 4th day of June, 1985.

*David Baker*  
Notary public for the State of Missouri

My commission expires on the 17th day of November, 1987.

I N D E X

	Page
Statement of Facts -----	1
Point Relied On -----	2
Argument -----	3
Conclusion -----	9

STATEMENT OF FACTS

Respondent adopts his Statement of Facts as set forth in his original brief. Additional facts pertinent to this issue will be more fully developed under the Argument portion, as needed.

For the purposes of this brief, the following abbreviations will be used: "L.F." designates legal file; "C.H." designates the competency hearing and trial testimony of Melissa Davis held during the first trial; "Tr." designates the transcript of the second trial.

POINT RELIED ON

THE TRIAL COURT COMMITTED NO ERROR, PLAIN OR OTHERWISE, IN FINDING EIGHT-YEAR OLD MELISSA DAVIS COMPETENT TO TESTIFY BECAUSE THE RECORD SUPPORTS SHE HAD MEMORY SUFFICIENT TO RETAIN AN INDEPENDENT RECOLLECTION OF OBSERVATIONS MADE IN THAT SHE WAS ABLE TO TESTIFY AS TO MATTERS PECULIARLY WITHIN HER KNOWLEDGE AND DEMONSTRATED HER ABILITY TO TESTIFY AS TO PRESENT AND PAST FACTS. FURTHER, THE SECOND TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN ADOPTING THE FIRST COURT'S FINDING AS TO MELISSA'S COMPETENCY BECAUSE NO FURTHER INQUIRY WAS NECESSARY IN THAT THE COMPETENCY HEARING HAD BEEN HELD LESS THAN TWO MONTHS BEFORE THE SECOND TRIAL BEGAN.

Hildreth vs. Key, 341 S.W.2d 601 (Mo.App., Spr.D. 1960);

State vs. Hastings, 477 S.W.2d 108 (Mo. 1972);

State vs. Lock, 625 S.W.2d 631 (Mo.App., E.D. 1981);

State vs. Brookshire, 353 S.W.2d 681 (Mo. 1962);

State vs. Lewis, 637 S.W.2d 93 (MO.App., E.D. 1982);

State vs. Gadberry, 638 S.W.2d 312 (Mo.App., E.D. 1982);

State vs. Smith, 641 S.W.2d 463 (Mo.App., E.D. 1982);

State vs. Grady, 649 S.W.2d 240 (Mo.App., E.D. 1983).



## ARGUMENT

THE TRIAL COURT COMMITTED NO ERROR, PLAIN OR OTHERWISE, IN FINDING EIGHT-YEAR OLD MELISSA DAVIS COMPETENT TO TESTIFY BECAUSE THE RECORD SUPPORTS SHE HAD MEMORY SUFFICIENT TO RETAIN AN INDEPENDENT RECOLLECTION OF OBSERVATIONS MADE IN THAT SHE WAS ABLE TO TESTIFY AS TO MATTERS PECULIARLY WITHIN HER KNOWLEDGE AND DEMONSTRATED HER ABILITY TO TESTIFY AS TO PRESENT AND PAST FACTS. FURTHER, THE SECOND TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION IN ADOPTING THE FIRST COURT'S FINDING AS TO MELISSA'S COMPETENCY BECAUSE NO FURTHER INQUIRY WAS NECESSARY IN THAT THE COMPETENCY HEARING HAD BEEN HELD LESS THAN TWO MONTHS BEFORE THE SECOND TRIAL BEGAN.

In his supplemental point, appellant's claim of error surrounds the issue of finding eight-year old witness and victim, Melissa Davis, competent to testify. The original trial court made the finding after holding a competency hearing. The pertinent facts about Melissa are as follows: On the date of the crimes, Melissa was seven years six months old. At the time of the competency hearing and first trial testimony, Melissa was eight years ten months old. The second trial was held less than two months later, approximately eight days before Melissa's ninth birthday.

Appellant first claims the original trial court erroneously found the child to be competent based on the allegation that the trial judge did not sufficiently examine the child as to her independent recollection of what she observed (App. Br. at 6). Appellant seems to make the further claim that the second trial court erred in adopting the first court's ruling as to competency (App.Br. at 8).

Before addressing the merits of appellant's claim, respondent argues that this issue has not been preserved for review. At the first trial, after the judge completed examining the child, the court asked if either side had any suggested questions that they wanted him to ask (C.H. 10). Defense counsel stated

that he felt the judge should inquire whether she knew why a lie was bad and truth was good and whether she thought any consequences would fall if she did tell a lie (C. H. 10). Defense counsel also suggested questions concerning the child's psychological background which he and the court agreed were not properly asked of this child (C.H. 10-11). When the court asked if there was anything else, both parties said no (C.H. 11-12). The court then made its ruling (C.H. 12-13). A short discussion was held concerning psychological background information (C.H. 13-14). The court then stated it had made its determination (C.H. 14). The defense counsel said "Okay" (C.H. 14). The state then immediately started with its direct examination of Melissa (C.H. 14). Defense counsel did not object.

Just prior to conducting voir dire during second trial, the second judge adopted the prior ruling on Melissa's competency (Tr. 5). At the same time, the judge accepted the prior findings as to the testimony of a psychologist concerning the observation, recall, etc., of any witness (Tr. 5). Defense counsel interrupted and clarified this went to Elizabeth Loftus and Howard Timm (Tr. 5). The judge said yes (Tr. 5). The court subsequently stated it also adopted the prior ruling on appellant's prior persistent and dangerous offender status (Tr. 6). Defense counsel then stated, "for the record, as to each of those three announcements by the court, I would object so that the record would show the objection" (Tr. 6). The state then asked, "You are not saying that Judge Gallagher didn't find that, though, are you?" (Tr. 6). Defense counsel said no (Tr. 6). Then, at trial, appellant made no objection when the witness in question was called to testify nor at any time during her examination (Tr. 314-389). In his motion for new trial, appellant then makes the objection that the trial court erred in permitting this witness to testify, in adopting the prior ruling as to her competency and in finding the child to be competent and credible (L.F. 42).

Based on these facts, this issue has not been preserved for several reasons. First, appellant waived his objection to the child's competency to testify by not voicing his objection at the time the witness began to testify, at either trial. State vs. Hastings, 477 S.W.2d 108, 111 (Mo. 1972). Second, a point in a motion for new trial and in appellant's brief must be based on objections made and the reasons assigned at the time the error occurs. State vs. Brookshire, 353 S.W.2d 681, 688 (Mo. 1962); State vs. Lewis, 637 S.W.2d 93, 97 (Mo.App., E.D. 1982). The objection must be specific and give the valid reasons so that the court may have the opportunity to rule on it. State vs. Gadberry, 638 S.W.2d 312, 313 (Mo.App., E.D. 1982).

Under these principles of law, appellant's issue is not preserved. If there is any basis in the record of the competency hearing that appellant made a specific objection, which respondent maintains he did not, it could only be to the elements of truthfulness (C.H. 10). On appeal, appellant is employing a different theory. Appellant sets forth the four elements a trial court must find in ruling on a child's competency. Briefly, these are: 1) present understanding of or intelligence to understand, an obligation to speak the truth; 2) mental capacity at the time of the occurrence to observe and register such occurrence; 3) memory sufficient to retain an independent recollection of the observations made; and 4) capacity to translate into words the memory of such observations. Hildreth vs. Keith, 341 S.W.2d 601, 609 (Mo.App., Spr.D. 1960). On appeal, appellant concedes the sufficiency of the questioning as to the element of truth (App.Br. at 6). He limits his challenge to the sufficiency of the questioning as to the child's independent recollection. This presents a different theory and, therefore, presents nothing which may properly be reviewed. State vs. Lewis, supra at 984. But, the second reason appellant has preserved nothing under the above-stated principles of law is because of the general objection that the second trial

to the court's adoption of the prior ruling (Tr. 6). No reasons were given, either at trial or in his motion for new trial, as to why he objected. Indeed, it is not until one works through the rationale of appellant's argument that a reason is presented. That reason seems to be that the cited case law states it is proper and necessary to ascertain whether a child has independent recollections and the longer the interval between the occurrence and the trial, the more extensive and penetrating the judicial inquiry should be (App.Br. at 7, citing Hildreth vs. Keith, supra at 610). Appellant states the second trial court's failure to examine Melissa was seriously prejudicial because the child's testimony was the sole evidence which linked appellant to the crime (Tr. 8). Not only do these facts illustrate that merely a general objection was made, but they illustrate that the reason alleged as error is fully dependent upon the different theory, that is, insufficient questioning concerning Melissa's independent recollection. For these reasons, appellant's point has not been preserved and should not be reviewed. Hildreth vs. Key, supra at 613; State vs. Hastings, supra at 111.

However, regardless of the standard of review, appellant's point must fail because the record reflects that there was a basis for finding the particular element appellant is now challenging. The finding of competency is a matter within the trial court's discretion and will be overturned only upon a showing of clear abuse of that discretion. State vs. Smith, 641 S.W.2d 463, 466 (Mo.App., E.D. 1982). Not only does review entail examining the preliminary hearing, but examining the trial testimony also. State vs. Grady, 649 S.W.2d 240, 243 (Mo.App., E.D. 1983). Before briefly reviewing this testimony, respondent reminds the court that, due to the fact that sexual offenses were committed upon this child, in addition to finding the bloody body of her mother, she was testifying "about a subject that naturally leaves an impression upon [her] memory of a much more lasting character than if it were something that [she] merely saw or observed." Hildreth vs. Key, supra at 611-612.

At the competency hearing, Melissa was asked her name, age, where she currently lived, with whom, and where she went to school (C.H. 1-2). She was also asked what grade she was in, her subjects and her teacher's name (C.H. 2). She was asked about telling the truth (C.H. 2-3). She remembered the street where she lived the previous year, who lived there and what school she attended there (C.H. 4). She remembered where everyone slept in the house and about various other rooms (C.H. 6). She remembered where she was when she got hurt and gave some details as to the man who hurt her and her sister (C.H. 7). She also gave details as to her attempt to hide (C.H. 8). She remembered the name of the hospital where she went and the doctor's first name (C.H. 8). She was also able to relate the details of her contacts with the police after the incident (C.H. 9).

Based on these responses, the trial court found the child competent under the four elements of Hildreth (C.H. 12-13). This questioning was even more extensive as that apparently conducted in State vs. Locke, 625 S.W.2d 631, 632-633 (Mo.App., E.D. 1981), where the child witnesses were found to be competent.

Melissa's trial testimony is replete with factual details. For example, at the first trial, Melissa explained how she found her mother's body (C.H. 16), described a park across from appellant's house (C.H. 17-18), her description of the sexual assault and the stab wounds she received (C. H. 20-21). This transcript contains numerous other details requiring an independent recollection. At the second trial, which was held less than two months after this original testimony, Melissa testified as to these same matters (Tr. 317-321, 325). Again, her testimony at the second trial is replete with numerous other details requiring an independent recollection.

Melissa's ability to describe these matters clearly illustrates she had the memory sufficient to retain an independent recollection. However, appellant

seems to argue that it is not the memory which he challenges, but that a showing was not made that she independently recalled these details. The answer to this is in the fact that Melissa's clear explanation of the events at the time of the crime were observed solely by Melissa and her four-year old sister. Unless appellant suggests her younger sister was advising her what happened, there was no one else present who could have told her these details.

Appellant complains of the fact that the second judge did not independently question Melissa. The adoption of the prior ruling as to her competency was made less than two months after the first judge found Melissa to be competent. The transcript of the competency hearing and testimony which contained the previous ruling had to be before the second judge. It is entirely reasonable for the judge to decide there would be no point in reexamining the child given the short time span since her original examination. As such, respondent asserts this was a proper exercise of his discretion.

When the details to which Melissa testified is coupled by the gravity of the events in which Melissa was involved, the record fully supports the finding that she was competent to testify. Therefore, appellant's point should be denied.

CONCLUSION

For the foregoing reasons respondent request that appellant's conviction be affirmed.

Respectfully submitted,

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