**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1761**

In the Matter of the Welfare of:
B.J.D., Child.

**Filed August 18, 2009**
**Reversed and remanded**
**Schellhas, Judge**

Watonwan County District Court
File No. 83-JV-07-188

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

LaMar Piper, Watonwan County Attorney, Kevin C. Lin, Assistant County Attorney, 710 Second Avenue South, St. James, MN 56081 (for respondent State of Minnesota)

Marie L. Wolf, Interim Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant B.J.D.)

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

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

**SCHELLHAS**, Judge

Following a court trial, appellant challenges his adjudication of delinquency on a third-degree criminal sexual conduct charge. Because appellant's confrontation rights at

trial were violated and the error was not harmless, appellant is entitled to a new trial. We therefore reverse and remand.

## FACTS

Respondent State of Minnesota charged appellant B.J.D. with third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(d) (2006) (engaging in sexual penetration with a complainant whom the actor knows or has reason to know is "mentally impaired, mentally incapacitated, or physically helpless"). The state alleged that, on June 23, 2007, appellant sexually penetrated victim B.M.P., when he knew or had reason to know that B.M.P. was mentally impaired. Before appellant was charged, police conducted taped interviews of B.M.P., co-defendant J.T.R, J.S., and appellant. B.M.P. stated that, while in a car with appellant, J.T.R., and J.S., J.T.R. dared her to touch appellant and to perform oral sex on appellant. After the dare, J.T.R. touched B.M.P.'s breasts while appellant penetrated B.M.P.'s mouth with his penis. J.T.R. told police that he saw B.M.P. perform oral sex on appellant. J.S. told police that he heard J.T.R. dare B.M.P. to perform oral sex on appellant. Appellant told police that he saw J.T.R. reach toward B.M.P. and assumed that J.T.R. was touching her breasts. Appellant denied that oral sex occurred, but admitted that he heard J.T.R. dare B.M.P. to perform oral sex. The state charged both appellant and J.T.R. and tried them in a joint trial.

Before trial, appellant and J.T.R. moved for an adverse psychological examination of B.M.P. on the issues of competency and reliability. They argued that, although B.M.P.

had been psychologically examined, the examination was not conducted to determine B.M.P.'s competency and reliability. The district court denied the motion.

On the day of trial, J.T.R.'s counsel moved to prevent admission of appellant's and J.T.R.'s statements to police. Appellant's counsel joined the motion, arguing that because both juveniles were invoking their right to remain silent, there would be no opportunity for cross-examination and admission of their statements would violate appellant's confrontation rights. The district court denied the motion.

At trial, Betsy Anderson, a licensed psychologist, testified that she had performed a psychological evaluation of B.M.P. that was aimed at determining cognitive and adaptive functioning. Anderson diagnosed B.M.P. with borderline intellectual functioning, which is "a classification for individuals who struggle with cognitive impairments and impairments in their adaptive functioning, meaning how they get through their everyday life." B.M.P.'s Full Scale IQ score was 74, which Anderson testified is on the "very, very low end." Anderson's report was admitted in evidence. In her report, Anderson stated that the Full Scale score is "an average of widely discrepant skills" and that B.M.P.'s verbal and non-verbal IQ scores should be "looked at separately." B.M.P.'s verbal IQ score was 67, in the extremely low range, and her non-verbal IQ score was 85, in the low average range. Anderson testified that verbal IQ addresses "understanding spoken language or written language" and "has to do with the way a person interprets and reasons . . . using language." According to Anderson, B.M.P.'s verbal IQ "would translate into some pretty significant challenges just in day-to-day life," including "extreme difficulties academically, occupationally." Testing of

B.M.P.'s adaptive behavior resulted in a functional age equivalent of 12 years and 4 months.

Officer Paul Wegner participated in the police interviews and testified about statements made by appellant and J.T.R in their police interviews. Wegner's testimony was consistent with the interviews summarized above, but added that J.T.R. initially told police that nothing had happened and then, about 30 minutes into the interview, said that he thought, from what he saw, B.M.P. had performed oral sex on appellant. J.T.R. told officers that it was obvious that oral sex had taken place and that there was no doubt in his mind B.M.P. had performed oral sex on appellant because he saw B.M.P.'s head going up and down. Officers obtained samples of what appeared to be stains from inside the vehicle. No semen or DNA was found through testing.

J.S. testified that he heard J.T.R. dare B.M.P. to perform oral sex on appellant. According to J.S., appellant refused but then appellant and J.T.R. went back and forth discussing whether "to do it or not to." J.S. was not sure if B.M.P. ever carried out the dare. J.S. saw B.M.P. "kind'a over towards [appellant's] way, kind of bent over." The car seat blocked J.S.'s view, and he could not see B.M.P.'s head after she bent over appellant. J.S. agreed that, during his police interview, he answered, "Yeah," when asked if he thought "it was wrong that [B.M.P.] was giving [appellant] a blowjob."

B.M.P. testified that J.T.R. dared her to "[s]uck [appellant]" and "[s]uck him down there." The prosecutor asked B.M.P. if she was talking about oral sex and she answered, "Yes." B.M.P. performed the dare. When asked by counsel if appellant ejaculated, B.M.P. answered, "Yes, he did." When asked if she spit it out, she answered, "Yes, I

did." When asked if she spit it on the floor, she answered, "I think so." B.M.P. told police she felt that it was her fault, and testified at trial, "I feel like it is [my fault]."

Before this incident, B.M.P. had not spent time with the boys but had spent time with E.R., J.T.R.'s older sister, "a lot." B.M.P stopped being friends with E.R. after E.R. slept with J.H., whom B.M.P. considered to be her boyfriend. B.M.P. was so upset with E.R. over the situation that she filed a false police report alleging that E.R. hit her. Police learned the report was false after B.M.P. told her parents and her uncle that she had lied and her uncle told the police. B.M.P. admitted that she was still angry with E.R. B.M.P. also admitted that she had told individuals in the community that she was pregnant with J.H.'s child and this was a lie. After the incident with appellant and J.T.R., B.M.P. told J.H. that J.T.R. had raped her. B.M.P. testified at trial that this statement to J.H. was a lie.

C.P., B.M.P.'s mother, testified that B.M.P. would get into trouble and "do stupid things" because "people would tell her to do things and she'd do things." According to C.P., B.M.P. is like "a sixth grader where sometimes young kids make up stories and sometimes they tell the truth." C.P. testified that B.M.P. did not want to testify and had "cried and cried" the night before the trial. Because the trial was hard on B.M.P., C.P. and others had wanted the charges dropped. After defense counsel questioned C.P. on whether she was concerned about B.M.P.'s truthfulness in these allegations, given B.M.P.'s prior false allegations, the district court questioned C.P. about how she assessed whether B.M.P. was lying in general and whether she thought B.M.P. was lying about the incident with appellant and J.T.R. C.P. did not think that B.M.P. was lying.

Several witnesses called by the defense testified that B.M.P. had a reputation for untruthfulness and exaggeration and that, in their opinion, B.M.P. was not truthful.

Several witnesses, including E.R. and J.T.R.'s mother, C.R., also testified that B.M.P. had recanted. C.R. testified that B.M.P. said "I'm sorry, I didn't mean it, I didn't mean it, I didn't mean to get [J.T.R.] in trouble," and that she had lied and had been mad at E.R. C.R. asked her if anything had really happened and B.M.P. said no, she was just mad at E.R. The district court asked C.R. about her disbelief of B.M.P. regarding the incident, asking if she also disbelieved J.T.R.'s statement to the police indicating that oral sex had occurred. C.R. testified that she believed her son and clarified on questioning by defense counsel that she believed him when he said that he did not commit the crime.

Madelia Police Lieutenant Larry Schickling testified that he had known B.M.P. for most of her life and was familiar with her reputation. He said she had some mental problems and people would give different accounts of her behavior; some would say she is very truthful and others would say she fabricates things. He said it was part of her condition, explaining that "there are times she believes it to be true but it's not in fact true." There were occasions when B.M.P. reported things and officers did not find enough evidence to bring charges related to the reports, including the report that E.R. hit her. But B.M.P. had also made truthful reports to the police. Robert Prescher, an officer with the Madelia Police Department, testified that he met B.M.P. after this case started and that B.M.P. had been truthful in his contacts with him.

The district court found appellant guilty and adjudicated him delinquent. This appeal follows.

## D E C I S I O N

Appellant challenges his adjudication, arguing that: (1) there was insufficient evidence that B.M.P. was mentally impaired and that appellant knew or had reason to know of the impairment; (2) his confrontation rights were violated when the district court admitted statements made by J.T.R. in his police interview; (3) the district court erred in denying the motion for an adverse psychological exam; (4) the district court improperly elicited vouching testimony; and (5) a new trial should be ordered based on the cumulative effect of errors. We conclude that admission of J.T.R.'s statement violated appellant's confrontation rights and that appellant is entitled to a new trial. Because we order a new trial on confrontation grounds, we do not reach appellant's other claims of error.

The Sixth Amendment provides an accused with the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. An alleged violation of the Confrontation Clause presents a question of law reviewed de novo. *State v. Rodriguez*, 754 N.W.2d 672, 678 (Minn. 2008). In *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004), the Supreme Court ruled that the Confrontation Clause bars admission of testimonial out-of-court statements of an unavailable witness when the accused is not given a prior opportunity to cross-examine the witness.

Appellant relies on *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), in arguing that admission of J.T.R.'s statements violated his confrontation rights. "*Bruton* established the rule that when two defendants are tried jointly, the pretrial confession of one, which implicates the other defendant, cannot be admitted against the

other defendant unless the confessing codefendant testifies at trial." *State v. Blanche*, 696 N.W.2d 351, 367 (Minn. 2005) (applying *Bruton*, 391 U.S. at 135-37, 88 S. Ct. at 1628). Generally, "[a]dmitting such a confession when the codefendant does not testify is a violation of the other defendant's Confrontation Clause rights." *Id.* The state concedes admission of J.T.R.'s statement was contrary to *Bruton*.

Statements of juveniles tried together in a joint trial are also subject to Minn. R. Juv. Delinq. P. 13.07. Under rule 13.07, "[w]hen two or more children are jointly charged with an offense," they may be tried jointly. Minn. R. Juv. Delinq. P. 13.07, subd. 1. When an out-of-court statement of one child "refers to, but is not admissible against another child" and the prosecuting attorney intends to offer the statement as evidence in its case in chief, the court "shall require" the prosecuting attorney to elect one of three options, none of which was elected in this case. *See id.*, subd. 3 (stating options). The state concedes that it failed to follow this rule.

Though the state concedes error, the state argues that a new trial is not warranted because the errors were harmless. Confrontation Clause violations are subject to a harmless-error analysis. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). For a Confrontation Clause violation to be deemed harmless, it must be harmless beyond a reasonable doubt. *Rodriguez*, 754 N.W.2d at 682. "An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was surely unattributable to the error." *Id.* (quotation omitted).

In assessing whether a verdict is "surely unattributable" to an error, we consider the following factors: (1) the manner in which the evidence was presented; (2) whether it

was highly persuasive; (3) whether it was used in closing argument; (4) whether it was effectively countered by the defendant; and (5) whether the evidence of guilt was overwhelming. *Caulfield*, 722 N.W.2d at 314 (citing *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005)).

A court considering the manner in which evidence was presented considers whether the evidence was "lost among a plethora of evidence" and whether the evidence "was aimed at having an impact on the verdict." *Id.* The district court's questioning of C.R. regarding J.T.R.'s statement indicates that the statement was not lost among a plethora of evidence. And the evidence presented through the testimony of a police officer was clearly designed to have an impact on the verdict. The district court's findings reflect that the evidence was highly persuasive. The district court noted in its findings that all accounts of the evening were consistent except as to whether the sex acts occurred and, on this critical fact, noted that J.T.R.'s statement was consistent with the act occurring. The admission in evidence of J.T.R.'s statement may have persuaded the court to disregard or place less weight on the testimony regarding B.M.P.'s history of lying and exaggeration.

The state referred to J.T.R's interview statements in its written closing argument, noting that the police interviews were consistent about the alleged dare to B.M.P. and noted that much of B.M.P.'s testimony was supported by the statements of J.T.R. and appellant to the police. The only evidence to counter J.T.R.'s statement was appellant's statement in his police interview. J.T.R.'s statement was not effectively countered.

Finally, though there was significant evidence of appellant's guilt, aside from J.T.R.'s statement, we do not conclude that there was overwhelming evidence of guilt such that the error was harmless. *See id.* at 317 (noting that harmless error has historically been found by the supreme court only when several factors weigh in that direction).

The state argues that any prejudice is lessened because the trial was a bench trial rather than a jury trial. We acknowledge that "evidentiary errors may be less prejudicial in a bench trial than in a jury trial," but, where a judge overrules a *Crawford* objection and admits evidence, "[t]he obvious implication is that the judge found the evidence relevant and probative." *Id.* at 315 n.8. Because the district court in this case similarly viewed the evidence as relevant and probative and relied on J.T.R.'s statement in its order adjudicating appellant delinquent, we cannot conclude that the error was less prejudicial simply because this was a bench trial. And because each factor indicates that the admission of J.T.R.'s statement was prejudicial, we cannot conclude that the district court's decision was "surely unattributable" to the error. Because we conclude that the error was not harmless, appellant is entitled to a new trial.

**Reversed and remanded.**