STATE OF MINNESOTA
IN COURT OF APPEALS
A11-72

State of Minnesota,
Respondent,

vs.

Michael Ross Benjamin,
Appellant.

Filed December 12, 2011
Affirmed
Bjorkman, Judge

Mille Lacs County District Court
File No. 48-CR-09-788

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, St. Paul, Minnesota; and

Janice Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Robert A. O'Malley, Milaca, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Collins, Judge.*

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

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

BJORKMAN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct.[1] He argues that (1) the district court erred by admitting the victim's statements to her examining doctor and her social worker, (2) the district court erred by failing to conduct an in-camera review of the victim's confidential records, and (3) the evidence is insufficient. We affirm.

FACTS

This case arises from an incident involving appellant Michael Ross Benjamin and his 11-year-old cousin, M.N. Prior to trial, appellant moved the district court to conduct an in-camera review of all of M.N.'s social service, psychological, medical, and school records. Appellant argued that these records might contain information suggesting that M.N. fabricated her allegations against appellant or otherwise lacks credibility. The district court denied the motion, ruling that appellant did not make a plausible showing that the requested records were relevant and favorable to his defense.

At trial, M.N. testified that appellant took off her pants and underwear, took off his own pants and boxers, and laid on top of her despite her protests that she wanted to go home. She testified that appellant touched his "private" to her "private" and moved back and forth, causing her pain. The incident ended when M.N.'s older brother pushed his way into the bedroom and saw M.N. sitting on the bed without her pants.

[1] The jury also found appellant guilty of fleeing a police officer and second-degree criminal sexual conduct. The district court convicted appellant on the fleeing offense. Appellant does not challenge that conviction.

Patti Hook, M.D., examined M.N. on the night of the offense. The district court allowed Dr. Hook to testify about her observations and verbatim statements that M.N. made for diagnostic or treatment purposes. Dr. Hook testified that she observed an abrasion inside M.N.'s vaginal canal that indicated recent sexual assault. During the pelvic examination, M.N. reported pain similar to what she experienced during the incident with appellant:

> A: So I inserted this larger speculum carefully. I believe I, I was able to get about three-quarters of the way into the length of the vaginal vault and, ah, when [M.N.] suddenly cried out, scooted up the table, because the legs are in a frog-like position, straightened her legs, pushed herself up the table, cried out, reached around to her aunt, grabbed her aunt around the neck and, and c — and yelled. And I said, "[M.N.], did your cousin Mike penetrate you to this level?" and she said, "Yes." I said, "[M.N.], did it cause this pain, this very same pain?"
>
> [Appellant objects; the district court overrules the objection.]
>
> A: The patient said, "Yes." I said, "Is this, is this the same pain you had at the time of the incident?" "Yes."

After this exchange, Dr. Hook took cervical "swabs" to test M.N. for sexually transmitted diseases. But instead of fully inserting a speculum to visually inspect M.N.'s cervix, Dr. Hook took the swabs "blindly" to avoid aggravating the pain that M.N. was experiencing. Appellant objected that M.N.'s statements to Dr. Hook were hearsay not within the medical exception, and the district court overruled the objection.

Following the assault, a social worker conducted a videotaped interview with M.N. M.N. told the social worker that appellant's "private" went inside M.N.'s "private," causing her pain. When asked to identify what she meant by "private" on

drawings of a naked man and a naked woman, M.N. circled the genitalia on each. Prior to trial, the parties stipulated to the admissibility of the interview. But during trial, well after M.N. had finished testifying, appellant attempted to withdraw his stipulation. He argued that he had stipulated to the admission of the interview assuming that M.N. would testify that appellant penetrated her and that the videotaped interview would therefore be an admissible prior consistent statement. Because M.N. did not explicitly testify at trial that appellant penetrated her, appellant urged the district court to exclude the interview from evidence. The state argued that it had conducted its examination of M.N. relying upon the admission of the interview and excluding the interview would therefore be unfair. The district court agreed and admitted the interview into evidence.

The jury found appellant guilty of both criminal-sexual-conduct offenses. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting M.N.'s statements to her examining doctor and social worker.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A. Statements to M.N.'s examining doctor

Appellant argues that M.N.'s statements to her examining doctor are hearsay and do not fall within the medical exception. A hearsay statement is admissible if it is "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803(4). Such statements are admissible even if they are not supported by independent indicia of reliability. *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993).

M.N.'s statements to Dr. Hook fall within the medical exception. Dr. Hook elicited the challenged statements in the *middle* of a pelvic exam after M.N. cried out in pain: "And I said, '[M.N.], did your cousin Mike penetrate you to this level?' and she said, 'Yes.' . . . I said, 'Is this, is this the same pain you had at the time of the incident?' 'Yes.'" Dr. Hook continued the pelvic exam but deviated from her normal practice: instead of fully inserting the speculum to visually inspect M.N.'s cervix, she took four cervical swabs "blindly" to test M.N. for sexually transmitted diseases. Because M.N.'s statements influenced the way Dr. Hook conducted her diagnostic exam, they affected her medical treatment, and the district court did not abuse its discretion by admitting them.

Moreover, M.N.'s statements to Dr. Hook are admissible because they are consistent with M.N.'s trial testimony. A witness's prior out-of-court statement is not hearsay if the witness testifies at trial, the witness is subject to cross-examination, and the statement is "reasonably consistent" with the witness's testimony and helpful to the trier of fact. Minn. R. Evid. 801(d)(1)(B); *State v. Bakken*, 604 N.W.2d 106, 108-09 (Minn.

App. 2000) (quotation omitted), *review denied* (Minn. Feb. 24, 2000). M.N. told Dr. Hook that appellant penetrated her, causing her pain. At trial, M.N. testified that appellant touched his genitalia to her genitalia and "moved back and forth," causing her pain—implying that he penetrated her. These statements are reasonably consistent and the district court did not abuse its discretion in admitting M.N.'s statements to Dr. Hook.

B. Statements to M.N.'s social worker

Appellant contends that the district court abused its discretion by admitting M.N.'s interview with her social worker pursuant to the parties' pretrial stipulation. We disagree. Generally, parties are bound by their stipulations. *See Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010) (stating that stipulated judgments are binding); *Abendroth v. Nat'l Farmers Union Prop. & Cas. Co.*, 363 N.W.2d 785, 787 (Minn. App. 1985) (stating that stipulations as to fact are binding). There is no reason to abandon this rule here. Because M.N. had emotional difficulty testifying, the state, reasonably assuming that the evidence of penetration would be presented through the videotaped interview, did not specifically ask her about penetration. During cross-examination of M.N., appellant's counsel did not ask M.N. about penetration or seek to withdraw the stipulation. Instead, appellant waited until the state had called five more witnesses before he sought to withdraw his stipulation. Under these circumstances, it would have been unfair to the state for the district court to exclude evidence that appellant had stipulated to. The district court did not err in holding the parties to their pretrial stipulation.

Further, the specific statements that appellant challenges—that appellant penetrated her and that it hurt—are prior consistent statements. Because M.N.'s statements to the social worker are reasonably consistent with her trial testimony (*see* section I.A.), they are not hearsay and the district court did not abuse its discretion in admitting them.

II. The district court did not abuse its discretion by declining to conduct an in-camera review of M.N.'s confidential records.

A district court must conduct an in-camera review of confidential records requested by a criminal defendant only if the defendant first makes a "plausible showing" that the information contained therein is "both material and favorable to [the] defense." *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quotation omitted). Such a showing must go beyond mere "argument or conjecture." *State v. Evans*, 756 N.W.2d 854, 873 (Minn. 2008). And the defendant's request must be reasonably specific. *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *review denied* (Minn. Sept. 15, 1989). We review a district court's decision not to disclose confidential records for abuse of discretion. *See State v. Reese*, 692 N.W.2d 736, 742-43 (Minn. 2005).

Appellant argues that the district court abused its discretion by refusing to conduct an in-camera review of all of M.N.'s social service, psychological, medical, and school records. We are not persuaded. Appellant relies on M.N.'s reference to a psychiatrist during her interview with the social worker and asserts that the psychiatrist's notes and other confidential records might undermine M.N.'s credibility. Without citing any factual support, appellant speculates that M.N.'s confidential records might reveal that

M.N. has at some point in her life been untruthful or been exposed to something that might cause her to be untruthful. Appellant's broad request for all of M.N.'s confidential records is not reasonably specific and suggests that appellant's speculations are a pretext for an invasive fishing expedition. On this record, we conclude that the district court did not abuse its discretion by denying appellant's request for an in-camera review of M.N.'s confidential records.

III. The evidence supports the jury's verdicts.

Appellate review of a sufficiency-of-the-evidence claim is "limited to ascertaining 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." *State v. Buckingham*, 772 N.W.2d 64, 71 (Minn. 2009) (quotation omitted). We review the evidence in the light most favorable to the state and presume that the jury believed the state's witnesses and disbelieved any contrary evidence. *Id.* We defer to the jury's credibility determinations and may uphold the jury's verdict even if it is based solely on the testimony of one eyewitness. *Id.*

Appellant maintains that the evidence is insufficient to support his guilty verdicts of first- and second-degree criminal sexual conduct. We disagree. Where, as here, the complainant was under 13 years old at the time of the alleged assault and the defendant was more than 36 months older than the complainant, first-degree criminal sexual conduct requires "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." Minn. Stat. §§ 609.341, subd. 11(c), .342, subd. 1(a) (2008). Similarly, second-degree

criminal sexual conduct requires "intentional touching . . . of the complainant's intimate parts" with "sexual or aggressive intent." Minn. Stat. §§ 609.341, subd. 11(a)(i), .343, subd. 1(a) (2008).

M.N.'s testimony showed not only that appellant engaged in first- and second-degree criminal sexual conduct but that appellant vaginally penetrated M.N.[2] M.N. testified that appellant touched his bare genitalia to her bare genitalia while moving back and forth and that this hurt her. Additionally, she told her social worker that appellant's "private" felt hard inside her. M.N.'s testimony was corroborated by Dr. Hook's testimony that M.N. had an abrasion inside her vaginal canal that indicated recent sexual assault and would rarely result from anything other than sexual assault. This evidence is sufficient to establish first- and second-degree criminal sexual conduct and to support the jury's finding that appellant vaginally penetrated M.N.

Appellant protests that M.N.'s testimony is insufficient to support the guilty verdicts because M.N. testified about facts she had not earlier disclosed, M.N. was drinking alcohol on the date of the offense, Dr. Hook may have been fishing for prosecutorial evidence, and M.N.'s brother's testimony was unpersuasive on the ultimate issue of guilt. But even if true, these facts are not inconsistent with the jury's conclusion that appellant engaged in sexual contact with an 11-year-old girl. More importantly, the jury is entitled to believe M.N.'s testimony and reject the inferences that appellant tried to

[2] We note that the district court instructed the jury that penetration was a necessary element of criminal sexual conduct in the first degree. Although this is error, the parties did not object. Consequently, our analysis focuses on whether there was sufficient evidence of penetration.

draw from contrary evidence. Accordingly, we conclude that the evidence amply supports the jury's verdicts.

Affirmed.