

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**No. 2009-0241**

**State of New Hampshire**

**v.**

**David Proverb**

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**Appeal Pursuant to Rule 7 from Judgment  
of the Hillsborough County Superior Court / South**

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**BRIEF FOR THE DEFENDANT**

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(15 Minutes Oral Argument)**

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying Proverb's motions to suppress as untimely.

Issue preserved by Proverb's motions to suppress, State's objections, and trial court's rulings. App.\* A1-4; A5-8; A9-12; A13-14.

2. Whether the trial court erred in finding the complaining witness, J.W., competent to testify.

Issue preserved by court's *sua sponte* interrogation of J.W., T 269-73, argument regarding her competence, and the trial court's ruling. T 273-77.

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\*Citations to the record are as follows:  
"App." refers to the Appendix to this brief;  
"H1" refers to the transcript of the hearing held on September 23, 2008;  
"H2" refers to the transcript of the hearing held on January 12, 2009;  
"NOA" refers to Proverb's notice of appeal;  
"T." refers to the consecutively-paginated transcripts of the three day jury trial held in February 2009.

STATEMENT OF THE CASE

David Proverb was charged with eight counts of aggravated felonious sexual assault, six counts of felonious sexual assault, and two counts of endangering the welfare of a child. T 30-39. During a three day jury trial in February 2009, the court dismissed two aggravated felonious sexual assault charges at the conclusion of the State's case. T 311. The jury found Proverb not guilty of two felonious sexual assault charges and guilty of the remaining twelve charges. T 369-75. The court (Lynn, C.J.) sentenced Proverb to two consecutive ten to twenty year prison sentences and to a number of concurrent sentences. NOA.

## STATEMENT OF THE FACTS

### **Events leading to arrest**

David Proverb lived with his wife and their two children, Alexis and Austin, in the Canterbury Apartments in Nashua. T 40-41; 145-46. During the summer of 2005, Alexis became friends with J.W., because they lived in the same apartment complex and because the two girls rode the special education bus to school together. T 147; 207; 227. J.W. went to the Proverbs' apartment nearly every day and frequently spent the night. T 148. In October 2006, the Proverbs moved to a different apartment building in Nashua. T 151. J.W. was not able to come over as often, but she still slept over on the weekends. T 214-15.

On January 5, 2007, J.W. disclosed at school that Proverb was sexually assaulting her and the school called her father, Michael West. T 210; 221; 253-54. West reported the matter to the police. T 211. J.W. was interviewed at the Child Advocacy Center (CAC) on January 8, 2007. T 212.

Later that day, Proverb was interviewed by the police. T 68; 76. Before the officers told Proverb what they wanted to talk to him about, Proverb began speaking about concerns he had about J.W. and her behavior towards his children. T 71-72; 91-92; 100. Proverb indicated that he thought the police had come to talk to him because of a verbal confrontation he had had with J.W. T 92-101. The officers told Proverb that they were there

to investigate a sexual allegation. T 103. Proverb initially admitted to touching J.W. once. T 104. However, after the police continued questioning him and falsely advised him about the evidence against him, Proverb admitted touching J.W. as charged in 07-S-728-31, 733, 735-36, 738, 740, 743. T 109-18; 122-24; 129. Proverb denied ever asking J.W. to have intercourse with him. T 131-32. As Proverb was booked at the jail the following day, he had an exchange with a corrections officer in which he made additional inculpatory statements. T 287-90.

#### **Events before trial**

Proverb had a series of appointed lawyers. App. A10. His first three attorneys withdrew through no fault of Proverb. Id. This series of changes in counsel required a series of continuances in the trial date. Id. When each trial date was set, the court would issue a scheduling order setting a deadline for the filing of substantive motions. App. A17; A19; A22; A26; A28; A31. The court initially set the motion deadline, in accord with Superior Court Rule 98, as 45 days prior to jury selection. App. A17; A19; A22; A26. However, during the pendency of Proverb's case, the court changed its policy and set the motion deadline as 55 days after arraignment. App. A28; A31

After having filed a notice of intent to plead, Proverb hired Attorney Sweeney. App. A10; A29. However, at the plea and

sentencing, Proverb advised the court that he was withdrawing his notice and requested a trial date. H2 3. The court set a new trial date and ordered that there be no further continuances. App. A30-31. Sweeney filed two suppression motions on January 27, 2009. App. A1-4; A5-8. The court denied those motions as untimely. App. A3; A5.

### **Events at trial**

J.W. was fifteen at the time of trial and she was in the ninth grade. T 170; 225; 269-70; see also App. A69-121 (transcript of J.W.'s trial testimony, attached for the Court's convenience; all citations will refer to the transcript page number). However, she appeared to have limited abilities. See, e.g., T 247 (trial court found that J.W. did not have "the capacities of a typical fifteen-year-old."). J.W. had difficulty testifying and answered many questions with "I don't know how to answer" or "I don't remember." See, e.g., T 244-46. After initially testifying that she did not remember an incident, the State was allowed to continue questioning her until J.W. answered questions about that incident. See, e.g., T 246-47; 251.

J.W. testified that Proverb would take her from Alexis' room, where she was sleeping, and bring her to his bedroom. T 230-31. While in his room and while both were clothed, Proverb "got on top of" J.W. so that his "private" touched her "private."

T 232-35. J.W. also testified that Proverb used his hand to touch her chest, her "private," and her buttocks T 236-38; 243. J.W. further testified that Proverb asked to have intercourse with her. T 242.

During cross-examination, J.W. agreed, in response to leading questions, that numerous people had been sleeping in the room with her at the Proverbs' apartment, including J.W.'s cousins. T 266. J.W. then testified that her cousins were not present. T 268. Before she was excused, the court, *sua sponte*, questioned J.W. on her capacity and whether she understood the difference between a truth and a lie. T 269-72. Following that colloquy, the court heard argument and then found J.W. competent to testify. T 273-77.

## SUMMARY OF THE ARGUMENT

1. The trial court erred in denying Proverb's motions to suppress as untimely. During the pendency of Proverb's case, the court changed its motion deadline from 45 days before jury selection to 55 days after arraignment. Proverb's counsel was hired long after the court's motion deadline had passed. Proverb's counsel filed the motions shortly after the plea agreement fell through and long enough before trial to address the merits of the motions.

2. The trial court erred in finding J.W. competent and denying Proverb's motion to strike her testimony. J.W. could not articulate answers to many questions, could not identify the difference between truth and falsity, and never indicated an understanding of her duty to tell the truth.

I. THE TRIAL COURT ERRED IN DENYING PROVERB'S MOTIONS TO SUPPRESS AS UNTIMELY.

Proverb was initially represented by Attorney Todd Russell of the Public Defender's Office. App. A15 (Russell Appearance filed April 23, 2007). He was arraigned on April 27, 2007. App. A16. The court issued a scheduling order on May 24, 2007. App. A17. Jury selection was scheduled for August 6, 2007. Id. The order stated that pre-trial motions were to be filed in accordance with the requirements of Superior Court Rule 98, id., which mandates that pre-trial motions, such as motions to suppress, be filed 45 days prior to jury selection. Jury selection in this case was held on February 17, 2009, App. A31, thus, under Rule 98, suppression motions were due January 3, 2009.

Russell withdrew when transferred to a different public defender office. App. A10. Attorney Ed Cross of the Public Defender's Office filed an appearance on May 25, 2007. App. A18. The State assented to a motion to continue, App. A10, and jury selection was scheduled for November 13, 2007. App. A19. However, Cross had to withdraw on November 2, 2007 due to a concurrent conflict of interest under New Hampshire Rule of Professional Conduct 1.7. App. A20-21. The case was again continued, with jury selection scheduled for March 3, 2008. App. A22. Attorney Paul Bennett filed an appearance for Proverb on January 2, 2008, App. A23, but he also withdrew due to a conflict

under Rule 1.7 on February 21, 2008. App. A24-25. The case was rescheduled again for jury selection on March 31, 2008. App. A26. Attorney Maryellen Bilech filed an appearance on February 26, 2008. App. A27. The State assented to Bilech's motion to continue, App. A10, and jury selection was then scheduled for July 7, 2008. App. A28.

After Bilech was appointed, the Court changed its scheduling order to require that all pre-trial motions be filed within 55 days of arraignment. Id. However, that date, June 21, 2007, had passed eight months before Bilech's appointment. Moreover, only Attorneys Russell and Cross could have filed motions by that deadline. However, both had been given a deadline of 45 days prior to jury selection, App. A17; A19, and so were not aware that the court would regard as untimely any motion filed after June 21, 2007.\*\*

While represented by Bilech, Proverb filed a Notice of Intent to Plead Guilty on June 27, 2008. App. A10. On September 1, 2008, Attorney Shawn Sweeney filed an appearance as retained counsel. App. A29. This was the only change in counsel over which Proverb had any control. At the previously scheduled plea and sentencing hearing on September 23, 2008, Sweeney indicated

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\*\*Bilech filed a motion to extend the motion deadline by ten days on May 9, 2008. App. A32-33. She apparently believed that the current deadline was 45 days prior to jury selection. Id. The State objected, App. A34, and the court denied the motion. App. A32.

that he could not go forward as he had not received any discovery in the case. H1 5. Sweeney had tried to obtain the discovery from prior counsel, apparently because the State was unwilling to provide discovery to him. H1 3; 8-9; see also, H2 4 (State asserts that Sweeney was "directed" to get discovery from prior counsel).

The court rescheduled the hearing for January 12, 2009, at which time Sweeney indicated that Proverb did not wish to enter a guilty plea and asked that the case be scheduled for trial. H2 3. The case was scheduled for jury selection on February 17, 2009. App. A31. The jury trial began on February 24, 2009. T 1.

Sweeney filed two motions to suppress his statements on January 27, 2009. App. A1-4; A5-8. This was fifteen days after Proverb withdrew his notice of intent to plead guilty and twenty-one days before jury selection. The State objected to both as untimely, without alleging any specific prejudice attributable to the timing of the motions. App. A9-12; A13-14. The court denied the motions as untimely. App. A3; A5. In so ruling, the court erred.

The motions to suppress allege violations of Proverb's privilege against compelled self-incrimination and of his right to due process, protected by the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article 15 of the

New Hampshire Constitution. App. A1-4; A5-8. While trial courts may set filing deadlines, Sup. Ct. R 96-A; State v. Baker, 127 N.H. 801, 804 (1986), constitutional considerations may trump other rules of court. See, e.g., State v. Ellsworth, 142 N.H. 710, 719 (1998) ("due process ... rights guaranteed by the State and Federal Constitutions may trump established evidentiary rules."). See also Sup. Ct. R. Preface ("As good cause appears and as justice may require, the court may waive the application of any rule."). In Baker, this Court articulated the balance thus:

The way to force an accommodation of sound judicial management with constitutionally mandated procedures is to issue and enforce scheduling rules or orders, with provisions for sanctions against counsel who violate their terms. When, as here, a court seeks to penalize the criminal defendant for his lawyer's untimeliness, the result is simply a colorable claim of ineffective assistance of counsel.

127 N.H. at 804.

Here, Proverb was penalized because his lawyer missed a deadline with which it was impossible for him to comply, as counsel did not represent Proverb until over a year after the court's latest deadline had run. Nor is it fair to penalize Proverb for prior counsel's actions, especially since prior counsel had been given a different deadline. Under these circumstances, the court's order denied Proverb the assistance of counsel. See, e.g., Geders v. U.S., 425 U.S. 80, 91 (1976)

(court's interest in control of trial process superseded by defendant's right to assistance of counsel; court denied defendant assistance of counsel by preventing defendant from consulting with counsel during an overnight recess).

Counsel filed the motions to suppress shortly after the defendant indicated he wanted a trial and four weeks before trial. The court did not make a finding that there was insufficient time to schedule an evidentiary hearing to address these motions prior to trial. Even if there was insufficient time to hold an evidentiary hearing, the court should have considered alternate measures, such as a brief continuance, that did not deprive Proverb of a fair adjudication of his constitutional rights. In denying Proverb's motions to suppress solely on the basis of timeliness, the court erred and must be reversed. Proverb asks this Court to remand for a hearing on his motions to suppress.

II. THE TRIAL COURT ERRED IN FINDING J.W. COMPETENT AS A WITNESS AND IN DENYING PROVERB'S MOTION TO STRIKE HER TESTIMONY.

On direct examination, over half of J.W.'s answers were in response to leading questions. T 225-55. Even J.W.'s narrative answers were extremely short, none more than one line of text.

Id. When questioned about the charged allegations, J.W.'s answers were even shorter, none more than seven words. T 232-52.

During J.W.'s testimony, she frequently answered even simple questions with "I don't know how to answer that." See, e.g., T 228 ("How did you [and Alexis] get to be friends?"); 230 ("How would [Proverb] ask you to do that?"); 231 ("How would you get onto the bed?"); see also, T 232; 235; 236; 242; 243; 244; 245, line 21; 245, line 7; 245, line 12; 245, line 14; 246. After J.W. responded that she did not know how to answer a question or that she did not remember the answer to the State's question, the State continued to question J.W. about the topic until she answered. See, e.g., T 232-33:

Q. [J.W.], I'm going to show you a drawing and ask if you've seen this drawing before.

A. Yes.

Q. Do you remember where you first saw that drawing?

A. I don't know.

Q. Do you remember talking to a young lady in a purple room?

A. Yes.

Q. Was that when you first saw that drawing?

A. Yes.

See also, T 228; 231; 232-36; 242; 244; 245; 246-48; 249-50; 251-52; 252. The State followed up on J.W.'s unresponsive answers with leading questions, even regarding the charged allegations.

See, e.g., T 244:

Q. And do you remember where you were when he did that?

A. No.

Q. Okay. Was - did this happen at Canterbury?

A. Yes.

Q. And did it happen at Royal Crest?

A. Yes.

See also, T 235-36; 242; 246-48; 248-50. The State even asked leading questions after J.W. denied that some of the charged allegations occurred and thereby obtained testimony contrary to her initial denial.

Q. Okay. Did he ever touch you with any other part of his body other than his private?

A. No.

Q. Did he ever touch you with his hand?

A. Yes.

Q. Where did he touch you with his hand?

A. On my chest.

...

Q. What other part of your body did he touch with his hand?

A. My private.

T. 236-38.

Leading questions may be allowed with child victims of sex-related offenses as to preliminary matters but are not allowed regarding essential elements of the crime. Superior Court Rule 93-A provides that:

In the event that the alleged victim or minor witness is nervous, afraid, timid, or otherwise reluctant to testify, the Court may allow the use of leading questions during the initial testimony but shall not allow the use of such questions relating to any essential element of the criminal offense.

See also, N. H. R. Ev. 611(c) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."). However, here the trial court overruled Proverb's objections to the leading questions, finding that some "leeway" was necessary because J.W. did not have "the capacities of a typical fifteen-year-old." T 247. See also, T 251.

On cross-examination, J.W. continued to be led after she indicated that she did not remember the answer to the question. See, e.g., T 256; 258; 258-59; 259, lines 6-11; 259, lines 12-16; 260; 260-61; 267. J.W. testified that her cousins were sleeping

in the room with her at the Proverbs' apartment, T 266, but she later testified that her cousins were not there. T 268.

After re-direct, the court *sua sponte* began questioning J.W. T 269. J.W. did not know who Barack Obama is and she believed that George Bush was the president. T 270. She could not name the governor of New Hampshire. T 270-71. The court asked J.W. whether she knew the difference between a truth and a lie. T 271. Although she said that she did know the difference, when asked to express it, J.W. replied "Don't really know how to answer it." Id. The court then asked:

THE COURT: Okay. If I said that I was wearing a white robe, would that be the truth or a lie?

THE WITNESS: A lie.

THE COURT: Okay. What color is my robe?

THE WITNESS: Black.

Id.

Defense counsel asked to approach following the court's exchange with J.W. and argued that J.W. was not competent to testify. T 273. The State acknowledged that J.W. had "selective mutism" and that she had an individual education plan (IEP) at school, but argued that J.W. was competent. T 274. The court reviewed the transcript of J.W.'s interview at the CAC from two years prior. T 274-76; see also T 212 (CAC interview on January 8, 2007) and T 170 (J.W.'s testimony on February 25, 2009). The

court agreed that J.W. was easily led during her testimony but found her competent to testify. T 275-77. Proverb filed a motion to reconsider the court's ruling, App. A35-37, however the court does not appear to have ruled on that motion.

Although "witnesses are presumed competent to testify," that presumption may be overcome. State v. Briere, 138 N.H. 617, 620 (1994). New Hampshire Rule of Evidence 601(b) provides that "A person is not competent to testify as a witness if the court finds that the witness lacks sufficient capacity to observe, remember, and narrate as well as understand the duty to tell the truth." This Court will review a trial court's determination of witness competence under an unsustainable exercise of discretion standard. Briere, 138 N.H. at 620; see also State v. Lambert, 147 N.H. 295, 296 (2001).

"When determining whether a youth understands the duty to tell the truth, the trial court must first ascertain that the child understands the difference between the truth and falsehood." State v. Mills, 136 N.H. 46, 53-54 (1992) (Brock, C.J., dissenting) (quotation and citation omitted). An inquiry into the difference between truth and falsehood is only a starting point to determine whether the witness understands her duty. The court must also ascertain whether the witness possesses "a sense of moral responsibility, a consciousness of

the duty to speak the truth." Goy v. Director General, 79 N.H. 512, 514 (1920) (emphasis in original).

In assessing a witness' competence, "[a] child's inconsistent testimony, lack of knowledge, or inability to grasp certain skills are material to the issue." State v. Dixon, 144 N.H. 273, 279 (1999). It can also be significant that the witness is easily led in her testimony. See, e.g., id. ("the trial court agreed that [the witness] was easily led in her testimony."); Mills, 136 N.H. at 54 (Brock, C.J., dissenting) ("The largely leading questions posed by the trial court, combined with the cryptic answers ... given by [the witness], do not provide a sufficient foundation to legally qualify him to testify."). A court may use means such as "hypothetical questions posed to the child [ ]or any other dialogue by which it may be determined that the child underst[ands] his duty to tell the truth." Id.

In this case, J.W. did not exhibit a sufficient "capacity to observe, remember and narrate." She was easily led into giving inconsistent testimony and she repeatedly indicated that she did not know how to answer questions or that she did not remember the matter upon which she was being questioned. J.W. was almost completely unable to give a narrative answer. It was only through the use of leading questions, used after she expressed inability to answer a question or lack of memory about the

subject matter, that J.W. was able to testify about the charged allegations.

More significant is the lack of evidence that J.W. understood the duty to tell the truth. J.W. was unable to articulate the difference between a truth and falsehood, the first prerequisite to finding that she understood her duty. Furthermore, she never articulated any understanding of her obligation to be truthful. While the trial court's competence ruling is to be given "great deference," Briere, 138 N.H. at 620, here the record is devoid of evidence sufficient to support a finding of competence.

Nor does the transcript of J.W.'s CAC interview support a finding that, as of the time of trial, she was a competent witness. "[T]he determination of competency is an ongoing one for the judge to make based on the witness' actual testimony at trial." Kentucky v. Stincer, 482 U.S. 730, 740 (1987). The interview occurred two years prior and is minimally relevant on the question of J.W.'s competence at trial. Even if the interview may be used as some evidence of J.W.'s competence at the time of trial, the interview does not contain evidence that J.W. understood the difference between truth and falsehood or that she understood her obligation to tell the truth at that time or at a later trial. See, App. A41 (J.W. promises to tell the truth at interview).

There was insufficient evidence that J.W. had the ability to function as a witness or that she understood her "moral responsibility" to tell the truth. The court erred in finding her a competent witness and this Court must reverse.

CONCLUSION

WHEREFORE, Mr. Proverb respectfully requests that this Court vacate his convictions or, in the alternative, remand for an evidentiary hearing on his motions to suppress.

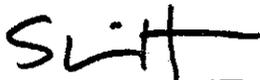
Undersigned counsel requests fifteen minutes of oral argument before a full panel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephanie Hausman, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 16th day of October, 2009.

  
Stephanie Hausman, #15337

DATED: October 16, 2009