STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1359

State of Minnesota,
Respondent,

vs.

Danny Lee Lau,
Appellant.

Filed June 23, 2009
Affirmed
Bjorkman, Judge

Steele County District Court
File No. 74-CR-06-1290

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Douglas L. Ruth, Steele County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

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Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

In this appeal from his conviction and sentence for first-degree criminal sexual conduct, appellant argues that (1) the district court abused its discretion in finding the child complainant competent to testify, (2) there is insufficient evidence to sustain his conviction of first-degree criminal sexual conduct, and (3) his conviction for second-degree criminal sexual conduct must be vacated because it is a lesser-included offense of the first-degree charge for which appellant was sentenced. We affirm.

FACTS

Following allegations that he had sexual contact with his then nine-year-old step-granddaughter, M.S., appellant Danny Lau was charged with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006) (sexual contact with person under age 13 and actor is more than 36 months older than complainant); one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(i) (2006) (actor has significant relationship to complainant, complainant was under age 16 at the time of sexual penetration, and actor accomplished sexual penetration by force or coercion); and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2006) (complainant under age 13, and actor is more than 36 months older).

A court trial was held on February 20 and 21, 2008. M.S. testified that she was staying with her grandparents around the time of the county fair in August 2006. She stated that she was downstairs in appellant's bedroom watching television one night; he

came in and laid down on the bed with her. M.S. later turned off the television and "was trying to get to bed," when she "felt something cold and wet on [her] back." M.S. had on pajamas and underwear. Appellant was wearing a shirt and boxers. M.S. testified that appellant touched her back with his "wiener." She became uncomfortable so she moved to her other side, facing appellant. M.S. testified that appellant then touched the "outside of [her] peep," the word she uses to refer to her vagina, with his "wiener" while her underwear were still on. After that, appellant pulled down her underwear, and she felt the "skin" of his "wiener" touch her "peep." Appellant kept his boxers on, but his "wiener" was exposed through the front opening. M.S. also testified that earlier that evening, appellant asked her to "come and look" at "some nasty videos" of "girls" on his computer.

The district court found appellant guilty of counts one and three of the complaint. The court dismissed count two, finding that "the State did not show sufficient evidence of force or coercion in this incident." At a later sentencing hearing, the district court denied appellant's motion for a downward departure and sentenced him to one 144-month sentence on count one, first-degree criminal sexual conduct. The court did not convict or sentence appellant on count three, the second-degree charge, recognizing that it was part of "the same behavioral incident." This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in finding M.S. competent to testify.

Determining whether a witness is competent to testify is a matter for the district court to consider, *State v. Lau*, 409 N.W.2d 275, 277 (Minn. App. 1987), and rests within the court's sound discretion. *State v. Sime*, 669 N.W.2d 922, 925 (Minn. App. 2003).

A child under age ten is presumed competent to testify unless the district court specifically finds that the child lacks competency.[1] Minn. Stat. § 595.02, subd. 1(m) (2006); *see also State v. Brovold*, 477 N.W.2d 775, 778-79 (Minn. App. 1991) (holding that a three-year-old child was competent to testify), *review denied* (Minn. Jan. 17, 1992). The district court engages in a two-part analysis, considering whether the child (1) has the capacity to tell the truth, and (2) has the ability to recall facts. Minn. Stat. § 595.02, subd. 1(m); *State v. Struss*, 404 N.W.2d 811, 814 (Minn. App. 1987), *review denied* (Minn. June 9, 1987). In determining competency, the district court generally asks questions "unrelated to the basic issues of the trial. Children often are 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." *Sime*, 669 N.W.2d at 926 (quotation omitted). Any doubts as to the child's competency are resolved in favor of finding the child to be competent. *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990).

[1] Although M.S. was 11 years old at the time of trial, the district court conducted the competency hearing at defense counsel's request.

Here, the district court asked M.S. questions concerning both her ability to recall facts and her capacity to distinguish between truth and falsity. The district court asked M.S. to explain the difference between the truth and a lie and tested her definition with questions, including a question about the color of his robe. In describing the questioning used to test M.S.'s ability to recall facts, the district court stated:

> Some of my preliminary questions [to M.S.] of how old [she is], where [does she] go to school, what's the name of [her] teacher, her ability to spell . . . shows her ability to recall facts.
>
> I also asked her what her favorite class was, which I then kind of followed up saying, well, if I told you that Phy Ed was your favorite class, would that be true, and she understood that that wouldn't be true, and she then recalled what her favorite class was, what she told me. And, granted, it was a fairly short time, but that at least gives you some confidence that she has the ability to recall facts.

Appellant argues that the district court's competency determination was inadequate because the court did not ask M.S. to recall events that occurred during the time period in question, late summer of 2006. Appellant also challenges the accuracy of M.S.'s testimony at the competency hearing, because she stated the events in question occurred "a year ago" when it was really about 18 months prior, and because she gave her age at the time as ten, not nine as the timeline suggests. These arguments are unavailing.

First, appellant fails to cite any authority that requires the district court to ask whether the witness recalls events from the specific time period in question. Rather, caselaw directs the court to "determine in a general way whether the child remembers or can relate events truthfully." *Lanam*, 459 N.W.2d at 659-60. The court here asked

questions similar to those outlined in *Sime*, and the record reflects that M.S. appropriately answered them, demonstrating her capacity to tell the truth and recall facts. We also note that appellant's challenges to M.S.'s responses relate more to her credibility, which is a separate consideration, than to her competency to testify at trial. *See 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 [fact-finder]."), *review denied* (Minn. Apr. 24, 1986).

Second, defense counsel had the opportunity to submit questions for the district court to ask in determining M.S.'s competency. Defense counsel took advantage of this opportunity, asking the district court to follow up on M.S.'s definition of the truth. The court did so, and defense counsel did not request any additional questions. And in his summation at the competency hearing, defense counsel never suggested that M.S. had not been adequately questioned regarding her ability to recall facts, stating only that she equivocated when discussing her understanding of what it means to tell the truth.

On this record, we conclude that the district court did not abuse its discretion in determining that M.S. was competent to testify.

II. There is sufficient evidence in the record to support appellant's conviction of first-degree criminal sexual conduct.

Our review of appellant's insufficiency-of-the-evidence argument involves a thorough analysis of the record to determine "whether the facts in the record and the legitimate inferences drawn from them would permit the [fact-finder] to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *Davis v. State*, 595

N.W.2d 520, 525 (Minn. 1999) (quotation omitted). We review the record in the light most favorable to the conviction. *State v. Miles*, 585 N.W.2d 368, 372 (Minn. 1998). The fact-finder has the exclusive function of judging witness credibility and weighing the evidence, and we assume that the fact-finder believed the evidence supporting the state's case and disbelieved contrary evidence. *Dale v. State*, 535 N.W.2d 619, 623 (Minn. 1995).

Appellant was charged with first-degree criminal sexual contact in violation of Minn. Stat. § 609.342, subd. 1(a), which provides that it is unlawful to engage in sexual penetration or sexual contact with a person under 13 years of age, and who is at least 36 months younger than the actor. "'Sexual contact with a person under 13' means the intentional touching of the complainant's bare genitals or anal opening by the actor's bare genitals or anal opening with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(c) (2006).

The district court found that "[M.S.] credibly testified that [appellant] placed his wiener (penis) on her peep (vagina)." The court also found that "[b]ecause [appellant] showed [M.S.] pictures of naked women on the computer prior to the sexual contact and because the sexual contact occurred in the relative isolation of [appellant's] bedroom, [the] acts were committed with a sexual or aggressive intent."

Appellant contends that the state did not present evidence of "bare genital-on-genital contact between [appellant] and M.S." We disagree. Although there was some confusion in the exchange between counsel and M.S. leading to her testimony that she felt the touch of appellant's "skin" on her "peep," we defer to the district court's

credibility determinations regarding this testimony. *Dale*, 535 N.W.2d at 623. M.S. described a sequence of events that supports the finding that appellant removed her underwear and touched his penis to her vagina. M.S. testified that although appellant still had his boxers on, his "wiener" touched her "peep" through "a hole in his boxers." Thus, viewing the record in the light most favorable to the conviction, the facts in the record and all legitimate inferences to be drawn from them support appellant's conviction of first-degree criminal sexual conduct.

III. The district court did not convict appellant of a lesser-included offense.

In the event we affirm appellant's conviction on count one, appellant urges this court to vacate his conviction on count three. When a defendant is convicted of multiple crimes in violation of different sections of the same statute, only one conviction may be adjudicated. *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). If a defendant's conviction for a lesser-included offense is "formally adjudicated," that conviction should be vacated. *State v. Plan*, 316 N.W.2d 727, 728-29 (Minn. 1982).

Although the district court found appellant guilty of both counts one and three, appellant was only formally convicted of and sentenced on count one. *See Spann v. State*, 740 N.W.32d 570, 573 (Minn. 2007) ("A guilty verdict alone is not a conviction."). The record reflects that at appellant's sentencing hearing, the district court specifically stated that it would not sentence appellant on count three because it was part of "the same behavioral incident." Thus, there is no conviction on count three for this court to vacate.

Affirmed.