Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 18 2009

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-172

NOVEMBER TERM, 2009

In re F.E.	}	APPEALED FROM:
	}	
	}	
	}	Washington Family Court
	}	
	}	
	}	DOCKET NO. 149-11-08 Wnjv
		Trial Judge: Thomas J. Devine

In the above-entitled cause, the Clerk will enter:

F.E. appeals from an adjudication of delinquency based on one count of sexual assault. He contends the trial court's assessment of the complainant's credibility lacked a rational basis. We affirm.

The complainant, who was nine years old at the time of the events in question and eleven at the time of the hearing, testified as follows. For a period of several months in late 2006, complainant spent a number of nights at a neighbor's apartment while his mother worked. The neighbor's son, F.E., was fourteen years old at the time. Complainant slept in F.E.'s bedroom and shared the bed with F.E. On several occasions, F.E. forced him to engage in oral sex. Complainant recalled that he resisted, on one occasion hiding his head under a Spiderman pillow, but that F.E.—who was older and larger—forcibly removed the pillow and held complainant's head. F.E. later warned complainant not to tell anyone, showed him a BB gun and a knife, and threatened to slit his throat. Complainant feared for his life and therefore did not tell anyone about the incidents until F.E. moved away some months later.

In February 2007, complainant's stepmother observed that the boy appeared to be withdrawn and acting differently. Although initially reluctant to explain what was wrong, he ultimately told her about the assaults. She thereupon informed the child's therapist, who in turn reported the matter to his biological mother and the Department for Children and Families, which sent a social worker and police officer to interview complainant. The social worker testified that she was trained to conduct such interviews and stated that she detected nothing to indicate that complainant's responses had been coached. The social worker also interviewed F.E., who initially expressed uncertainty as to whether he knew complainant, but then acknowledged that they had played together a few times. F.E. also initially denied that complainant had ever been to his room, but subsequently acknowledged that he had slept there several times. F.E. further denied owning a BB gun, then indicated that a friend had loaned him one, and finally acknowledged that he owned one, which he kept under his bed.

Complainant's biological mother also testified, recalling that complainant underwent a period of emotional distress after his disclosure of the assaults; he tried to run away, would not

see other people, attempted to choke himself, and began to pull out hair. F.E. testified in his own behalf, denying that he had ever sexually assaulted or threatened complainant.

The court issued a written decision in May 2009, finding that the State had met its burden of proving the charge beyond a reasonable doubt and entering an adjudication of delinquency. This appeal followed.

F.E. contends the court's finding concerning complainant's credibility lacked a rational basis. The claim rests on the assertion that complainant's testimony may have been tainted—or coached—through prior, repeated questioning by his therapist, mother, and stepmother. Prior to the hearing, F.E. had moved to depose the therapist to determine, in part, the number and types of statements that complainant had made, based on the theory that the accusations may have been the product of suggestive, repetitive questioning. The court denied the request, concluding that F.E. had failed to make a sufficiently particularized showing to overcome the communications privilege between a sexual assault victim and his or her therapist. F.E. later moved, a week before the hearing, to continue the matter for six to eight weeks to allow a forensic psychologist to review the depositions of witnesses to determine whether complainant was improperly questioned or influenced. The court denied the motion, as well as a renewed motion for a continuance after the first day of the hearing, observing that a merits determination was long overdue and that the delay was not justified.

In its decision, the court carefully assessed complainant's credibility in light of his testimony, noting that complainant's demeanor as a witness was forthright and direct, that at times he appeared to be embarrassed and overcome with emotion, and that "[a]t no point did he seem to be reciting something he had learned by rote." He provided specific details about some of the incidents. He was initially reluctant to disclose the incidents at all. He was observed to be withdrawn after the assaults and later exhibited dramatic changes in his emotional behavior. The court acknowledged in its findings the defense's concern that complainant's testimony may have been influenced by repeated questioning, but noted that the social worker had interviewed him only once, and that she was vigorously cross-examined about her questioning technique. Further, although both complainant's mother and stepmother acknowledged discussing the matter with him on multiple occasions during the two years between the disclosure and the trial, the court noted that both parents had testified that it was generally complainant who initiated the discussions.

Assessments of credibility are "the sole province of the factfinder." State v. Wetherbee, 156 Vt. 425, 431 (1991). Although F.E. argues that complainant's initial disclosure was not "spontaneous," noting that it was in response to his stepmother's questioning, and challenges the significance of the fact that complainant initiated the conversations with his parents, these are matters within the fact-finder's province to consider in assessing credibility, and we discern no basis to conclude that the court's findings in this regard were irrational.

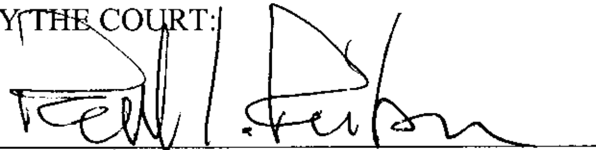
F.E. argues, albeit quite summarily, that the court erred in denying the continuance request because an expert psychologist was essential to determine whether complainant's testimony was influenced by prior questioning, and further asserts that the court erred in refusing to pierce the patient-therapist privilege to determine the frequency and nature of the therapist's questioning. We have certainly recognized that expert testimony may be admissible to explain the general "symptomatology of abused children," id. at 433, or even how the methods of examining children may affect the reliability of their testimony, State v. Wigg, 2005 VT 91, ¶¶ 17-22, 179 Vt. 65. We have not held or implied, however, that such testimony is essential, or that without it the trial court lacks a rational basis to evaluate the credibility or reliability of the

testimony of a child witness. We thus find no abuse of discretion in the court's decision to deny the request for a two-month delay to allow a forensic psychologist to review the evidence. State v. Lund, 168 Vt. 102, 105 (1998) (we will not disturb court's decision to deny motion for continuance absent clear abuse of discretion).

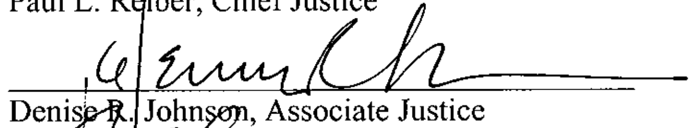
Nor did the court err in denying the request to depose complainant's therapist. The court here was essentially asked to balance complainant's "compelling privacy interest[]" in protecting the patient-therapist privilege against the mere possibility of unearthing something in complainant's conversations with his therapist to show that he was coached. State v. Rehkop, 2006 VT 72, ¶ 25, 180 Vt. 228. As the trial court correctly observed, this was little more than a "fishing expedition" and did not approach the "particularized" showing and "compelling justification" that we have required to breach the privilege. Id. ¶¶ 25, 26. Accordingly, we find no error, and no basis to disturb the judgment.

Affirmed.

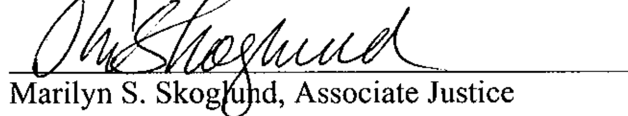
BY THE COURT:



Paul L. Reiber, Chief Justice



Denise R. Johnson, Associate Justice



Marilyn S. Skoglund, Associate Justice