STATE OF MINNESOTA
IN COURT OF APPEALS
A09-639

In the Matter of the Welfare of: J. J.W., Child.

Filed February 9, 2010
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-JV-08-13002, 27-JV-08-11653,
27-JV-08-12376, 27-JV-08-13138, 27-JV-08-9987

Marie L. Wolf, Interim Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, MN (for appellant J.J.W.)

Lori Swanson, Attorney General, St. Paul, MN; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, MN (for respondent county)

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

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

MINGE, Judge

Juvenile appellant challenges his adjudication of delinquency for second-degree criminal sexual conduct based on allegations made by his young niece. Appellant claims that the district court erred by (1) failing to properly assess the alleged victim's competency to testify; (2) failing to properly swear in the alleged victim; (3) admitting hearsay statements or, in the alternative, statements barred by the Confrontation Clause of

the Sixth Amendment to the United States Constitution; (4) improperly admitting evidence of a defense witness's prior conviction for impeachment purposes; and (5) finding appellant delinquent based on insufficient evidence. We affirm.

FACTS

In 2008, four-year-old T.B. and her mother temporarily lived with T.B.'s maternal grandmother and others in an extended family. The household included additional young children and T.B.'s uncle, 16-year-old appellant J.J.W. The children, including appellant, slept in the living room on couches and mattresses.

On the morning of October 20, 2008, when mother returned home from working a night shift, she noticed that appellant was sleeping on the same bed as T.B. T.B. was wearing a shirt and underwear. Appellant usually slept on a separate couch. Appellant was half-awake, and when mother (appellant's sister) asked him why he was sleeping with T.B., he told her to "shut up." T.B. then said, "[appellant] humped me" and that appellant had "spit on" her. Mother noticed that T.B. had a wet spot on her underwear.

Mother promptly brought T.B. to North Memorial Hospital. Enroute on a bus, T.B. demonstrated appellant's actions by laying on top of the baby stroller. At the hospital, T.B. was seen by emergency-room physician Dr. Amy Kolar. T.B. told Dr. Kolar that appellant had "humped" her. Dr. Kolar briefly examined T.B., found no physical injuries, and referred T.B. to Midwest Children's Resource Center (MCRC), a unit at the St. Paul Children's Hospital. MCRC specializes in evaluating potential child-abuse victims.

At MCRC, Nurse Margaret Carney performed a more complete physical exam of T.B. and interviewed her. The recording of that interview indicates that T.B. was distracted and often inaudible, talked about monsters under her bed, but did say that appellant had "humped" her on her "butt" and the back of her leg. T.B. also demonstrated what appellant did by making pelvic thrusts towards a chair. T.B. stated that both she and appellant had clothes on, but that appellant's "peterwacker" touched the back of her leg, and that appellant spit on her "butt." MCRC staff collected T.B.'s underwear and gave it to the police.

As a mandatory reporter under state law, Nurse Carney referred the matter to the Minneapolis Police Department for further investigation. Sergeant Clark Goset reviewed the MCRC records, met with mother and T.B., and contacted appellant to obtain a buccal swab for testing. Sergeant Goset sent T.B.'s clothing and appellant's swab to a laboratory for testing. Laboratory analysis indicated that the spot was appellant's semen. Appellant was charged with second-degree criminal sexual conduct. Minn. Stat. § 609.343, subd. 1(a).

A bench trial was held in January and February 2009. T.B., mother, grandmother, Nurse Carney, Dr. Kolar, Sergeant Goset, and two lab analysts testified and T.B.'s various statements to them were introduced. After inquiry and objection by appellant, the district court found T.B. competent to testify and swore her in as a witness. Appellant objected to the admission of the recording of T.B.'s MCRC interview and that portion of Nurse Carney's, Dr. Kolar's, and mother's testimony recounting T.B.'s out-of-court statements to them, claiming that the testimony was inadmissible hearsay and, in the

alternative, barred under the Sixth Amendment of the United States Constitution because the declarant T.B. was not competent to testify. The district court admitted all of the testimony, citing Minn. Stat. § 595.20 (2006) (children's statements concerning abuse) and Minnesota Rules of Evidence 803(4) (statement for medical diagnosis) and 807 (statements with indicia of reliability). Appellant called grandmother as a witness and, over objection by appellant, the prosecution impeached her with evidence of an earlier conviction for credit-card fraud.

At the end of the bench trial, the district court made thorough findings of fact and conclusions of law and adjudicated appellant delinquent. This appeal followed.

D E C I S I O N

I.

A. Competency

The pivotal issue on appeal is whether T.B. was competent to testify. Appellant objected to competency at trial and renews this objection on appeal. State law provides:

> 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.

Minn. Stat. § 595.02, subd. 1(m) (2006). Even where there is doubt as to a child's competency, "it is best to err on the side of determining the child to be competent." *State v. Lanam*, 459 N.W.2d 656, 660 (Minn. 1990). Generally, the determination of competency falls within the sound discretion of the district court. *State v. Berry*, 309 N.W.2d 777, 782 (Minn. 1981). The determination regarding a witness' competency is

one "peculiarly for the [district] court to consider." *State v. Lau*, 409 N.W.2d 275, 277 (Minn. App. 1987).

Appellant argues that the voir dire was improperly conducted and did not establish that T.B. was competent. Appellant points to a series of questions that were asked by the district court without a response indicated on the transcript.[1] We agree that from the transcript it appears that the questioning may have been confusing and that it is important to allow for or acknowledge a response from the witness. However, those exchanges were brief and isolated. The district court's questioning otherwise was clear and provided for answers from T.B. One inartful series of questions does not render the witness incompetent.

Appellant also argues that T.B. was not competent to testify because at the time of the incident she had just turned four and allegedly could not distinguish reality from fantasy and has cognitive disabilities. Appellant points out that T.B. talked about monsters under her bed, that grandmother testified that T.B. used the term *humping* indiscriminately for several days prior to the incident with appellant, and that a comparison of T.B.'s testimony in court and the reports of various interviews discloses that she answered some questions inconsistently, ambiguously, or not at all.

But the record indicates that T.B. answered many questions during the competency voir dire. She told the judge her name and age, who did her hair, corrected

[1] For instance, following T.B.'s statement that she saw Barack Obama on television, the court consecutively asked "Who is Barack Obama? Do you know who Barack Obama is? Does Barack Obama have any little girls?" Later he asked, "do you know what color [your shirt] is? Do you know colors? You have such a cute smile here now. What kind of jeans do you have on? What kind of pants do you have on?"

the judge when he misstated her date of birth, told the judge that she went to a preschool which was not close to her home, that she watched Barack Obama on television, what toys she received for Christmas, and that it snowed the previous day. She also identified the gender of the judge and mother, and corrected the judge when he asked if it would be a lie to say mother was a boy. However, she could not recount what she had eaten for breakfast, whether she watched television, identify her favorite beverage, recall whether she celebrated Christmas, or name the president.

We recognize that T.B. did not answer all voir dire questions or answer everything consistently and that she sometimes contradicted herself in statements made to those who had interviewed her. For example, T.B. told Nurse Carney that she and appellant were clothed at the time of the incident, and she testified that they did not have clothes on. However, the issue we address concerns competency, not credibility. The test is whether the district court abused its discretion. Here, the district court asked and T.B. responded to questions with particularity and corrected the judge when he misstated certain facts. This enabled the district court to assess T.B.'s intellectual functioning, demeanor, and comportment, and to make a competency determination. The district court found that "the child is able to recall facts, the child is able to distinguish between what is true and what is not true within her age and limited capacity." We conclude that on this record the district court did not abuse its discretion in determining that T.B. was competent to testify.

B. Oath

Appellant also claims that, even if T.B. was competent to testify, she was not properly sworn and therefore her testimony is invalid. Because appellant did not object at trial to the swearing-in procedure, the issue is reviewed under a plain-error standard. Under a plain-error analysis, the appeals court may review a ruling only if there is (1) error; (2) that is plain; and (3) that affects substantial rights. If these requirements are met, an appellate court may reverse if it concludes that reversal is required to ensure fairness and the integrity of the judicial proceedings. *State v. Vance*, 734 N.W.2d 655, 655-56 (Minn. 2007).

Minnesota law provides that "every witness shall be required to declare that the witness will 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." Minn. R. Evid. 603. This rule is "designed to afford the flexibility required in dealing with . . . children. Affirmation is simply a solemn undertaking to tell the truth; *no special verbal formula is required*." *State v. Mosby*, 450 N.W.2d 629, 633 (Minn. App. 1990) (quoting Minn. R. Evid. 603 cmt.), *review denied* (Minn. Mar. 16, 1990). In *Mosby*, the child witness was considered properly sworn after stating that "*you can get in big trouble [for telling a lie]*" and affirmatively answering "yes" when asked if he knew that he was supposed to tell the truth in court. *Id*. at 633. In *State v. Morrison*, the child witness "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 422, 428 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

The day after the competency hearing, T.B. testified. The district court swore T.B. as a witness based on the following exchange: "[T.B.], you have just the cutest smile, [T.B.]. You going to tell us the truth today. Yes? All right. The record should reflect that she shook her head yes." In the previous voir dire establishing competency, the district court and T.B. had discussed the difference between telling lies and truths, and T.B. had identified statements by the district court about the judge's gender and mother's gender as false. The administration of the oath again invoked the importance of honesty on the witness stand. The swearing-in was accomplished in a manner similar to that in *Morrison*: the district court asked if the witness would tell the truth and the witness promptly nodded her head in affirmance.

Even if the affirmation complied with Minnesota law, appellant argues that United States Supreme Court jurisprudence regarding the Confrontation Clause of the Sixth Amendment bars her testimony, citing *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990) and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). Appellant urges us to rule that these cases preclude the kind of affirmation that occurred in this case. In *Craig*, the Supreme Court affirmed the use of one-way closed-circuit television to procure child testimony in sexual-abuse cases. *Id.* at 851-57, 110 S. Ct. at 3166-69. In allowing this method, the Court stated that the central elements of the Confrontation Clause were "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.* at 846, 110 S. Ct. at 3165. But the Court nowhere elaborated on the oath requirement or implied that swearing by affirmation was unacceptable. If anything, the ruling in *Craig* supports a flexible approach to addressing the elements of

the confrontation right. *See id*. at 848, 110 S. Ct. at 3165 (eschewing a rigid and "literal" application of the Confrontation Clause).

Crawford also does not address the validity of oaths and rule 603's standard. Post-*Crawford* federal cases decided under a federal rule concerning oaths, which is similar to the Minnesota rule, have been flexible in allowing children to be sworn as a witness. *See Haliym v. Mitchell*, 492 F.3d 680, 703 (6th Cir. 2007) ("[W]e consider [the oath requirement] satisfied for purposes of the Confrontation clause if the witness is able to understand the concept of the truth and his duty to present truthful information to the court."); *Campbell v. Poole*, 555 F. Supp. 2d 345, 371-72 (W.D.N.Y. 2008) (upholding state ruling finding child swearing valid). Rule 603 mandates that the oath/affirmation need only impress upon the witness the solemnity of the proceedings and the importance of truth telling and elicit a commitment to tell the truth. Because we find this standard met, we conclude the district court did not err in swearing T.B. in as a witness.

II.

The second set of issues raised by appellant concerns whether mother, Dr. Kolar, and Nurse Carney were improperly allowed to repeat T.B.'s out-of-court statements. Appellant asserts that the statements are inadmissible hearsay and that, even if the statements are within exceptions, their admission violates appellant's right to confront witnesses under the Sixth Amendment to the U.S. Constitution. Minnesota's hearsay rule bars out-of-court statements introduced to prove the truth of the matter asserted unless a recognized exemption or exemption applies. Minn. R. Evid. 801-807. This court will

only reverse hearsay rulings if they "demonstrate prejudicial error." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997) (quotation omitted).

The district court found the statements given to Dr. Kolar and Nurse Carney admissible under rule 803(4). That rule admits out-of-court statements "made for purposes of medical diagnosis or treatment." Minn. R. Evid. 803(4). Children's statements to medical professionals concerning sexual abuse can be considered "pertinent to treatment." *State v. Larson*, 453 N.W.2d 42, 47 (Minn. 1990). Such is the case when "the evidence suggests that the child knew she was speaking to medical personnel and that it was important she tell the truth." *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993).

In regard to the statement to Nurse Carney, the circumstances suggest that T.B. knew she was speaking to a medical professional. The nurse made clear at the outset that she was "a nurse that works here at the doctor's office and today I thought we could just talk for a little bit and when we're all done talking we could do a check-up on your body to make sure you're healthy." The interview was a follow-up to the emergency-room visit, took place at a hospital, and included a physical examination. These facts sufficiently establish that T.B.'s statements to Nurse Carney were for medical diagnosis under the rule. T.B.'s statements to Dr. Kolar at the emergency room also were made within hours of the abuse at a hospital to a physician; they also were admissible under rule 803(4).

The district court also admitted all of T.B.'s challenged statements under the statutory exception for reliable child statements. Minn. Stat. § 595.02, subd. 3 (2006).

That section allows otherwise inadmissible out-of-court statements as substantive evidence if the district court finds "sufficient indicia of reliability."[2] Rule 807, too, admits extrajudicial statements that have "equivalent circumstantial guarantees of trustworthiness" to other hearsay exceptions. We afford district courts "considerable leeway" in evaluating reliability under these rules. *See In re Welfare of L.E.P.*, 594 N.W.2d 163, 170 (Minn. 1999) (quotation omitted).

Upon review of the record and the district court's ruling, we find the district court did not err in admitting T.B.'s statements to her mother and Nurse Carney under these rules. The district court found T.B.'s assertions corroborated by their spontaneity (in the statement to mother), their timing very soon after the alleged abuse, the absence of leading questions, and the DNA evidence consistent with the allegations. *See id*. (listing factors for district court to consider in measuring reliability of statements).

Because we have concluded that T.B. gave competent and sworn testimony and appellant had the ability to confront his witness, we further conclude that the admission of the out-of-court statements do not violate the Sixth Amendment.

III.

The next issue raised by appellant is whether the district court abused its discretion in allowing the admission of grandmother's prior conviction for credit-card fraud for impeachment purposes. Minnesota Rules of Evidence provide that evidence of a

[2] The statute also requires that the child either testify or be unavailable to testify and there is corroborative evidence of the act. Minn. Stat. § 595.02, subd. 3. Because we have already concluded that T.B. competently testified under oath or affirmation, this requirement is met.

witness's crime is automatically admitted for impeachment if (1) the crime was a felony and the probative value of the evidence outweighs any prejudicial effect; or (2) the crime involved dishonesty, regardless of the severity. Minn. R. Evid. 609. A district court's ruling on the impeachment of a witness by prior conviction is reviewed, as an evidentiary ruling, under a clear-abuse-of-discretion standard. *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998).

Under Rule 609's provision regarding felonies, the value-versus-prejudice balancing test involves the consideration of several factors. *State v. Jones*, 271 N.W.2d 534, 538 (Minn. 1978). Evidence of dishonesty crimes, however, does not invoke application of a balancing test. *State v. Sims*, 526 N.W.2d 201, 201-02 (Minn. 1994). Also,"[e]xamination regarding prior convictions for impeachment purposes" can include "the nature of the offense." *State v. Valtierra*, 718 N.W.2d 425, 436 (Minn. 2006).

Here, grandmother committed credit-card fraud. *See* Minn. Stat. § 609.821. This offense involves dishonesty or false statement: it denotes the commission of or intent to commit fraud, forgery, or the giving of false statements in the presentment and use of a credit card. *See id*. Evidence regarding the nature of the crime was properly admitted. The fact that it was an isolated incident committed out of dire circumstances goes to the weight of the evidence, not its admissibility.

In sum, we conclude that the district court did not abuse its discretion by allowing the prosecution to impeach grandmother with her prior conviction for credit-card fraud.

IV.

The final issue that we consider is the sufficiency of the evidence. Appellant argues there was insufficient evidence to sustain a finding that the prosecution established all elements of the charged crime. In criminal matters, we defer to the fact finder's credibility determinations. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). When reviewing a determination that the elements of a delinquency petition are met beyond a reasonable doubt, this court "is limited to ascertaining whether, given the facts and legitimate inferences, a fact-finder could reasonably make that determination. [We] assume that the fact-finder believed the state's witnesses and disbelieved any contrary evidence." *In re Welfare of T.N.Y.*, 632 N.W.2d 765, 768 (Minn. App. 2001) (quotations omitted). This standard applies to bench trials as well as jury trials. *In re Welfare of J.G.B.*, 473 N.W.2d 342, 344-45 (Minn. App. 1991).

Appellant was adjudicated delinquent on the basis that he was guilty of second-degree criminal sexual conduct, which provides:

> A person who engages in sexual contact with another person is guilty [of the crime] if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense. In a prosecution under this clause, the state is not required to prove that the sexual contact was coerced.

Minn. Stat. § 609.343, subd. 1(a) (2006). "Sexual contact" includes any of the following acts "committed with sexual or aggressive intent":

> (i) the intentional touching by the actor of the complainant's intimate parts, or

(ii) the touching by the complainant of the actor's, the complainant's, or another's intimate parts effected by a person in a position of authority, or by coercion, or by inducement if the complainant is under 13 years of age or mentally impaired, or

(iii) the touching by another of the complainant's intimate parts effected by coercion or by a person in a position of authority, or

(iv) in any of the cases above, the touching of the clothing covering the immediate area of the intimate parts.

Id. § 609.341, subd. 11(a) (2006). Intimate parts include "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." Minn. Stat. § 609.341, subd. 5.

Appellant contends that, even if T.B.'s testimony and statements were admissible, they did not establish that appellant initiated "sexual contact" with his or T.B.'s "intimate parts." As previously noted, there were inconsistencies in T.B.'s statements. However, she both testified and repeatedly stated to others that appellant "humped" her and that appellant's "peterwacker" touched her "butt" and upper leg. She further testified that appellant's belly button touched her and that she and appellant were not clothed at the time of the incident. Also, the laboratory test results established that appellant's sperm was on the underwear that T.B. was wearing the night of the incident. The record contains bases for the district court's implicit determination that T.B. was credible: the spontaneity of her statements, the basic consistency of her account, the context in which certain statements were made (immediately after mother discovered T.B. and appellant in the same bed and on the bus enroute to the hospital), and their corroboration by DNA evidence.

Based on this record and the deference we afford district courts in determining credibility, we conclude the district court did not abuse its discretion in deciding that there was proof beyond a reasonable doubt that appellant, with sexual intent, intentionally contacted T.B. with his intimate parts and intentionally touched T.B.'s intimate parts.

Affirmed.

Dated: