Rechucher v. ROP, 12 ROP 51 (2005)
KURT RECHUCHER,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 03-007
Criminal Case No. 03-091

Supreme Court, Appellate Division
Republic of Palau

Argued: November 23, 2004
Decided: January 17, 2005

Counsel for Appellant: Mark Doran

Counsel for Appellee: Joan Yang

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice.

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Appeal from the Trial Division, the Honorable R. BARRIE MICHELSEN, Associate Justice, presiding.

MILLER, Justice:

After being convicted of attempted child sexual abuse, attempted indecent assault, and assault, Kurt Rechucher received a two-and-a-half year prison sentence. He appealed his convictions, arguing that the trial court erred in allowing two children to testify without conducting a proper examination into their competency and that introduction of the victim's written statement at trial violated his constitutional right to examine witnesses. Rechucher waived the competency argument and, because the victim was present at trial for cross-examination, Rechucher's constitutional right to confront witnesses was not violated. Accordingly, we affirm the judgment of the trial court.

BACKGROUND

The Government charged Rechucher by Information with fourteen counts of criminal activity, including four counts of child abuse, four counts of attempted child sexual abuse, four counts of attempted indecent assault, and one count each of obstructing justice and assault. The

case proceeded to trial before Associate Justice R. Barrie Michelsen on September 18, 2003.

The Government's first witness was Rebecca Ngirmechaet, the victim, who was nine years old at the time of the criminal incident but was ten years old at trial. After the clerk administered the oath to Rebecca, the Government began its questioning by asking if Rebecca knew the difference between the truth and a lie and by providing examples of each kind of statement. Rebecca demonstrated that she understood what the truth was and agreed to tell the truth in court. The Government then asked "that her testimony be acceptable to the Court," and with no objection from Defendant, the Court allowed the Government to continue questioning Rebecca.

During her testimony, Rebecca was able to identify Rechucher as someone she lived near and of whom she was afraid. She testified that something bad happened with Rechucher -- that he had called her and taken her into the laundromat where he closed the doors and the windows. Rebecca said that Rechucher had loudly told her not to make any noise and that he "almost took my shirt off." She answered affirmatively that she saw a knife in the laundromat, but did not remember if Rechucher had used it. Rebecca testified that when her friend Yuing called to her from outside, Rechucher let her go. Rebecca remembered speaking truthfully with an investigator about the incident, but she was unable to remember very many other details about what happened inside the laundromat.

In addition to the episode in the laundromat, which occurred on January 2, 2003, Rebecca testified that one time Rechucher asked her to go to his room with him, but she did not remember when that was and she stated that she did not go with him. She also testified that Rechucher had said to her two Palauan phrases, both of which apparently translated to "I'm going to lick your pussy," and that she had told her friend Yuing about those "bad words" when they were playing on a trampoline.

Later, Yuing Chin, who was 11 years old at the time of trial, took the stand. Again, the Government discussed the difference between the truth and a lie and elicited from Yuing a promise to tell the Court only the truth. Yuing then identified Rechucher as her ⊥53 uncle and Rebecca as one of her friends. Regarding the events of January 2, 2003, Yuing testified that she had told Rebecca to stay and wait for her while she went to the store. But when she returned, Rebecca was gone. She called out Rebecca's name and saw Rebecca coming out of the laundromat looking scared. Rebecca then told Yuing that Rechucher had called her into the laundromat, tied her hands and legs, and pulled her shirt. Yuing testified that Rebecca also reported that Rechucher said he would kill her if she told anyone what happened.

With respect to Rebecca's written statement, the Government called Officer Margarete Martin of the Attorney General's Office, who testified that on January 29, 2003, a male police officer brought Rebecca and her mother to Martin's office, and that Martin spent approximately three hours talking with Rebecca. Martin asserted that she knew none of the details of the incident prior to her meeting with Rebecca, that she prepared a typed statement after her conversation with Rebecca, that she read the typed statement to Rebecca in both English and Palauan, and that Rebecca signed it as being a correct transcription of her statements.

After Officer Martin's testimony, the trial court heard argument from the attorneys concerning the admission of the written statement that memorialized Rebecca's conversation with Martin. Ultimately, the statement was admitted into evidence over Defendant's hearsay and Confrontation Clause objections. The Court found that the statement satisfied the requirements of Rule 803(5), the "recorded recollection" hearsay exception, and also Rule 804(b)(5), the general catch-all category of hearsay exceptions. Additionally, the judge ruled that the statement had a "high indicia of reliability" so as not to violate the Constitution.

At the conclusion of the trial, the Court found Rebecca and Yuing "very credible witnesses." The Court also accepted as believable the testimony of Officer Martin. But "for a wide variety of reasons," the Court found that the alibi witnesses Rechucher had called on his behalf were not credible. The Court then concluded that "these acts occurred . . . in the manner stated by . . . the complainant." Based on those findings, the Court found Rechucher guilty beyond a reasonable doubt of Count 2 (attempted child sexual abuse), Count 4 (attempted indecent assault), and Count 5 (assault), and it later imposed a two-and-a-half year prison sentence.

STANDARD OF REVIEW

The factual findings of the trial judge will be disturbed only if they are clearly erroneous. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). The lower court's conclusions of law are reviewed using the *de novo* standard. *Tsai v. ROP*, 9 ROP 142, 143 (2002). And the decision of the trial court to admit certain evidence will stand unless this Court finds it to be an abuse of discretion. *Kumangai v. ROP*, 9 ROP 79, 82 (2002).

ANALYSIS

Rechucher frames his appeal as raising six questions, but they can be categorized as addressing two main issues -- whether Rebecca and Yuing were competent to testify at trial, and whether the admission of Rebecca's written statement violated Rule 804(b)(5) of the Rules of Evidence and Rechucher's rights to fully examine witnesses.

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1. Competency of Child Witnesses

Rechucher argues on appeal that the trial court had a duty to conduct an independent examination into the competency of Rebecca and Yuing to testify, and he asserts that they were not competent either on the stand during trial or at the time Rebecca gave her statement to Officer Martin. As a result of the Court's errors, Rechucher claims, several pieces of evidence were improperly admitted including Rebecca's written statement, Rebecca's testimony that Rechucher said bad words to her, and Yuing's testimony about what Rebecca told her after the laundromat incident.

The Government asserts that Rechucher waived this issue by not raising it before the trial judge. Rechucher did not ask the trial judge to conduct a competency hearing for either Rebecca or Yuing, and in fact, his counsel[1] indicated no objection to the Government's motion after its voir dire of Rebecca that her testimony "be acceptable to the Court." As such, the Government maintains, Rechucher is now precluded from disputing the competency of the witnesses.

This Court has consistently held that arguments raised for the first time on appeal are deemed waived. *Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 10 (1999); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998). In exceptional circumstances, however, this Court has allowed that rule to be relaxed. *Ngerketiit Lineage*, 7 ROP Intrm. at 43. For example, this Court will address issues not raised below in order to prevent the denial of a fundamental right, "especially in criminal cases where the life or liberty of an accused is at stake." *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994).

Few cases discuss this exception in more detail, but the predominant rule in the United States is that competency of a witness to testify is waived if not objected to at trial, even in criminal cases. *See, e.g.*, *United States v. Odom*, 736 F.2d 104, 111-12 (4th Cir. 1984) (finding the competency issue waived because defendant failed to object at the time the witness took the stand, even though defendant had previously requested an *in camera* hearing on the issue); *People v. Cudjo*, 863 P.2d 635, 658 (Cal. 1994) ("[T]o preserve for appeal a claim that a witness lacked testimonial competence, a party must object on this ground in the trial court."); *Wright v. State*, 264 N.E.2d 67, 69 (Ind. 1970) ("[T]he failure of the defendant to object to the child's testimony must be treated as a waiver of any question as to the competency of such child as a witness."); *Griego v. State*, 893 P.2d 995, 998 (Nev. 1995) (holding that defendant's failure to request a voir dire examination or to object to child witness's testimony resulted in waiver of the issue on appeal). We adopt this rule here and find that Rechucher waived his challenge to the competency of the witnesses.

2. Rebecca's Written Statement

As noted earlier, Rebecca testified that she remembered talking with Officer Martin and that she did so truthfully at the time, though she could not at the time of trial recall all the details of the laundromat incident. Officer Martin testified that she interviewed Rebecca alone for several hours, without knowing beforehand what had happened. She explained that after Rebecca told her the story, Officer Martin wrote out a statement, read it ⊥55 to Rebecca in both English and Palauan, and had Rebecca sign it.

When the Government sought admission of the statement into evidence, Rechucher objected that the statement violated the proscription against hearsay and also infringed upon his Confrontation Clause rights. After argument from the attorneys, the trial judge found that the statement was admissible as an exception to the hearsay rule on two grounds: first that it was a recorded recollection, as defined in Rule 803(5), and second that it fit under the catchall or residual exception of Rule 804(b)(5). Additionally the trial judge concluded that the written statement contained a high indicia of reliability so as not to violate the Constitution. Rechucher

[1]We note that Rechucher's appellate counsel did not represent him during the trial proceedings.

claims that the written statement does not satisfy the requirements of either exception to the hearsay rule, and that its admission denied him the opportunity to confront and fully examine witnesses.

a. Hearsay

The Rules of Evidence provide that "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" is not excluded by the hearsay rule if the declarant is unavailable. ROP R. Evid. 804(b)(5).[2] Rechucher asserts that the statement does not have a guarantee of trustworthiness because Rebecca was not "competent" at the time she gave the statement. Specifically, Rechucher claims that Rebecca was not placed under oath during her conversation with the Officer and that she failed to fully appreciate the need to tell the truth. Additionally, Rechucher points to Officer Martin's inexperience with questioning children and her lack of psychological training as further evidence that the written statement is not trustworthy.

The trial judge's decision to admit certain evidence will not be disturbed unless this Court finds it to be an abuse of discretion. *Kumangai*, 9 ROP at 82. In finding that the written statement satisfied the requirement that it have an "equivalent circumstantial guarantee[] of trustworthiness," the trial judge reviewed in great detail the manner in which the statement was prepared. He found it particularly important that Officer Martin could not lead Rebecca's story in a certain direction because she knew nothing of the situation before her conversation. Rebecca's mother was not in the room at the time and so she also could not direct Rebecca's comments. Officer Martin, although not a trained child psychologist, had experience doing similar police work and also had children of her own. Moreover, after having heard Rebecca give much of her testimony in English, the trial judge commented favorably on Officer Martin's decision to review the written statement with Rebecca in both English and Palauan. Based on these facts, the judge concluded, the statement was trustworthy.

Rechucher is correct that Rebecca was not formally placed under oath during the interview and that Officer Martin had no prior experience questioning children in an investigative setting. But given the facts outlined by the trial judge supporting his ruling to admit the statement, we cannot conclude that he abused his discretion.

Rechucher continues his challenge to the admission of the statement by arguing that ⊥56 it could not have been properly admitted as a recorded recollection under Rule 803(5) because that rule provides that "[i]f admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." ROP R. Evid. 803(5). At trial, however, the judge admitted the statement itself instead of merely reading it into the record. We are doubtful that any violation of this rule, which is designed to prevent a jury's over-emphasis on the document, 4 Weinstein's Evidence ¶ 803(5)[01] (1981), rises to the level of reversible error in a bench trial. In any event, because the admission of the statement under Rule

[2]The Rules of Evidence have been recently amended but have not yet been published. Under the new version, the contents of Rule 804(b)(5) were transferred to Rule 807, though no change in meaning is intended.

804(b)(5) was proper, the judge was entitled to review the document as an admitted exhibit.

b. Opportunity to Examine Witnesses

The Palau Constitution provides that a criminal defendant shall have a "full opportunity to examine all witnesses." Palau Const. art. IV, § 7. Relying on this clause, labeling it the Confrontation Clause, Rechucher objected during trial to the admission of the written statement as in violation of his constitutional rights. Applying United States law, as this Court has found appropriate in interpreting this provision of the Palau Constitution, *Ngiraked v. ROP*, 5 ROP Intrm. 159, 170-71 (1995), the judge concluded that hearsay can be admitted, consistent with the Confrontation Clause in the United States Constitution and thus consistent with the right to examine witnesses granted by the Palau Constitution, if (1) the declarant is unavailable and (2) the statement bears adequate indicia of reliability. *See Ohio v. Robert*s, 100 S.Ct. 2531, 2538-39 (1980). Reliability can be inferred when the evidence falls within a "firmly rooted" hearsay exception. *Idaho v. Wright*, 110 S.Ct. 3139, 3146 (1990). If it is not within a firmly rooted exception, the evidence is "presumptively unreliable," and it must therefore bear a "particularized guarantee[] of trustworthiness" in order to be constitutionally admitted. *Lee v. Illinois*, 106 S.Ct. 2056, 2063 (1986).

Rechucher argues on appeal that the "catchall" exception created by Rule 804(b)(5) is not "firmly rooted" and so the written statement is presumed to be unreliable. He asserts that such presumption is not overcome because the statement lacks the necessary guarantee of trustworthiness. The Government maintains that the written statement satisfies the two-part *Ohio v. Roberts* test because Rebecca was unavailable by virtue of her lack of memory and the statement was admitted under Rule 803(5), which is a "firmly rooted" hearsay exception.

The Government is on solid ground in refuting Rechucher's argument using the test set forth in *Ohio v. Roberts*. That test first requires that the declarant be unavailable, and by testifying that she no longer remembered the details of the events described in her statement, Rebecca was unavailable as provided in the Rules of Evidence. ROP R. Evid. 804(a)(3). The second part of the test focuses on the statement's reliability, requiring either that it be a firmly rooted hearsay exception or that it bear a particularized guarantee of trustworthiness. As noted earlier, the trial judge admitted the statement under both Rule 803(5) and Rule 804(b)(5). Rule 803(5) is a firmly rooted exception, *Hatch v. State*, 58 F.3d 1447, 1467 (10th Cir. 1995), and so the statement would be constitutionally admissible under that exception. Rule 804(b)(5) is not firmly rooted, *United States v. Bradley*, 145 F.3d 889, 896 (7th Cir. 1998), but the trial judge detailed the reasons why the statement was trustworthy—Rebecca spoke to Officer ⊥57 Martin alone, so she would not have been influenced by her mother's presence; Officer Martin was unaware of what happened and so would not have shaped Rebecca's story in any way; the evidence at trial did not reveal any motive for Rebecca to lie or cause trouble for Rechucher; Officer Martin read the statement to Rebecca in both Palauan and English to verify its accuracy.

Rechucher maintains that Rebecca did not understand, at the time she spoke with Officer Martin, "that [her] statements would be used by the Police or in a court of law, or . . . the consequences of her actions when she made the statements." Thus, he claims, her written

statement lacks the necessary guarantee of trustworthiness. Given the manner in which the statement was created, however, the trial judge did not abuse his discretion in allowing the statement to be admitted, even given Rechucher's constitutional objection.

To the extent we look to United States case law for guidance in Confrontation Clause matters, we note that the United States Supreme Court recently handed down *Crawford v. Washington*, 124 S.Ct. 1354 (2004), which altered the requirements for admitting hearsay evidence so as not to violate the Confrontation Clause. The *Crawford* opinion abrogated the two-part test set out in *Ohio v. Roberts* by declaring that any judicial determination of "reliability" is inimical to the Framers' intention in creating the Confrontation Clause. *Crawford*, 124 S.Ct. at 1369-70. Instead, the Supreme Court divided hearsay statements into testimonial and nontestimonial: admission of nontestimonial hearsay is "wholly consistent" with the Constitution, but testimonial hearsay evidence may only be admitted if the declarant is unavailable and if there was a prior opportunity for cross-examination. *Id* at 1374.[3]

We need not decide in this case, however, whether to follow *Ohio v. Roberts* or to embrace the new approach set forth in *Crawford* because *Crawford*, by its own terms, does not apply in the circumstances of this case. As a footnote to *Crawford* explains, the concerns it raises with respect to "witnesses absent from trial," *id.* at 1369, are not implicated when, as here, the declarant actually testifies:

> Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.

Id. at 1369 n.9 (citing *California v. Green*, 90 S.Ct. 1930 (1970)). As was explained in *California v. Green*, "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does ⊥58 not create a confrontation problem." *Green*, 90 S.Ct. at 1937. Since Rebecca was present in court to testify under cross-examination,[4] *Crawford* would not prevent

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[3]The Court did not offer a precise definition of "testimonial," but it identified various "formulations" of testimonial statements, including (1) *ex parte* in-court testimony or its functional equivalent; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 124 S.Ct. at 1364. The Court also concluded that the term "testimonial" incorporates, at a minimum, police interrogations and prior testimony at a preliminary hearing, grand jury, or trial. *Id.* at 1374.

[4]Although there is an apparent incongruity between Rebecca's "unavailability" (due to lack of memory) for purposes of the hearsay rule and her availability for cross-examination for purposes of the Confrontation Clause, "it is possible, and in fact not uncommon, for a witness who appears at trial to be considered unavailable for some purpose, but deemed available for and subject to cross-examination." *Mercer v. United States*, 2004 WL 3048727, at *2 (D.C. Sept. 2, 2004), citing *United States v. Owens*, 108 S.Ct. 838, 844-45 (1988). Indeed, although defendant's trial counsel apparently made a strategic decision not to ask her any questions, Rebecca's memory of the incident–and lack of same–would have been fair ground for cross-examination.

the admission of her written statement.

This reading of *Crawford* is consistent with opinions issued by other United States courts in its wake. *E.g.*, *People v. Argomaniz-Ramirez*, 2004 WL 2782273, at *3 (Colo. Dec. 6, 2004) (allowing admission of prior statements by alleged child victims of sexual assault: "Because the hearsay declarants will testify at trial and will be subject to cross-examination, admission of their out-of-court statements does not violate the Confrontation Clause."); *Mercer v. United States*, 2004 WL 3048727, at *2 & n.4 (D.C. Sept. 2, 2004); *People v. Miles*, 815 N.E.2d 37, 43-44 (Ill. App. Ct. 2004). Accordingly, we find that neither *Roberts* nor *Crawford* mandates reversal of Rechucher's convictions.

CONCLUSION

Rechucher waived his challenge concerning the competency of the witnesses by failing to raise it in the trial court. The trial court acted in accordance with respect to hearsay evidence and the right to confront witnesses as delineated in *Roberts*, and the *Crawford* opinion also does not require anything more in this case. Rechucher's convictions are affirmed.