

Who Is an Expert? Competency Evaluations in Mental Retardation and Borderline Intelligence

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Evaluations of competency to stand trial (CST) in defendants with mental retardation or borderline intellectual functioning can be difficult when deficits are masked by the type of adaptations seen in many with developmental disabilities. Accordingly, many evaluators have used validated test instruments, such as the CAST*MR (Competence Assessment to Stand Trial for Defendants with Mental Retardation) and tests measuring receptive and expressive language, to augment the clinical interview. The authors present a New Jersey case illustrating the need for clinicians to have adequate experience and training in some of the less known psychometric tests before presenting evidence in court. At the CST hearing, the judge disregarded the testimony of several psychologists while accepting that of a less experienced state's expert, we believe, to find the defendant competent. The finding was reversed on appeal. We encourage forensic professionals to be aware of the various instruments and minimum standards when employing specialized testing.

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Evaluations of competency to stand trial (CST) are frequent in forensic psychiatry and psychology and are often thought to be relatively simple and straightforward. Some experts, noting variability in how clinical data are applied to various state standards, utilize psychological testing to flesh out some of the less obvious aspects of a defendant's competency.^{1,2} Statutes specifying the CST criteria are generally based on the decision in *Dusky v. U.S.*³ The standard is set low: a defendant is expected to be able to identify the persons and elements of a criminal trial and "to consult with his attorney with a reasonable degree of rational understanding and a rational as well as factual understanding of proceedings against him" (Ref. 3, p 402).

Competency entails the ability of a defendant to understand a possible waiver of constitutional rights in the event of a guilty plea or waiving the right to

counsel. The U.S. Supreme Court held that these elements are coextensive with basic competency and do not require revisiting the matter.⁴ Sometimes, this can lead to uncomfortable results, such as having psychotic defendants with poor judgment represent themselves.^{2,5} Nevertheless, some states require separate hearings for determination of competency-related matters such as waiving the right to counsel and forgoing a defense of insanity.

In any event, there is great pressure to move defendants through the imperfect system,⁶ sometimes overlooking defendants with genuine deficits, ones who fly under the radar. Such defendants may include those with learning disorders and more serious developmental disabilities. The gatekeeping function of a *Dusky*-type standard appears to have more to do with keeping psychotic, not retarded, defendants out of the courtrooms, at least temporarily. As Slobogin put it: "Given *Dusky's* language, the apparent purpose of requiring proof of mental disorder in this context is to ensure that any inability to understand the criminal process or make decisions about it is the result of irrationality rather than ignorance or intransigence" (Ref. 5, p 512). As clinicians are well aware,

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there are meaningful differences between “ignorance” and relatively fixed intellectual deficits.

The presence of mental retardation or borderline intellectual functioning can give rise to concerns about CST, though the IQ score *per se* is never dispositive of the legal question. While the techniques for presenting evidence of subnormal intellect have not been a controversial subject in the CST literature (as they have in discussions of death penalty eligibility/exclusion),⁷ the manner and expertise with which the evidence is brought forth have come under scrutiny. The purpose of this report is to alert clinicians to the need for specialized training in the area of mental retardation. In the following case, a New Jersey Superior Court appellate decision, *State v. M.J.K.*,⁸ overturned a 2003 conviction of a young man with an IQ of 73, who had been erroneously judged competent to proceed. The decision turned on the analysis that the opinion of the state’s psychologist, on which the trial court relied, lacked substance due to insufficient training and experience.

The Case

The defendant-appellant, M.J.K., had a genuine and well-documented developmental disability. The school records indicated classifications of “neurologically impaired” and “perceptually impaired.” In 1998, he was arrested for attempted sexual assault of a female high school student. Because it was well known and undisputed that M.J.K. was at least learning disabled, his competency was extensively studied. Four psychologists evaluated him: a psychologist from New Jersey’s forensic hospital on behalf of the prosecution, who administered the CAST*MR (Competence Assessment to Stand Trial for Defendants with Mental Retardation)⁹; a court-appointed psychologist who calculated the defendant’s full-scale IQ at 73; one of us (M.S.), who interviewed the defendant and conducted many psychometric tests but did not administer the CAST*MR; and the author of the CAST*MR, who administered the instrument to the defendant and provided a critique of its use by the prosecution’s expert.

At the CST hearing, the trial judge heard testimony from the four witnesses. The state’s expert concluded that the defendant was competent, whereas the court-appointed psychologist and the two defense witnesses considered him incompetent.

State’s Expert

The prosecution witness, whose 90-minute examination was considered too brief by the appellate court (Ref. 8, p 4), testified that M.J.K. had borderline intellectual functioning (not mental retardation). Nevertheless, she administered the CAST*MR. Giving the CAST*MR to those who are not mentally retarded is prohibited, as listed in the test instructions. The reason for the prohibition is that, as the IQ approaches 75, a defendant is likely to be found competent on the CAST*MR solely due to IQ, because the test is heavily weighted on the intellectual deficits that make for a significantly subnormal IQ (i.e., mental retardation). It is therefore inappropriate to give it if one diagnoses someone as having borderline intellectual functioning. At the upper ranges of mental retardation, it also may not be a fair test, since the CAST*MR has a bias toward competency as one’s IQ approaches 75. Therefore, anyone with borderline intellectual functioning is likely to be found competent with the CAST*MR, regardless of actual competency. Having given the CAST*MR despite finding borderline intellectual functioning rather than mental retardation, the state’s expert found the results of the CAST*MR to indicate competency. The state’s expert also noted that M.J.K. had no difficulty answering questions; reported information consistent with the investigation material; was oriented to time, place, and person; and understood the purpose of the meeting. She opined that the defendant was competent to proceed.

Court-Appointed Examiner

A court-appointed expert stated that, at first, he thought the defendant competent due to his relatively sophisticated vocabulary and good memory. This psychologist concluded that those two strengths gave the impression that the defendant’s cognitive functions were higher than they actually were. However, after a careful and extended evaluation, he found the defendant not competent to proceed and came to the opinion that M.J.K. never would achieve an intellectual level to assist adequately in his own defense.

Author’s Testimony

M.S., a defense expert, stated that “on the surface, the depth of the defendant’s disability was not apparent” (Ref. 8, p 5). However, a lengthy and detailed evaluation using many different cognitive and lan-

guage instruments led to the opinion that M.J.K. was not competent to waive his constitutional rights. Moreover, “the defendant did not have the ability to understand and weigh the decision about whether or not to testify, did not understand the consequences of his answers and had no capacity to understand plea negotiations” (Ref. 8, p 5), leading to an opinion that the defendant did not have the ability to participate adequately in his own defense. Regarding the state’s expert, M.S. also opined that she “was not qualified to administer the CAST*MR because the test protocol requires that it be given by those who have at least one year of specific experience working with people with mental retardation” (Ref. 8, p 5), which she admittedly lacked. In addition, her protocol showed evidence of at least one leading question, guiding the defendant to an answer and giving him full credit for it, as well as giving more information than allowed to help him answer questions correctly, again giving M.J.K. full credit for incomplete answers.

Like the court-appointed expert, M.S. also obtained a full-scale IQ of 73 and found significant adaptive deficits, leading to a diagnosis of mental retardation. Because he lacked experience with the instrument at that time, he did not administer the CAST*MR. Instead, he deferred to Dr. Caroline Everington (coauthor of the instrument with law professor and mental retardation expert Ruth Luck-*asson*), who was the fourth expert.

Dr. Everington’s Testimony

Dr. Everington testified that:

... persons with mental retardation frequently master testing ability, so it may be difficult to detect a disability unless one is an experienced examiner. . . . They are likely to answer “yes” and are easily led because they do not want to admit to the examiner that they do not understand. . . . If a person without experience in dealing with this population allows suggestibility into the testing process, you may not get an accurate assessment of the person’s understanding” [Ref. 8, p 6].

Therefore, she asserted that experts without significant experience and training can and often do miss the deficits of the mentally retarded. She also found that the state’s expert’s protocol showed evidence of a leading question, guiding the defendant to an answer and giving full credit, and giving him more information than allowed to help him answer questions correctly. There were also scoring errors in the state psychologist’s analysis. All scoring errors were in the direction of finding the defendant competent.

The trial court gave more weight to the state’s expert and found the defendant competent to proceed. M.J.K. was subsequently convicted at jury trial and sentenced to five years’ probation and 364 days in the county jail. He appealed on several grounds, but only the CST question was addressed at the appellate level.

The Opinion

Whereas the trial court relied more heavily on the state’s testimony, the appellate court was impressed by the strength of the three other psychologists’ opinions. The opinion cited the state’s expert’s lack of qualifications for conducting competency evaluations for the mentally retarded, primarily because she had had too little experience working with a mentally retarded population. The appellate court accepted the defense position that persons with mental retardation may appear competent on the surface. The trial judge, the court said,

... overlooked the fact that [the state’s expert’s] experience in evaluating mentally retarded individuals like defendant was minimal. . . . Most telling, we think, is the fact that [the state’s expert’s] very lack of experience with this population led her to make precisely the error that the [CAST*MR]’s originator [Dr. Everington] warned of, namely, perceiving relatively strong language skills, coupled with a good memory and an eagerness to please, to be evidence of far greater mental capacity than [this] defendant actually has [Ref. 8, p 26].

The opinion noted that the state’s expert’s lack of specific experience with the mentally retarded led her to make errors in evaluating the defendant’s competencies in several areas, as well as in scoring the CAST*MR. However, the court had no general criticism of the expert’s overall competency in the area of CST:

Nor do we intend to imply that [the state’s expert] is not, in general, qualified to determine competence to stand trial. We do conclude, however, that given the particular deficits of this defendant, her ability to accurately evaluate his competence, when compared with the experience and credentials of the other three experts, was lacking [Ref. 8, p 29].

Thus, this decision was not about an admissibility threshold for expert testimony in this area; rather, it concerned the relative weight of the various experts’ opinions and the need for significant experience with this population.

Discussion

This case illustrates the need for knowledge of and professional vigilance in the use or misuse of psycho-

logical tests, including specialized, forensically oriented psychological tests. The trial judge, despite significant testimonial evidence to the contrary, endorsed the prosecution's flawed data, thus costing M.J.K. a conviction. This scenario, described by Perlin as "sanism,"⁶ places a higher value on achieving a legal end, bringing the defendant to trial, than in seeking the truth about his capacity. In Perlin's schema, courts may accept disingenuous or flawed testimony or ignore testimony that would tend to stand in the way of finding the defendant "sane." In the M.J.K. case, the trial court relied on obviously flawed data, while disregarding a more accurate version. Here, the defense, noting the defects in the state's data, did something remarkable in retaining the originator of the CAST*MR. This move was a good way to refocus the meaning of the test results, coupled with a significant amount of clinical and additional psychometric data, although it was ineffective at the CST hearing. Fortunately, the appellate court was not suffering from "sanism."

In contrast to evaluations of defendants with mental illness, CST evaluations of defendants with mental retardation require specialized experience and expertise. An IQ test, even when coupled with an examination of factual questions based on items required by statute, is not always satisfactory in court. Rather, evaluations of developmentally disabled persons require evaluating the client in a manner that includes measures of intellectual functioning and assessing various cognitive and language deficits. Expertise in mental retardation and assessing persons with borderline intellectual functioning requires significant experience and knowledge of this population; knowledgeable use of a broad array of psychological, cognitive, and linguistic tests; and often, specialized competency instruments such as the CAST*MR. An expert in determining the competency of developmentally disabled individuals is an expert with significant training, knowledge, and experience with this population.

In addition to our cautionary tale about too casual use of the CAST*MR, we offer the following general

points about assessing CST in persons with subnormal intellect:

The defendant will try to conceal his or her deficits. Short replies and glibness may function as a defense against exposing areas about which the defendant may feel profound shame.

The defendant may answer in the affirmative, but the responses may have a perseverative quality (acquiescence response set).

The examiner must never accept a simple yes or no, or even many brief replies as a complete response. Instead, the defendant should be asked to repeat the substantive point, and often, to expand on its meaning. In so doing, one often finds deficits that were not apparent until such an exposition.

Specialized tests of language functioning may be required (e.g., the Test of Adolescent and Adult Language—Third Edition; TOAL-3).¹⁰ Such tests often give a meaningful representation of what a defendant will actually hear or process, and what he or she will be able to communicate within the complexities of a real-time courtroom.

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