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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2114

State of Minnesota,
Respondent,

vs.

Aaron Joseph Maher,
Appellant.

Filed December 2, 2013
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-11-13838

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

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

Faison T. Sessoms, 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

KIRK, Judge

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

by admitting the complainant's out-of-court statements, and (3) the district court abused its discretion by admitting evidence that child pornography was found on his computer. Because we conclude that the evidence was sufficient, that the district court did not abuse its discretion by admitting the out-of-court statements, and that any error in admitting evidence of child pornography was harmless, we affirm.

FACTS

Appellant Aaron Joseph Maher was charged with aiding and abetting first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), and aiding and abetting second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2008), from June 1, 2010, through July 31, 2010. The charges involve Maher's roommate Brad Solvie's son B.S., who accused Solvie and 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," 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 using 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 fingers in his butt. B.S. also testified that they 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.[1] 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 character evidence that the allegations were not consistent with their character. The district court received a photo of Maher's computer in the basement as an exhibit for the purpose of showing that it would not have been possible for B.S. to see pictures on the computer without anyone

[1] The blue back massager appears to be the blue "thermometer" B.S. described.

noticing he was there. Following a court trial, the district court found Maher guilty of second-degree criminal sexual conduct. This appeal follows.

D E C I S I O N

I. The evidence is sufficient to sustain Maher's conviction.

When determining the sufficiency of the evidence, this court meticulously reviews 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 factfinder, 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 where 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). To impose aiding-and-abetting liability, the state must prove that the defendant played a "knowing role" in the commission of the crime. *State*

v. Ostrem, 535 N.W.2d 916, 924 (Minn. 1995). But "active participation in the overt act which constitutes the substantive offense is not required . . . ." *Id.*

The district court found that Maher was the "helper guy" who would "just watch and take pictures," but later participated with Solvie in playing with B.S.'s "peep," and sticking fingers and a "thermometer" in B.S.'s butt. This is sufficient for second-degree criminal sexual conduct. *See State v. Kobow*, 466 N.W.2d 747, 752 (Minn. App. 1991) (affirming conviction for second-degree criminal sexual conduct, noting "[t]estimony regarding sexual penetration is sufficient to raise an inference of sexual contact[]"), *review denied* (Minn. Apr. 18, 1991).

Maher asserts that there are "grave doubts" as to his guilt and that his conviction must be reversed under *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), because B.S.'s statements were manipulated by Solvie's ex-wife, there is no physical evidence, and B.S.'s testimony is contradictory. These arguments are not persuasive.

On rare occasions, the Minnesota Supreme Court has reversed a conviction and ordered a new trial in the interests of justice where the court had "grave doubts about the defendant's guilt." *See, e.g., State v. Langteau*, 268 N.W.2d 76, 77 (Minn. 1978) (remanding for new trial in interest of justice where victim's testimony was questionable and unexplained, no evidence connected defendant to the crime, and jury was confused about reasonable doubt). To support his "grave doubts" argument, Maher relies on his "no known history of being attracted to anyone other than age-appropriate women" and B.S.'s lack of credibility. This court does not re-weigh evidence or assess witness credibility. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). The district court

considered B.S.'s trial testimony and out-of-court statements and found that they 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 also 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. After reviewing the trial transcript and exhibits, and mindful of our standard of review, we are not persuaded that there are "grave doubts" as to Maher's guilt that would warrant reversal and requires us to remand for a new trial in the interests of justice.

We are also not persuaded that *Huss* applies to this case. In *Huss* the child victim's mother introduced her 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. 506 N.W.2d at 292-93. In Maher's case, the district court found that B.S. spontaneously reported the sexual abuse, the record does not reflect that B.S. was subjected to any suggestive materials, and B.S.'s 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 back massager found in Solvie's bedroom had B.S.'s DNA on it. The only similarity between Maher's case and *Huss* is that both child victims' parents are divorced. *Id.* at 290-91. The evidence introduced at trial supports the district court's finding of guilt of second-degree criminal sexual conduct.

II. The district court did not abuse its discretion by admitting B.S.'s out-of-court statements.

Maher next argues that the district court erred when it admitted B.S.'s out-of-court statements under the hearsay exception for prior consistent statements, Minn. R. Evid. 801(d)(1)(B), and as a statement by a child under the age of ten describing an act of sexual contact or penetration under Minn. Stat. § 595.02, subd. 3 (2012). "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). On appeal, the appellant bears the burden of establishing that the district court abused its discretion and that the appellant was prejudiced as a result. *Id*.

A. Minn. R. Evid. 801(d)(1)(B).

"'Hearsay' is 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). Hearsay is inadmissible unless an exception applies. Minn. R. Evid. 802. An out-of-court statement is not hearsay if the declarant testifies at trial, is cross-examined about the statement, and the statement is consistent with the declarant's trial testimony and helpful to the factfinder in evaluating the declarant's credibility. Minn. R. Evid. 801(d)(1)(B). But before a prior consistent statement may be admitted under this rule, the district court must determine whether (1) "there has been a challenge to the witness's credibility," (2) "the prior consistent statement would be helpful to the trier of fact in evaluating the witness's credibility," and (3) "the prior statement and the trial testimony are consistent with each other." *State v. Bakken*, 604 N.W.2d 106, 109 (Minn.

App. 2000), *review denied* (Minn. Feb. 24, 2000). A prior consistent statement that meets these requirements is admissible as substantive evidence. *State v. Nunn*, 561 N.W.2d 902, 908 (Minn. 1997).

The district court admitted the following statements as prior consistent statements on the ground that they were similar to B.S.'s trial testimony: B.S.'s August 1, 2010, statement to his mother and her boyfriend that Solvie put his finger in his butt as an explanation for why he was having trouble controlling his bowels; B.S.'s August 3, 2010, statement during dinner the night before the appointment with the CornerHouse doctor where B.S. first revealed Maher's involvement in sticking the "thermometer" in his butt and taking pictures; and B.S.'s statement to the parenting time consultant on January 31, 2012, that Solvie puts "pointy things"—his "peep" and a "thermometer"—in his butt.

Maher argues that the statements are inadmissible because the district court failed to evaluate each of the *Bakken* factors on the record. But the record is clear from opening statement and cross-examination that the defense theory was that the allegations were false and that B.S.'s mother was telling him what to say. *See id.* at 909 (noting prior consistent statements were admissible where Nunn challenged witnesses' credibility during cross-examination by disputing their recollection). The record is, therefore, sufficient to demonstrate that Maher was challenging B.S.'s credibility. Second, because the defense theory was that B.S. was making false statements at his mother's direction, introducing B.S.'s prior spontaneous and consistent out-of-court statements was helpful in evaluating his credibility. *See id.* (noting witnesses' prior out-of-court statements corroborated their in-court testimony and were thus helpful in evaluating their

credibility). Indeed, the district court's findings of fact suggest that the consistency of B.S.'s statements was persuasive in reaching the court's guilty verdict. The district court did not err in admitting these prior consistent statements.

B. Minn. Stat. § 595.02, subd. 3.[2]

Section 595.02, subdivision 3, 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 district 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 making this determination, the district court is to 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

[2] Maher also asserts that the out-of-court statements were inadmissible under Minn. R. Evid. 807, the residual hearsay exception. The circumstances that are relevant to determining admissibility of a child-victim's out-of-court statements regarding sexual abuse are the same whether the court is determining admissibility under section 595.02, subdivision 3, or the residual hearsay exception. *State v. Hollander*, 590 N.W.2d 341, 345-46 (Minn. App. 1999). If statements are admissible under the statute, there is no reason to address admissibility under the residual hearsay exception. *In re Welfare of L.E.P.*, 594 N.W.2d 163, 169 (Minn. 1999). And we decline to do so.

important when evaluating admissibility of out-of-court statements. *See, e.g.*, *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 the following out-of-court statements by B.S.: (1) on July 23, 2010, to his mother, her boyfriend, and his grandfather that Solvie pulled on his "peep" and it hurt; (2) on August 1, 2010, to his mother and her boyfriend 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 a pointy thing 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.

Considering the animosity between Solvie and his ex-wife, it is possible that she had a motive to fabricate the sexual abuse charges involving her ex-husband. But it is unclear how that motive would influence her to encourage B.S. to make false statements about Maher when he had only recently moved into Solvie's residence. Regardless, even if it was improper for the district court to admit the out-of-court statements without individually assessing each witness's motive to fabricate, Maher is not entitled to a new trial unless the district court's error substantially influenced the verdict. *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009). Without analysis, Maher asserts that the district court's error was "striking and prejudicial." But the district court's verdict was not based on B.S.'s out-of-court statements alone. The district court also relied on B.S.'s trial testimony in reaching its verdict, and B.S.'s testimony does not require corroboration. Additionally, 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) and the CornerHouse doctor's statement was admitted under the exception for medical diagnosis or treatment under Minn. R. Evid. 803(4). 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. *See State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (noting the focus of rule 807 is the statement and not the testifying witness who heard the statement). Because the guilty verdict is legally

sufficient without the out-of-court statements admitted under section 595.02, subdivision 3, any error was harmless.

Finally, Maher argues that it was improper for the district court to admit the out-of-court statements 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. Jan. 9, 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.*

The second to last sentence in 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." Maher appears to read the word "recorded" in conjunction with the clause providing that a child's out-of-court statement that is "not otherwise admissible by statute or rule of evidence" means that only recorded statements are admissible. Minn. Stat. § 595.02, subd. 3. 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 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. Any error in admitting evidence that there was child pornography on Maher's computer was harmless.

Maher argues that the district court erred in admitting evidence that images of child pornography were found on his computer where that evidence lacked probative or corroborative value because no photos of B.S. were found on the computer. Although the district court admitted testimony about the images, the district court also considered Maher's expert witness's testimony explaining that the images were "thumbnails" and may never have been viewed. Further, the district court's findings of fact do not reference the images found on Maher's computer. Because there is no indication that the district court relied on this evidence in finding Maher guilty, any error in admitting the evidence was harmless. *See State v. Hall*, 764 N.W.2d 837, 844 (Minn. 2009) (explaining that the appellate court need not decide merits of an issue where it is clear that any such error was harmless).

Affirmed.