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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1889**

State of Minnesota,
Respondent,

vs.

Michael Anthony Llona,
Appellant.

**Filed September 11, 2017
Affirmed
Hooten, Judge**

Scott County District Court
File No. 70-CR-15-818

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

Ronald Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Bjorkman, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant argues that because the district court erroneously admitted out-of-court statements of the victims that were inconsistent with their testimony at trial, he is entitled to the reversal of his criminal sexual conduct convictions and a new trial. We affirm.

FACTS

From December 2010 to July 2013, appellant Michael Anthony Llona lived at the home where J.T. and T.T. resided with their children.¹ Llona would often babysit J.T. and T.T.'s youngest two children, K.T. and E.T., and the children's two young cousins, A.H. and G.H, while their parents were at work. During a family gathering in November 2014, over a year after Llona had moved out of the family's home, K.T., then eight years old, told her parents that Llona had sexually abused her when he lived with the family. J.T. called the police to report the abuse. While they were waiting for the police to arrive, A.H.'s mother asked A.H. whether Llona had "do[ne] anything to [her]," and A.H., then 12 years old, reported that he had sexually abused her.

A Scott County detective interviewed A.H. a few days later. On the day following A.H.'s interview, K.T. was interviewed by a nurse at Midwest Children's Resource Center (MCRC). Both A.H. and K.T. again reported that Llona had sexually abused them.

Llona was charged with three counts of first-degree criminal sexual conduct relating to K.T. All three counts alleged that between December 18, 2010, and July 16, 2013, Llona

¹ Llona helped raise J.T. as a child, and J.T. and T.T.'s children considered Llona to be a grandfather figure.

committed criminal sexual conduct against K.T. and that he was guilty under Minn. Stat. §609.342.1(a) (2012), (complainant under 13 years of age and actor more than 36 months older than complainant); Minn. Stat. §609.342.1(g) (2012) (significant relationship to complainant and complainant under age of sixteen); and, Minn. Stat. §609.342.1(h)(iii) (2012) (actor has significant relationship to complainant, complainant under 16 years of age at the time of sexual penetration, and sexual abuse involved multiple acts over an extended period of time). Llona was also charged with three counts of second-degree criminal sexual conduct relating to A.H.

At trial, both K.T. and A.H. testified about the sexual abuse. After K.T. had testified, the video recording of K.T.'s interview at MCRC was admitted into evidence over Llona's objection and was played for the jury. The district court also allowed the detective to testify about the statements A.H. made to him, over defense counsel's objection that Llona had not attacked her credibility.

The jury found Llona guilty of all three counts of first-degree criminal sexual conduct relating to K.T. With regard to A.H., the jury found Llona was guilty of one count of second-degree criminal sexual conduct, but found him not guilty of the two other counts of second-degree criminal sexual conduct. The district court imposed a 180-month sentence for one of the first-degree criminal sexual conduct counts and a consecutive sentence of 36 months for the second-degree criminal sexual conduct count. This appeal followed.

DECISION

A district court's ruling regarding the admission of evidence lies within its broad discretion and will not be reversed absent an abuse of discretion. *State v. Hall*, 764 N.W.2d 837, 841 (Minn. 2009). A defendant claiming that the district court erroneously admitted evidence "must show both the error and resulting prejudice." *Id.*

Llona contends that the district court erred by admitting the recording of K.T.'s interview at MCRC and allowing the detective to testify about A.H.'s statements to him, arguing that these statements were not consistent with the victims' testimony at trial. A prior statement of a witness who testifies at trial is not hearsay if the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B).

The state argues that Llona objected to the admission of the recording of the MCRC interview and A.H.'s statement on different grounds at trial and therefore the plain error standard of review should apply. We agree.

In his motion in limine, Llona, through his defense counsel, sought an order prohibiting the use of the recording of K.T.'s MCRC interview, arguing that the evidence violated his constitutional rights under the Confrontation Clause. At the pretrial hearing, Llona objected on the basis that the recording was not the "best evidence" and would be unduly prejudicial. Later, after the jurors had been selected but before they were sworn in, Llona again objected to the admission of the recording in a discussion outside of the presence of the prospective jurors, arguing that the admission of the recording violated the Confrontation Clause and was "duplicative." At trial, when the state offered the MCRC

recording as evidence after K.T. had testified, Llona merely renewed his previous objections, rather than arguing that the interview was inconsistent with K.T.'s testimony. Over Llona's objection, the recording of the interview was received and played for the jury.

Regarding A.H.'s statement to the detective, defense counsel contended at trial that the evidence was not admissible because A.H.'s credibility had not been challenged, not that her statement was inconsistent with her testimony at trial. Minnesota courts have interpreted Minn. R. Evid. 801(d)(1)(B) as requiring a challenge to the witness' credibility before the prior consistent statement is admissible. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). On appeal, however, Llona concedes that "the defense arguably challenged K.T.'s and A.H.'s credibility."

To properly preserve a claim that evidence should have been excluded, a defendant must "timely object[]" and "stat[e] the specific ground of objection, if the specific ground was not apparent from the context." Minn. R. Evid. 103(a)(1). The Minnesota Supreme Court has stated that it is "particularly important" for counsel to object to hearsay evidence with specificity because of the "complexity and subtlety of the operation of the hearsay rule and its exceptions." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). Because Llona did not object to K.T.'s or A.H.'s statements on the ground that they were not consistent with their testimony at trial, we apply the plain error test to his claims of error. *See State v. Mosley*, 853 N.W.2d 789, 796–797, 797 n.2 (Minn. 2014) (applying plain error test to argument that evidence should have been excluded under Minn. R. Evid. 403 when trial counsel objected on other grounds).

Under the plain error doctrine, an appellant is entitled to relief only if he shows that (1) there is an error; (2) that is plain; and (3) the error affects his substantial rights. *Id.* at 797. An error is plain if it “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the plain error test is satisfied, we must then determine whether it is necessary to address the error in order “to ensure fairness and the integrity of the judicial proceedings.” *State v. Rossberg*, 851 N.W.2d 609, 618 (Minn. 2014) (quotation omitted).

Because the purpose of rule 801(d)(1)(B) is to allow a party to bolster the credibility of a witness, “when a witness’ prior statement contains assertions about events that have not been described in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule.” *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007). The reasoning behind this principle is that “the exception should not be the means to prove new points not covered in the testimony of the speaker.” *Id.* (quotation omitted).

If the inconsistencies directly affect the elements of the criminal charge, the rule 801(d)(1)(B) consistency requirement is not satisfied and the prior statements may not be admitted as substantive evidence under that rule. *See Bakken*, 604 N.W.2d at 110 (concluding that district court erred in admitting out-of-court statement of sexual abuse victim where conduct described in recorded statement but not at trial would have escalated severity of offense to first-degree criminal sexual conduct). However, “[t]he trial testimony and the prior statement need not be identical to be consistent, and admission of a videotaped statement that is reasonably consistent with the trial testimony is not

reversible error” *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (citation and quotation omitted).

Although Llona argues that the MCRC interview and A.H.’s statements to the police were inconsistent with K.T.’s and A.H.’s trial testimony, we conclude that many of the statements that Llona contests are not necessarily inconsistent with K.T.’s and A.H.’s testimony at trial.

Llona argues that A.H., at trial, denied that Llona tried to put his hand down the front of her pants, but told the detective that Llona would try to “go to her [vagina.]” In her statement to the detective, A.H. did not indicate that Llona had touched her vaginal area or put his hand down the front of her pants, but instead indicated that when he would try to touch her vaginal area, she would wiggle, get up, or get the attention of someone else in order to avoid his touch. A.H.’s statements were consistent in describing that Llona would try to touch her vagina. Therefore, there was no error in the admission of A.H.’s statement to the detective as a prior consistent statement.

With regard to K.T., Llona argues that K.T. told the nurse during the MCRC interview that he put his penis “against” her vagina, while she testified at trial that he put his penis “in” her vagina. However, this argument mischaracterizes K.T.’s testimony at trial. When K.T. was asked at trial to describe what happened, she explained that when Llona was caring for her while her parents worked, Llona would bathe her, dry her off, and have her go up on a bed. She indicated that he would then take down his pants so that his penis was exposed and then “would put it on [her]”. Upon further questioning, she stated that “[h]e would put it on [her] or in [her].” The nurse that conducted the MCRC interview,

who also testified at trial, explained that K.T., in describing Llonas conduct, identified the labia minor as the part of the vagina that he put his penis in or on. Based upon this record, we conclude that her testimony at trial is reasonably consistent with her statements during her MCRC interview.

Llona also argues that the statements in K.T.s MCRC interview are inconsistent with her trial testimony in several other respects. At trial, K.T. testified that Llona put his mouth on her breast and put his finger in her vagina; she did not describe this conduct during her MCRC interview. But, because these statements were made during the trial, they are not hearsay. Llona.s only other alleged inconsistency is that K.T. claimed in her MCRC interview that Llona had rubbed his penis on her buttocks and licked her vagina, but she did not testify to this conduct at trial. Therefore, we must determine whether the district court committed plain error in admitting K.T.s MCRC interview as a prior consistent statement despite these discrepancies.

Although K.T. did not testify at trial that Llona rubbed his penis on her buttocks or licked her vagina, K.T. testified at trial regarding multiple incidents of sexual contact, including sexual penetration, on multiple occasions over a period of time, consistent with her MCRC interview. Additionally, K.T. was consistent in reporting that the abuse occurred in the home where she lived with her family when Llona babysat her while her parents were at work. Unlike in *Bakken*, where the only evidence of first-degree criminal sexual conduct was contained in the victim.s recorded interview, 604 N.W.2d at 110, here both the MCRC interview and K.T.s testimony at trial provided evidence of first-degree criminal sexual conduct. And, this court has rejected similar arguments regarding the

admission of a recording of a child victim's interview with police where the prior statement was more detailed than the victim's trial testimony and allegedly "contained significant facts" to which the victim did not testify at trial. See *In re Welfare of K.A.S.*, 585 N.W.2d 71, 75–76 (Minn. App. 1998). In viewing the recording as a whole, we conclude that K.T.'s MCRC interview was reasonably consistent with her trial testimony. Therefore, we cannot say under these circumstances that the district court plainly erred by admitting K.T.'s recorded MCRC interview as a prior consistent statement.

Moreover, Llonca cannot prove that any error in the admission of K.T.'s MCRC interview affected his substantial rights. In evaluating whether any error affected Llonca's substantial rights, we must "examine whether there is a reasonable likelihood that the error had a significant effect on the jury's verdict." *State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010). Llonca "bears a heavy burden of persuasion on this prong." *Id.* (quotation omitted). In determining whether a defendant met this heavy burden, appellate courts "review the strength of the [s]tate's case, the pervasiveness of the error, and whether the defendant had an opportunity to respond to the testimony." *Id.*

It is true that K.T. indicated in her MCRC interview that Llonca had licked her vagina and rubbed his penis on her buttocks, but failed to testify to this at trial. But these inconsistencies, if believed, would not have escalated the charges against Llonca, as in *Bakken*. An individual is guilty of first-degree criminal sexual conduct if he or she "engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c)." Minn.

Stat. § 609.342 (2012).² The definition of “sexual penetration” includes “sexual intercourse” and “any intrusion however slight into the genital or anal openings . . . of the complainant’s body by any part of the actor’s body.” Minn. Stat. § 609.341, subd. 12 (2012). “Sexual contact with a person under 13” is defined as “the intentional touching of the complainant’s bare genitals or anal opening by the actor’s bare genitals or anal opening with sexual or aggressive intent or the touching by the complainant’s bare genitals or anal opening of the actor’s or another’s bare genitals or anal opening with sexual or aggressive intent.” *Id.*, subd. 11(c) (2012). K.T. testified to numerous sexual acts that fit within the statutory definition of first-degree criminal sexual contact, even though she did not testify at trial that Lloná licked her vagina or rubbed his penis on her buttocks.

Given the numerous incidents of sexual contact, including sexual penetration, to which K.T. testified at trial, Lloná fails to explain how there is a reasonable likelihood that any alleged error in admitting the MCRC recording had a significant effect on the jury’s verdict. During the trial, Lloná had the opportunity to cross-examine K.T. regarding her claims that she was sexually abused by him on multiple occasions in the family home. The jury found her claims to be credible. Her statements during the MCRC interview that Lloná licked her vagina or rubbed his penis on her buttocks did not enhance the charges and were reasonably consistent with her multiple claims of repeated sexual contact and penetration by Lloná during the extended period that he babysat the children in their home. Under

² The exact date of the offenses is unclear. However, because the offenses occurred sometime between December 2010 and July 2013 and because the legislature made no relevant amendments to the statutes during the time frame of the offenses, we cite to the 2012 version of the statutes.

these circumstances, we conclude that Llona failed to show that the admission of K.T.'s MCRC interview affected his substantial rights.

Affirmed.