STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2044

In the Matter of the Welfare of:
E.T., Jr., Child.

Filed December 30, 2008
Affirmed in part and reversed in part
Huspeni, Judge[*]

Hennepin County District Court
File No. 27-JV-06-13056

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mike Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant E.T., Jr.)

Considered and decided by Peterson, Presiding Judge; Stauber, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

Appellant was adjudicated delinquent for first- and second-degree criminal sexual conduct involving his seven-year-old sister, and argues on appeal that (1) the district

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

court erred in failing to suppress statements made by appellant during custodial interrogation prior to being given a *Miranda* warning; (2) statements made by appellant were inadmissible because they were not made voluntarily; (3) the prosecution failed to prove venue; (4) there was insufficient evidence of genital-to-genital contact; and (5) that second-degree criminal sexual conduct is a lesser included offense of first-degree criminal sexual conduct. Because any error in failing to suppress the statements was harmless, but the evidence was insufficient to support the first-degree criminal sexual conduct adjudication, we affirm in part and reverse in part.

FACTS

Seven-year-old T.T. confided in her foster mother that appellant E.T., Jr., her older brother, had "freaked her." The foster mother immediately called T.T.'s social worker, and the case was assigned to Sergeant Knight. Knight summoned E.T., Jr. to the "family violence unit" at the police station for an interview. Upon arrival, E.T., Jr. was told that he was not under arrest and that he would return home with his foster mother. The 45-minute recorded interview was conducted by Knight, who was not in uniform, and a child protection worker. Knight showed E.T., Jr.'s foster mother where the interview would be conducted and showed E.T., Jr. the room where his foster mother would be waiting. Knight showed E.T., Jr. that the door to the interview room was unlocked and stated, "any time you want [to] leave you can leave."

At the outset of the interview, Knight told E.T., Jr. to "[l]ook at me when I talk to you." Several times during the interview, Knight told E.T., Jr., "[W]e know you

remember" and asked, "[A]re you sorry you did it?" Knight suggested that if E.T., Jr. told the truth, the judge would look favorably upon him and that the reason E.T., Jr.'s older brother was in jail was because he did not cooperate and tell the truth. When pressed, E.T., Jr. told Knight, "If I say I don't remember, I don't remember." At one point during the interview, E.T., Jr. told Knight that he would feel more comfortable talking to a doctor. Knight told E.T., Jr. that he would have to talk to "police or child protection" first. E.T., Jr. confessed to one incident he described as occurring in Illinois, where he touched T.T.'s breasts and vagina with his hand over her clothes for "5 seconds." He was subsequently charged by petition filed in Hennepin County Juvenile Court with first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (2004), and second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(a) (2004).

Prior to trial, E.T., Jr. moved to suppress his statements from the interview on the grounds that he was never advised of his *Miranda* rights and his statements were involuntary. At the *Rasmussen* hearing, after presentation of testimony from E.T., Jr. and Knight regarding the interview, the district court denied E.T., Jr.'s suppression motion.

At trial, T.T. testified that E.T., Jr. touched her vagina with his "dingaling" but that it was over her clothing. T.T. testified that when E.T., Jr. touched her vagina with his private part, "[i]t hurted." On a picture of an anatomically correct doll, T.T. pointed to the doll's penis when asked what she thought a "dingaling" was.

One of T.T.'s other older brothers, D.T., also testified at trial regarding an incident he witnessed between E.T., Jr. and T.T. In response to the prosecutor's question,

"[W]hat did you see [E.T., Jr.] touch T.T. with?" D.T. pointed to a part on an anatomically correct male doll without clothes. When asked if there was a name for the part of the doll in which he pointed, D.T. said "Penis." D.T. testified that one night while sleeping on the floor, he felt E.T., Jr. "humping" T.T. He stated that he got up and "faked" using the bathroom and cracked the bathroom door to observe E.T., Jr. and T.T. The prosecutor asked D.T. if "that's when [he] saw [E.T., Jr.'s] penis touching T.T.'s behind?" D.T. responded, "Yes." D.T. testified that E.T., Jr. was humping T.T. similar to how he had seen his parent's hump. On cross-examination, D.T. testified that "[E.T., Jr.] grabbed [T.T.'s] pants and then pulled them down."

Finally, E.T., Jr.'s foster mother testified that T.T. told her that E.T., Jr. had "stuck his thing" in her "private" and "freaked her." When she asked T.T. what she meant by "freaked," T.T. said it meant "sex."

E.T., Jr. called CornerHouse[1] interviewer Sara Blahauvietz to testify regarding her interview with T.T. Neither the transcript nor the videotape from that interview was entered into evidence, but Blahauvietz testified from her recollection of the contents of the interview with T.T. and from her knowledge of characteristics of sexually abused children, stating that T.T. said she would be in trouble if she talked about "her business" and that "her mother would whip her if she talked about stuff." T.T. did not disclose to Blahauvietz whether E.T., Jr. had touched her sexually or otherwise inappropriately. Blahauvietz testified that it is not abnormal for siblings to be hesitant about reporting

[1] CornerHouse is a child-abuse evaluation center.

certain incidents either because they do not want to incriminate their sibling or for safety reasons.

Finally, Knight testified that, according to his investigation, the incidents took place between June 2005 and January 2006 and that E.T., Jr. and his family resided at 2810 Bloomington Avenue South in Minnesota during that time.

E.T., Jr. was adjudicated delinquent on both counts of criminal sexual conduct. This appeal follows.

D E C I S I O N

E.T., Jr. argues that the district court erred in adjudicating him delinquent because (1) his statement to Knight should have been suppressed because he was in custody and had not been given a *Miranda* warning; (2) and even if he was not in custody his statement was not made voluntarily; (3) there was insufficient evidence that Hennepin County was the proper venue; (4) the evidence was insufficient to prove genital-to-genital contact; and (5) the charge of second-degree criminal sexual conduct should be vacated as a lesser-included offense. We address each of these arguments in turn.

I.

Whether a defendant was in custody at the time of an interrogation is a mixed question of law and fact. *In re Welfare of D.S.M.*, 710 N.W.2d 795, 797 (Minn. App. 2006). We apply the controlling legal standard to historical facts as determined by the trial court. *Id.* We review the district court's findings of fact for clear error, but review

de novo the district court's custody determination and the need for a *Miranda* warning. *Id.*

E.T., Jr. argues that he was in custody during his interview with Knight because he believed that he was not free to leave. A defendant must be given a *Miranda* warning informing him of his Fifth Amendment privilege against self-incrimination prior to being subject to custodial interrogation. *Id.* at 797 (citing *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966)). *Miranda*'s due-process protections apply to juveniles as well as adults. *State v. Burrell*, 697 N.W.2d 579, 592 (Minn. 2005) (citing *In re Gault*, 387 U.S. 1, 13, 87 S. Ct. 1428, 1436 (1967)). The determination of whether a juvenile would reasonably believe he was in custody must be made from the perspective of the juvenile. *D.S.M.*, 710 N.W.2d at 798. We also consider factors such as the child's age, intelligence, education, experience with the law, the warning given, and the presence or absence of the child's parents. *In re Welfare of M.A.K.*, 667 N.W.2d 467, 471 (Minn. App. 2003). Furthermore, the Minnesota Supreme Court has noted that one or more of the following circumstances may indicate that a suspect was not subject to custodial interrogation:

> questioning taking place in the suspect's home; police expressly informing the suspect that he or she is not under arrest; the suspect leaving the police station at the close of the interview without hindrance; the brevity of questioning (fifteen minutes); the suspect's freedom to leave at any time; a nonthreatening environment; and the suspect's ability to make phone calls.

State v. Staats, 658 N.W.2d 207, 212 (Minn. 2003).

Because the circumstances surrounding the interview in this case would have made a reasonable juvenile believe that he was not free to leave, we conclude that the district court erred in concluding that E.T., Jr. was not in custody. E.T., Jr. was a 13-year-old boy and, by all accounts, a child of average intelligence and maturity for his age. E.T., Jr. testified that he had never been interrogated by the police before, but had answered questions from the police about his father. On this occasion, he was brought to the police station by his foster mother without being told why and after declaring that he did not want to go. Upon arrival, he was escorted to a private room after his foster mother was told to sit in a waiting room.

E.T., Jr. was in an unfamiliar environment and in the presence of law enforcement personnel whom he had never met. During the course of the interview, Knight confronted E.T., Jr. with statements and questions which were consistently accusatory in nature. Knight's insistence on his version of the facts led E.T., Jr. to conclude that Knight would not accept any other version. While Knight told E.T., Jr. that he was free to leave if he did not want to talk to him, Knight's complete disregard for E.T., Jr.'s affirmation that he would feel more comfortable speaking with a doctor first is indicative of the fact that E.T., Jr. believed he would not be allowed to leave until Knight was through with his investigation.

The district court determined that E.T., Jr. "answered the questions very much to the point and held his own quite well with the officer." While the facts of this case present us with a close call, after considering all circumstances we conclude that E.T., Jr.

was improperly subjected to a custodial interrogation prior to receiving a *Miranda* warning. However, our analysis cannot end with that determination. We must determine whether the admission of the illegally gained confession was harmless error.[2] The district court's error in admitting a juvenile's statement does not automatically result in a reversal and the granting of a new trial. *In re Welfare of T.J.C.*, 670 N.W.2d 629, 631 (Minn. App. 2003) (applying harmless error analysis to a verdict of a bench trial), *review denied* (Minn. Jan. 20, 2004). In examining the impact of the error, we must ask ourselves, "what effect, if any, did E.T., Jr.'s statement, as heard by the district court, actually have on the delinquency adjudication?" To decide whether the district court's verdict was "surely unattributable" to the error, we look to the record as a whole. *State v. Juarez*, 572 N.W.2d 286, 292 (Minn. 1997).

T.T.'s testimony that E.T., Jr. had touched her over her clothing supports an adjudication of second-degree criminal sexual conduct. We must infer that the district court found the testimony of the prosecution witnesses credible. *In re Welfare of L.A.F.*, 554 N.W.2d 393, 396 (Minn. 1996) (finding the district court in a "superior" position to assess credibility of witnesses). Furthermore, the foster mother and D.T. testified to different events that could support a second-degree conviction, and the district court understood the circumstances under which E.T., Jr.'s statements were elicited.

[2] We are aware that in *D.S.M.*, we held that the harmless error rule may not be applied to the review of juvenile delinquency adjudications that were submitted on stipulated facts. 710 N.W.2d at 798 (citing *In re Welfare of R.J.E.*, 642 N.W.2d 708, 712-13 (Minn. 2002)). However, E.T., Jr.'s case is distinguishable because his case was tried by a fact-finder.

Therefore, the district court's error in admitting E.T., Jr.'s statements taken in violation of his *Miranda* rights was harmless beyond a reasonable doubt because adjudication following a bench trial was "surely unattributable" to this erroneous admission because substantial other evidence at trial sufficiently supports the adjudication of delinquency for second-degree criminal sexual conduct.

II.

Alternatively, E.T., Jr. argues that the district court erred in denying his motion to suppress because his statement was not made voluntarily. Whether a defendant's statement was voluntary presents a question of law that this court reviews de novo. *State v. Ritt*, 599 N.W.2d 802, 808 (Minn. 1999), *cert. denied*, 582 U.S. 1165, 120 S. Ct. 1184 (2000). But the district court's factual findings regarding the circumstances that surround an interrogation will be upheld unless clearly erroneous. *State v. Williams*, 535 N.W.2d 277, 286 (Minn. 1995).

A defendant who is convicted based on an involuntary statement is deprived of due process of law under the Fourteenth Amendment of the United States Constitution. *State v. Camacho*, 561 N.W.2d 160, 169 (Minn. 1997). "A confession is not voluntary if the actions of the police, combined with the circumstances, are so coercive and intimidating that the defendant is unable to make a free-will decision. The actions of police need not be threats or deliberate intimidation to be coercive." *M.A.K.*, 667 N.W.2d at 472. Deciding whether a juvenile's statement was made voluntarily mandates consideration of the juvenile's "age, maturity, intelligence, education, experience, and

ability to comprehend; length and legality of the detention; lack of, or adequacy of a warning; the nature of the interrogation; and whether the defendant was deprived of physical needs." *In re Welfare of D.S.N.*, 611 N.W.2d 811, 814 (Minn. App. 2000).

Applying the totality-of-the-circumstances test to the facts of this case and cognizant of our conclusion that E.T., Jr.'s interrogation was custodial in nature, we conclude that the challenged statement was involuntary. Although E.T., Jr. does not suffer from any physical or mental disabilities, he was only 13 years old at the time of the interview with Knight. We recognize that E.T., Jr. never asked for, and thus was never denied, access to any food, drink, or bathroom use during the course of the interview. Nor can we conclude from the record before us whether, if requested, E.T., Jr. would have been given the opportunity to have his foster mother present. And we are aware that the absence of a parent is not determinative of whether a juvenile's confession was voluntary, but rather only one factor that must be weighed in concert with the totality of the circumstances. *See In re Welfare of G.M.*, 560 N.W.2d 687, 696 (Minn. 1997) (stating that a totality-of-the-circumstances inquiry includes presence or absence of parents).

Knight's approach to interrogation is similar to the "sympathetic" approach police used in *State v. Hough*, 571 N.W.2d 578, 581 (Minn. App. 1997), *rev'd on other grounds*, 585 N.W.2d 393 (Minn. 1998). There, we concluded that the state satisfied its burden of proving voluntariness. We find E.T., Jr.'s case distinguishable because E.T., Jr. had no gainful experience with the law whereas the juvenile in the *Hough* case had a

"history in the juvenile court system." *Id.* This inexperience along with the intimidating surroundings and the presence of coercive tactics make it probable that a 13 year old such as E.T., Jr. was unable to make a free-will decision. At one point during the interview, Knight asked E.T., Jr. what he thought about someone saying they don't remember, to which he replied, "You can't make um say what they don't want to say." Yet Knight continued to push his own theory before finally leading E.T., Jr. to break down and confess to Knight's version of the facts.

Despite the presence of factors weighing in favor of and against a determination that E.T. Jr.'s statement was involuntary, the nature of the interview itself, including Knight's tactics, convinces us that the statement was involuntary. Knight did not raise his voice or threaten E.T., Jr. with charges or punishment during their conversation, but in downplaying the seriousness of the allegations and suggesting the favorable treatment E.T., Jr. would receive from the judge if he told the "truth," we conclude that E.T., Jr. was coerced into giving an involuntary statement. The totality of circumstances surrounding the interview indicates that the district court erred in determining that E.T., Jr.'s statement was made voluntarily.

As with our discussion regarding custodial interrogation, we do not end our analysis of the involuntariness of E.T., Jr.'s statements without determining whether the error in admitting those statements was harmless. As discussed above, substantial evidence elicited from the testimony of T.T. sustains E.T., Jr.'s delinquency adjudication for second-degree criminal sexual conduct. Therefore, despite our finding that the district

court erred in determining that E.T., Jr.'s statements to Knight were voluntary and the subsequent admission of those statements at trial was error, we find that the error was "surely unattributable" to the delinquency adjudication. The district court's error was harmless beyond a reasonable doubt.

III.

We turn next to E.T., Jr.'s argument that the state failed to prove venue beyond a reasonable doubt. "On appeal from a determination that each of the elements of a delinquency petition have been proved beyond a reasonable doubt, [we are] limited to ascertaining whether, given the facts and legitimate inferences, a fact-finder could reasonably make that determination." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 768 (Minn. App. 2001) (quotation omitted).

E.T., Jr.'s contention that venue was improper in this case appears to actually be an allegation that the State of Minnesota lacked jurisdiction to adjudicate him. E.T., Jr. argues that the state did not prove beyond a reasonable doubt whether the incidents occurred in Minnesota or Illinois, and therefore the evidence was insufficient to support the delinquency adjudications. The district court rejected this argument. We review jurisdictional issues de novo. *State v. LaRose*, 543 N.W.2d 426, 427 (Minn. App. 1996).

Minnesota Statutes section 609.025 (2006) confers jurisdiction to prosecute when a person "[c]ommits an offense in whole or in part within this state." A criminal case is to be tried in the county where the offense was committed. Minn. Stat. § 627.01, subd. 1 (2006); Minn. R. Crim. P. 24.01. Venue is an element of the criminal-sexual-conduct

offense that the state must prove beyond a reasonable doubt. 10 *Minnesota Practice*, CRIMJIG 12.07, 12.15 (2006).

At trial, E.T., Jr. identified several inconsistencies in the testimony of the state's witnesses regarding the location of the alleged incidents of criminal sexual conduct. We note initially that it is not always possible to determine with certainty when an offense or offenses occurred. This is especially true in cases like this where there is a minor victim who does not complain to the authorities immediately. *See, e.g.*, *State v. Becker*, 351 N.W.2d 923, 926 (Minn. 1984). "Inconsistencies and conflicts in evidence do not necessarily provide the basis for reversal" because they "are a sign of human fallibility . . . especially when the testimony is about a traumatic event." *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *review denied* (Minn. June 30, 2004).

D.T. testified regarding an incident that occurred either "in Bloomington" or "on Bloomington." Whether "Bloomington" refers to a street address or to a city, both are located in Hennepin County, Minnesota. Knight's address search revealed that E.T., Jr. lived on Bloomington Avenue with his family during the time of the alleged incidents. "When indirect evidence such as a street address or town name is offered during trial, a judge may take judicial notice of venue." *State v. Larsen*, 442 N.W.2d 840, 842 (Minn. App. 1989) (citing *State v. Trezona*, 286 Minn. 531, 176 N.W.2d 95 (1970)). Based on the testimony offered at trial, a reasonable fact-finder could determine that the offenses were committed in the State of Minnesota and that Hennepin County was the proper venue.

IV.

Next, E.T., Jr. contends that the state failed to present sufficient evidence of genital-to-genital contact to support a delinquency adjudication of first-degree criminal sexual conduct. In reviewing a claim of insufficient evidence, we must ascertain whether given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged. *T.N.Y.*, 632 N.W.2d at 768. We may not retry the facts, but must view the evidence in the light most favorable to the state and assume that the jury believed the state's witnesses and disbelieved any contradictory evidence. *In re Welfare of J.G.B.*, 473 N.W.2d 342, 345 (Minn. App. 1991) (citing *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978)). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980).

E.T., Jr. was adjudicated delinquent of first-degree criminal sexual conduct based on sexual contact with a person under the age of 13. Minn. Stat. § 609.342, subd. 1(a). "Sexual contact with a person under 13" is defined as the intentional touching of the child's bare genitals or anal opening by the actor's bare genitals with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(c) (2004).

Here, D.T. affirmatively answered that he witnessed E.T., Jr.'s penis touch T.T.'s behind. D.T. compared this incident with one in which he observed his parents involved in this same behavior. We recognize that the evidence of a single witness is sufficient to sustain a verdict. *See State v. Lanam*, 459 N.W.2d 656, 662 (Minn. 1990) (sustaining

criminal-sexual-conduct conviction largely based on testimony of child victim); *see also State v. Burns*, 524 N.W.2d 516, 521 (Minn. App. 1994) (uncorroborated testimony of a child witness provides sufficient evidence to convict in cases of criminal sexual conduct), *review denied* (Minn. Jan. 13, 1995). It remains the state's burden, however, to prove a crime beyond a reasonable doubt and one of the essential components for a delinquency adjudication of first-degree criminal sexual conduct is bare genital-to-genital contact. Minn. Stat. § 609.341, subd. 11(c); *see In re Welfare of S.M.J.*, 556 N.W.2d 4, 6 (Minn. App. 1996) (requiring the state to prove beyond a reasonable doubt every fact necessary to constitute the charged crime in a delinquency case). On the record before us, a fact-finder could not conclude beyond a reasonable doubt that E.T., Jr.'s "bare" penis touched T.T.'s "bare" behind. While that circumstance may, indeed, be possible or even probable, proof beyond a reasonable doubt is required. The "bare-genital-to-bare-genital" element of the offense was not elicited from D.T. during his examination. That element having not been met, there was insufficient evidence to support E.T., Jr.'s conviction for first-degree criminal sexual conduct.

Although the foster mother's testimony that T.T. told her E.T., Jr. "freaked" her corroborates D.T.'s version of events, T.T. did not testify that E.T., Jr. touched her other than over her clothing. Even presuming that the district court found D.T.'s testimony to be more credible than contradictory evidence presented by E.T., Jr., the record is insufficient to allow the fact-finder to find that there was bare-genital-to-bare-genital

contact involving E.T., Jr. and T.T. Therefore, the adjudication of first-degree criminal sexual conduct cannot be sustained and must be vacated.

V.

We need not address, in the context of appellant's first-degree criminal sexual conduct adjudication, his argument that his adjudication for second-degree criminal sexual conduct must be vacated because it is a lesser included offense of first-degree criminal sexual conduct. Instead, we review whether evidence of a second incident supports an adjudication of second-degree criminal sexual conduct. T.T. testified about an occasion when E.T., Jr. touched her breasts and vagina with his "dingaling" over her clothing, while she was in her bed wearing her "dress" and "panties." This incident was one totally separate to the incident described by D.T. Although T.T. gave slightly differing statements at different times, we must presume that the district court found the version of the sexual abuse T.T. testified to in open court to be credible. If a victim gives differing accounts of the incident at different times, it is left to the fact-finder to determine the credibility of each account. *See State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990) (holding that evidence was sufficient to sustain conviction even though victim's account of the sexual abuse changed over time), *review denied* (Minn. May 23, 1990); *State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (stating that the inconsistencies between victim's prior statement and testimony was an issue for the fact-finder to consider in weighing victim's credibility).

The incident described by T.T. sufficiently supports the delinquency adjudication for second-degree criminal sexual conduct. Therefore, we reverse the district court's delinquency adjudication of first-degree criminal sexual conduct and affirm the delinquency adjudication of second-degree criminal sexual conduct.

Affirmed in part and reversed in part.