Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-356

AUGUST TERM, 2017

State of Vermont	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
v.	}	Criminal Division
	}	
	}	
Glenn Boule	}	DOCKET NO. 439-8-14 Oscr
		Trial Judge: Howard E. Van Benthuysen

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for aggravated sexual assault for engaging in a sexual act with a person under the age of thirteen when he was at least eighteen. On appeal, defendant argues that the court erred in denying his requests to depose the minor victim prior to trial and to admit into evidence videotaped interviews of the minor victim and a witness. We affirm.

The record reveals the following. At the time of the relevant events, the victim, A.F., was twelve and defendant was twenty-one. The victim met defendant through a friend and they would hang out together. Defendant expressed an interest in going out with A.F. Initially, she declined because of the age difference, but she relented and they had a short relationship before she broke it off. After the break up, she was at defendant's house with a friend, K.M. A.F. became upset when she saw defendant and her friend kissing because she still had feelings for him. K.M and defendant tried to apologize to A.F and defendant thereafter engaged in sex with her. A.F. testified that K.M. was in the room with them at the time. K.M. told defendant's girlfriend what had happened. The girlfriend then arranged to meet A.F. and physically beat A.F. When investigators became involved after this beating, A.F. reported to her mother that she was beaten up because she had sex with defendant. The girlfriend admitted at trial that she had beaten up A.F. after learning that defendant had sex with A.F. Defendant's girlfriend spoke to defendant on the telephone in recorded conversations about his having sex with A.F. Those recorded calls were admitted at trial and played for the jury.

During the investigation, videotaped interviews were taken of A.F. and K.M. In May 2016, defendant moved to have the videotapes of the full interviews of A.F. and K.M. admitted at trial. Defendant argued that the interviews should be admitted to present the full story to the jury, to show the jury the setting in which the interview was conducted, and to demonstrate to the jury inconsistencies in the statements made by the witnesses. The State responded that the interviews were inadmissible hearsay and that some statements in the interviews were precluded from admission under Vermont's Rape Shield Law. The court denied the motion. The court explained that statements made during the interviews were inadmissible hearsay, but could be used to

impeach the credibility of witnesses. On the Rape Shield Law issue, the court sided with the State but instructed defense counsel that he could seek to admit the evidence later in the trial and the court would review it again based upon the state of the evidence at that time.

Prior to trial, defendant moved to depose A.F.[1] Defendant argued that the deposition would give his counsel an opportunity to meet the victim, assess her demeanor, and "avoid behavioral challenges in the courtroom." Defendant also asserted that he required a deposition to determine the conditions of the investigative interview.[2] The court denied the motion. Relying on the requirements of the relevant criminal rule, the court concluded that defendant had not demonstrated the requisite necessity in this case. The court explained that this was a straightforward case and that defendant had access to the videotaped interviews of the victim and her friend. The court stated that defendant could obtain the information sought from other sources, noting that defendant had not conducted depositions of the investigating detective, who conducted the interview, the grandparents, with whom A.F. was living, A.F.'s mother, or the social worker from the Department for Children and Families.

The case proceeded to trial. At trial, A.F. testified. During cross-examination, defendant used statements made by A.F. during the videotaped interview to demonstrate inconsistencies in her testimony. The jury was also able to view the interview setting. The jury found defendant guilty and the court sentenced defendant to twenty to forty years. Defendant filed this appeal.

On appeal, defendant first argues that the court erred in denying his request to depose A.F. prior to trial. "The trial court has discretion in ruling on defendant's request to depose the victim. Thus, defendant must show that the trial court abused its discretion—that is, that the decision was untenable or clearly unreasonable." State v. Palmer, 169 Vt. 639, 640 (1999) (mem.). Vermont Rule of Criminal Procedure 15(5)(A) provides that no deposition of a victim under sixteen in a sexual assault case can be taken without agreement of the parties or approval of the court. The court may approve a deposition if

> the court finds that the testimony of the child is necessary to assist the trial, that the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child of being deposed. In determining whether to approve a deposition under this subdivision, the court shall consider the availability of recorded statements of the victim and the complexity of the issues involved.

[1] Defendant also moved to depose K.M. At the hearing on the motion, defense counsel clarified that that request related to a separate case in which K.M. was the victim. To the extent that defendant made an argument in this appeal concerning this deposition, it is not before us.

[2] Although the interviews were videotaped, defendant initially asserted that the interviews were audio-only and that a deposition was required to find out the interviewees' body language and facial expressions. Defendant later admitted that he was mistaken and the interviews had been recorded on video.

V.R.Cr.P. 15(5)(B); 2009, No. 1, § 26.

The court's decision was well within its discretion in this case. The court found that a deposition was not "necessary to assist" defendant insofar as there was a recorded interview of the victim available to defendant. Further, the issues in the case were not complex—the victim reported that she had sex with defendant and he denied that it happened. The court further noted that much of the information sought by defendant—about how the victim was prepared for the interview and the conditions of the video interview—were available through other sources. On appeal, defendant asserts that a deposition was required to establish a rapport with the victim prior to trial. Defendant has not demonstrated how this need overcomes the strong presumption against deposing minor victims; indeed, such a desire would exist in every case.

Moreover, defendant fails to demonstrate how lack of a deposition prejudiced him at trial. Defendant claims that the inability to depose A.F. in advance of trial resulted in the fact that he was unaware A.F. had a learning disability and this was prejudicial to him. At trial, he asked A.F. to read a portion of her taped interview, but she had difficulty doing so and had to take a break. Defendant fails to demonstrate that during a deposition he would have discovered A.F.'s learning disability or that this interaction prejudiced the jury against him. See Palmer, 169 Vt. at 640 (explaining that to prevail on appeal defendant must show prejudice from evidentiary ruling and showing that "there might have been prejudice" is not enough).

Defendant also challenges the court's decision on defendant's request to admit the videotaped interviews of A.F. and K.M. The court ruled that the entire interviews were not admissible because they were hearsay, but that defendant could use statements for impeachment. "We review the trial court's evidentiary rulings deferentially and reverse only when there has been an abuse of discretion that resulted in prejudice." State v. Felix, 2014 VT 68, ¶ 19, 197 Vt. 230 (quotation omitted). The court did not abuse its discretion here. To the extent defendant sought to admit the interviews in his case in chief, the statements were hearsay. See V.R.E. 801(c) (defining hearsay as "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"); State v. Brochu, 2008 VT 21, ¶ 70, 183 Vt. 269 (concluding that statement made to police officer during investigation is hearsay). Therefore, the statements were not admissible; see also V.R.E. 802 (stating that "hearsay is not admissible" except as provided by statute or rule). They could be used for impeachment purposes, however, as the trial court allowed. State v. Kelley, 2016 VT 58, ¶ 35 (explaining that out-of-court statement may be admitted to impeach witness).

Defendant offers no rule or statute that would allow admission of the hearsay statements in this case. Instead, defendant analogizes to Rule of Evidence 804a, which contains a hearsay exception for statements by a victim under twelve, and asserts that all of the Rule 804a requirements are met in this case. However, that rule cannot be used as a basis to admit the hearsay statements because defendant did not seek admission of the evidence on this ground below and, as a result, the trial court was never asked to make the findings required by the rule. Because defendant has offered no basis to admit the hearsay statements, they were properly excluded.

Finally, there is no merit to defendant's argument that his inability to admit the statements violated his constitutional right to confront witnesses. Defendant's confrontation right was preserved insofar as he had an opportunity to cross examine A.F. at trial and he was not precluded

from using relevant and admissible evidence. See State v. Lawrence, 2013 VT 55, ¶ 6 n.2, 194 Vt. 315 (explaining that Confrontation Clause provides defendant with opportunity for cross examination, but is "not limitless" and "applies only to evidence that is relevant and otherwise admissible"). "Whatever constitutionally protected right defendant may have to elicit evidence showing a witness's motive to fabricate or otherwise impeaching a witness's credibility, it does not require a court to allow a defendant to introduce or elicit incompetent or hearsay testimony for the purpose of such impeachment." Felix, 2014 VT 68, ¶ 21.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice