Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-380

APRIL TERM, 2020

In re A.M., Juvenile*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NOS. 253/280-6-18 Cnjv, 289-7-18 Cnjv, 402-9-18 Cnjv
		Trial Judge: Samuel Hoar, Jr.

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

Juvenile, A.M., appeals the family division's determination that he violated a juvenile probation condition by possessing marijuana at the residential facility where he had been placed. We reverse.

In November 2018, the family division adjudicated A.M. a delinquent after accepting the parties' stipulation that he had committed several delinquent acts. In January 2019, following disposition, A.M. remained in the custody of the Department for Children and Families (DCF) and was placed on juvenile probation, with conditions, at a residential facility in New Hampshire. In August 2019, a juvenile probation-violation complaint was filed with the family division, alleging, in relevant part, that A.M. had been found in possession of marijuana, as described in a written "Administrator on Duty" report from the New Hampshire facility. The report stated that: (1) the academic case manager came to "this writer" saying she had seen A.M. trying to hand something to another student; and (2) as a result, "a full search was conducted" with A.M.'s consent, revealing, among other things, "a green leafy substance" resembling marijuana. Following a hearing held over two days on September 6 and October 18 of 2019, the family division determined that A.M. had violated his probation by possessing marijuana.

At the September 6 hearing, a permanency coordinator from the New Hampshire facility testified about the report concerning A.M. The report was not signed, sworn, or certified, but it indicated that it was authored and completed by the dean of students and was reviewed, edited, and finalized by another named person—not the person testifying at the hearing. The permanency coordinator stated that the facility made such reports to document more serious incidents "in cases of police involvement or property destruction or . . . injury." He further testified that he received a copy of the report from the clinical director—the person who had finalized the report—but that he had no personal knowledge of the incident that led to the report. A.M.'s attorney objected to admission of the report, arguing that its admission without the testimony of anyone with personal knowledge of the underlying incident violated his right to confront witnesses against him. The attorney also argued that the report contained multi-layered hearsay and was inadmissible under

the business-records hearsay exception set forth in Vermont Rule of Evidence 803(6) because it was more akin to an investigative police report than a business record.

The hearing was continued until October 28, when the State presented the testimony of A.M.'s DCF case worker, who testified that, in discussing the report with A.M., A.M. admitted possessing marijuana but claimed it was not his.* The case worker also testified that: (1) she had no personal knowledge of the incident and did not know if the information in the report was accurate; (2) drugs discovered at the New Hampshire facility are generally turned over to police; and (3) she was unaware of any police report or lab report identifying the green leafy substance as marijuana. At the conclusion of the case worker's testimony, A.M.'s attorney renewed her objection to admission of the report. The family division overruled the objection and admitted the report, concluding that: (1) the permanency coordinator's testimony was sufficient to demonstrate that the report could be admitted pursuant to the business records hearsay exception; (2) even if the report did not fall within that exception, the court could rely on it because the DCF case worker's testimony corroborated it, thereby enhancing its reliability; and (3) there were no concerns regarding A.M.'s right to confront witnesses against him because the report was investigative rather than testimonial in nature. The court explicitly indicated at the end of the hearing that it was finding a probation violation based on a combination of the report and the caseworker's corroborating testimony, neither of which alone would have been sufficient to support the finding.

On appeal, A.M. argues that the family division erred in admitting the New Hampshire report under the business-record exception to the hearsay rule. A.M. asks this Court to reverse the court's finding of a probation violation insofar as the report was the primary basis upon which the family division found the violation. The State concedes reversible error, stating that: (1) it failed to meet its burden of establishing that the report was nontestimonial, thereby implicating A.M.s right to confront witnesses against him; and (2) the court failed to analyze all the relevant factors to determine whether there was good cause to forego those rights. The State concedes that because the family division improperly admitted and relied on the report in finding a probation violation, its order must be reversed.

Upon review of the record and the applicable law, we agree with the parties that the family division's determination of a probation violation must be reversed. Although hearsay evidence "is not categorically inadmissible" in proceedings concerning alleged probation violations, probationers are "entitled to confront adverse witnesses under the Due Process Clause of the Fourteenth Amendment." State v. Eldert, 2015 VT 87, ¶ 16, 199 Vt. 520 (quotation omitted). Therefore, "before a court may deny a probationer the right of confrontation and admit hearsay evidence, it must make an explicit finding on the record that there is 'good cause' to do so." Id. "In evaluating good cause, the trial court must balance the probationer's right to confront a witness against the grounds asserted by the government for not requiring confrontation." State v. Stuart, 2018 VT 81, ¶ 15, 208 Vt. 127 (quotation omitted). The two principal factors in determining if good cause exists are "the State's explanation of why confrontation is undesirable or impractical" and "the reliability of the evidence offered by the State in place of live testimony." Id. (quotation omitted).

Here, the State did not explain why presenting a witness with personal knowledge of the New Hampshire report was undesirable or impracticable, and the family division did not consider this factor at all. Regarding the reliability factor, the court addressed only one of the five

* The case worker also testified that A.M. told her "[t]oday" that he had "never admitted" to possessing marijuana.

considerations we have deemed important in determining reliability to justify denying a defendant the right to confront an adversarial witness. See Eldert, 2015 VT 87, ¶ 20 (listing nonexclusive list of important considerations for determining reliability of hearsay evidence). In light of these omissions, we conclude that the court erred in admitting and relying on the New Hampshire report, irrespective of whether the report fit within the business-records exception set forth in Vermont Rule of Evidence 803(6). "[T]he admission of an out-of-court statement violates the Confrontation Clause where the statement was testimonial, the declarant is unavailable to testify at trial, and there [is] no prior opportunity for cross-examination." State v. Alers, 2015 VT 74, ¶ 7, 199 Vt. 373. "This is true even when the statement is otherwise admissible under the rules of evidence (e.g., under a Rule 803 or 804 exception)." Id.

We also agree with the State that, on this record, it failed to establish that the report was nontestimonial. Generally, evidence is testimonial if it is intended to adduce what happened in the past primarily for investigative purposes for potential use in court proceedings. Id. ¶¶ 9-10; see Davis v. Washington, 547 U.S. 813, 822 (2006) (stating that evidence is testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). Here, at the probation-violation hearing, the State did not argue that the report was nontestimonial, and the State's witness regarding the report testified that such reports were made with respect to serious incidents in which the police would become involved. In sum, we conclude that, on the record before it, the family division erred in admitting and relying on the New Hampshire report absent a witness with personal knowledge of the incident that was the subject of the report. See Stuart, 2018 VT 81, ¶ 11 (stating that generally we "review evidentiary rulings for abuse of discretion," but "we review the trial court's application of the legal framework surrounding an evidentiary question without deference").

Reversed.

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