STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1771

State of Minnesota,
Respondent,

vs.

David Ronald Leonard,
Appellant.

Filed August 31, 2020
Affirmed
Cochran, Judge

Fillmore County District Court
File No. 23-CR-18-199

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Cochran, Judge.

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

COCHRAN, Judge

Appellant contends that the district court made erroneous evidentiary rulings that deprived him of his Confrontation Clause rights as guaranteed by the United States and

Minnesota Constitutions. Because the district court's evidentiary rulings were not erroneous and did not violate appellant's Confrontation Clause rights, we affirm.

FACTS

The state charged appellant David Ronald Leonard with one count of second-degree criminal sexual conduct and two counts fifth-degree criminal sexual conduct. A jury found Leonard guilty of all counts. At issue in this appeal is the admission of two videotaped forensic interviews of the then-eight-year-old victim, N.M., and the manner in which they were introduced at trial.

It is undisputed that the trial evidence shows that, in the spring of 2016, N.M. lived down the street from a family with three children, A.G., L.G., and T.G. N.M. often went to the family's house to play with T.G., the youngest of the three children. Leonard is T.G.'s great uncle. Leonard occasionally helped with childcare at the family's house. Leonard also did maintenance work at a nearby cemetery. On one occasion, he brought N.M., T.G., L.G., and another child to the cemetery to help with some work. In November 2017, N.M. told her mother that she had been sexually abused by the person she believed to be T.G.'s grandfather.

Near the beginning of trial, the state notified the court and Leonard that it intended to call N.M. and several other child witnesses on the first day of trial. Defense counsel indicated that if the forensic interviews were introduced later at trial, "it's possible that there would be further cross-questions based on those statements that the defense may need to ask [N.M.]."

In her trial testimony, N.M. identified Leonard in the courtroom, and explained that she had previously believed that Leonard was T.G.'s grandfather. She proceeded to testify about several incidents during which Leonard sexually abused her. The first incident that N.M. testified about occurred at T.G.'s house. Leonard told her to move closer to him and touched her on her thigh. He told her to take off her pants, but N.M. refused and then physically resisted Leonard's attempts to remove her pants. Leonard also touched her chest.

In another incident, Leonard pushed N.M. into the family's bathroom and made her hold a towel. Leonard took off his pants and ejaculated.

In a third incident, Leonard placed N.M. on his lap, touched her hair and her thigh, and told her that she had beautiful eyes. He told N.M. not to talk to her brother about the incidents.

A fourth incident occurred at the cemetery where Leonard worked. Leonard drove N.M., T.G., L.G., and another child to the cemetery to help do some work there. In Leonard's truck, N.M. saw a picture of a naked woman. When they arrived at the cemetery, Leonard gave everyone except N.M. a bag to pick up flowers. Leonard told N.M. that she could get a bag from a shed. When Leonard and N.M. went into the shed, Leonard shut the door. He looked down N.M.'s pants, touched her genitals, and tried to kiss her. He also told N.M. to get on the tractor and pull her pants down so that he could take a picture. When she sat on the tractor, he pulled her pants down and her legs apart. Then, after taking pictures, he gave N.M. a bag and let her leave. Later that day, Leonard confronted N.M. in the family's garage and would not let her leave until she said she loved him.

Finally, N.M. testified about a fifth incident. While changing clothes after a water fight, she saw Leonard looking at her through a crack in the door.

At some point, T.G.'s mother asked N.M. if Leonard had done anything to her, but N.M. said that nothing had happened. N.M. eventually told her own mother about Leonard's abuse. The prosecutor asked N.M. if she had talked to anyone about the incidents after she told her mother. N.M. confirmed that she spoke with someone—a "lady or somebody from the police department"—about what had happened. She said that she did not tell that person everything that Leonard had done because she was scared.

Defense counsel cross-examined N.M. by asking about her memory, whether she had talked to anyone about the incident, and if anyone had told her that they believed something had happened to her. While defense counsel did not ask questions about the substance of the forensic interviews that were later introduced, defense counsel did ask N.M. some questions about whether she had talked to a social worker about the incidents.

Later in the trial, the state called the social worker who conducted the forensic interviews at issue in this appeal. Before the social worker testified, the district court watched the video recording of the interviews. The district court concluded that N.M.'s statements in the forensic interviews were admissible under Minn. R. Evid. 801(d)(1)(B) as prior consistent statements. The state introduced the forensic interview videos through the social worker and played them for the jury.

In the first forensic interview, N.M. told the social worker about the incident at the cemetery. She also discussed a time when she was at T.G.'s house and she ran away because she was afraid of Leonard.

In the second forensic interview, which occurred on a later date, N.M. again discussed the cemetery incident. She described other incidents, including an incident when Leonard grabbed her and asked if she loved him while they were in the family's garage. She told the social worker about another incident that occurred in T.G.'s parents' room when Leonard attempted to "go in her pants." She physically resisted Leonard's attempt to put his hands in her pants. She eventually ran away.

Other witnesses corroborated aspects of N.M.'s testimony. T.G.'s father testified that Leonard told him that he had helped N.M. change after a water fight. T.G.'s mother testified that she had asked N.M. if Leonard had done anything to her. T.G. saw Leonard and N.M. go into a room by themselves on two different occasions. Both T.G. and L.G. testified that Leonard brought them to the cemetery with N.M. They testified, however, that they did not see N.M. and Leonard go into a shed. N.M.'s mother testified about when N.M. told her about Leonard's abuse.

After the state rested, Leonard asked the state to recall N.M. for further cross-examination about her statements during the forensic interviews. The district court did not require the state to recall N.M. and suggested that Leonard subpoena N.M. to have her testify.

Leonard testified in his case-in-chief. He asserted that he did not sexually abuse N.M. But he also admitted that he brought the children to the cemetery, that there was a riding lawn tractor at the cemetery, and that there was a calendar with a picture of a naked woman in his truck.

The jury found Leonard guilty of all counts. After trial, Leonard brought a motion for a new trial, arguing that he was denied his right to confrontation because he was denied an opportunity to confront N.M. after the forensic interviews were introduced. After a motion hearing, the district court issued a written order denying Leonard's motion. The district court sentenced Leonard to 91 months in prison.

Leonard appeals.

D E C I S I O N

Leonard's appeal concerns the admission of the forensic interview videos and the manner in which they were introduced. He first argues that, because N.M. testified before the videos were introduced, and because the district court did not require the state to recall N.M. after they were introduced, the district court deprived him of his Confrontation Clause rights. Second, he argues that the district court abused its discretion by admitting the forensic interview videos as prior consistent statements under Minn. R. Evid. 801(d)(1)(B). We address each issue in turn.

I. There is no Confrontation Clause violation because N.M. testified and was subject to cross-examination.

Leonard first argues that he was deprived of his Confrontation Clause rights because he was allowed to cross-examine N.M. before, but not after, the state introduced N.M.'s prior statements. An alleged denial of a defendant's rights under the Confrontation Clause is a question of law that is subject to de novo review. *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008); *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007).

Both the United States and the Minnesota Constitutions provide that a criminal defendant has the right to confront the witnesses against him. *Holliday*, 745 N.W.2d at 564 (citing U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .")); Minn. Cont. art. I, § 6 ("The accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). The "ultimate goal [of the Confrontation Clause] is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370 (2004). "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined." *Id.* We apply the same analysis to a Confrontation Clause claim under both the United States and Minnesota Constitutions. *Holliday*, 745 N.W.2d at 564.

In *Crawford*, the United States Supreme Court determined that the Confrontation Clause precludes the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54, 124 S. Ct. at 1365. The United States Supreme Court emphasized:

> [W]e reiterate that, *when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements*. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at

> trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.)

Id. at 59 n.9, 124 S. Ct. at 1369 n.9 (quotations and citations omitted) (emphasis added). Relying on *Crawford*, the Minnesota Supreme Court has stated that "[a] successful Confrontation Clause claim has three prerequisites: the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013). The prerequisite at issue here is whether Leonard was unable to cross-examine the declarant, N.M.[1]

We conclude that Leonard's Confrontation Clause claim is not successful because he was able to cross-examine N.M. "[A] declarant's appearance for cross-examination at trial removes all Confrontation Clause barriers to the admission of his or her prior statements." *Holliday*, 745 N.W.2d at 565 (citing *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9). In *Holliday*, the Minnesota Supreme Court specifically held that "[t]he admission of a witness's prior out-of-court statements did not violate appellant's Confrontation Clause rights as guaranteed by the United States and Minnesota Constitutions where the witness appeared for cross-examination at trial." *Id.* at 559. In this case, N.M. testified at trial and Leonard cross-examined her. Thus, there

[1] The parties do not address whether N.M.'s statements were introduced to prove the truth of the matter asserted. And while Leonard argues that N.M.'s statements were testimonial, the state does not address the issue. Because we ultimately conclude that Leonard was able to cross-examine N.M., satisfying the Confrontation Clause, we do not address whether the statements were testimonial or whether they were introduced to prove the truth of the matter asserted.

was no Confrontation Clause barrier to the admission of the two forensic interviews later in trial.

Leonard argues that *Holliday* is distinguishable and, therefore, its holding does not apply to this case. Leonard notes that, in *Holliday*, the declarant was asked about the prior statements at issue and the declarant testified that he did not recall making the statements. *See id.* at 561. Leonard contends that he was not afforded a similar opportunity to cross-examine N.M. about her statements because the forensic interview videos were introduced and admitted after N.M. testified. We are not persuaded. Under the rules of evidence, Leonard could have cross-examined N.M. about the content of the forensic interviews prior to the admission of the videos because N.M.'s credibility was at issue. *See* Minn. R. Evid. 611(b) ("Cross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness*. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.") (Emphasis added.). And the record clearly establishes that Leonard was aware of the state's intent to introduce the forensic interview videos before trial. Leonard did not have to wait until the state introduced the videos to cross-examine N.M. about their contents. Leonard had the opportunity to cross-examine N.M. about the prior statements, but opted not to. Leonard's efforts to distinguish the holding in *Holliday* are unavailing.

Leonard also relies on the United States Supreme Court's statement in *Crawford* that the Confrontation Clause "does not bar admission of a statement so long as the

declarant is present at trial to defend or explain it." 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9. The Minnesota Supreme Court explicitly discussed this passage in *Holliday*:

> We recognize that the Supreme Court's conclusion that the Confrontation Clause does not bar admission of a prior testimonial statement "so long as the declarant is present at trial to defend or explain it," [*Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9], could be interpreted to require that the declarant actually defend or explain the statement. But such an interpretation both ignores the fact that the Court's "language still focuses on presence and ability to act without requiring that the record show the declarant actually did defend or explain the statement," Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 Brook. L. Rev. 35, 76 (2005), and is at odds with the Court's more explicit assertion that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements," *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. [at 1354 n.9].

745 N.W.2d at 565-66. Considering this discussion, we find Leonard's reliance on this passage to be misplaced.

Leonard also points to two pre-*Holliday* court of appeals opinions as further support for his argument that his Confrontation Clause rights were violated. These cases are inapposite. The cases tangentially reference the premise that the Confrontation Clause is satisfied where the declarant testifies at trial and is subject to cross-examination concerning a prior statement. *See State v. Tate*, 682 N.W.2d 169, 176 n.1 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004); *see also State v. Courtney*, 682 N.W.2d 185, 196 (Minn. App. 2004), *rev'd on other grounds*, 696 N.W.2d 73 (Minn. 2005). But neither case addresses whether a defendant's Confrontation Clause rights are violated where a declarant

is subject to cross-examination before the declarant's prior statement is admitted. These pre-*Holliday* cases shed no light on the issue raised by Leonard in this case.

Finally, Leonard argues that the district court's invitation to subpoena and recall N.M. in his case-in-chief for further cross-examination violates the principle established in *Melendez-Diaz v. Massachusetts* that the ability to subpoena a declarant does not alleviate Confrontation Clause issues when the declarant's prior statement is introduced at trial. 557 U.S. 305, 324, 129 S. Ct. 2527, 2540 (2009). But in *Melendez-Diaz*, the declarant—a forensic analyst who drafted an affidavit reporting the results of a forensic analysis that was admitted at trial—did not testify at trial. *Id.* at 307-09, 129 S. Ct. at 2530-31. Here, the state subpoenaed N.M., and N.M. testified and was cross-examined. *Melendez-Diaz* is inapplicable.

Ultimately, the Confrontation Clause guarantees a criminal defendant the "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Holliday*, 745 N.W.2d at 566 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985)). Leonard cross-examined N.M. and had the opportunity to cross-examine her about her prior statements, but opted not to. We are not persuaded that Leonard was denied an opportunity to cross-examine N.M. Because N.M. testified and was subject to cross-examination, the Confrontation Clause was satisfied.

II. The district court did not abuse its discretion by admitting the forensic interview videos as prior consistent statements under Minn. R. Evid. 801(d)(1)(B).

Leonard also argues that the district court abused its discretion by allowing the state to introduce N.M.'s forensic interview statements as prior consistent statements under Minn. R. Evid. 801(d)(1)(B).

We will not reverse a district court's evidentiary rulings absent a "clear abuse of discretion." *Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020) (quotations omitted); *see also Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009) (reviewing district court's ruling on hearsay evidence for an abuse of discretion). A district court abuses its discretion if its ruling is "based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019).

Rule 801 defines hearsay 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." Minn. R. Evid. 801(c). Generally, hearsay is inadmissible at trial unless an exception to the general rule applies. Minn. R. Evid. 802. But a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and 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 district court admitted N.M.'s forensic interview statements as prior consistent statements under Rule 801(d)(1)(B). Leonard argues that the forensic interview statements were inadmissible as prior consistent statements because (1) N.M. was not subject to

cross-examination concerning the statements, and (2) N.M.'s prior statements were not consistent with her trial testimony.

A. N.M. was subject to cross-examination concerning the statements.

"Rule 801(d)(1) requires that a witness be testable about the statement, meaning that he must be reasonably responsive to questions on the circumstances in which he made it." *State v. Morales*, 788 N.W.2d 737, 759 (Minn. 2010) (addressing a prior inconsistent statement introduced under rule 801(d)(1)(A)). Thus, in *Morales*, a witness's prior inconsistent statement was not admissible under rule 801(d)(1)(A) because the witness refused to answer questions about his prior statement, and was therefore not "subject to cross-examination concerning the statement" as contemplated by the rule. *Id.*

Leonard's argument that N.M. was not subject to cross-examination concerning the statements made in the forensic interview videos is not persuasive. As discussed above, Leonard had an opportunity to cross-examine N.M. about her statements. And as the state points out, Leonard in fact asked N.M. about the circumstances under which she made the forensic interview statements. On cross-examination, Leonard asked N.M. about whether she had spoken to a social worker about the incidents, and asked N.M. a series of questions regarding whether her memory of the incidents had been influenced by others.

We recognize the difficulty a defendant faces in determining whether and how to cross-examine a declarant about statements not yet in evidence, but that does not change the fact that N.M. was subject to cross-examination concerning the statements.

B. N.M.'s forensic interview statements are reasonably consistent with her trial testimony.

A prior statement need only be "reasonably consistent" with trial testimony to be admissible under rule 801(d)(1)(B). *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Jan. 4, 2000); *see also In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). "The trial testimony and the prior statement need not be identical to be consistent." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005). But a prior statement is not consistent with trial testimony if inconsistencies "directly affect the elements of the criminal charge." *Bakken*, 604 N.W.2d at 110. For example, the declarant in *Bakken* testified that he did not remember whether the defendant used a knife during a criminal-sexual-conduct offense, but he alleged in a prior statement that the defendant did use a knife. *Id.* We concluded that the prior statement was not consistent because "if the jury believed the inconsistent videotaped statements, the criminal conduct would legally escalate from third-degree to first-degree." *Id.*

Leonard argues that N.M.'s forensic interview statements are inconsistent with her trial testimony because the statements omitted certain incidents and details that N.M. later testified about at trial. After reviewing the statements, we conclude that the district court did not abuse its discretion by concluding that they are reasonably consistent with N.M.'s trial testimony. It is true that N.M.'s forensic interview statements are not as comprehensive as her trial testimony in that they do not describe all of the incidents or details that she testified to at trial. But with regard to the incidents that she described both

at trial and during the forensic interviews, her statements are reasonably consistent. And her trial testimony added to her prior statements. Thus, unlike in *Bakken*, there is no danger that if the jury believed N.M.'s prior statements and not her trial testimony, that Leonard's criminal conduct would rise to a more serious crime.

Because N.M.'s forensic interview statements were reasonably consistent with her trial testimony, and because N.M. was subject to cross-examination about the statements, we conclude that the district court did not abuse its discretion by admitting the forensic interview videos as prior consistent statements.

In sum, we conclude that the district court neither violated Leonard's rights as guaranteed under the Confrontation Clause nor abused its discretion by admitting N.M.'s forensic interview statements as prior consistent statements under Minn. R. Evid. 801(d)(1)(B).

Affirmed.