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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1180

In the Matter of the Welfare of:
R.A., Jr., Child.

Filed May 27, 2008
Affirmed in part, reversed in part, and remanded
Harten, Judge*

Blue Earth County District Court
File No. 07-JV-06-2134

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Harten, Judge.

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

HARTEN, Judge

Appellant R.A. challenges his delinquency adjudication after being found to have committed second-degree and fifth-degree criminal sexual conduct with R, a female

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

child. Because the district court did not abuse its discretion in excluding evidence of an order for protection (OFP) or in denying appellant's motion for a hearing to determine if an improper interview of R tainted her evidence, we affirm those decisions; because the district court erred by failing to determine R's competency before trial and to require on the record R's declaration that she would testify truthfully, we reverse and remand for a new trial.

FACTS

In April 2006, R, then age 4, lived in Mankato with her mother, A; her brother, D, then age 12; and her cousin, S, then age 13. S's good friend was appellant, then age 14, who lived a few houses away; D's best friend was one of appellant's younger brothers. Appellant and S were frequently together at each other's houses; R and D were also often at appellant's house.

On 29 April, appellant and S were using a computer on the porch of appellant's house when R and D arrived. They first watched television, and then R, D, and appellant played a brief game of hide-and-seek. Appellant returned to S and the computer; he then told S that he was going to the bathroom. Thereafter, R came to the porch and told S that appellant had showed her his penis. R appeared normal and untroubled. Appellant explained that R had walked in on him while he was in the bathroom, urinating.

That evening, R told her mother that she had seen appellant's "peanut," a term A had not heard R use before. According to A, R then described (1) "milk" coming from appellant's "peanut"; (2) appellant touching R's "gina"; (3) appellant putting the "milk" on R; (4) appellant kissing R's "gina"; and (5) appellant wanting R to kiss his "peanut."

R's mother, A, went to appellant's house. Appellant's parents were absent but appellant was home. Appellant told A that R had walked in on him in the bathroom. The next day, A and S went to appellant's house to question him. Appellant denied R's account of what had happened in the bathroom. S told A that appellant and R had not been together long enough for the acts that R described to have occurred. Appellant and his parents went to R's house to talk to her. R confronted appellant with the allegations and asked him if he remembered. A took R for a medical examination, which revealed no abnormalities, and reported the incident to the police. Appellant was charged with first-degree, second-degree, and fifth-degree criminal sexual conduct.

A police detective conducted a Cornerhouse interview of R. The detective later testified that, during the interview, he was attempting to get R to confirm her allegations and that he told R to put the anatomically correct dolls together to simulate a sexual act. A state's witness, called to testify as to the reliability of the detective's interview, said that the detective's use of the dolls was improper and that R's answers to his questions were often incomprehensible. The transcript of the interview reveals that R's answers were often inaudible. The district court found the Cornerhouse interview unreliable and said it would be ignored in adjudicating the case.

The district court conducted an "off-the-record" hearing to determine R's competency to testify. After interviewing R, the district court stated:

> I don't know if she'll answer any questions [at a trial]. If we have a trial, the prosecution will bring her in and we'll see . . . . I'm not going to be able to judge her competency until we actually try . . . . She may remember; she may not. If she does she'll tell us, perhaps. And then we'll see.

At the subsequent trial, the district court said that R's comments at the competency hearing had been almost inaudible. Noting that R did not want to look at him, the district court asked the prosecutor to question R about her understanding of telling the truth. The district court chose not to put R under oath.

When asked, "Do you promise that you'll tell the truth when you answer the questions?" R replied, "Cuz I can – I only remember my letter and my name." When asked, "What do you remember?" she answered, "I just remember my A-B-C's." The prosecutor then began an evidentiary interrogation, but appellant's attorney objected on the grounds that no inquiry had been made into R's understanding of telling the truth and indicated that "[the prosecutor] asked her to tell the truth and she shook her head."

R was then asked if she knew what it meant to tell the truth and what it meant to tell a lie; her responses to both questions were inaudible. When asked, "Do you promise that you will only tell what really happened today, and you won't say anything that didn't happen today?" she said, "I will tell what happened, and I won't tell what didn't happen." Asked to repeat this, she said, "I will tell what I had in my brain cuz something happened."

While some of R's testimony was consistent with her earlier accounts of events, some of it was broadly divergent: for example, she testified that she played hide-and-seek not with appellant but with his younger brother, who had not been home that day. For the first time, R claimed that she had been made to touch appellant's "peanut" with her hand.

At the end of her unsworn testimony, R said she did not remember talking about being at appellant's house, to which she had testified earlier.

At the conclusion of the state's case, the district court first granted appellant's motion to dismiss the count of first-degree criminal sexual conduct and then denied the motions to dismiss the counts of second-degree and fifth-degree criminal sexual conduct. Appellant's disposition included an out-of-home placement at the Many Rivers Treatment Center in Rochester.

Appellant challenges the adjudication, arguing that the district court abused its discretion in excluding evidence of an OFP obtained by R's mother against R's father and in denying appellant's motion for a hearing to determine if R's testimony would be tainted by her Cornerhouse interview. Appellant also argues that the district court erred by not determining R's competence to testify prior to trial and that appellant's right to confrontation was violated by R's being allowed to give unsworn testimony.

D E C I S I O N

1. Evidentiary Decisions

Absent an erroneous interpretation of the law, the question of whether to admit evidence is within the district court's discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). Appellant challenges the exclusion of the OFP evidence and the admission of R's testimony.

a. Exclusion of OFP Evidence

About six weeks after appellant's alleged incident with R, A obtained an OFP against R's father on the ground that he had repeatedly forcibly sexually assaulted A.

Appellant sought to introduce evidence of the OFP to show that sexual trauma in R's home could have been an alternate source of R's sexual knowledge. After reviewing the OFP file, the district court excluded it as irrelevant because it did not show that R had been exposed to any sexual activity in her home. The exclusion was not an abuse of discretion.

b. R's Testimony

Before that, appellant moved for a hearing to determine if R's testimony would be tainted by the improperly-conducted Cornerhouse interview. The district court denied the motion and admitted R's testimony. To challenge the denial, appellant relies only on the reference to a "taint hearing" in *State v. Michaels*, 642 A.2d 1372 (N.J. 1994). No Minnesota law supports this argument. Absent Minnesota precedent, the district court did not abuse his discretion in denying appellant's motion for a hearing to determine if R's testimony would be tainted.

2. Pretrial Failure to Determine Competency[1]

A child is 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). Appellant raised the issue of R's competency

[1] The state claims that appellant has waived the right to challenge the district court's finding that R was competent because he did not challenge the finding earlier. Generally, matters such as trial procedure and evidentiary rulings are subject to appellate review only if they were raised in a motion for a new trial. *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). But here the district court never made a finding that R was a competent witness. The district court explicitly stated that he could not determine her competency *until after the trial*. Accordingly, there was no competency finding for appellant to challenge.

and requested a competency hearing. The purpose of such a hearing is to determine whether a child has or lacks the capacity to remember facts and to relate them truthfully. *See, e.g., State v. Smith*, 384 N.W.2d 546, 549 (Minn. App. 1986) ("[T]he competency hearing held before trial . . . established that the child was competent to testify at trial."), *review denied* (Minn. 29 May 1986); *State v. Fitzgerald*, 382 N.W.2d 892, 894 (Minn. App. 1986) ("Once the trial court made this threshold determination [of children's competency at pretrial hearing], evaluation of the children's credibility was for the jury."), *review denied* (Minn. 24 Apr. 1986). Thus, a competency determination is a judicial decision that differs from a credibility determination to be made by a factfinder based on competent evidence at trial. The pretrial competency hearing is to determine a child's capacity to remember facts and relate them truthfully; the trial is to determine the weight and credibility of evidence including the testimony of competent witnesses.

Here, the district court explicitly stated that he would decide R's competence to testify based on her responses at trial. After the hearing, the district court speculated as to what would happen at trial: "[Maybe R] does what she did today [at the competency hearing], at least initially, and . . . [s]he never says anything that has any merit in regard to the case. Good chance that's exactly what'll happen, obviously. So then she's 'not available.'" Thus, the district court said that he could find R "not available to testify" only after she had attempted to testify. The state has not offered any precedent for this procedure, and we have found none. We conclude that it was error to admit testimony from a witness whose competency had not been established and declared prior to that witness being presented to be sworn-in.

If a district court errs in admitting evidence, this court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict; if the verdict might have been more favorable to the defendant without the evidence, then the error is prejudicial. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). The district court found R's testimony to have "overwhelming credibility" because she "never once wavered from her claim that [appellant] shook or jiggled his 'peanut' and made 'milk' come out of it" and because the district court assumed that R would not have known about male masturbation or the appearance of semen unless appellant had committed the acts of which she accused him. Having found that R's testimony had "overwhelming credibility[,]" the district court necessarily found appellant's claims valid. The admission of R's testimony was obviously prejudicial to appellant.[2]

3. Unsworn Testimony

The fundamental necessity that witness testimony be under oath is not to be undermined—it is more than a mere formality. *See State v. Saybolt*, 461 N.W.2d 729, 737, (Minn. App. 1990) ("[O]aths are not formalities . . . ."), *review denied* (Minn. 17 Dec. 1990). Minn. R. Evid. 603 states:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form

[2] Although the district court found R's testimony credible because of its consistency, the record shows it was inconsistent on several points. For example, the testimony used to convict appellant of second-degree criminal sexual conduct, i.e., his "taking [R's] hand and placing it upon his penis," was not consistent with either the account of the incident R gave to her mother or the account she gave in the Cornerhouse interview. R did not mention her hand being placed on appellant's penis on those occasions.

> calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

See also State v. Mlynczak, 268 Minn. 417, 419, 130 N.W.2d 53, 54-55 (1964) (unsworn statements are incompetent as substantive evidence in criminal context).

Appellant argues that the admission of R's testimony violated his right to confrontation because R was an unsworn witness. The state argues that she was properly sworn in. Both parties rely on *State v. Mosby*, 450 N.W.2d 629 (Minn. App. 1990), *review denied* (Minn. 16 Mar. 1990), and *State v. Morrison*, 437 N.W.2d 422 (Minn. App. 1989), *review denied* (Minn. 26 Apr. 1989).

In *Mosby*, a child, age ten, answered a question as to the difference between the truth and a falsehood by saying, "The difference between a lie and the truth is when you lie you're not telling the truth, you're not saying what really happened, and the truth is when you're saying what really happened." 450 N.W.2d at 633. When asked, "What happens if you don't tell the truth?" the child answered, "You can get in big trouble for it." *Id.* Asked if she knew that she was supposed to tell the truth in court, she answered, "Yes." *Id.* Because it was "clear [the child] understood she was obliged to tell the truth[,]" the form of oath used was found adequate. *Id*. In *Morrison*, a child, age five, was found to have been "administered the equivalent of an oath" because she "indicated she knew what a lie was, what the truth was, and nodded her head when asked to promise to tell the truth." 437 N.W.2d at 428.

A review of R's testimony reveals that it does not meet the *Mosby* and *Morrison* standards. When asked, "Do you promise that you'll tell the truth when you answer the

questions?" her non-responsive reply was, "Cuz I can—I only remember my letter and my name." Her responses when asked what a lie was and what the truth was were inaudible, although she later answered, "Yup," when asked if she would tell the truth. The record does not reflect that R was "required to declare that [she] [would] testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so," as required by Minn. R. Evid. 603.

We affirm the exclusion of evidence of the OFP and the denial of appellant's motion for a hearing to determine if the Cornerhouse interview tainted R's evidence; we reverse the district court's adjudication and remand for a new trial on the grounds that it was prejudicial error for the district court (1) to fail to determine R's competency to testify prior to trial, and (2) to fail to obtain an on-the-record declaration from R that she would testify truthfully within the meaning of Minn. R. Evid. 603.

Affirmed in part, reversed in part, and remanded.