STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0755

State of Minnesota,
Appellant,

vs.

Mark Bradley Zontelli,
Respondent.

Filed December 13, 2021
Reversed and remanded
Worke, Judge

Crow Wing County District Court
File No. 18-CR-19-658

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Janine L. LePage, Assistant County Attorney, Brainerd, Minnesota (for appellant)

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

WORKE, Judge

The state challenges the district court's pretrial ruling that statements that the child complainant made to a forensic interviewer were inadmissible at trial. We reverse and remand.

FACTS

On August 11, 2018, J.P. called the police to report that her neighbor, respondent Mark Bradley Zontelli, had sexually assaulted her four-year-old daughter, M.P.

On August 17, a nurse practitioner (nurse) trained in conducting forensic interviews interviewed M.P. at the Family Advocacy Center (FAC). The nurse asked M.P. to tell her why M.P. came to talk to her. M.P. replied: "[Zontelli] just licked my private parts." The nurse asked where M.P. was when Zontelli did that. M.P. replied: "He was just putting me on his bed. Then he licked my private parts." M.P. stated that she was wearing shorts at the time and that Zontelli licked her under her clothes. The following exchange occurred:

> NURSE: Okay. How were your clothes when [Zontelli] licked your private parts?
> M.P.: He just opened it.
> NURSE: Okay.
> M.P.: Then he licked it.
> NURSE: He opened it and then he licked it? Okay.
> M.P.: That's bad.
> NURSE: Okay. How did that make your private parts feel when he did that?
> M.P.: Like that bad.
> NURSE: It made it feel that bad?
> M.P.: (Nods head up and down.)
> NURSE: Okay. What part of [Zontelli]'s body did he use to lick your private parts?
> M.P.: His tongue.

NURSE: His tongue? Okay. Did [Zontelli] use any other part of his body --
M.P.: No.
NURSE: -- on your body?
M.P.: No. He only used his tongue.

Appellant State of Minnesota charged Zontelli with first-degree criminal sexual conduct—penetration with a person under 13 years of age and the actor is more than 36 months older than the complainant, and second-degree criminal sexual conduct—sexual contact with a person under 13 years of age and the actor is more than 36 months older than the complainant. *See* Minn. Stat. §§ 609.342, subd. 1a, .343, subd. 1a (2018).

In his pretrial motions, Zontelli moved to, among other things, exclude M.P.'s out-of-court statements and her testimony because she had reported to prosecutors that she no longer had a memory of the alleged incident. At a pretrial hearing, the district court examined M.P. to determine whether she was competent to testify. After questioning M.P., the district court stated that M.P. was competent to testify, but "[w]hether or not she has recollection issues is a completely different issue."

Because Zontelli had moved to exclude M.P.'s prior out-of-court statements, J.P. and the nurse testified at the pretrial hearing about M.P.'s statements to them. J.P. testified that in August 2018, she and her family lived in an upstairs apartment and Zontelli lived in the downstairs apartment. Their families went to church together, and M.P. would visit Zontelli about once a week. In the morning of August 11, M.P. went downstairs for approximately one-half hour. She then returned home and acted like her "normal self." Shortly after noon, M.P. told J.P. that "when she was downstairs that morning that [Zontelli] licked her private parts." J.P. asked M.P. if she was sure, and M.P. replied, "Yes,

mom. He really did. He put me on his bed, and he licked my private parts." J.P. asked M.P. if Zontelli had taken her clothes off. M.P. stated, "No." The nurse testified about the FAC interview and the recorded interview was received into evidence.

The district court ruled that M.P.'s statements made to J.P. were admissible. But her statements made during the FAC interview were inadmissible because, while M.P. was expected to testify, she was essentially "unavailable" to testify because she had no recollection of the incident. The district court determined that the FAC interview was testimonial because it was produced with the "primary" purpose of generating evidence for prosecution. The district court made this determination because the "team" at the FAC includes law enforcement who watched the interview as it occurred, and the interview occurred shortly after M.P.'s initial disclosure. The district court also determined that the FAC interview was not admissible under the residual hearsay exception because J.P.'s testimony essentially about the same thing was admissible. This appeal followed.

DECISION

The state challenges the district court's pretrial ruling that the FAC interview was inadmissible. In a state's pretrial appeal of the district court's suppression order, an appellate court will reverse if the state can "clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted).

Critical impact

"We view critical impact as a threshold issue and will not review a pretrial order absent such a showing." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted). The state can satisfy the critical-impact standard if "the suppression of the evidence significantly reduces the likelihood of a successful prosecution." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999).

"[W]hen a young child is found incompetent to testify and is thus unavailable the suppression of the child's statements describing the alleged sexual abuse reduces the likelihood of a successful prosecution and meets the critical impact test." *Id.* Here, the district court determined that M.P. was unavailable to testify. But the district court did not suppress all of M.P.'s statements because it ruled that J.P.'s testimony was admissible. However, as the state argues, without the FAC interview, it "has no ability to prove the allegations in count one of the complaint."[1]

Count one alleges that Zontelli committed first-degree criminal sexual conduct, which requires proof of penetration. *See* Minn. Stat. § 609.342, subd. 1 (stating that "[a] person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the first degree"). "Sexual penetration" means, among other things, "cunnilingus." Minn. Stat. § 609.341, subd. 12(1) (2018). M.P. told J.P. that Zontelli "licked her private parts." But she told J.P. that Zontelli had not removed her clothes.

[1] Zontelli conceded this issue, but we conduct an analysis because the state bears the burden of proof on this threshold issue, and we must decide cases according to the law, even if the parties agree. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

During the FAC interview, M.P. stated that she was wearing shorts and that Zontelli "opened it" and "[t]hen he licked it," under her clothes with his tongue. Without these details that Zontelli "opened" M.P.'s shorts and licked her under her clothes with his tongue, the state's likelihood of proving the sexual-penetration element of count one is "significantly reduce[d]." *See L.E.P.*, 594 N.W.2d at 168. Thus, the state has established critical impact, and we will determine whether the district court's order constituted error.

Admissibility of out-of-court statements made during FAC interview

"When reviewing pretrial orders on motions to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred in its ruling." *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

Confrontation Clause

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Hearsay is generally inadmissible unless an exception applies. Minn. R. Evid. 802. "In criminal cases, offering hearsay statements against the accused from declarants who do not testify and are not subject to cross-examination, may implicate the constitutional right to confrontation." Minn. R. Evid. 807 cmt. Whether hearsay evidence violates a defendant's rights under the Confrontation Clause is a question of law reviewed de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend VI; *accord.* Minn. Const. art. 1,

§ 6. The Confrontation Clause bars from admission testimonial out-of-court statements when the accused is not afforded an opportunity to cross-examine the declarant. *State v. Bobadilla*, 709 N.W.2d 243, 249 (Minn. 2006). Statements made to nongovernment questioners, who are "not acting in concert with or as an agent of the government," are nontestimonial. *State v. Scacchetti*, 711 N.W.2d 508, 514-15 (Minn. 2006); *but see Bobadilla v. Carlson*, 575 F.3d 785, 791-93 (8th Cir. 2009) (concluding that statements by child victim in interview by social worker as part of police investigation were testimonial).

The state conceded that M.P.'s statements made during the FAC interview were testimonial but asserts that the statements are admissible because M.P. is available for cross-examination. "[T]he admission of a witness's prior statements does not violate the Confrontation Clause where the witness appears for cross-examination and claims that he or she cannot remember either making the statements or the content of the statements." *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008). The supreme court stated that the determination as to admission focuses on "presence and ability" to respond to cross-examination, rather than on a showing as to what the declarant will actually state. *Id.* (quotation omitted).

Here, the district court stated as much when, after questioning M.P., it stated that M.P. was competent to testify, but "[w]hether or not she has recollection issues is a completely different issue." There is no dispute that M.P. is planning to testify. Thus, she will be present and subject to cross-examination, and there is no violation of the Confrontation Clause. The district court erred in concluding that M.P.'s statements made

during the FAC interview were inadmissible because admission would violate the Confrontation Clause.

Residual hearsay exception

The district court also ruled that M.P.'s statements made during the FAC interview were inadmissible and that no hearsay exception permitted admissibility. The state argues that M.P.'s out-of-court statements are admissible under the residual exception to the hearsay rule.

Statements not covered under a specific hearsay-exception rule may still be admissible under the residual exception. Minn. R. Evid. 807. Statements that have guarantees of trustworthiness are not excluded by the hearsay rule if the district 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.

The district court determined that M.P.'s statements made during the FAC interview met the "threshold of trustworthiness" and were offered as evidence of a material fact, but the final two requirements were not met. The district court stated that the FAC interview was not the most probative evidence that the state could procure because M.P.'s disclosure "of what allegedly occurred is not unobtainable by the state as [J.P.'s testimony] alleging much of the same facts is immediately available to [the state]." The district court also determined that if the FAC interview was admitted, the general purpose of the rules of

evidence and the interests of justice would not be served because the purpose of the hearsay exceptions is to allow for the admission of "vital information" that would otherwise be impossible for the factfinder to consider. The district court determined: "A clear avenue exists within the law for the [s]tate to enter their evidence and the [c]ourt's ruling that only one [J.P.'s testimony] of the two are admissible by no means makes the case for the evidence to be admissible under the residual exception."

As we determined in our critical-impact analysis, the most probative evidence in establishing the penetration element of count one in the complaint is M.P.'s statements made during the FAC interview. Although M.P. disclosed much of the same information to J.P., the extra details that she provided during the FAC interview are likely the only evidence showing that Zontelli penetrated M.P. And, as the district court noted, the purpose of the hearsay exceptions is to allow the factfinder to be presented with "vital information" that it generally would not hear. Thus, the purposes of the rules and the interests of justice would be served by admission of the evidence. The district court erred in suppressing the statements that M.P. made during the FAC interview. We reverse and remand for further proceedings.

Reversed and remanded.