

DISTRICT OF COLUMBIA COURT OF APPEALS

In re D.W.

27 A.3d 1164 (D.C. 2011) · Decided September 1, 2011

SUMMARY

The District of Columbia Court of Appeals affirmed D.W.'s juvenile delinquency adjudication for incest. The court held that uncontradicted testimonial and circumstantial evidence was sufficient to establish beyond a reasonable doubt that D.W. and the victim were half-siblings within the statutory degree of consanguinity, and that genetic testing was not required.

OPINION

SCHWELB, J.

SCHWELB, Senior Judge: Following an evidentiary hearing in this juvenile delinquency case, D.W. was adjudicated guilty of incest, in violation of D.C.Code § 22-1901 (2001). He appeals, contending that the evidence was insufficient to establish that D.W. and the victim were related “within... the fourth degree of consanguinity,” as required under the statute.

Because the uncontradicted testimony supports the trial judge’s finding of guilt, we affirm. I. The underlying charges of incest and of first degree sexual abuse, in violation of D.C.Code § 22-3002(1) (2001), stem from a single incident of sexual intercourse between D.W., then aged 14, and D.S., then aged 11, which occurred in August of 2006 at the home of Willie Jones, the children’s grandfather.¹ A pregnancy resulted, and D.S. gave birth to a baby boy at Washington Hospital Center on April 26, 2007.

Genetic testing established a probability of 147,501,000 to 1 that D.W. was the father of the child. At the evidentiary hearing resulting in his adjudication, D.W. did not dispute that the intercourse between him and D.S. took place. Rather, he moved for a judgment of acquittal (MJOA) at the close of the District’s case, arguing that the evidence that D.W. and D.S. were related by blood was insufficient as a matter of law to establish his guilt of incest beyond a reasonable doubt.

The trial judge denied the motion and, after the defense had presented its evidence, none of which was directed to contesting the incest charge, the judge found D.W. guilty of incest.² D.W. filed a timely appeal. II. At the evidentiary hearing, Donald Berry testified that he has five children, including the respondent, D.W. and the complaining witness, D.S.

When he was asked whether he is the biological father of both children, Mr. Berry stated that “I have not [taken] a blood test, so I’m not positive that I’m the father, but yes, I’m considered the father.” D.S., the complainant, testified that she and D.W. have the same father and that D.W. is

her brother. Referring to the sexual episode between her and D.W., D.S. explained that although D.W. “was my brother and I didn’t want to do that with my brother,” she also “didn’t want nothing bad to happen to my brother.” D.S. also testified that her baby son does not live with her, but with her father {%.&., Mr. Berry).

Keisha Simmons, the mother of D.S., confirmed that Mr. Berry is D.S.’ father, and also stated that D.W. is Mr. Berry’s *1167son with another woman.³ Willie Jones, who was called as a defense witness, testified that D.W. lives with him, and that both D.W. and D.S. are his grandchildren. No evidence contrary to any of the foregoing testimony was adduced by the defense.⁴ As previously noted, the judge found D.W. guilty of incest.

III. In assessing D.W.’s claim of evidentiary insufficiency, “this court must view the evidence in the light most favorable to the government, keeping in mind the right of the trier of fact to assess credibility and to draw reasonable inferences from the evidence.” *Long v. United States*, 940 A.2d 87, 99 (D.C.2007); see also *Rivas v. United States*, 783 A.2d 125, 134 (D.C.2001) (en banc); *In re T.M.*, 577 A.2d 1149, 1151 (D.C.1990) (juvenile delinquency proceeding). “The government is not required to negate every possible inference of innocence.” *Blaize v. United States*, 21 A.3d 78, 82 (D.C.2011) (citations omitted). “It is only where there is no evidence upon which a reasonable mind might fairly infer guilt beyond a reasonable doubt that this court can reverse a conviction.” *Id.* (citations omitted); see also *Kaliku v. United States*, 994 A.2d 765, 786 (D.C.2010).

Our review of the judge’s findings is “deferential,” *Rivas*, 783 A.2d at 134, because the judge had a front seat as the testimony unfolded. We, on the other hand, are limited to a paper transcript which, while capturing the words of a case, may often miss its heart and soul. *Combs v. District of Columbia Dep’t of Employment Servs.*, 983 A.2d 1004, 1010 n. 3 (D.C.2009); see also *In re S.G.*, 581 A.2d 771, 779 (D.C.1990).

The sole question before us is whether, applying the foregoing standard of review, there is sufficient support in the record for the judge’s finding that the District proved the requisite degree of consanguinity — here, that D.W. is the half-brother of D.S. — beyond a reasonable doubt.⁵ D.W. asks us to answer this question in the negative. D.W.’s appellate counsel acknowledge in their reply brief that genetic testing is not required in every prosecution for incest.

Nevertheless, they claim that in this case, in light of Mr. Berry’s remark that in the absence of a blood test, he is not positive that he is the children’s father, as well as the discrepancies as to how many children Mr. Berry has, scientific evidence was necessary in order to establish D.W.’s guilt. Specifically, counsel contend, and our dissenting colleague apparently agrees, that we should look for guidance to the statutory framework and body of case law addressing the adjudication of paternity in the civil context.

Under the provisions of D.C.Code § 16-909(b-1) (2001), there are two ways to establish a “conclusive presumption of paternity”: either by an affidavit from an approved laboratory certifying a genetic test indicating a 99% probability that the putative father *1168 is the father of the child, or by the father’s written acknowledgment of paternity. Counsel argue that what they describe as Mr. Berry’s equivocal testimony would not satisfy the requirements for a written acknowledgment of paternity, and that the District should therefore have been required to introduce the results of a genetic test in order to satisfy its burden of proof of consanguinity.⁶ We do not agree with D.W.’s position.

In our view, D.W. overstates the “equivocal” nature of Mr. Berry’s testimony when that evidence is viewed in the light most favorable to the District. When asked how many children he has, Mr. Berry answered that he has five, and he listed both D.W. and D.S. as being among them.

In response to this initial question, he expressed no doubt at all. It was only after he had made this categorical and unqualified statement that he indicated any uncertainty resulting from the lack of a blood test. It is at least a permissible construction of Mr. Berry’s remark that he is not “positive,” when that comment is read in conjunction with his earlier testimony that both D.W. and D.S. are his children,⁷ to take the two statements together as meaning that so far as Mr. Berry knows, he is their father, but that he is aware that one cannot be absolutely certain of that fact without a blood test.

Assuming, arguen-do, that there was some ambiguity as to Mr. Berry’s level of certainty, the judge, as the trier of fact, had the right to draw any reasonable inference, and she was not required to take Mr. Berry’s testimony as meaning that the witness entertained any appreciable or reasonable doubt that he was the children’s father, especially when he had named both D.W. and D.S. as being his children.

For an appellate court to substitute its interpretation of Mr. Berry’s evidence for the trial judge’s factual finding would be especially inappropriate in circumstances such as those presented here. Judge Jerome Frank could easily have had in mind a case just like this one when he opined that [a] stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify.

The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried. *Broadcast Music v. Havana Madrid Rest. Corp.*, 175 F.2d 77, 80 (2d Cir.1949) (quoting Ulman, *The Judge Takes The Stand* 267 (1933)); see also *Morris v. United States*, 728 A.2d 1210, 1215 (D.C.1999) (quoting *Broadcast Music*).

Here, the trial judge was in a position to discern Mr. Berry’s tone and the comparative emphasis that the witness placed on the two statements, while we are unable to do so because, to adapt Judge Frank’s phrase, our peach is indeed dehydrated.

To second-guess the trier of fact, where the outcome may depend on the inflection of the witness' voice or the stress which he may have placed upon a particular word or sentence, is not an acceptable appellate option.⁸ It is also significant that Mr. Jones, having been called to the stand by D.W.'s attorney, testified that both D.W. and D.S. are his grandchildren.

If this defense testimony was true — and D.W.'s counsel did not contradict or impeach it⁹ — then D.W. and D.S. must have been either siblings or cousins, and there is no evidence at all that they were cousins. The record is likewise devoid of any testimony or other evidence tending to show, or even suggest, that someone other than Mr. Berry is the father either of D.W. or of D.S.¹⁰ Further, as previously noted, all reasonable inferences must be drawn in the District's favor, and it was not irrational for the trial judge to construe and assess Mr. Berry's statement of uncertainty as she evidently did.

In particular, on this record, the judge could reasonably find to be minimal the possibility that all of the witnesses who testified that D.W. and D.S. are siblings were mistaken in their belief. Although this court has not heretofore addressed the nature of the proof *1170required in prosecutions or delinquency proceedings for incest, courts of other jurisdictions have held that the testimony of relatives alone, if credited by the trier of fact, is sufficient to prove this offense.

See, e.g., *Lusby v. State*, 217 Md. 191, 141 A.2d 893, 896 (1958) ("The testimony of the prosecutrix to the effect that the defendant was her father was sufficient proof of her pedigree status")¹¹; *Williams v. State*, 284 Ga.App. 255, 643 S.E.2d 749, 752 (2007) ("The jury could also reasonably conclude from testimony by the victim and her siblings that Williams was the biological and/or legal father of them all.

The evidence sufficed to sustain Williams's conviction for incest as well.")¹² "It has been held proper, where the evidence is otherwise competent, for one to testify to facts of family history which relate to him, such as the identity of his parents, or other relations." *Lusby*, 141 A.2d at 896 (quoting 31 C.J.S., Evidence, § 226(b)).

Moreover, the District contends, and we agree, that "this testimony must be sufficient because we have had blood and DNA tests for comparatively few years, but there have been prosecutions of incest cases for centuries." Relying on 4 William Blackstone, *Commentaries on the Laws of England* 64, the District points out that incest was made a capital crime in 1650.¹³ Because *1171a family member is competent to testify concerning whether a particular person is his or her relative, it is necessarily the function of the trier of fact to assess each witness' credibility and to determine whether the witness has knowledge of the relevant facts.

Moreover, we have held in several other contexts that even where scientific evidence could have been introduced, proof by testimonial or circumstantial evidence is sufficient to demonstrate guilt beyond a reasonable doubt. See, e.g., *Bernard v. United States*, 575 A.2d 1191, 1195 n. 5

(D.C.1990); *Harris v. District of Columbia*, 601 A.2d 21, 24-27 (D.C.1991); *Derosiers v. District of Columbia*, 19 A.3d 796, 800-01 (D.C.2011).¹⁴ The Supreme Court of Nebraska explained the applicable principles well 128 years ago, long before the advent of genetic tests: It is certainly competent for one who, from his earliest recollection, has been a member of one's family, given his name, and reared in the belief, and in all ways given to understand that he is a son in the household, to testify of his parentage.

His testimony may not be satisfactory or conclusive of the fact, but it is at least admissible for what it is worth in the minds of the jury, and clearly sufficient to make *prima facie* case, thus throwing the burden of overcoming it upon him who controverts it. *Comstock v. State*, 14 Neb. 205, 15 N.W. 355, 356 (1883); accord, *Lusby*, 141 A.2d at 896 (quoting *Comstock*).

Indeed, D.W. has cited no authority to the contrary, and we are aware of none. The record before us contains no evidence "controvert[ing]" or "overcoming," *Comstock*, 15 N.W. at 356, *Lusby*, 141 A.2d at 896, the District's presentation, at the very least, of a strong *prima facie* case. It is true that in this very proceeding, the District introduced the results of genetic testing to prove conclusively that D.W. is the father of the baby boy born to D.S.

If the District had presented similar evidence to show that Mr. Berry is the father of both D.W. and D.S., its case would have been stronger, the contradictions in the record with regard to how many children Mr. Berry has would have been entirely beside the point, and reasonable appellate judges would not now be disagreeing as to the sufficiency, even under our deferential standard of review, of the District's evidence of consanguinity.

Nevertheless, we cannot say that the trial judge's decision lacks adequate support in the record. Accordingly, the judgment is Affirmed.. Jones is a not the grandfather's real name. We have substituted fictitious names for the actual names of the parents and grandfather of D.W. and D.S. in order to preserve and accord primacy to the children's anonymity. See D.C.Code § 16-2331 (2001); *Super*.

Ct. Juv. R. 53(a); *In re J.D.C.*, 594 A.2d 70, 75-76 (D.C.1991). We have elected not to use initials for the adults in order to minimize any confusion as to whom particular initials identify.. The trial judge reserved her ruling on the single count of sexual abuse and requested additional briefing. She subsequently found D.W. not guilty of that charge. D.W. was placed on supervised probation for one year on the incest count..

According to Ms. Simmons, "it should be like eight kids [Mr. Berry] has, including my three." (*Id.* at 27) Mr. Berry testified that he only has five children.. D.W.'s mother was not called as a witness by either party.. D.C.Code§ 22-1901 (2001) provides: If any person in the District related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law, shall marry or cohabit with or have sexual intercourse with

such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment for not more than 12 years.

It is undisputed that this statute prohibits sexual intercourse between a half-brother and a half-sister.. The analysis in a civil paternity proceeding involves significantly different considerations from those that apply here.

The presumption of paternity under D.C.Code § 16-909.01 (2001) is a means of establishing the existence of a parent-child relationship and "all rights, privileges, duties, and obligations" therein. D.C.Code § 16-907. A common application of that presumption arises in a civil action to compel the payment of some monetary entitlement, such as child support, inheritance, or survivor's benefits.

See, e.g., *Matthews v. District of Columbia*, 875 A.2d 650 (D.C.2005) (applying statutory presumption in suit by widow seeking survivor's benefits for child of decedent); *In re Estate of Glover*, 470 A.2d 743, 749 (D.C.1983) (applying statutory presumption to permit child born out of wedlock to offer proof that decedent putative father is his parent).

The purpose of the presumption, as the District explains in its brief, is to establish paternity where the father is either denying parentage or is otherwise unavailable to confirm it. The present appeal, which involves a father who has not denied but claimed parentage of the two children, does not implicate the principles governing paternity proceedings.. Ms. Simmons, who is the mother of D.S., testified that Mr. Berry is her daughter's father.

Both parents having confirmed that this is so, we do not believe that the trial judge's finding of a father-daughter relationship between Mr. Berry and D.S. can be second-guessed on appeal..According to our dissenting colleague, the record "afford[s] a reason for hesitation about that [i.e., the trial court's] interpretation," and this reason for hesitation "rendered impossible anything approaching [the] near certitude," *Rivas*, 783 A.2d at 133, which is required for a finding of guilt beyond a reasonable doubt.

Post, at p. 1173. The question before us is not, however, whether a reason for hesitation exists. The court is not required "to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979) (emphasis in original) (citation omitted). Accordingly, we must decide whether under the foregoing standard, with due recognition of the superior opportunity of

the trier of fact to assess credibility and to draw reasonable inferences, the judge's assessment of Mr. Berry's testimony, and her finding of guilt beyond a reasonable doubt, were clearly in error.

See *Rivas*, 783 A.2d at 134; *Blaize*, 21 A.3d at 82. Judge Thompson also points to the discrepancy, see *supra* n. 3, between Mr. Berry's account of how many children he has and the testimony of Ms. Simmons. An examination of this discrepancy reveals, however, that Mr. Berry does not admit paternity of children that Ms. Simmons attributes to him, and not that he falsely claims paternity where no such claim is warranted.

Mr. Berry had no apparent motive to testify that D.W. was his son if this was untrue, since such a false claim would subject D.W. to unwarranted delinquency proceedings for incest.. "The credibility of a witness may be attacked by any party, including the party calling the witness." D.C.Code § 14 — 102(a) (2001); see *Sparks v. United States*, 755 A.2d 394, 401 (D.C.2000); *Smith v. United States*, 26 A.3d 248, 261 (D.C.2011).

Nevertheless, in the trial court, the defense did not suggest in any way that Mr. Jones was being untruthful, or that he had no basis of knowledge, regarding the children's relationship to him.. There is no evidence in the record that the mothers of D.W. and D.S. might have been having sexual relations with men other than Mr. Berry at the time that these children were conceived.

The trial judge was not obliged to credit such an unoffered explanation in the face of Mr. Berry's affirmative statement that both D.W. and D.S. are his children..The *Lusby* decision is more than half a century old, but it remains persuasive.

Moreover, we have reiterated twice in the very recent past that decisions of the Court of Appeals of Maryland are "accorded the most respectful consideration by our courts." In *re Estate of Turpin*, 19 A.3d 801, 808 n. 11 (D.C.2011) (citing *Roberts-Douglas v. Meares*, 624 A.2d 405, 419 n. 20 (D.C.1992)); *English v. United States*, 25 A.3d 46, 54 n. 11 (D.C.2011).

Although it is true that in *Lusby*, 141 A.2d at 897, the court described the victim's testimony that the defendant was her father as "uncontroverted," the same can fairly be said in this case; Mr. Berry testified that he was both children's father, and no witness testified to the contrary or claimed that anybody else was the father of either children. Judge Thompson quotes a sentence in *Tapscott v. State*, 106 Md.App.

109, 664 A.2d 42, 52 (1995), *aff'd* as to different issue, 343 Md. 650, 684 A.2d 439 (1996), to the effect that in order "to prove the charge of incest, the State had to produce scientific facts about the relationship of the accused to the victim." In *Tapscott*, however, the prosecution had in fact introduced DNA evidence, and no question was presented as to whether the State's case would have been insufficient without such evidence.

The intermediate appellate court in Tapscott could hardly have intended to overrule Lusby, a decision of Maryland's highest court. Further, the sole question presented to the Maryland Court of Appeals in Tapscott was "whether half-blood relationships are included within Maryland's prohibition against incest." 684 A.2d at 440.

The court answered that question in the affirmative, and its opinion had nothing at all to do with whether evidence of genetic testing is required in order to prove incest. We therefore cannot agree with the suggestion in footnote 6 to the dissent that the decision of Maryland's highest court in Tapscott somehow undercuts Lusby or is "notabl[e]" in relation to the issue of evidentiary sufficiency now before us..

See also *Sargent v. State*, 875 N.E.2d 762, 767 (Ind.Ct.App.2007) ("The State presented sufficient evidence to establish that Sargent committed [two counts of incest], T.S. and Sargent both testified that T.S. was Sargent's daughter."); *State v. Sockbeson*, 430 A.2d 1105, 1106 (Me.1981) ("[T]he child's statement that the defendant was her father and the defendant's admission that she was his daughter were sufficient to prove their relationship and sustain a conviction of incest.")..

Our dissenting colleague suggests that at least on this record, scientific proof of consanguinity should be required, in part because of the high "level of stigma" and "almost disgust" generated by allegations of incest.

As we have explained in note 1, *supra*, the law preserves and accords primacy to the anonymity of juveniles in D.W.'s circumstances, and we have also disguised the names of D.W.'s relatives in order to further that goal.

In any event, we are of the opinion that any question whether the nature of incest is such that more (or different) proof must be presented in prosecutions for that crime than in *1171other cases is appropriately addressed to the legislature..

We do not believe that any of the decisions described in footnote 9 of the dissenting opinion supports the proposition that the District's evidence of consanguinity in this case was insufficient as a matter of law.