STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0843

State of Minnesota,
Respondent,

vs.

Kurt Alan Kluessendorf,
Appellant.

Filed June 10, 2008
Affirmed in part, reversed in part, and remanded
Willis, Judge

Dakota County District Court
File No. K8-05-3356

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

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Timothy R. Redfield, Appelman & Olson, P.A., 212 Butler North Building, 510 First Avenue North, Minneapolis, MN 55403; and Eric Newmark, 333 South Seventh Street, Suite 3020, Minneapolis, MN 55402 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Poritsky, 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

WILLIS, Judge

Appellant was convicted of two counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct for two incidents involving his five-year-old neighbor, A.M.L. Appellant argues that the district court abused its discretion by admitting out-of-court statements made by A.M.L. to her mother and by allowing the jury to review A.M.L.'s videotaped statement twice during deliberations. Because we find no abuse of discretion, we affirm on those issues. Appellant also argues that the evidence was insufficient to support his convictions. We find that there is sufficient record evidence to support appellant's conviction of one count of first-degree criminal sexual conduct and affirm that conviction. But because the evidence fails to establish beyond a reasonable doubt that a second incident occurred, we reverse and remand for vacation of the conviction of the other count of first-degree criminal sexual conduct. And because it is unclear from the record before us whether appellant was formally convicted of the two counts of the lesser-included offense of second-degree criminal sexual conduct, we also remand for vacation of any convictions entered on those counts.

FACTS

On October 1, 2005, A.M.L. told her mother that appellant Kurt Kluessendorf, who lived next door, had touched her inappropriately. Two days later, A.M.L.'s mother, V.L., contacted the Hastings Police Department. A police officer spoke with A.M.L.'s parents and recommended that they take A.M.L. to the Midwest Children's Resource Center (MCRC) for evaluation.

On October 6, A.M.L. was examined and interviewed by a nurse at MCRC. The interview was videotaped.

Several weeks later, a complaint was filed charging Kluessendorf with two counts of second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(a) (2004). The complaint alleged that the victim had reported that Kluessendorf had touched her "vagina on the inside and outside with his finger" sometime in 2005 and that the victim "also advised that a similar incident occurred on one other occasion." Before trial, the complaint was amended to allege that Kluessendorf had engaged in sexual penetration with the victim and therefore add two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2004).

Kluessendorf's trial was held in November 2006. Before trial, the district-court judge questioned A.M.L. in chambers and concluded that she was competent to testify. A.M.L. testified at trial and was cross-examined. She answered some basic questions about herself and her family, but she could not remember if anything had happened at Kluessendorf's home, and she could not remember talking to a nurse or telling the nurse about "some things that happened" with Kluessendorf.

A.M.L.'s mother, V.L., testified that Kluessendorf was a neighbor in their trailer park. V.L. testified that one day, at about 2 or 2:30 p.m., she returned a cake pan that she had borrowed from another neighbor. V.L. claimed that A.M.L. wanted to stay at home, so V.L. left her there. V.L. testified that when she returned, her front door was "wide open," and A.M.L. was gone. V.L. testified that she got neighbors to help her look for A.M.L. and went "door to door."

After 30 to 45 minutes, V.L. claimed that she realized that she had not checked Kluessendorf's home, so she "rushed over there" and heard A.M.L. and Kluessendorf talking inside. When V.L. tried the door, it was locked, so she started "beating on the door with both [her] hands." V.L. testified that she heard Kluessendorf say, "Hurry up," and that when he opened the door, A.M.L. came out with "her shirt tucked in, in the back," which V.L. thought was unusual because "she doesn't walk around with her shirt tucked in." V.L. testified that she grabbed A.M.L. and started yelling at Kluessendorf, who slammed the door in her face.

V.L. took A.M.L. home and asked her, "What was going on behind those doors?" A.M.L. told her, "Nothing, Mom. I was over there coloring. He came over and got me. He said that you would know[.]"

V.L. testified that later that day, she found A.M.L. with a five-year-old boy in the back room "with their clothes off." V.L. testified that the boy was on his hands and knees between A.M.L.'s legs. V.L. claimed that she had never seen such behavior from A.M.L. before.[1] Over Kluessendorf's objection on hearsay grounds, V.L. was allowed to testify that after she found A.M.L. and the boy with their clothes off, she asked A.M.L., "Where have you seen that?" and that A.M.L. told her, "Kurt next door." V.L. testified that A.M.L. told her that Kluessendorf "would come over and get her, and he would take her over to his house and start touching her in weird ways that she did not like being touched." V.L.

[1] V.L. acknowledged, however, that about one week before this incident, she had had a conversation with A.M.L. about sex. V.L. claimed that she told A.M.L. about good touch, bad touch; V.L. claimed that A.M.L. had never seen her parents being intimate and denied watching any sexually explicit movies in front of A.M.L.

testified that A.M.L. told her that Kluessendorf touched her and "put his fingers inside [her]." V.L. further testified:

> I had her pretend that I was [Kluessendorf], and I had asked her exactly how he approached her and done it. And she took her own hand and put it on top of her underwear, then she said, "But then he went underneath, mom, and put his finger inside of me."

V.L. claimed that she was hesitant to call police because she was concerned about the trauma that A.M.L. might suffer.

On cross-examination, V.L. acknowledged that she did not remember everything that she told the police officer two days after the incident because it had occurred more than a year before trial and because she "tried so hard to forget about all this stuff." When asked about the inconsistencies between her initial statement to police, in which she stated that the incident had occurred early in the morning when she woke up, discovered A.M.L. missing, and found her at Kluessendorf's house, and her testimony at trial, V.L. became angry and said that she did not want to be there. Following a brief recess after which the district court instructed the jury to disregard V.L.'s outburst, defense counsel was allowed to continue to cross-examine V.L. and to point out the numerous inconsistencies between her report to police at the time of the incident and her trial testimony.

The MCRC nurse who interviewed and examined A.M.L. testified that she found no physical evidence of sexual penetration but testified that that was not unusual in this type of case. The videotape, which was played for the jury, showed that A.M.L. was initially reluctant to talk to the nurse but that she eventually told the nurse that her neighbor, "Kurt,"

had touched her "pee-pee" with his fingers while she was in his living room and that it had happened "two times."

A.M.L. told the nurse that she was home alone coloring while V.L. and A.M.L.'s little sister were returning a pan and that Kluessendorf "asked me if I would come over and color at his house." A.M.L. told the nurse that she was at Kluessendorf's house and that V.L. was looking for her and found her there. During the physical examination, which was off-camera, A.M.L. responded, "No," several times when the nurse asked if Kluessendorf had touched her in different places. But when the nurse pointed to A.M.L.'s labia, A.M.L. indicated that Kluessendorf had touched her there and inside with his finger.

The state also called as witnesses the police officer who responded to the initial call and two of A.M.L.'s neighbors. One neighbor testified that about a year earlier, she recalled one morning when V.L. was looking for her daughters; a short time later, the neighbor saw A.M.L. come out of Kluessendorf's home. Another neighbor testified that he once saw Kluessendorf and A.M.L. walking toward Kluessendorf's home at about 6:30 a.m.; the neighbor thought that Kluessendorf was babysitting A.M.L. and thought nothing of it.

Kluessendorf did not testify in his own behalf. But the defense did call as an expert a psychologist who specializes in evaluating children who have been sexually abused. Based on her review of the MCRC videotape, the psychologist testified that in her opinion, the MCRC nurse "did a good job of not leading the child and of establishing the child's verbal capabilities and so on." But the psychologist also testified that "there were a lot of questions that weren't asked in the interview that, again, I think could provide information that would be important for someone who needs to determine the veracity or credibility of

what this child is saying." For instance, the psychologist testified that she was unable to determine whether A.M.L.'s responses during the interview had been unduly influenced by outside sources because there were so many unanswered questions about the circumstances surrounding the incident.

The jury began its deliberations at 11:20 a.m. At 1:51 p.m., the jury asked to review the MCRC videotape. Defense counsel objected, claiming that "by replaying it is going to unduly stress [A.M.L.'s] testimony and unfairly [single] out her testimony versus the other testimony of the case." Defense counsel stated that the jury "should be instructed to rely on the recollection of what was said." The prosecutor had no objection, noting that the videotape was referred to by both counsel in final arguments and that "[a]ny concerns about over-emphasizing the tape can be addressed by requiring the jury to review the tape in the courtroom in the presence of the court, which would prevent them from stopping, rewinding, looking at something over and over again." The district court allowed the jury to view the videotape in the courtroom, with counsel and Kluessendorf present, and without stopping or pausing the tape.

At 2:30 p.m., the jury asked to review the MCRC videotape once more. Defense counsel again objected and requested that the jury be told to rely on their recollections. The prosecutor had no objection, noting that the videotape was an exhibit and that the risk of over-emphasizing a certain portion "can be eliminated or certainly minimized by requiring that the entire videotape be viewed," without allowing the jury to fast forward, rewind, or focus only on certain parts. The district court allowed the jury to review the tape one more time in the courtroom.

At 3:55 p.m., the jury found Kluessendorf guilty on all counts, and he was sentenced to 144 months in prison, which is the presumptive sentence under the guidelines for a conviction of first-degree criminal sexual conduct with Kluessendorf's criminal-history score of zero. Kluessendorf appeals.

D E C I S I O N

I. The district court did not abuse its discretion by admitting A.M.L.'s out-of-court statements to V.L.

Kluessendorf argues that the district court abused its discretion by admitting, under the residual hearsay exception, V.L.'s testimony regarding out-of-court statements made to her by A.M.L. Kluessendorf claims that there are "serious doubts" regarding V.L.'s ability to accurately recall those statements and that A.M.L.'s statements lack "circumstantial guarantees of trustworthiness." Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent an abuse of that discretion. *State v. Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006), *cert. denied*, 127 S. Ct. 382 (2006).

The residual hearsay exception provides that "[a] statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule." Minn. R. Evid. 807.[2] The proper analysis under the exception is to use "the totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness." *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (quotation omitted). Circumstantial guarantees of the trustworthiness of a child's out-of-

[2] Rule 807 became effective September 1, 2006, and replaced Minn. R. Evid. 803(24) and 804(b)(5). Although the district court here ruled that A.M.L.'s statements to V.L. were admissible under rule 804(b)(5), we analyze the issue under rule 807.

court statement include, but are not limited to, "whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate." *State v. Larson*, 472 N.W.2d 120, 125 (Minn. 1991) (quotation omitted).

Here, we conclude that there are sufficient circumstantial guarantees of trustworthiness to make A.M.L.'s statements to V.L. admissible under the residual hearsay exception. A.M.L.'s statements to V.L. were consistent, spontaneous, and timely. In addition, A.M.L. used age-appropriate terminology, and she did not agree with every question that V.L. asked her. V.L. may have asked A.M.L. slightly leading questions, but the MCRC nurse did not, and she received essentially the same information from A.M.L. Finally, nothing in the record suggests that A.M.L. had a motive to make false statements about Kluessendorf. We conclude that the district court did not abuse its discretion by admitting A.M.L.'s statements under the residual hearsay exception.

Much of Kluessendorf's argument on the hearsay issue focuses on V.L.'s inability to accurately recall the circumstances surrounding A.M.L.'s statements. In her testimony, V.L. made several statements that were inconsistent with the version of events that she first gave to the police, and she was not clear about the chronology of events on the morning of the incident. Those inconsistencies were emphasized during her cross-examination and created an issue of credibility, which was for the jury to assess. But V.L.'s version of the events as described to the jury was consistent with what A.M.L. had told the MCRC nurse: that

Kluessendorf had asked her to come to his house when her mother and little sister were returning a pan to a neighbor. V.L. was not present during the MCRC interview and had not seen the videotape. We will not disturb the jury's assessment of V.L.'s credibility. *State v. Landa*, 642 N.W.2d 720, 725 (Minn. 2002).

II. The district court did not abuse its discretion by allowing the jury to view the videotape of A.M.L.'s interview twice during deliberations.

Kluessendorf argues that the district court committed prejudicial error by permitting the jury to view the videotaped interview of A.M.L. twice during deliberations. Kluessendorf does not challenge the admissibility of the videotape but asserts that the repeated viewings during deliberations unduly emphasized that item of evidence to the exclusion of other evidence.

During deliberations, if the jury requests a review of testimony or evidence not taken to the jury room, the district court may grant the jury's request. Minn. R. Crim. P. 26.03, subd. 19(2)1. If the district court chooses to grant the request, it has broad discretion to control the jury's review of the evidence to minimize prejudice. *State v. Wembley*, 728 N.W.2d 243, 246 n.1 (Minn. 2007) (citing *State v. Kraushaar*, 470 N.W.2d 509, 514-15 (Minn. 1991)).

In *Kraushaar*, the videotaped interview of the child victim was admitted into evidence, played for the jury, and sent into the jury room along with the other exhibits. 470 N.W.2d at 511. The supreme court concluded that while it would have been preferable for review of the videotape to have occurred in the courtroom under supervision, rather than the jury room, any error was harmless because (1) the tape viewed in the jury room was no

different from the tape that the jury would have seen in the courtroom; (2) replaying the tape merely allowed the jury to rehear what it had already heard; (3) the victim's testimony was positive, consistent, and corroborated by other evidence; and (4) it was extremely unlikely that the fact that the jury replayed the tape prompted the jury to convict when it otherwise would not have done so. *Id.* at 516.

Cases applying *Kraushaar* have concluded that when exercising its discretion to allow a videotape entered into evidence to be replayed to the jury during deliberations, a district court should consider whether the material will aid the jury, whether any party will be unduly prejudiced, and whether the material may be subjected to improper use by the jury. *See, e.g.*, *State v. Meemken*, 597 N.W.2d 582, 585 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). In *State v. Haynes*, the supreme court concluded that the district court did not abuse its discretion by replaying two tapes that had been admitted into evidence "once in open court," because the district court followed the analysis set out in *Kraushaar* by allowing the jury to review the tapes in the courtroom and not in the jury room and because both tapes were played in their entirety, thus minimizing any prejudice or misuse by the jury. 725 N.W.2d 524, 528-29 (Minn. 2007). *Haynes* does not establish a "bright-line" rule prohibiting a district court from allowing a jury to review a videotape more than once during deliberations, but it does iterate that in exercising its discretion, a district court should follow the analysis in *Kraushaar*.

Under the *Kraushaar* analysis, the district court here did not abuse its discretion by replaying the videotape twice during deliberations, when it did so in the courtroom, under supervision, and with both parties present. By replaying the videotape in its entirety, the

district court assured that no single portion was unfairly highlighted or unduly emphasized. *See State v. Ross*, 451 N.W.2d 231, 237 (Minn. App. 1990) (holding that a district court did not abuse its discretion by allowing the jury to review testimony of a child victim when the jury's broad request did not unfairly highlight that portion of evidence and granting the request simply enabled the jury to take greater care in evaluating the evidence), *review denied* (Minn. Apr. 13, 1990). The videotape was not particularly lengthy, and much of the interview involved the nurse asking A.M.L. questions about herself to establish rapport with the child; A.M.L.'s responses to the nurse's questions about Kluessendorf's touches took up little time in the interview. We therefore conclude that the district court did not abuse its discretion by allowing the jury to view the videotape twice during deliberations.

III. The evidence reasonably supports the jury's verdict on only one count of first-degree criminal sexual conduct.

Kluessendorf argues finally that the evidence is insufficient to support his convictions because the only evidence of his guilt consisted of the videotaped interview with A.M.L. and because his expert psychologist testified that based on her review of the videotape, she could not conclude that any offense had been committed. He asserts that the state's case against him was weak, noting that (1) the child victim gave no substantive testimony; (2) no physical evidence was presented; and (3) V.L.'s testimony was "so incredible given her inconsistencies" that it would be error for the jury to base its verdict on her testimony.

On review of a challenge to the sufficiency of the evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when

viewed in the 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). This court must determine whether, considering the facts in the record and the legitimate inferences that could be drawn from those facts, a jury could reasonably conclude that Kluessendorf was guilty beyond a reasonable doubt of the offenses of which he was convicted. *See Davis v. State*, 595 N.W.2d 520, 525 (Minn. 1999).

When the evidence is viewed in a light most favorable to the verdict, sufficient evidence was presented to support a finding that Kluessendorf committed first-degree criminal sexual conduct on one occasion. A.M.L. made fairly consistent statements to the MCRC nurse and to V.L. regarding where and how Kluessendorf had touched her. A child victim's testimony standing alone may be sufficient to support a jury's verdict. *See State v. Blair*, 402 N.W.2d 154, 158 (Minn. App. 1987) (holding that, despite numerous inconsistencies, a child victim's testimony was sufficient to support the verdict). And the weight and credibility to be given to the testimony of a witness, whether A.M.L. or V.L., are the sole province of the fact-finder. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). We therefore conclude that the record reasonably supports the jury's verdict that Kluessendorf sexually penetrated A.M.L. *See* Minn. Stat. § 609.341, subd. 12(1) (2004) (defining sexual penetration as "any intrusion however slight into the genital or anal openings").

Kluessendorf also challenges the sufficiency of the evidence to support his convictions on two separate counts of first-degree criminal sexual conduct. Kluessendorf insists that the only evidence of separate incidents was A.M.L.'s statement to the MCRC

nurse that Kluessendorf touched A.M.L. twice; he accurately notes that it was unclear whether A.M.L. was referring to being touched twice during the same incident and that she did not provide any details regarding a second incident. We agree that the evidence does not support a finding that two separate incidents occurred: V.L.'s trial testimony and the testimony of a neighbor focused on the events of the day that V.L. returned home to find A.M.L. gone, searched the neighborhood, and found A.M.L. inside Kluessendorf's home. Although exact dates need not be proved when sexual abuse is charged, something more than is in the record here is needed to convict Kluessendorf of charges based on incidents that allegedly occurred on separate occasions. *See State v. Levie*, 695 N.W.2d 619, 627-28 (Minn. App. 2005). Because the evidence supports Kluessendorf's conviction of only one count of first-degree criminal sexual conduct, we reverse and remand to vacate the conviction on the other count, as well as to vacate any convictions that were entered on the lesser-included charges of second-degree criminal sexual conduct.

Affirmed in part, reversed in part, and remanded.