FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-0989

ANTHONY JACQUES MILES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
William F. Stone, Judge.

August 30, 2021

RAY, J.

Anthony Jacques Miles appeals his conviction for human trafficking involving a child under the age of eighteen. Because the trial court committed harmful error by allowing the introduction of hearsay testimony about the minor victim's age, we reverse and remand for a new trial.

Miles was originally charged with two counts of human trafficking. Count I alleged the trafficking of a child, J.D., and count II alleged the trafficking of an adult, R.C. During a pretrial hearing on Miles's motion to sever the charges, defense counsel advised the trial court that he had been unable to serve J.D. with a subpoena for her deposition. He acknowledged that the State had provided him with various addresses, but he had not been able

locate her. He was concerned both by his inability to depose her and the possibility that she might not appear for trial, which might cause the jury to speculate about the reason for her absence. The State responded that J.D. had cooperated during a previous deposition attempt but had since become unavailable. The State still intended to pursue the charge involving J.D. and since both charges relied on the same evidence, the State argued that severance was inappropriate. The motion to sever was denied.

Two months later, the State tried the case without J.D.'s participation. To prove her age at the time of the offenses, the State presented the testimony of Katherine McCrary, a juvenile probation officer, and Michael Evans, a senior investigator from the Okaloosa County Sheriff's Office. Officer McCrary testified that she was not J.D.'s supervising officer, but she had seen J.D. at the Department of Juvenile Justice. She determined J.D.'s age by reviewing her probation records. Investigator Evans testified that he learned J.D.'s birthdate and age from Officer McCrary and by interviewing J.D. Over Miles's hearsay objections, both witnesses testified to J.D.'s age and birthdate. At the end of the trial, Miles was convicted of the charge concerning J.D. and acquitted of the charge concerning R.C.

On appeal, the State does not dispute that the testimony about J.D.'s age and birthdate was hearsay. Instead, the State argues that it was admissible under section 90.804(2)(d), Florida Statutes (2019), which creates a hearsay exception for statements of personal or family history, including statements about the declarant's birth. But the hearsay exceptions in section 90.804(2) only apply when the declarant is unavailable. *Wilson v. State*, 45 So. 3d 514, 516 (Fla. 4th DCA 2010). The proponent of the evidence has the burden of establishing unavailability and showing the exercise of due diligence in making a good-faith effort to secure the declarant's attendance. *Essex v. State*, 958 So. 2d 431, 432 (Fla. 4th DCA 2007); *McClain v. State*, 411 So. 2d 316, 317 n.3 (Fla. 3d DCA 1982).

To satisfy its burden under this hearsay exception, the State relies on defense counsel's comments during the hearing on the motion to sever that J.D. had become difficult to locate and might not appear for trial. Yet there was no stipulation at that hearing

that J.D. was "unavailable" for a trial that would occur months later. The State also failed to lay any of the groundwork to establish J.D.'s unavailability despite being on notice that she had become uncooperative. In response to Miles's hearsay objections at trial, the State did not assert that J.D. was unavailable or describe the steps taken to locate her or serve her with a subpoena. Given that the State made no attempt to meet its burden of establishing J.D.'s unavailability, there is no basis in the record for the admission of the challenged testimony. *See Francis v. State*, 308 So. 2d 174, 176 (Fla. 1st DCA 1975).

We agree with Miles that the error in admitting the hearsay evidence was not harmless. The harmless error test requires the State to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986).

J.D.'s age was an essential element of the charged offense. *See* § 787.06(3)(g), Fla. Stat. (2016). The jury was not given the option to convict Miles of any lesser offenses. Without the challenged testimony, there would not have been any evidence on the age of the victim, which would have led to either a judgment of acquittal or not guilty verdict. Because the State cannot prove beyond a reasonable doubt that the trial court's error did not contribute to Miles's conviction, we reverse and remand for a new trial. *See Richardson v. State*, 875 So. 2d 673, 677 (Fla. 1st DCA 2004) (reversing and remanding for a new trial based on the erroneous admission of hearsay testimony that was not harmless where it was the primary evidence of theft and the sole evidence of the amount of money missing). With this disposition, we decline to address Miles's second issue on appeal.

REVERSED and REMANDED.

MAKAR and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jason Cromey of Cromey Law, P.A., Pensacola, for Appellant.

Ashley Moody, Attorney General, and Daren L. Shippy, Assistant Attorney General, Tallahassee, for Appellee.