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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2141**

State of Minnesota,
Respondent,

vs.

Faizan Ali Khan,
Appellant.

**Filed September 24, 2012
Affirmed and remanded
Kalitowski, Judge**

Wright County District Court
File No. 86-CR-10-3355

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Tom Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

On appeal from his trial where he was charged on multiple counts of criminal sexual conduct and one count of using a minor in a pornographic work, appellant Faizan Ali Khan argues that (1) the district court committed reversible error by admitting hearsay statements by the victim, A.M.K., to a nurse and social worker, and (2) the district court file must be corrected to reflect that several counts remain unadjudicated. Appellant also submits a pro se supplemental brief challenging the sufficiency of the evidence. We affirm appellant's conviction on one count of criminal sexual conduct, but we remand to the district court to correct and clarify the Warrant of Commitment.

DECISION

I.

Hearsay is not admissible except as provided by the Minnesota Rules of Evidence. Minn. R. Evid. 802; *see* Minn. R. Evid. 801(c) (defining “[h]earsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”). “Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In May 2010, then nine-year-old A.M.K. was taken to her pediatrician after she reported that her cousin, appellant, may have sexually abused her. The pediatrician reported the suspected abuse to police, who referred A.M.K. to the Wright County Human Services Department and the Midwest Children's Resource Center (MCRC). The

investigating social worker, Jennifer Droneck, conducted a CornerHouse-style interview with A.M.K., and Beth Carter, a nurse at MCRC, also interviewed and examined A.M.K. A.M.K. disclosed to both Droneck and Carter that appellant had penetrated her “private” with his “private,” touched her “private” with his hand and mouth, and made her touch his “private” with her mouth.

At trial, A.M.K. testified that appellant touched her “private” with “[h]is hand and private.” But she could not recall specific details or whether appellant touched any other part of her body with his penis, and she denied that appellant put “his private . . . inside [her] private.” She recalled being interviewed, but could not recall meeting with Droneck or Carter.

Statements to nurse Carter

To supplement A.M.K.’s testimony, the state called Carter to testify as to A.M.K.’s out-of-court statements. Appellant objected on the basis that inconsistencies between A.M.K.’s out-of-court statements and her trial testimony would have a “prejudicial [e]ffect” on him. The district court admitted the statements under the medical-diagnosis-or-treatment exception to the hearsay rule, but ruled that Carter would be limited to providing a general description of the abuse A.M.K. reported and could not relay A.M.K.’s identification of appellant as the abuser.

Out-of-court statements may be admissible if they are “made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” Minn.

R. Evid. 803(4). “The rationale behind the rule is ‘the patient’s belief that accuracy is essential to effective treatment.’” *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006) (quoting 2 Charles T. McCormick, *McCormick on Evidence* § 277, at 247 (John W. Strong et al. eds., 4th ed. 1992)). “The statements are admissible only if the evidence suggests that the child knew she was speaking to medical personnel and that it was important she tell the truth.” *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993).

Appellant argues for the first time on appeal that the district court failed to make the necessary foundational findings that A.M.K. knew she was talking to a medical professional and that it was important she tell the truth, and he contends that the record does not support such findings. Because appellant failed to raise this objection at trial, we review this claim for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that a reviewing court has discretion to review unobjected-to error if plain error is established). The three-prong test for plain error asks whether there is (1) error, (2) that is plain, and (3) that affected the defendant’s substantial rights. *Id.* If that test is met, we then assess whether fairness and the integrity of the judicial proceedings require that we address the error. *Id.*

Although the district court did not make an explicit finding that A.M.K. knew she was talking to a medical professional and that it was important she tell the truth, these findings are implicit in the court’s general finding that the statements were made “for the purposes of medical diagnosis or treatment.” Moreover, we conclude that the record supports the court’s implicit findings.

The record reveals that A.M.K.'s statements to Carter were made within a medical context under circumstances that suggest A.M.K. knew Carter was a medical professional. Carter testified that the MCRC clinic where A.M.K. was interviewed has a waiting room and examination rooms that contain medical equipment and therefore looks like a traditional medical clinic. And Carter further testified that when she enters an examination room to meet with a child patient, she explains who she is and that it is her job to conduct a physical examination to "make sure that [the child is] safe" and that "her body is healthy," and that she will ask questions "about that." Based on the experiences of a typical nine-year-old child, we can infer that A.M.K. would have understood from the setting and Carter's explanations that Carter was a medical professional and that the purpose of the interview and examination was to determine whether she needed medical treatment.

The record also establishes that A.M.K. understood the importance of being truthful. A.M.K. met with Carter shortly after reporting sexual abuse, and Carter testified that when she asked A.M.K. whether she "had any worries about her body," A.M.K. responded in the affirmative. Thus, A.M.K. could reasonably have believed that the visit would result in some medical treatment. In addition, Carter testified that she tailored the scope of her physical examination to those areas of A.M.K.'s body that A.M.K. indicated had been touched. In *State v. Larson*, the Minnesota Supreme Court held that a three-year-old child, who was taken to a family-practice clinic to be examined after complaining of vaginal soreness and burning urination, had "the same 'selfish' treatment-related motive to speak the truth that anyone has when one goes to a doctor's office

sincerely inquiring about one or more symptoms.” 472 N.W.2d 120, 126 (Minn. 1991).

We conclude that A.M.K. had the same treatment-related motive for truthfulness here.

Because the record supports the district court’s implicit finding that the state laid sufficient foundation to admit A.M.K.’s statements to Carter under rule 803(4), the district court did not plainly err by admitting the statements.

Statements to social worker Droneck

The state also called Droneck to testify about A.M.K.’s out-of-court statements and offered a videotape of Droneck’s interview with A.M.K. Over appellant’s objection, the district court admitted this evidence under the residual exception to the hearsay rule.

See Minn. R. Evid. 807. That exception provides:

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id.

Appellant does not contest the district court’s findings that A.M.K.’s statements during the Droneck interview have circumstantial guarantees of reliability and were offered as evidence of a material fact. But appellant argues that A.M.K.’s statements to Droneck regarding sexual abuse were not more probative than her trial testimony because “[l]ive sworn in-court testimony is by its very nature more probative than unsworn ex parte hearsay statements.” We disagree.

The district court correctly identified two reasons why the CornerHouse-style interview was more probative than trial testimony: A.M.K.'s young age and the additional delay between the incidents of abuse and trial. As a ten-year-old child at the time of trial, A.M.K. was likely to be nervous and intimidated by testifying in a courtroom setting. And her discomfort was likely magnified by the intensely personal nature of the memories she was asked to recount. This context explains why A.M.K.'s testimony at trial was marked by an inability to recall details of the sexual abuse. And the fact that she had been able to recall these events in greater detail during the interview with Droneck may be attributable to the child-centered setting and CornerHouse-style protocol Droneck employed.

In addition, A.M.K.'s interview with Droneck took place over a year before she testified at trial. At the time of the interview, just months had passed since the most recent incidents of abuse. A.M.K.'s memory of the abuse was therefore likely to be more complete at the time of the interview.

Appellant also argues that admission of the interview statements does not serve the purposes of the rules of evidence or the interests of justice because doing so “turns the preference for in-court testimony on its head.” We disagree.

The purpose of the rules of evidence is to see that “the truth may be ascertained and proceedings justly determined.” Minn. R. Evid. 102. In furtherance of that purpose, the rules make reliable hearsay statements admissible. *See* Minn. R. Evid. 803, 807. Here, the district court found that A.M.K.'s statement during Droneck's interview were reliable and more probative than any other evidence of appellant's guilt. We therefore

conclude that admission of the interview statements serves the truth-seeking function of the rules of evidence and the interests of justice. *See State v. Robinson*, 699 N.W.2d 790, 798 (Minn. App. 2005) (“[B]ecause we have already stated that the district court rightly concluded that the statements contain indicia of trustworthiness, admission of the statements serves the interests of justice.”), *aff’d on other grounds*, 718 N.W.2d 400 (Minn. 2006).

The district court therefore properly admitted A.M.K.’s statements to Droneck.

II.

The jury found appellant guilty of three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(a), 1(h)(i), 1(h)(iii) (2008) (counts I, II, and III, respectively), one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(c) (2008) (count IV), and one count of using a minor in a sexual performance or pornographic work in violation of Minn. Stat. § 617.246, subd. 2 (2008) (count V).

At sentencing, the district court formally adjudicated appellant convicted of “[c]ount I of the complaint now before this [c]ourt,” but the court recited the statutory provision for count II, section 609.342, subdivision 1(h)(i). The parties have not raised this discrepancy and appear to assume that the court intended to adjudicate only count I. For purposes of our sufficiency analysis below, we conclude that the district court’s reference to the statutory provision for count II was mistaken and that appellant stands convicted of count I under section 609.342, subdivision 1(a).

Appellant argues that the Warrant of Commitment in the district court file should be corrected because it erroneously indicates that he was “[c]onvicted” of all four criminal-sexual-conduct charges. The state concedes that the record should be corrected to reflect no adjudication as to counts II through IV. We agree.

A “[c]onviction” means “a verdict of guilty by a jury” that is “accepted and recorded by the court.” Minn. Stat. § 609.02, subd. 5 (2010). Here, the district court properly withheld adjudication as to counts II through IV because counts I through III arose from a single behavioral incident and count IV is a lesser-included offense. *See* Minn. Stat. §§ 609.04, subd. 1 (prohibiting defendant convicted of one offense from being convicted of an included offense and defining an included offense as “[a] crime necessarily proved if the crime charged were proved”), 609.035, subd. 1 (prohibiting criminal defendant from receiving multiple punishments for conduct constituting more than one offense) (2010); *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that when a defendant is convicted of multiple crimes arising out of the same act, “the court [is] to adjudicate formally and impose sentence on one count only” and keep the remaining counts unadjudicated pending reversal of the adjudicated count). Because the Warrant of Commitment does not reflect the proper conviction status with respect to counts II through IV, we remand to the district court with instructions for correction and clarification.

We note that neither party discusses count V. The Warrant of Commitment indicates that appellant stands “[c]onvicted” of count V as well, but the sentencing transcript reflects that the district court did not formally adjudicate or sentence appellant

on this count. On remand, the district court may in its discretion determine whether count V should be adjudicated or sentenced, or whether the Warrant of Commitment should be corrected, with respect to count V.

III.

In his pro se supplemental brief, appellant argues that the evidence presented at trial shows that “there was no proof of penetration” and creates “doubts about [his] guilt.” Essentially he challenges A.M.K.’s credibility and argues that the evidence is insufficient to support his conviction of first-degree criminal sexual conduct. We disagree.

A person commits criminal sexual conduct in the first degree when the person “engages in sexual penetration with another person” and “the complainant is under 13 years of age and the actor is more than 36 months older than the complainant.” Minn. Stat. § 609.342, subd. 1(a).

It is undisputed that A.M.K. was under 13 years of age and that appellant was more than 36 months older than A.M.K. at the time the alleged sexual abuse occurred. And although A.M.K. was unable to testify as to sexual penetration at trial, her statements to nurse Carter and Droneck that appellant put his “private” in her “private,” butt, and mouth, are sufficient to establish this element of the crime. A finding of penetration is also supported by testimony from appellant’s sister and father that they viewed a video clip on appellant’s cell phone showing a male penetrating A.M.K.’s mouth with his penis, and an inference that the male was appellant based on the totality of the circumstances. The jury’s decision to credit this evidence over A.M.K.’s testimony at trial will not be disturbed on appeal. *See Francis v. State*, 729 N.W.2d 584,

589 (Minn. 2007) (“Assessing the credibility of a witness and the weight to be given a witness’s testimony is exclusively the province of the jury.”). The evidence in the record is sufficient to support appellant’s conviction.

Affirmed and remanded.