STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2432

In the Matter of the Welfare of: A. H. A., III, Child.

Filed February 12, 2008
Affirmed
Minge, Judge

Houston County District Court
File No. 28-J8-05-50166, 28-JV-06-777, 28-JV-05-76

John M. Stuart, State Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant A.H.A.)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Richard Jackson, Houston County Attorney, Suzanne M. (Harnack) Bublitz, Assistant County Attorney, 304 South Marshall, Suite 201, Caledonia, MN 55921 (for respondent County)

Considered and decided by Stoneburner, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges the determination that he committed criminal sexual conduct in the second degree and is a juvenile delinquent. He argues that the district court erred when it admitted a taped interview of the child victim into evidence and that he received ineffective assistance of counsel. We affirm.

FACTS

Appellant A.H.A. is seventeen years old. From mid-2004 to early 2005, A.H.A. and his girlfriend would occasionally babysit for M.S. M.S. was born in February 2001. M.S.'s aunt and her boyfriend also sometimes babysat M.S. In late January of 2005, M.S. saw her aunt and her boyfriend French kissing while they were babysitting her. M.S. told them that A.H.A. kissed her like that, describing the experience with choking and gagging gestures. Throughout the night M.S. made other disclosures, including that A.H.A. had kissed her leg and "down below."

M.S.'s mother heard these allegations from a number of family members. The mother stated that when she asked M.S. about the contacts, M.S. was upset and did not say much. On February 4, 2005, the mother took M.S. in for an interview with Danielle Swedberg, a child protection social worker with Houston County Human Services. Swedberg conducted a Cornerhouse interview of M.S.[1] She undertook the interview for the police, not for human services. Because M.S. refused to enter the interview room with Swedberg alone, her mother accompanied her. The mother was instructed to remain quiet and to allow M.S. to answer the interview questions.

The interview was recorded both on audiotape and videotape and was transcribed. During the interview, M.S. stated that A.H.A. touched her on her butt and belly, that he kissed her with his tongue, that he took his and her clothes off, and that he kissed her and

[1] "Cornerhouse" is the name used for a forensic interviewing technique using child-friendly practices in cases where children have suffered physical or sexual abuse.

touched her "pee pee" while her clothes were off. A.H.A. denied any sexual contact with M.S.

Houston County filed a juvenile delinquency petition in district court, charging A.H.A. with four counts of criminal sexual conduct in the first degree, requiring sexual penetration, and four counts of criminal sexual conduct in the second degree, requiring sexual contact. After trial, the district court concluded that the state had not presented sufficient evidence of penetration and granted a directed verdict for A.H.A. on all four counts of criminal sexual conduct in the first degree. The district court later dismissed three counts of criminal sexual conduct in the second degree, and adjudicated A.H.A. delinquent on the remaining count. This appeal follows.

D E C I S I O N

I.

The first issue is whether the Cornerhouse interview should have been excluded on the ground that it lacked sufficient indicia of reliability under Minn. Stat. § 595.02, subd. 3 (2006),[2] or Minn. R. Evid. 807 (formerly Minn. R. Evid. 803(24)). "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (quotation omitted).

[2] A.H.A. argues that the constitutionality of this statute has been called into question by this court's decision in *State v. Krasky*, 721 N.W.2d 916 (Minn. App. 2006). But that decision has since been overruled by the Minnesota Supreme Court. *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Oct. 25, 2007) (No. 07-7390).

Rule 807 is a residual hearsay exception. Section 595.02, subd. 3, is a legislatively created hearsay exception for sexually abused children. Under both, otherwise excluded hearsay is admissible if it has sufficient indicia of reliability or guarantees of trustworthiness. Minn. R. Evid. 807; Minn. Stat. § 595.02, subd. 3(a). The considerations relevant to both hearsay exceptions are similar. *State v. Hollander*, 590 N.W.2d 341, 345-46 (Minn. App. 1999). If the statements are admissible pursuant to the residual exception, it is unnecessary to consider the legislative exception. *Id.* at 346.

A. Admissibility under Rule 807

A hearsay statement that does not fall within any other exception is admissible if it (1) has equivalent circumstantial guarantees of trustworthiness; (2) is offered as evidence of a material fact; (3) is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and (4) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. Minn. R. Evid. 807.

At the outset, we note that factors two and three are not at issue. The Cornerhouse-style interview was offered into evidence to prove a material fact—that conduct constituting abuse occurred; this satisfies factor two. Because M.S. balked at answering questions at trial about the alleged abuse, *see infra* Part II.A., the interview was the most probative evidence available, and factor three is met. As for factor four, we note that the rules of evidence have as a goal the "promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Minn. R. Evid. 102. With M.S. unwilling to testify to details of the alleged

abuse, admission of the tape of the interview was the best opportunity for the finder of fact, the district court, to hear the allegations from the accuser. Assuming the interview accurately disclosed what happened, use of the interview allowed the district court to better ascertain credibility, and the truth. Whether factor four is met depends on the reliability of the interview. Because this is also the focus of factor one, factor one is the key consideration.

In cases of child victims, Minnesota courts look to a number of criteria to determine the reliability of out-of-court statements. Among them "are spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 170 (Minn. 1999) (citing *Idaho v. Wright*, 497 U.S. 805, 821-22, 110 S. Ct. 3139, 3150 (1990)). Additionally, we consider the knowledge of the declarant, the motives of the declarant and witnesses to speak truthfully, the proximity in time between the statement and the events described, whether the person talking with the child had a preconceived idea of what the child would say, and the lack of leading or suggestive questions. *Id.*

***Consistent Repetition*:** M.S. consistently identified A.H.A. as the perpetrator of sexual contact with her when making disclosures to family members, during the interview, and on the witness stand. M.S. was also consistent within the interview itself, focusing on the placement of A.H.A.'s kisses.

***Mental State of Declarant*:** Courts have found interviews of child sex-abuse victims more credible where the child is in an agitated state during the interview. *See*

State v. Edwards, 485 N.W.2d 911, 916 (Minn. 1992). However, our supreme court has found statements reliable where a child was "cheerful" during the interview. *In re Welfare of L.E.P.*, 594 N.W.2d at 171-72. Although M.S.'s mother testified that M.S. was upset when the two first discussed these allegations and although M.S. was clearly upset on the witness stand, she did not show negative emotion during the interview. Given the conflicting caselaw and M.S.'s varied emotions, we do not draw conclusions regarding M.S.'s credibility based on this factor.

***Terminology*:** The words M.S. uses throughout the interview are age appropriate. She discusses "kisses" and uses the word "pee pee" for her genitals. However, the conduct of A.H.A. being described by M.S. is not generally within the experience of a three year old. She is not likely to be conjuring up or imagining something outside her realm of experience. The fact she is describing such unusual conduct indicates reliability. *L.E.P.*, 594 N.W.2d at 171.

***Lack of Motive to Fabricate and Motives of Declarant and Witnesses to Speak Truthfully*:** M.S.'s allegations are not the type one expects a child of her age to fabricate. *State v. Lana*, 459 N.W.2d 656, 661 (Minn. 1990). M.S., who appears to have only had contact with A.H.A. when he babysat for her, does not have any more motivation to fabricate these allegations than other children her age. Furthermore, M.S.'s mother and her aunt's boyfriend stated that M.S. had never made similar allegations against anybody else. The only other person to testify substantively regarding the interview was Swedberg, who had no reason to fabricate anything regarding the interview.

***Knowledge of Declarant*:** When analyzing the knowledge of the declarant, we consider whether the declarant had knowledge of intimate sexual acts beyond others in his or her age group, as well as whether that knowledge could have come from another source other than the accused. *State v. Allen*, 755 P.2d 1153, 1163 (Ariz. 1988) (cited in *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989)). This factor is similar to the terminology factor. M.S. was not yet four years old at the time of the interview. While her comments about kissing could have derived from her seeing her aunt kissing, this does not explain her allegation that A.H.A. kissed her genitals. That latter comment is of course beyond the knowledge of most three year olds.

***Proximity of Events and Statements*:** M.S. never stated exactly when A.H.A.'s abusive conduct took place. A.H.A. was present in M.S.'s home from mid-2004 to as late as January 2005. M.S. first disclosed the abuse at the end of January 2005. The interview took place on February 4, 2005. Although the abuse may have been only a few days before M.S.'s January disclosure, it also may have been months earlier. For a four year old, that time could be significant. The uncertainty regarding the time of the abuse detracts from the reliability of the statements.

***Interviewer Preconception*:** Cornerhouse interviewer Swedberg testified that she was aware of the allegation that M.S. had been kissed by an older child. Swedberg did not testify that she was aware of more serious allegations. Regardless, Swedberg's questioning was not result oriented. She was ready to end the interview before M.S. stated that A.H.A. had touched her "pee pee." Only after Swedberg started summarizing did M.S. make the more serious allegations.

***Lack of Leading or Suggestive Questions*:** Swedberg did not ask leading or suggestive questions during the interview.

***Spontaneity*:** This is the most contested indicator on appeal. The district court explicitly found that M.S. spontaneously stated that A.H.A. had touched her "pee pee." The district court also found that M.S.'s mother had very little involvement in the interview. Pointing to a number of interjections in the interview, A.H.A. contends that the mother's presence and participation constituted interference and undermined the reliability of the interview. Most of these claims are unpersuasive. For instance, A.H.A. states that the mother corrected M.S., telling her that she was "being silly" after giving incorrect answers. While true, this happened at the beginning of the interview, long before any discussions concerning A.H.A., and in response to M.S. stating that her mother and father were named "Bee" and "R" respectively.

One aspect of the interview, however, is troubling. During the interview, the primary audio recorder frequently failed. As a result, someone outside the room telephoned Swedberg to indicate this failure. At one point, while Swedberg was on the telephone with the caller, M.S. and the mother have a conversation on the side. It is difficult to ascertain what is said, but the district court thought the mother directed M.S. to tell Swedberg "what happened" and that "[A.H.A.] had kissed her." This occurs at about halfway through the interview. Prior to this statement, M.S. had not made any allegation that A.H.A. had touched her genitals. Within less than three minutes after the exchange with her mother, M.S. first discloses that A.H.A. touched her "pee pee."

The question about spontaneity, M.S.'s relative calm, and the uncertainty regarding the lapse of time between any misconduct and the interview detract from admissibility. Although the district court was aware of the interjection of the mother into the interview, stating that it thought she told M.S. to "tell her what happened," the district court ultimately determined that it could only hear the mother say something like "[A.H.A.] had kissed her," and determined that the Cornerhouse-style interview was admissible.

On balance, we conclude the record contains substantial indicia supporting admissibility. The district court had to weigh many factors. Most of them favored admissibility. The district court considered whether the mother's presence and statements caused the disclosures to be unreliable. It explicitly found that they did not. We conclude that the district court did not abuse its discretion by admitting the interview tape.[3]

B. Admissibility under Section 595.02, Subdivision 3.

Under section 595.02, subdivision 3, the statement will be admitted if the district court finds that: (1) 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; (2) the child either testifies or is unavailable and corroborative evidence of the abuse exists; and (3) the proponent of the statement gives proper notification to the

[3] A.H.A. emphasizes the susceptibility of children to suggestion. Presumably this is the reason why Minnesota courts analyze interviews such as this one so closely before submitting them into evidence. But this does not make up a separate part of the test for determining reliability. Additionally, all parties denied coaching M.S.

opposing party. Minn. Stat. § 595.02, subd. 3. Parts two and three are not challenged here. Part one is largely determined based on the same criteria as used for reliability under rule 807. *Hollander*, 590 N.W.2d at 345-46.

A.H.A. attacks admissibility on the additional ground that "time, content, and circumstances of the statement" were not reliable because of repeated interruptions during the interview due to technical problems and the entrance of one of Swedberg's coworkers. The district court noted that the "tape speak[s] for itself" regarding whether or not these disruptions caused M.S. problems and declined to exclude it. Based on our foregoing analysis under rule 807, we conclude that the district court did not abuse its discretion in admitting the interview under section 595.02, subdivision 3.

II.

The next issue is whether A.H.A. received ineffective assistance of counsel. Such claims are mixed questions of fact and law, reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Effective assistance of counsel forms a part of the Sixth Amendment right to a fair trial under the United States Constitution. *Id*. (citations omitted); *see also Strickland v. Washington*, 466 U.S. 663, 684-86, 104 S. Ct. 2052, 2063-64 (1984). A party alleging ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors. *Rhodes*, 657 N.W.2d at 842 (quotation omitted). "To act within an objective standard of reasonableness, an attorney must provide his or her client with the representation that an attorney exercising the customary skills and diligence . . . [of a]

reasonably competent attorney would perform under similar circumstances." *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (alteration in original) (quotation omitted). We consider the totality of the evidence to determine whether counsel was ineffective. *Rhodes*, 657 N.W.2d at 842 (citation omitted). We do not review matters of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). A strong presumption exists "that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

A.H.A. bases his ineffective-assistance-of-counsel claim on his trial counsel's failure to object to the determination that M.S. was competent to testify. A.H.A. maintains that the outcome of his trial would have been different because, had his counsel objected, M.S. would have been found incompetent, and therefore unavailable. If unavailable, he argues, M.S.'s statement and the interview would not have been admissible because he would not have had an opportunity to confront the witness who initially gave the statement. Because A.H.A.'s claim is based on M.S.'s legal competency, we first consider that matter.

A. Competency

Because the determination of a witness's competency rests within the sound discretion of the district court, we review for a clear abuse of that discretion. *State v. Cermak*, 350 N.W.2d 328, 332 (Minn. 1984); *State v. Sime*, 669 N.W.2d 922, 925 (Minn. App. 2003). A child less than ten years old is presumed competent to testify "unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined." Minn. Stat. § 595.02, subd. 1(m) (2006). Thus,

the district court must first conclude that the child has (1) the capacity to tell the truth and (2) the ability to recall facts. *Sime*, 669 N.W.2d at 926. To determine competency, children are typically "asked their names, where they go to school, how old they are, whether they know who the judge is, whether they know what a lie is, and whether they know what happens when one tells a lie." *State v. Scott*, 501 N.W.2d 608, 615 (Minn. 1993). The district court must determine that the child is able to recall facts generally, not the facts of the particular offense to which his or her testimony relates. *Id.*; *State v. Lanam*, 459 N.W.2d 656, 659-60 (Minn. 1990). Generally, recall of the events related to the crime go to the weight of the evidence, not competency. This is an important distinction. In cases like the one before us, parties often are preoccupied with recall of the facts of the specific crime.

The district court asked M.S. general questions about whether she was comfortable and whether she understood the difference between telling the truth and something not true. M.S. did not answer the district court out loud, but nodded yes. The district court had M.S. promise to tell the truth, and she nodded yes in response. M.S.'s answers show that she had the ability to tell the truth. The district court did not formally declare M.S. competent to testify, but stated "[prosecutor], you can inquire," a clear indication that it was passing the witness.

Once the prosecution began asking questions, M.S. opened up and answered questions orally. She truthfully answered questions about her family, her pets, and upcoming school. She was able to identify A.H.A. and accurately state such details as the city in which A.H.A. lives, A.H.A.'s girlfriend's name, and the city in which

A.H.A.'s girlfriend lives. The sum of her answers to these preliminary questions by the prosecutor indicates that M.S. was able to recall facts generally.

Appellant argues that his counsel at trial should have objected because M.S. did not provide detailed testimony regarding the alleged abuse by A.H.A. When asked about the allegations, all M.S. would say is that she did not like A.H.A. because "[h]e did it," but that she likes A.H.A.'s girlfriend because "[s]he did not do it." When asked what "it" was, she said to the prosecutor "I told you." After repeated, unsuccessful attempts to elicit details from M.S., the prosecution ended its examination. M.S.'s testimony does not show, either affirmatively or negatively, whether she was able to recall the specifics of the allegations. But this is not a matter of competency. Her competency was established when she demonstrated that she could tell the truth and recall facts generally. *Scott*, 501 N.W.2d at 615; *Lanam*, 459 N.W.2d at 659-60. In close cases, we err on the side of finding a child witness competent. *Lanam*, 459 N.W.2d at 660. Because M.S. had shown herself able to testify truthfully and recall facts generally, we conclude that an objection to her competency would properly have been denied by the district court.

B. Strategy

We also note that during trial, testimony of several witnesses about more serious allegations of abuse was excluded as hearsay. After the close of testimony, A.H.A.'s counsel moved for a directed verdict, and all four counts of first-degree criminal sexual conduct were dismissed because the state had not proven penetration. Upon further consideration, the district court dismissed three out of the four counts of second-degree criminal sexual conduct as well. Had A.H.A's counsel pressed the competency issue

based on the unwillingness of M.S. to respond to the prosecutor's questions about the details of abuse, the district court may have asked counsel to further question M.S. Had this occurred, A.H.A. faced the risk that M.S. would have opened up and testified about the other alleged, more serious abuses. It is not unlikely that the decision of A.H.A.'s counsel not to press the competency issue or cross-examine M.S. was trial strategy designed to avoid that risk. We do not review such tactical decisions.

Based on the record before us, we conclude that the decision of defense counsel not to challenge competency was one that an attorney of customary skill and diligence could reasonably make.

C. Confrontation Violation/Exclusion

A.H.A. claims that if his trial counsel had properly objected to M.S.'s competency, the interview would have been excluded. Out-of-court-testimonial statements are inadmissible without an opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004). A statement is testimonial "when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006). Here, it is not disputed that the interview was testimonial and, but for M.S.'s availability as a witness, would have been excluded.

A.H.A.'s argument for exclusion again raises matters we discussed in considering ineffective assistance of counsel. This is because as framed by A.H.A. on appeal, success on the *Crawford* argument requires that M.S. be found incompetent to testify. We have

already concluded that any objection by A.H.A.'s trial counsel regarding competency would have been properly denied. Therefore, A.H.A.'s confrontation argument as made in this appeal is unavailing.[4]

Affirmed.

Dated:

[4] We note that A.H.A.'s counsel did object at trial to the admission of the Cornerhouse interview as a violation of appellant's confrontation rights. That objection was denied by the district court and has not been directly appealed or argued to this court. Issues not briefed are waived on appeal. *State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997).