STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0664

State of Minnesota,
Appellant,

vs.

Nicholas Gerald Keller,
Respondent.

Filed September 10, 2018
Affirmed
Larkin, Judge

Olmsted County District Court
File No. 55-CR-17-7817

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Eric M. Woodford, Chief Deputy County Attorney, Erin A. Gustafson, Assistant County Attorney, Rochester, Minnesota (for appellant)

Zachary C. Bauer, Meshbesher & Spence, Ltd., Rochester, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

In this pretrial appeal, the state challenges the district court's dismissal of a criminal-sexual-conduct charge as time-barred under the applicable statute of limitations. We affirm.

FACTS

On November 15, 2017, appellant State of Minnesota charged respondent Nicholas Gerald Keller with one count of second-degree criminal sexual conduct under section 609.343, subd. 1(a) (2006), based on conduct that allegedly occurred between November 1, 2006 and August 31, 2008.[1] Keller moved to dismiss the charge, arguing that it was barred by the statute of limitations. The district court held an evidentiary hearing and received evidence indicating that the relevant facts are as follows.

On April 18, 2011, J.M. contacted law enforcement and reported that her daughter, K.M., had recently disclosed that she had been sexually assaulted. Specifically, J.M. told an officer from the Rochester Police Department that K.M. had been admitted to a hospital after a suicide attempt and that during a subsequent family therapy session on April 16, 2011, K.M. disclosed that she had been sexually assaulted at Gage Elementary School during the School Aged Child Care (SACC) program between 2005 and 2008.

[1] The relevant criminal statutes governing the charged offense did not substantively change between November 2006 and August 2008, the timeframe of the alleged abuse. *Compare* Minn. Stat. §§ 699.341, .343 (2006) (defining the charged offense in 2006), *with* Minn. Stat. §§ 699.341, .343 (2008) (defining the charged offense in 2008).

On April 20, 2011, Officer Anne Johnson of the Rochester Police Department spoke with J.M. by phone. J.M. told Officer Johnson that K.M. was not in a proper emotional state to provide a statement and asked Officer Johnson to wait until K.M.'s psychologist thought that it was safe for K.M. to do so.

On April 22, 2011, Child Protective Services (CPS) received a call regarding K.M.'s allegations at the family therapy session. CPS prepared a report documenting the caller's allegations as follows:

> [B]etween 3[rd]-5th grade [K.M.] attended School Age Child Care at Gage and Sunset Terrace Elementary. She stated there was a male staff [member] there (she estimated in his 20s) that would sit next to her in the cafeteria and touch her below her waist on the outside of [her] clothes. At first she thought she imagined it but it happened between 10-15 times. There was also a time that SACC went on a field trip to a movie and the staff [member] sat next to her there and tried to touch her there as well.

CPS forwarded the report to law enforcement. Officer Johnson testified that based on the CPS report, she "knew that a sexual assault had occurred."

In May 2011, J.M. called Officer Johnson and informed her that K.M. had been hospitalized after another suicide attempt. In June 2011, shortly before K.M. was discharged from the hospital, Officer Johnson interviewed her. K.M. requested that the interview not be recorded, and Officer Johnson complied with that request. The interview lasted approximately five to ten minutes. K.M. told Officer Johnson that the alleged perpetrator was a "white male in his early 20s, under the age of 25." K.M. stated that she did not want to talk about the specifics of the abuse. Officer Johnson provided K.M. her business card and told K.M. to call if she wanted to talk in the future.

After interviewing K.M., Officer Johnson contacted SACC staff in an attempt to identify the perpetrator. SACC staff indicated that there were several SACC employees who matched K.M.'s description, but staff would not provide any employee names due to data-privacy concerns. Officer Johnson testified that she did not move forward with the investigation because K.M. was not cooperative and she lacked adequate suspect information.

On September 25, 2017, K.M. called Officer Johnson and left a voicemail, stating that she had seen recent news coverage regarding allegations of sexual misconduct against Keller and that he was the person who had sexually assaulted her. Two days later, Officer Johnson interviewed K.M. On November 15, 2017, the state filed the underlying complaint charging Keller with second-degree criminal sexual conduct.

The allegations in the complaint against Keller are as follows. K.M. attended SACC before and after school at Gage and Sunset Terrace elementary schools when she was approximately nine or ten years old. Keller touched K.M. more than ten times while she was at SACC. Keller always touched her over her clothes. The complaint states that "there were several times that Keller moved his hand back and forth and rub[bed] his hand on top of her thigh and down into her inner thigh, into the bikini line area." Each time Keller touched K.M., he would move his hand closer to the inside of her thigh towards her vagina. K.M. remembered a specific incident in which she went to a movie during the SACC program, and Keller had K.M. sit with him alone a couple of rows ahead of everyone else. Keller tried to put his hand on K.M.'s thigh, and K.M. scooted over as far as she could in her seat so that Keller would not touch her. Officer Johnson obtained records from SACC

indicating that Keller worked for the SACC program at Gage and Sunset Terrace elementary schools from 2007 to 2010 and that Gage SACC students attended a movie on May 30, 2008.

Following the evidentiary hearing, the district court granted Keller's motion to dismiss. The district court reasoned that because "[t]he offense was reported when law enforcement received the child protective services report in April 2011," the November 15, 2017 complaint was time-barred under the applicable statute of limitations. The state appeals.

D E C I S I O N

The state's ability to appeal in a criminal case is limited. *State v. Lugo*, 887 N.W.2d 476, 481 (Minn. 2016). The state may appeal "from any pretrial order" where the "district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." Minn. R. Crim. P. 28.04, subds. 1(1), 2(2)(b). "Dismissal of a complaint satisfies the critical impact requirement." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001). Because the district court dismissed the charge against Keller, the critical-impact requirement is satisfied.

This court reviews the construction and application of a statute of limitations de novo. *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. App. 2014), *review denied* (Minn. June 17, 2014). If the language of a statute is clear, courts must apply it as written. *State v. Iverson*, 664 N.W.2d 346, 351 (Minn. 2003). In this case, the applicable statute of limitations is found at Minn. Stat. § 628.26(e) (2016). It provides:

> Indictments or complaints for violation of sections 609.322 and 609.342 to 609.345, if the victim was under the age of 18 years at the time the offense was committed, shall be found or made and filed in the proper court within the later of nine years after the commission of the offense or three years after the offense was reported to law enforcement authorities.

Minn. Stat. § 628.26(e).

The dispute in this case centers on whether the charged offense was reported to law enforcement authorities in 2011 or 2017. If the offense was reported in 2011, the later charging deadline started on the offense date and the charge is time-barred. However, if the offense was not reported until September 2017, the later charging deadline started on the report date and the charge is timely.

The state contends that the charged offense was not reported to law enforcement authorities until September 2017 and that the charge is therefore within the later three-year charging deadline under section 628.26(e). The state asserts that "[b]ecause [K.M.] made only a general statement in 2011 and did not provide specific detail, the offense was not reported in 2011," arguing that "the information provided to law enforcement in 2011 included only vague and general information about the events that occurred in 2005-08." The state complains that K.M. "provided no information about what part of her body . . . was touched," "adamantly refused to identify the offender," and "completely frustrated Investigator Johnson's efforts to get more detailed information."

The state relies on one unpublished case from this court and three cases from other states in support of its argument. Unpublished opinions from this court and cases from other jurisdictions are not precedential. *See Jackson ex rel. Sorenson v. Options*

Residential, Inc., 896 N.W.2d 549, 553 (Minn. App. 2017) ("[W]e are bound by precedent established in the supreme court's opinions and our own published opinions."); *State ex rel. Ulland v. Int'l Ass'n of Entrepreneurs of Am.*, 527 N.W.2d 133, 136 (Minn. App. 1995) ("[T]his court is not bound by precedent from other states or the federal courts."), *review denied* (Minn. Apr. 18, 1995). However, they may have persuasive value. *See Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) (stating that unpublished opinions of the court of appeals may have persuasive value). We consider the cases on which the state relies in this context.

The unpublished case from this court is *State v. Swan*. No. A15-0832, 2016 WL 764395, at *1 (Minn. App. Feb. 29, 2016), *review denied* (Minn. May 17, 2016). In *Swan*, a complaining party informed law enforcement that the defendant had engaged in several acts of sexual misconduct with her, but she did not allege that sexual penetration had occurred. *Id.* More than nine years later, the complaining party expanded her earlier allegations to include an accusation that the defendant had also sexually penetrated her. *Id.* The state charged the defendant with first-degree criminal sexual conduct based on the sexual-penetration allegation, and the defendant moved to dismiss the charge under section 628.26(e). *Id.* The district court denied the motion, and this court affirmed. *Id.* This court held that "the term 'the offense'" in Minn. Stat. § 628.26(e), "plainly refers to the conduct involving each particular offense listed in the complaint; it does not refer to general conduct." *Id.* at *3. We reasoned that "[b]ecause the act of penetration formed the basis for the complaint, and that act was not reported until February 2014, the district court did

not err by concluding that the complaint was filed within the statute of limitations period." *Id.*

Unlike the circumstances in *Swan*, here, the conduct underlying the charged offense is the same conduct that was reported to law enforcement in 2011. J.M. reported that K.M. had been sexually assaulted at Gage Elementary School during the SACC program between 2005 and 2008. CPS reported that a male SACC staff member touched K.M. below her waist on the outside of her clothes multiple times, including during a trip to a movie theater. Because the 2011 reports alleged the same conduct that is charged in the underlying complaint, *Swan* is distinguishable and does not persuade us that the charged act in this case was not reported until 2017.

We next address the out-of-state cases on which the state relies. In *People v. Quinto*, the New York Court of Appeals construed a statute of limitations similar to section 628.26(e) and concluded that "the phrase 'the offense is reported' as used in [the statute of limitations] would mean a communication that, at a minimum, describes the offender's criminal conduct and the particular harm that was inflicted on the victim." 964 N.E.2d 379, 384-85 (N.Y. 2012). The New York Court of Appeals explained that "[i]nformation of this nature provides the police with actual notice that a specific criminal offense has occurred, allowing them to conduct a prompt investigation." *Id.* at 385. The 2011 reports in this case described the alleged criminal conduct and the harm that was inflicted on K.M. Those reports provided the police with actual notice that a specific offense had occurred and allowed the police to conduct a prompt investigation, as shown by the ensuing sexual-assault investigation by Officer Johnson.

In *State v. Green*, the Utah Supreme Court adopted the following three-part test for evaluating whether something qualifies as a "report of the offense" under a Utah statute of limitations similar to section 628.26(e):

> (1) a discrete and identifiable oral or written communication[] (2) that is intended to notify a law enforcement agency that a crime has been committed and (3) that actually communicates information bearing on the elements of a crime as would place the law enforcement agency on actual notice that a crime has been committed.

108 P.3d 710, 721 (Utah 2005).

In this case, J.M. orally communicated to an officer from the Rochester Police Department that K.M. disclosed that she had been "sexually assaulted" at Gage Elementary School during the SACC program between 2005 and 2008. CPS sent law enforcement a written report with more detail regarding the alleged sexual assault, including the nature of the sexual conduct, when the conduct occurred, where the conduct occurred, and a description of the alleged perpetrator. K.M. provided additional information about the perpetrator in her 2011 interview with Officer Johnson, reporting that the perpetrator was a "white male in his early 20s, under the age of 25." The requirements of *Green*'s three-part test are met here.

Lastly, in *State v. Harberts*, the Oregon Court of Appeals explained that an offense is "reported" under an Oregon statute of limitations similar to section 628.26(e) "when there has been actual communication of the facts that form the basis for the particular offense reported." 108 P.3d 1201, 1209 (Or. Ct. App. 2005) (quotation omitted). Again,

the 2011 reports from J.M., CPS, and K.M. communicated facts that form the basis for the charged offense in this case.

In sum, the out-of-state cases on which the state relies indicate that an offense is reported to law enforcement if the report includes enough detail to put the authorities on notice that a specific criminal offense may have occurred. The reports to law enforcement did exactly that in this case. Although the reports generally alleged a sexual assault and touching over K.M.'s clothing below the waist, and not "the touching of the clothing covering the immediate area of" K.M.'s "intimate parts" as required by statute, the record clearly indicates that law enforcement perceived the reported conduct as criminal sexual conduct and promptly investigated it as such. Minn. Stat. § 609.341, subd. 11(a)(i)-(iv) (2006) (defining sexual contact with reference to "intimate parts"); *see id.*, subd. 5 (2006) (defining "intimate parts" to include "the primary genital area, groin, inner thigh, buttocks, or breast of a human being)." We recognize that more detail may have been necessary to charge the alleged offense, but that is not a triggering requirement under Minn. Stat. § 628.26(e). Nor does section 628.26(e) require the complaining witness's cooperation before the relevant charging deadline is triggered.

We appreciate the state's concern that a report to law enforcement could be so vague and lacking in detail that law enforcement could neither reasonably conclude that a criminal offense had been committed, nor reasonably be expected to commence an investigation. A certain amount of factual detail is necessary for a report to trigger the charging deadline under section 628.26(e). But it is not necessary for us to define the amount of detail that is necessary in all cases here. Suffice it to say that in this case, we have no doubt that the

2011 reports constituted a report of an offense to law-enforcement authorities that triggered the three-year charging deadline in section 628.26(e). Thus, the later charging deadline that governs in this case is the nine-year deadline that began to run on the offense date, which was, at the latest, August 31, 2008. Because the complaint charging the offense was filed on November 15, 2017, more than nine years after commission of the alleged offense, the charge is untimely under section 628.26(e). We therefore affirm the district court's order dismissing the charge.

Affirmed.