STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1410

In the Matter of the Welfare of:
J. M. P., Child.

Filed August 4, 2009
Affirmed in part and vacated in part
Schellhas, Judge

Douglas County District Court
File No. 21-J7-06-050544

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

Christopher D. Karpan, Douglas County Attorney, Megan E. Burkhammer, Assistant County Attorney, 305 Eighth Avenue West, Alexandria, MN 56308 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant J.M.P.)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

SCHELLHAS, Judge

Appellant challenges his delinquency adjudications of first- and second-degree criminal sexual conduct, arguing that (1) the district court made erroneous evidentiary rulings, (2) the evidence was insufficient to support a finding of guilt on either charge, and (3) he should not have been adjudicated delinquent on both the greater and lesser

charges. We affirm the district court's evidentiary rulings and findings of guilt on both charges but agree that appellant should not have been adjudicated delinquent on both charges. We therefore affirm in part and vacate in part, as to appellant's delinquency adjudication of second-degree criminal sexual conduct.

FACTS

Based on allegations that in October 2006 appellant J.M.P., at age 13, had sexual contact with his niece, D.J.P., then age 4, appellant was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2006), engaging in sexual penetration with a person under 16 years of age with whom the actor has a significant relationship, and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2006), engaging in sexual contact with a person under 16 years of age with whom the actor has a significant relationship.

At the time of trial, D.J.P. was age five, and the district court held a competency hearing at which D.J.P.: said that she knew what it meant to tell the truth; said that she knew that if you tell the truth you "don't get in trouble"; indicated that she did not know what a lie is; said "lies" are when a person does not tell the truth; said that her cat lies and that he lies with his tail by "trying to pull his tail off"; said that the judge was "silly" when he suggested his pen was a giraffe and that if the judge called the pen a giraffe, he would be telling a lie. On questioning by defense counsel, D.J.P. agreed that she was 5, that she thought defense counsel was 10, and thought her mother was 14. Noting the presumption favoring competency and explaining its reasoning at length, the district court concluded that D.J.P was competent to testify.

The state called D.J.P. as its first witness at the two-day trial. The following colloquy reflects D.J.P.'s nervousness:

> PROSECUTOR: You and your mom have a word you use when you discuss your private parts; is that right?
> D.J.P.: Yes.
> PROSECUTOR: What's that?
> D.J.P.: "Old man."
> PROSECUTOR: Are you saying "old man" because you're nervous?
> D.J.P.: (Nods head.)
> PROSECUTOR: Can you tell the Judge what the "old man" is?
> THE COURT: It works better if you take your fingers out of your mouth.
> D.J.P.: "Old man" is something my mom forgot.
> THE COURT: I can't hear her.
> PROSECUTOR: [D.J.P.], is there a part of your body that you call your "junk"?
> D.J.P.: (slaps forehead.)
> PROSECUTOR: Are you slapping your forehead because you're embarrassed?
> D.J.P.: Yes.

D.J.P. identified as "junk" the genital area of a stuffed horse. She said that appellant had touched her "junk" with his finger and pointed to the genital area of the stuffed horse again to indicate where appellant had touched her. She said his finger did not go inside her and that it felt "fuzzy." D.J.P. testified that she asked appellant to stop and that the touching did not occur while appellant changed her clothes, gave her a bath, or "anything like that."

On cross-examination, D.J.P. said that appellant would sometimes help change her diaper and clean her up and that he would wipe her "junk" and her "butt." Defense

counsel asked additional questions about appellant changing D.J.P.'s diaper and the following exchange occurred:

> DEFENSE COUNSEL: Did you tell your mom that [appellant] was helping you change your pants or helping you change your diaper?
> D.J.P.: Yes-siree.
> DEFENSE COUNSEL: That's what you told her?
> D.J.P.: Yes.
> DEFENSE COUNSEL: Why did you tell her that?
> D.J.P.: Because I thought that was the right thing to do and it is.
> DEFENSE COUNSEL: And did you think [appellant] had done something wrong?
> D.J.P.: Yes.
> DEFENSE COUNSEL: Why?
> D.J.P.: Because that's not good.
> DEFENSE COUNSEL: So, what's not good?
> D.J.P.: (Slaps hand on forehead.) I don't know that part.
> DEFENSE COUNSEL: You don't know why it's not good?
> D.J.P.: (Shakes head.) Because that's not the right thing to do.

D.J.P. also testified that she loved appellant, that he had never hurt her, and that he had always been good to her. On redirect, D.J.P. testified that when appellant had touched her with his finger, he was helping her wipe her "butt" and her "junk," and added: "It was normal and he was cleaning me up."

C.P., who is D.J.P.'s mother and appellant's sister, testified that on October 26, 2006, D.J.P. was diaper-trained. On that day, D.J.P. had been watching a movie in the living room and C.P. went to the bathroom for approximately five minutes. When she emerged, she saw that D.J.P. was not in the living room and assumed that she was in appellant's room, whose door was closed. C.P. tried to open appellant's door, discovered a chair was in front of the door, and pushed harder. Appellant's bedroom door then

opened quickly and C.P. observed that D.J.P was sitting in a chair, leaning back with her legs spread apart and her underpants around her ankles. Appellant was kneeling on the floor in front of her, near the edge of the chair. C.P. immediately took D.J.P. to the bathroom and asked her, "Where did he touch you," "What did he touch you with," and "Did it hurt?" C.P. testified that D.J.P. told her that appellant touched her with "a finger" and that it hurt. D.J.P. pointed to and said "my junk." C.P. testified that D.J.P. calls her vagina her "junk." C.P. then took D.J.P. to a hospital emergency room. The alleged incident occurred around 5:40 p.m., and the hospital visit occurred near 6:00 p.m.

On cross-examination, C.P. clarified that the chair in front of appellant's bedroom door kept the door from swinging open, noting that the door had no handle. C.P. admitted that she and appellant had not always had a good relationship, but she did not recall placing him in the trash when he was little, although she said it was "very possible" that she did.

Nancy Wiebe, a social worker, testified that she conducted a CornerHouse interview with D.J.P., and the state moved to admit a videotape of the interview. The defense objected that a chain of custody had not been established, the videotape was cumulative, it was hearsay not covered under "the exception," and D.J.P.'s statements were testimonial and not allowed under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). Noting the statute that allows admission of children's statements regarding sexual abuse, the district court ruled that *Crawford* was inapplicable because D.J.P. testified at trial and denied the motion to exclude the statements.

When Wiebe's testimony resumed, the videotape was admitted and played in the courtroom. During Wiebe's interview of D.J.P., D.J.P. said that the previous day a doctor checked her "junk" and her "butt" and that this was done to see if anyone had touched her. When Wiebe asked D.J.P. if anyone had ever touched those places, she nodded yes, said appellant's name, and said that appellant had touched her with his fingers. Wiebe then asked D.J.P., "What did he do with his fingers?" and D.J.P. answered, "Poked it in." Wiebe asked what part appellant had poked his finger in, and D.J.P. pointed to the area on a picture she had previously identified as "junk." D.J.P. said that it had hurt and that she had been in a chair when appellant poked her in her "junk." D.J.P. also said that appellant had pulled her skirt up and her underpants down. D.J.P. used an anatomically correct doll to demonstrate what happened when appellant touched her "butt." Wiebe testified that the doll previously had holes and that when D.J.P. demonstrated touches with the doll, her finger went "inside the female doll."

The state rested after Wiebe's testimony and the defense called appellant. Appellant testified that, at the time of the incident, his room had no doorknob and would not stay closed. To keep it closed, he would put a chair in front of it. Appellant testified that before D.J.P. was potty trained, he helped change her diapers and clean her. Appellant testified that D.J.P. was potty trained on October 26, 2006. On that day, he had been in his room watching a movie and D.J.P. came in and told him to play one of her movies. He did, and they were in the room together for roughly five minutes before C.P. entered. Appellant testified that while in his room, D.J.P. was not watching the movie; she was "jumping on the chair." She left the room to go to the bathroom, returning

"probably a couple of minutes before [C.P.] came in." When D.J.P. returned to appellant's room from the bathroom, she had a dress on and had her underwear in her hands. Appellant testified that he put D.J.P.'s underwear back on and C.P. then pushed her way into the room.

When asked whether appellant had to remove the chair from his door so that D.J.P. could reenter his room after she went to the bathroom, appellant said no, because "the chair was just sitting on the door." He explained that it was a fold-up chair, was in the folded-up position, was "just leaning against" the door, and D.J.P. was able to reenter the room without really disrupting the chair. Appellant denied inappropriately touching D.J.P.

Appellant remembered speaking with the police and testified that he told the police the "same thing." On cross-examination, appellant denied telling police officers that D.J.P. had asked for help removing her underwear. After being shown his statement to police and being asked again if he remembered what he told police, appellant answered, "Well, she needed them on," and he recalled telling the officer that when D.J.P. came to him, her underpants were on inside out and that he helped remove them, turn them right-side out, and replace them. He admitted that his statement to police was different than his trial testimony.

The district court found appellant guilty of both charges and adjudicated him delinquent on both counts. This appeal follows.

D E C I S I O N

I.

A. Competence of D.J.P.

Appellant argues that the district court abused its discretion when it ruled D.J.P. competent to testify. "Determination of witness competency rests in the discretion of the trial judge. The trial judge's finding of competency will not be reversed unless it is a clear abuse of discretion." *State v. Cermak*, 350 N.W.2d 328, 332 (Minn. 1984).

The competency of child witnesses under the age of ten is governed by Minn. Stat. § 595.02, subd. 1(m) (2006):[1]

> A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.

As discussed by the supreme court in *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990), the statute reflects a "legislative change in course" to a presumption of competency, *State v. Scott*, 501 N.W.2d 608, 613 (Minn. 1993) (applying *Lanam*). In *Lanam*, the court explained:

> In determining competency of a child, the trial court must determine whether the child understands the nature and obligations of an oath and whether the child has the capacity to remember or to relate truthfully facts respecting which the child is examined. The latter requirement does not mean that the court is to question the child on the details of possible testimony, but rather means that the court should determine in

[1] The statutory provision regarding child witnesses is currently found in paragraph (n) of subdivision 1, but the language has not been modified. Minn. Stat. § 595.02, subd. 1 (n) (2008).

> a general way whether the child remembers or can relate events truthfully. The jury will judge the child's credibility and decide the weight to assign the testimony. A competency hearing is not a credibility hearing. Competency concerns the child's ability to be truthful and to understand the importance of telling the truth in court. It also concerns the child's ability to remember and relate events. Whether a child is easily led goes more to credibility than to competency. Even adults at trial become inconsistent upon cross-examination. It is the jury's province to sort out the inconsistencies and determine credibility, the court's province to determine competency.

459 N.W.2d at 659-60 (quotation omitted). "The obligation of the oath has been interpreted as primarily an understanding of the necessity to tell the truth." *Cermak*, 350 N.W2d at 332. "Where the court is in doubt as to the child's competency, it is best to err on the side of determining the child to be competent." *Lanam*, 459 N.W.2d at 660.

Here, appellant argues that D.J.P. did not have the ability to tell the truth or to relate events. Whether D.J.P. was able to tell the truth and relate facts might have been a close call for the district court. The record clearly reflects that the district court gave the matter its close and careful attention. Based on the district court's broad discretion and the law that instructs that if the district court is in doubt about a child's competency, the court's best action is to err on the side of determining the child to be competent, we conclude that the court did not abuse its discretion in determining that D.J.P. was competent to testify.

B. Admission of Videotape of CornerHouse Interview

Appellant argues that, even if D.J.P. was properly allowed to testify, the videotape of the CornerHouse interview should not have been admitted. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse

of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *Id.*

Appellant argues that the videotaped interview was not admissible under Minn. Stat. § 595.02, subd. 3 (2006), and that the district court abused its discretion in admitting it because there was no separate hearing, the court did not make reliability findings, and reliability was not demonstrated. Minnesota Statutes, section 595.02, subdivision 3, provides:

> An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child . . . by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> (a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child . . . either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; and
>
> (c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.
>
> . . . An unavailable witness includes an incompetent witness.

Minn. Stat. § 595.02, subd. 3.

1. Separate Hearing

Appellant did not demand a separate hearing. "Ordinarily, this precludes raising the objection on appeal, even if hearsay objections are part of the trial court record." *In re Welfare of W.W.M.*, 400 N.W.2d 203, 206 (Minn. App. 1987) (quotation omitted) (addressing hearing on "trustworthiness" under Minn. Stat. § 595.02, subd. 3). We conclude that appellant waived the issue regarding no separate hearing.

2. Reliability Findings and Demonstration of Reliability

Appellant argues that the record shows that the statement was not reliable, and the district court did not in a separate hearing find that "the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability" under Minn. Stat. § 595.02, subd. 3(a). Appellant concedes that any error in not making explicit findings is not reversible, arguing instead that the statements lacked sufficient indicia of reliability because they were not spontaneous, the questions were "highly suggestive," the interviewer had a preconceived idea of what D.J.P. would say, C.P. had a motive to fabricate due to her strained relationship with appellant, and D.J.P. was never able to use her own words because her mother immediately suggested the word "touched."

The supreme court's analysis in *In re Welfare of L.E.P.*, 594 N.W.2d 163, 171 (Minn. 1999) is instructive regarding indicia of reliability. In *L.E.P.*, the supreme court concluded that the district court erred in holding statements inadmissible, noting that: (1) the witness was "clearly fond" of the defendant and had no motive to fabricate; (2) the statements were made spontaneously; (3) the witness's story had remained consistent

through multiple recounting; (4) the witness's demeanor on a videotaped interview was "cheerful"; and (5) the child seemed "quite willing" to help the interviewer understand exactly what had happened. *Id.* at 171-72. As to the interviewer, the supreme court concluded that: (1) though the interviewer told the child that the child's mother thought "maybe something happened" with the child's cousin, the language was "not so suggestive" that the victim "would be inclined to answer in any particular way"; (2) the interviewer had "employed techniques appropriate for gaining information from a 7-year-old without putting words in the child's mouth"; (3) the interviewer often repeated what the child said as if to confirm the information and usually asked open-ended questions such as "did anything else happen?"; and (4) though the questioning was "not pristine in its open-endedness," the statements were "not at all the product of leading questions or of [the interviewer's] own preconception of what [the victim] would say." *Id.* at 172.

We note the similarities between this case and *L.E.P.* Like victim L.E.P., D.J.P. was fond of the person about whom her statements were made and was consistent in reporting that the person touched her. And the CornerHouse interviewer, like the interviewer in *L.E.P.*, used the CornerHouse interview technique by guiding D.J.P. somewhat in topic, asking mostly open-ended questions and following up with confirming statements. The transcript of the CornerHouse interview in this case shows that the interviewer did not suggest that appellant had touched D.J.P.; rather, D.J.P. first suggested appellant had poked his finger inside her:

> INTERVIEWER: Okay. When you were at the doctor, what did the doctor do?

D.J.P.: Um, he pulled down around to see if I had any – and he looked on my butt and here.
INTERVIEWER: Okay. So he checked on this part? (Points on drawing.) What did you call that part again?
D.J.P.: Junk
INTERVIEWER: Do you call it junk?
D.J.P.: (Nods head.)
. . .
INTERVIEWER: Okay. And how come he was checking your junk and your butt?
D.J.P.: Because.
INTERVIEWER: Because why?
D.J.P.: Because to see if I had any spots.
INTERVIEWER: To see if you had any spots? How come the doctor thought you would have spots? Because he wanted to see if anybody touched you?
D.J.P.: (Nods head.)
INTERVIEWER: Did anybody ever touch those places?
D.J.P.: (Nods head.) [Appellant].
INTERVIEWER: [Appellant]? And what parts did [appellant] touch?
D.J.P.: This, this (points.)
INTERVIEWER: And so this part was called what again?
D.J.P.: Junk.
INTERVIEWER: The junk. So [appellant] touched the junk. And he touched -
D.J.P.: The butt.
INTERVIEWER: The butt. And he touched the butt, too?
D.J.P.: (Nods head.)
INTERVIEWER: Okay. What did he touch it with?
D.J.P.: His hand.
INTERVIEWER: His hand?
D.J.P.: Wait a minute. His fingers.
INTERVIEWER: His fingers, okay. What did he do with his fingers?
D.J.P.: Poked it in.
INTERVIEWER: Okay. And what part did he poke his finger in?
D.J.P.: Down here (points.)
. . .
INTERVIEWER: Okay. On the junk part, how did that feel when he poked the finger?
D.J.P.: It hurt.

> INTERVIEWER: It hurt? Okay. Where were you at when he poked you in the junk?
> D.J.P.: In the chair.

Like in *L.E.P.*, the questioning was "not pristine" in its open-endedness but was also not so suggestive as to lead D.J.P. to say any particular thing or create an interview that was the product of the interviewer's preconceived notions. The district court did not abuse its discretion in admitting the CornerHouse interview.

Appellant also argues that the interview was not admissible under Minn. R. Evid. 801(d)(1)(B) as a prior consistent statement. Because the interview was properly admitted under Minn. Stat. § 595.02, subd. 3, we do not address this argument.

II.

Appellant argues that the evidence is insufficient to support a finding of guilt on either charge. When sufficiency of the evidence is challenged, this court must "view the evidence in a light most favorable to the verdict to determine whether the facts in the record and the legitimate inferences drawn from them would permit the jury 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). Criminal bench trials are reviewed in the same manner as jury trials "when determining whether the evidence is sufficient to sustain convictions." *Id.*

A. First-Degree Criminal Sexual Conduct

Appellant argues that the evidence of sexual penetration is insufficient to support the district court's finding of guilt on the first-degree charge.

The crime of first-degree criminal sexual contact in violation of Minn. Stat. § 609.342, subd. 1(g), includes sexual penetration, which is defined as "any intrusion however slight into the genital or anal openings" of the complainant's body by any part of the actor's body. Minn. Stat. § 609.341, subd. 12(2)(i) (2006). Appellant argues that the only evidence of penetration in this case is the CornerHouse video and argues that it was improperly admitted. Because we have already concluded that the district court did not abuse its discretion in admitting the CornerHouse video into evidence, the evidence is sufficient to support the district court's finding that appellant is guilty of first-degree criminal sexual conduct.

B. Second-Degree Criminal Sexual Conduct

Appellant argues that the evidence of contact with a sexual or aggressive intent is insufficient to support the district court's finding of guilt on the second-degree charge.

The crime of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g), includes sexual contact, which is defined as "intentional touching by the actor of the complainant's intimate parts" committed with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(b)(i) (2006). Appellant argues that the victim's testimony was unclear about whether appellant's touching was with a sexual or aggressive intent. The district court found that the sexual or aggressive intent could be inferred from the types of touches, citing *State v. Ness* for the rule that in sexual-touching cases, "sexual or aggressive intent can readily be inferred from the contacts themselves." 707 N.W.2d 676, 687 (Minn. 2006). In *Ness*, a case in which the actor touched the inner-thigh and groin area of the complainant several times, the supreme court stated, "here,

there could be no other reason for Ness to touch [the victim's] intimate parts." *Id.* Appellant argues that he had an alternate reason to touch D.J.P.—his history of changing D.J.P.'s diapers and touching her intimate parts to clean her. But, here, appellant testified that he did not touch D.J.P.'s genital area at all during the incident in question. Thus, once the district court concluded that appellant did touch D.J.P. sexually on the day in question, the district court did not abuse its discretion in rejecting appellant's argument that the touching was for the purpose of cleaning D.J.P. We conclude that the district court did not err in finding that appellant's touching of D.J.P. was done with the sexual or aggressive intent necessary to support a finding of guilt of second-degree criminal sexual conduct.

III.

Appellant argues that even if reversal is not warranted on other grounds, the district court erred in adjudicating him delinquent of both first- and second-degree criminal sexual conduct and his delinquency adjudication of second-degree criminal sexual conduct charge must be vacated because it is a lesser-included offense of first-degree criminal sexual conduct. Appellant relies on Minn. Stat. § 609.035, subd. 1 (2006), which prohibits multiple prosecutions and punishments for conduct that amounts to a single behavioral incident, and Minn. Stat. § 609.04 (2006), which prohibits conviction of a charged crime and a lesser-included offense. Respondent concedes error on both grounds. Appellant seeks amendment of the district court's disposition order, vacating the adjudication of second-degree criminal sexual conduct, and respondent does

not oppose that relief. We therefore vacate the delinquency adjudication of second-degree criminal sexual conduct.

Affirmed in part, vacated in part.