STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2097

State of Minnesota,
Respondent,

vs.

Brad Steven Solvie,
Appellant.

Filed December 2, 2013
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CR-11-4044

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth Johnston, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Peter B. Wold, Aaron J. Morrison, Wold Morrison Law, Minneapolis, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

KALITOWSKI, Judge

Appellant challenges his conviction of second-degree criminal sexual conduct, asserting that (1) the evidence was insufficient, (2) the district court erred in admitting the

complainant's out-of-court statements under Minn. Stat. § 595.02, subd. 3 (2008), because they were not recorded, and (3) the district court erred in admitting the complainant's out-of-court statements under the statute without assessing the reliability of the person who heard the statements. We affirm.

FACTS

Appellant Brad Steven Solvie was charged with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), and second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2008), from August 1, 2008, through July 31, 2010. The charges involve Solvie's son B.S. who accused Solvie and his roommate Aaron Maher of sexually abusing him at Solvie's home.

Solvie and his ex-wife C.R.S. separated in 2007 when B.S. was about 15 months old. Solvie and C.R.S. had difficulty establishing a visitation schedule. C.R.S. was concerned because B.S. experienced night terrors and regressive behavior after returning from visits with his father. After a visit with Solvie in July 2007, C.R.S. observed a laceration on B.S.'s penis, but the medical examination was inconclusive because B.S. was too young to say what happened.

Maher and Solvie had previously worked together, and Maher moved into Solvie's home in May 2010 as a temporary arrangement. B.S. first disclosed that Solvie had sexually abused him on July 23, 2010, before a scheduled weekend visit with Solvie. B.S. cried and said he did not want to go. When C.R.S. asked why, B.S. responded, "My dad hurts me." C.R.S.'s father, who had been facilitating visitation transfers, was present

during this conversation and heard B.S. say that his dad hurts his "peep," a word B.S. uses for penis. When asked what he meant, B.S. responded that he and his dad would touch "peeps," and his dad would pull on his "peep," and "it hurt." Despite this report, the visit continued as scheduled, and C.R.S. contacted the police the next day.

B.S. was interviewed at CornerHouse on July 27, 2010. Solvie was arrested later the same day based in part on that interview, which is not a part of the appeal record. The record indicates that Solvie called Maher from jail and asked him to run a program called "eraser" or "erase" on Solvie's computer. Instead of running the program, Maher removed the hard drive from Solvie's computer.

The police executed a search warrant at the residence and police seized several computers, including one belonging to Maher located in his basement bedroom, and the note on which Maher had written the instructions about running the "erase" program. When Maher went to the police station to pick up his computer, he was arrested for aiding an offender. Maher was eventually charged with aiding and abetting first- and second-degree criminal sexual conduct based on B.S.'s subsequent statements that Maher also participated in the sexual conduct.

B.S. was six years old at the time of trial. He testified that his dad and Maher hurt him by sticking their "peeps" and finger in B.S.'s "butt." They also stuck a "medium-sized" blue "thermometer" in his "butt" and "it did not feel very good." B.S. could not remember if he was three or four years old at the time, and he testified that it happened more than one time, but Maher did not participate every time. Solvie and Maher took turns taking pictures, put the pictures on their computer, and B.S. saw the pictures on the

basement computer when he snuck downstairs. B.S. explained that he did not tell anyone right away because Solvie told him he would hurt his mom if he did. During cross-examination, B.S. admitted that his mom helps him remember things, that he is not sure that the things he described were real, and agreed that he is on his "mom's team."

In September 2011, B.S. was treated for molluscum contagiosum, a pimple-like bump on his scrotum, upper thigh, and penis that is a common virus transferred by skin-to-skin contact. Maher and Solvie denied ever having that skin condition. No photos of B.S. or other children were found in the Solvie residence. A blue back massager, described as three-by-six inches, was found in the bedside table in Solvie's bedroom. The back massager had B.S.'s DNA on it.

Solvie and Maher denied the allegations. With respect to the suspicious jail phone call, Solvie explained that he was concerned about adult pornography on the computer so he asked Maher to erase it. Maher explained that he did not erase what was on Solvie's computer because he did not know what was on there, but removed the hard drive instead to help Solvie out. The defense offered to return the hard drive so the state could analyze it, but the state refused to accept it. Solvie and Maher introduced evidence that the allegations were not consistent with their character. One of Solvie's character witnesses offered opinion testimony that C.R.S. has a reputation in the community for untruthfulness. Solvie also introduced testimony from a licensed psychologist who treats sex offenders that he evaluated Solvie and found that he did not fit the profile of a deviant sexual personality, which includes pedophilia.

Following a bench trial, the district court found appellant guilty of second-degree criminal sexual conduct.

D E C I S I O N

I.

Solvie challenges the sufficiency of the evidence to support his conviction of second-degree criminal sexual conduct. When determining the sufficiency of the evidence, this court conducts "a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The analysis is the same for bench trials as for jury trials. *State v. Hough*, 585 N.W.2d 393, 396 (Minn. 1998). In either case, "[t]he credibility of the witnesses and the weight to be given their testimony are determinations to be made by the factfinder." *DeMars v. State*, 352 N.W.2d 13, 16 (Minn. 1984). We will not reverse the verdict so long as the fact-finder, acting with due regard for the presumption of innocence and the requirement of "proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (alteration in original) (quotation omitted).

A defendant is guilty of second-degree criminal sexual conduct if he engages in sexual contact with the complainant who is under 13 years of age and the defendant is more than 36 months older. Minn. Stat. § 609.343, subd. 1(a). Sexual contact includes "the intentional touching by the actor of the complainant's intimate parts." Minn. Stat. § 609.341, subd. 11(a)(i) (2008).

Solvie argues that B.S.'s testimony was not credible because during cross-examination he indicated that he was not sure that these things happened and his mother and the prosecuting attorney helped him remember what to say. Solvie also argues that the district court's acquittal of first-degree criminal sexual conduct means the district court did not find B.S.'s testimony credible. Both arguments are unpersuasive.

First, weighing credibility of witnesses is exclusively for the fact-finder. *State v. Folkers*, 581 N.W.2d 321, 327 (Minn. 1998). The district court's guilty verdict indicates that the district court rejected B.S.'s statements of uncertainty during cross-examination. The district court expressly found B.S.'s trial testimony and statements were "consistent and factual in nature for a child his age," that B.S. was very mature for his age, and that there was evidence corroborating his testimony and statements. The district court found that Solvie "put his finger in [B.S.'s] butt, and played with his 'peep,'" that "peep" means penis, Maher did not participate in the abuse every time, Maher was the "helper guy" at first and would "just watch and take pictures," and Maher and Solvie would stick the "thermometer" in his "butt." The district court did not find Solvie and Maher credible based on the "two very suspicious jail calls" and Maher's removal of the hard drive from the computer. The district court's findings are sufficient to support a conviction for second-degree criminal sexual conduct.

Second, Solvie's argument that the acquittal of first-degree criminal sexual conduct implies that the district court did not find B.S. credible is unsupported. B.S.'s testimony describing anal penetration may have been sufficient to support a conviction of the more serious offense of first-degree criminal sexual conduct. *See* Minn. Stat.

§§ 609.342, subd. 1(a) (first-degree criminal sexual conduct), 609.341, subd. 12(1), (2) (defining "sexual penetration") (2008). But it also necessarily proved the lesser-included offense of second-degree criminal sexual conduct involving sexual contact because "[t]estimony regarding sexual penetration is sufficient to raise an inference of sexual contact." *State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). That the fact-finder acquits on the greater charge while convicting on a lesser-included offense does not mean that the evidence on the greater charge is insufficient. *See* Minn. Stat. § 609.04) (2008) (stating that "[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both."); *see also State ex rel. Isle v. Tahash*, 260 Minn. 156, 158-59, 109 N.W.2d 54, 56 (1961) (noting long held principle that a defendant may be convicted of a lesser degree of the crime charged); *State v. Staples*, 126 Minn. 396, 401, 148 N.W. 283, 285 (1914) ("Defendant cannot be heard to complain that the charge on which he was tried and convicted was not so grave as the facts alleged in the indictment would warrant.") (citation omitted).

Moreover, there is a reasonable explanation for the district court's acquittal of first-degree criminal sexual conduct. The CornerHouse doctor who examined B.S. explained that children describing penetration "in" their "butt" mean the space between the cheeks and "not the actual anal opening." The doctor was doubtful that the "thermometer," due to its size, could have penetrated B.S.'s anal opening. Although the district court did not explain its analysis, it is reasonable that the verdict reflects the district court's finding that B.S. meant that Solvie and Maher had contact with his anal

opening. Regardless, the fact-finder as the sole judge of credibility is entitled to accept or reject part of a witness's testimony. *State v. Poganski*, 257 N.W.2d 578, 581 (Minn. 1977).

Finally, Solvie relies on *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), to argue that reversal is required because there is evidence that B.S.'s statements were manipulated by his ex-wife. But *Huss* is inapposite because the child victim's mother introduced her daughter to a "suggestive" book and audio tape about sexual abuse of children, repeatedly played the tape to encourage the child to state that her father was sexually abusing her, and the child's trial testimony was contradictory and inconsistent in that she could not accurately identify her father or distinguish between good and bad touches. *Id.* at 292-93. In Solvie's case, the district court found that B.S. spontaneously reported the sexual abuse, the record does not reflect that he was subjected to any suggestive materials, and his trial testimony was consistent with his prior statements about Maher and Solvie putting their fingers, penises, and a "thermometer" in his "butt." Notably there was also corroboration: the blue "thermometer" that was found in Solvie's bedroom had B.S.'s DNA on it. The only similarity between Solvie's case and *Huss* is that both child victims' parents are divorced. *Id.* at 290-92.

The evidence introduced at trial supports the district court's finding of guilt of second-degree criminal sexual conduct.

II.

Solvie argues that it was improper for the district court to admit B.S.'s out-of-court statements under Minn. Stat. § 595.02, subd. 3, because they were not recorded.

"Statutory construction is a question of law, which this court reviews de novo." *State v. Perry*, 725 N.W.2d 761, 764 (Minn. App. 2007), *review denied* (Minn. Mar. 20, 2007). "When interpreting a statute, we first look to see whether the statute's language, on its face, is clear or ambiguous." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). "Basic canons of statutory construction instruct that we are to construe words and phrases according to their plain and ordinary meaning." *Id.* A statute is construed as a whole in light of all of the surrounding sections to avoid conflicting interpretations. *Id.*

Minnesota Statute section 595.02, subdivision 3, provides that "[f]or purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements." Solvie reads the word "recorded" in conjunction with the clause stating that a child's out-of-court statement that is "not otherwise admissible by statute or rule of evidence" to mean that only recorded statements are admissible. *Id.* But the statute says that "an out-of-court statement includes video, audio, or other recorded statements." *Id.* The plain and ordinary meaning of the word "includes" is defined as "[t]o contain or take in as a part, element, or member"; and "[t]o consider as a part of or allow into a group or class[.]" *The American Heritage Dictionary* 888 (5th ed. 2011). Applying the plain and ordinary meaning to section 595.02, subdivision 3, "includes video, audio, or other recorded statements" is a partial list of what may be considered an out-of-court statement. The district court did not err in admitting B.S.'s out-of-court statements because they were not recorded.

III.

Solvie also challenges the district court's admission of B.S.'s out-of-court statements under Minn. Stat. § 595.02, subd. 3, as lacking "sufficient indicia of reliability." This statute provides that out-of-court statements by a child under ten "alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child" may be admissible as substantive evidence if the following circumstances are present: (a) the court finds "that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability;" (b) the child testifies at the proceeding or is unavailable and there is corroborative evidence of the act; and (c) the proponent of the statement provides notice of its intent to offer the statement. Minn. Stat. § 595.02, subd. 3.

In determining the time, content, and circumstances of an out-of-court statement under the statute, the court must consider "the spontaneity of the statements, the consistency of the statements, the knowledge of the declarant, the motives of the declarant and witnesses to speak truthfully and the proximity in time between the statement and the events described." *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989). Spontaneity of the initial disclosure and consistency are important when evaluating admissibility of out-of-court statements. *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990). "The court also should consider possible suggestiveness created by leading questions, particularly by a parent or close authority figure; and should evaluate

corroborating factors, such as whether the declarant has recanted or reaffirmed the statement and also any corroborating physical evidence." *Conklin*, 444 N.W.2d at 276.

Relying on the statute, the district court admitted B.S.'s out-of-court statements: (1) on July 23, 2010, to his mother and his grandfather that Solvie pulled on his "peep" and it hurt; (2) on August 1, 2010, to his mother that Solvie put his finger in his "butt" and "maybe he was hurt" to explain his inability to control his bowels; (3) on August 3, 2010, to his mother and her boyfriend that Maher was the "helper guy" who would watch, that Solvie taught Maher what to do, they put a "thermometer" in his "butt," and they took pictures and put them on the computer; (4) on three occasions to his kindergarten teacher that his dad hurt him; (5) on August 4, 2010, to the CornerHouse doctor that his dad pulled on his "peep," and his dad put his finger in his "butt" and it "hurt when he pooped"; and (6) on January 31, 2012, to the parenting time consultant that his dad put "pointy things," his "peep," and a "thermometer," in his "butt." Before admitting these statements, the district court determined that the state had given notice, that B.S. testified, and that the statements were spontaneous, consistent, and did not appear to be in response to suggestive or leading questions. The district court also considered the timing of the statements and the circumstances or context in which they were made. But the record does not reflect that the district court expressly considered the reliability of the person to whom the statements were made and the person's motive to speak.

Even if the district court erred by admitting the out-of-court statements without individually assessing each witness's motive to fabricate, Solvie is not entitled to a new

trial without showing prejudice. Erroneously admitted evidence does not automatically require reversal of the defendant's conviction but is reviewed for harmless error, i.e., whether the district court's error substantially influenced the verdict. *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009). Solvie argues that the erroneous admission of the out-of-court statements prejudiced his case because they were the only evidence of sexual contact. But the district court also relied on B.S.'s trial testimony in reaching its verdict, and B.S.'s testimony does not require corroboration.

In addition, some of the statements that were admitted under section 595.02, subdivision 3, were also admitted as prior consistent statements under Minn. R. Evid. 801(d)(1)(B) or as statements for medical diagnosis or treatment under Minn. R. Evid. 803(4). Solvie does not challenge the admissibility of the out-of-court statements under the rules of evidence and neither of these evidentiary rules requires an assessment of the reliability of the person to whom the statements are made as a prerequisite to admissibility. *State v. Ahmed*, 782 N.W.2d 253, 260-61 (Minn. App. 2010).

Finally, because the guilty verdict is legally sufficient without the out-of-court statements admitted under section 595.02, subdivision 3, we conclude that any error in admitting the statements is harmless.

Affirmed.