STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1271

State of Minnesota,
Respondent,

vs.

Mark Clifford Newell,
Appellant.

Filed July 13, 2010
Affirmed
Lansing, Judge
Dissenting, Stauber, Judge

Beltrami County District Court
File No. 04-CR-07-6433

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, St. Paul, Minnesota; and

Timothy R. Faver, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

LANSING, Judge

In this appeal from conviction of first-degree criminal sexual conduct, Mark Newell raises three issues: that the testimony of the eight-year-old complainant is insufficient to sustain his conviction; that the district court abused its discretion by admitting prior out-of-court statements of a nine-year-old witness who was in the house at the time of the incident; and that the district court also abused its discretion when, following an in-camera review, it denied Newell's request for disclosure of the complainant's medical records from a hospitalization a few days before the incident. Because the evidence is sufficient to sustain the conviction, and the district court did not abuse its discretion in either of the challenged rulings, we affirm.

F A C T S

The events leading to Mark Newell's arrest and conviction occurred at his mother's house in Beltrami County on December 15, 2007. Newell was at the house with his son, MN, and daughter, HJN. The three of them often stayed overnight at the house on the weekends and each child had a designated bedroom. Two other children were also staying overnight at the house—eight-year-old HLL and her brother JL. Newell had dated JL and HLL's mother for two to three years when JL was an infant and before HLL was born. They lived together for much of this time. After the relationship ended, each married someone else, but JL and his mother maintained a relationship with Newell's mother, and JL and HLL referred to her as their grandmother, even though they were not

biologically related. When they were at her house, HLL and HJN played together, as did JL and MN.

As bedtime approached on December 15, HLL and HJN were in the living room, which is on the second floor of the two-story, split-level house. They had used blankets and pillows to fashion a place to sleep under the Christmas tree, changed into their pajamas, and were lying down watching television. Newell had worked during the day and was trying to thaw a slush-frozen four-wheeler in a detached garage to use for ice fishing. He went between the house and the garage over a two-and-a-half-hour period to check on the thawing process. When he was in the house he was watching television with HLL and HJN or playing video games. JL and MN were on the lower level of the house, playing video games in the family room where they intended to sleep. Newell's mother watched television with HLL and HJN but went to bed before the others because she had bronchitis and was not feeling well. She estimated her bedtime between nine and ten. Her bedroom is on the upper level of the house at the opposite end of a hallway from the living room. A bathroom, MN's bedroom, and HJN's bedroom are on that same hallway. The bathroom is between the living room and Newell's mother's bedroom.

HLL testified that after Newell's mother had gone to bed, Newell came into the living room and told HJN to go to her room. After HJN left, Newell lay down beside HLL, took off her pajamas and her underwear and "licked [her] privates." In a trial exhibit depicting the figure of a girl, HLL circled the genital area to show the place on her body where Newell licked her. HLL testified that after this occurred, Newell got up and went down the hallway to HJN's room, and HJN returned to the living room where

HLL, with no clothes on, was still lying on the blankets and pillows. HLL said that she told HJN that Newell had taken her clothes off and licked her privates. HLL said that HJN did not believe her and told her to put her pajamas on, which HLL did. HLL said that she felt uncomfortable and wanted to leave, but she fell asleep and she and HJN slept under the Christmas tree until morning.

HLL's father picked up HLL and JL the next morning. Her father testified that when he picked HLL up she appeared to be "down in the dumps" or "bummed out." When she and her father were alone in the car waiting for JL, HLL's father asked her if something was wrong, and she told him what had happened. HLL's father telephoned HLL's mother and, after he dropped JL off for a snowboarding event, he picked HLL's mother up and they took HLL to the sheriff's office to report the incident. An investigator spoke with all three family members and then with HLL and her father individually. The investigator also took HLL's pajamas and her underwear for testing.

The investigator arranged for them to meet with a sexual assault nurse examiner at the Family Advocacy Center the following morning. The nurse-examiner did a preliminary examination and collected evidence. During HLL's individual examination she told the nurse-examiner that Newell had "put his mouth on [her]" and she pointed to her genital area. HLL also told the nurse-examiner that "he had put his finger into [her]" and that "[she] told him it hurt, and he quit." The nurse-examiner noted that HLL seemed upset and embarrassed and tended to look down at the floor rather than make eye contact when she recounted what had happened. Based on the nurse-examiner's experience, this conduct is consistent with the demeanor of children who have been sexually abused. The

physical examination revealed some redness on the left side of HLL's genitals, toward the inside on the labia, but no tears or abrasions. The nurse-examiner testified that redness in the genital area of a child of HLL's age could be caused by many things and that it neither supports nor refutes the allegation of sexual abuse.

The results from the tests of HLL's clothes were also inconclusive. Neither semen nor male DNA were detected in the clothes. HLL's underwear tested positive for amalase, a component of human saliva, but some laundry detergents also contain amalase and therefore its presence is not necessarily proof of sexual contact.

Two days later the nurse-examiner again met with HLL and conducted a full Cornerhouse-type interview that was recorded and introduced as evidence at trial. HLL recounted the December 15 events consistent with her earlier account, except when asked whether Newell touched her or put anything inside her body she said "no." HLL told the nurse-examiner that Newell had been drinking beer on the night of December 15. This December 19 interview was an exhibit at trial and the video was presented to the jury.

HJN also testified at the trial. She said that she and HLL planned to sleep under the Christmas tree and that they were lying down watching television with her dad and her grandmother until her grandmother went to bed. She did not remember anything specific that her dad said to her that night. She testified that she left the living room to go to the bathroom. When she came back to the living room, her dad was not there. She saw that HLL did not have her pajamas on and she asked her about it. HJN said that HLL told her that it was because she was hot. HJN then told her to put them back on.

Evidence of two out-of-court interviews of HJN was also admitted at trial. Newell objected to the introduction of the prior statements on hearsay grounds, but the evidence was admitted under the rule permitting prior consistent statements by a witness. The first interview was with Beltrami county investigators on December 20, 2007. In that interview HJN said that she and HLL had fallen asleep on the living room floor and that Newell came in and told HJN to move to her bedroom and that he was going to carry HLL into the bedroom. But HLL woke up and Newell returned to HJN's bedroom, where HJN had fallen asleep. Newell told her to go back out to the living room to join HLL. When HJN returned, HLL was watching television and was not wearing any pajamas. HJN told HLL to put her pajamas back on. HLL said she had taken them off because she was too hot. The second interview was conducted by a sexual assault nurse examiner at the Family Advocacy Center on December 27, 2007. HJN told the nurse-examiner during the interview that on the night of December 15 her dad had come into the living room and asked HJN to go to another room. HJN said that she returned to the living room when her dad came and got her and that HLL did not have any clothes on. HJN said that HLL told her she took her pajamas off because she was too hot.

Newell testified to his activities on the night of December 15. He explained that he was working on the four-wheeler in the garage and also watching television and playing video games inside the house. He said that HJN and HLL were intending to sleep in the living room under the Christmas tree and that he planned to sleep in HJN's bedroom because he wanted to use the larger-screen television in her room. Newell's mother testified that Newell sometimes slept in a bedroom on the lower level of the house

that was adjacent to the family room and sometimes slept in HJN's room if HJN was not sleeping there.

Newell's mother testified that she did not allow her son to drink or keep alcohol in her home because he had abused alcohol in the past. She said that she had not seen any sign that he was drinking alcohol on December 15. Newell testified that he had problems with alcohol in the past but denied that he had consumed any alcohol on December 15. Newell said that he had told the investigating officer that there was no alcohol in the house, but on cross-examination he admitted that he had initially said there was no alcohol but then said, "Oh, there should be some from before, but I didn't drink that night." Newell explained that he "meant that there could have possibly been empty beer cans in the garage from deer season."

Newell testified that he went to bed about 10:30 as both of the girls were falling asleep. He said that he got HJN up to go to the bathroom before he went to bed because she sometimes had bed-wetting issues. He further testified that he went to bed before HJN came back from the bathroom, and that HJN came into the bedroom where he was sleeping and he told her to go back out to the living room with HLL, which she did. He denied that he ever took HLL's pajamas off and that he ever licked her genitals.

Several months before trial, the state disclosed to Newell a social-services report stating that HLL had been hospitalized five days before the incident as a result of an attempt to "hang herself with a rope belt." The attempt followed a disagreement with her parents over a disciplinary issue. Her parents took her to Prairie St. John's Hospital in Fargo where she was placed on a seventy-two-hour hold for an evaluation. As trial

approached, Newell asked that the records related to the hospitalization be released to the court and reviewed in camera. At a hearing on this request, the state suggested that because Newell's request appeared to be aimed at issues of competency, a competency hearing would be the more appropriate procedure. The defense indicated that it did not care whether a competency hearing was held.

The district court reviewed the following documents: continuing care/discharge planning report; discharge summary, including discharge diagnosis; treatment plans and treatment orders; assessments and screening questionnaires; vital signs records; progress notes and behavioral observations; psychiatric evaluation and consultation reports; and confidentiality notices. The district court concluded that they did not contain "exculpatory evidence[,] . . . relevant evidence to the matter alleged[,] . . . [or] information which would tend to negate or reduce [Newell's] guilt." The district court sealed the medical records and also did not find grounds to grant a competency hearing.

In this appeal from conviction of first-degree criminal sexual conduct, Newell challenges the sufficiency of the evidence to support his conviction, the admissibility of HJN's prior out-of-court statements, and the district court's denial of further disclosure of HLL's medical records from the two-day hospitalization that preceded the incident.

D E C I S I O N

I

Newell first argues that the evidence is insufficient to support his conviction. An appellate court will sustain the verdict if the jury, considering the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably

have concluded that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). In considering a challenge to the sufficiency of the evidence, we "make a painstaking review of the record to determine whether the evidence and reasonable inferences drawn [from the evidence], viewed in the light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Pendleton*, 706 N.W.2d 500, 511 (Minn. 2005).

A person commits first-degree criminal sexual conduct if that person engages in sexual penetration with another person under the age of thirteen, and the actor is at least three years older than that other person. Minn. Stat. § 609.342, subd. 1(a) (2008). Neither mistake about age nor consent is a defense. *Id.* Penetration includes cunnilingus. Minn. Stat. § 609.341, subd. 12 (2008).

Newell does not dispute that HLL's basic description of the sexual contact satisfies the statutory definition. Instead, Newell argues that his conviction should be reversed because HLL's testimony is inconsistent and uncorroborated. On the claim of insufficiency because of inconsistency, Newell relies primarily on *State v. Huss*, 506 N.W.2d 290 (Minn. 1993), in which the supreme court reversed a conviction for criminal sexual assault because it was based on the inconclusive and dramatically inconsistent testimony of a complainant who was three years old at the time of the alleged offense. 506 N.W.2d at 292-93. *Huss*, however, is distinguishable. The problems with the evidence in *Huss* were extreme and pervasive: they included apparent coercion of the complainant with a suggestive book on "yucky secrets;" the complainant's inability to identify the defendant; her statements that her mother, her father, a playmate, and five

other people had abused her; and patent uncertainty about whether or not the complainant had been abused at all. *Huss*, 506 N.W.2d at 292-93.

The record in this case does not provide a comparable basis for doubt. The jury was presented with HLL's clear and consistent statements to her father and to the sexual assault nurse examiner in two interviews, and in her testimony at trial. The only identified inconsistency is that in her initial interview with the nurse-examiner she stated that Newell not only licked her genitals but put his finger into her body. In her statements to her parents, in the later interview with the nurse-examiner, and in her testimony at trial, HLL did not say that Newell put his finger into her body. An inconsistency in the relating of a traumatic event does not mandate a reversal. *See State v. Stufflebean*, 329 N.W.2d 314, 319 (Minn. 1983) (discussing fallibility of human perception in relation to inconsistent trial testimony). The jury was presented with the identified inconsistency and was able to take it into consideration when assessing the evidence. *See State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (observing that jury considers any testimonial inconsistencies in determining credibility); *see also State v. Erickson*, 454 N.W.2d 624, 629 (Minn. App. 1990) (stating that jury is entitled to believe evidence even if it is inconsistent or contradictory in some degree), *review denied* (Minn. May 23, 1990). HLL never deviated in her account that Newell licked her genitals, which, on its own, is evidence sufficient to support Newell's conviction.

Newell's argument that his conviction should be reversed because HLL's testimony was uncorroborated also fails. Corroboration is not required when, as in this trial, a victim of sexual abuse testifies. Minn. Stat. § 609.347, subd. 1 (2008).

Furthermore, eye-witness corroboration and DNA evidence are frequently lacking in offenses of this type. The record supports a conclusion that Newell ensured that no other witnesses were present. And the nature of the act itself—briefly undressing a young girl and licking her genitals—explains why it might have left little in the way of physical evidence. Finally, Newell advances a very narrow concept of corroboration. HLL's prompt report of the incident provides corroboration. *State v. Reinke*, 343 N.W.2d 660, 662 (Minn. 1984). HLL's consistent statements to interviewers and her father provide corroboration. *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004), *review denied* (Minn. June 28, 2004). Evidence of HLL's demeanor the morning after the incident and during the initial report to the nurse-examiner provides corroboration. *Id.* And HJN's testimony about leaving the living room area and returning to find HLL without any clothes on also provides corroboration. The evidence against Newell was sufficient to support the conviction.

II

In his second challenge to the conviction, Newell argues that prior out-of-court statements by HJN were inadmissible hearsay. Under the rules of evidence, the prior consistent statement of a witness is admissible if it may be helpful to the trier of fact in evaluating the witness's credibility. Minn. R. Evid. 801(d)(1)(B); *State v. Fields*, 679 N.W.2d 341, 347-48 (Minn. 2004). The rule is applicable if the witness's credibility has been challenged and the prior statement "bolster[s] the witness'[s] credibility with respect to that aspect of the witness'[s] credibility that was challenged." *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). Prior statements need not be verbatim to be consistent.

State v. Bakken, 604 N.W.2d 106, 110 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

Newell argues that HJN's credibility was not challenged. HJN was not cross-examined and Newell had not yet testified when the prior statements were admitted. It was not clear that there was a challenge to HJN's credibility that would trigger rule 801(d)(1)(B).

Even if the district court erred in admitting HJN's prior statements, however, Newell has not shown prejudice. Both HLL and Newell testified that HJN left the room at Newell's direction, creating the opportunity to be alone with HLL. Repetition of this fact in HJN's out-of-court statement would not carry any additional effect. HJN's out-of-court statements imply that she may have been out of the living room for a longer period of time than her trial testimony suggests. But none of her statements indicate how long she was absent and HLL stated that HJN was gone "not too long." The contact comprising the charged offense was described as brief, and HJN's statement that she fell asleep when out of the room adds little to the existing facts. Finally, HLL described the abuse repeatedly and described the events surrounding the abuse consistently from the next morning when she reported it to her father, through the series of interviews, and in her trial testimony. No evidence suggests that HLL has ever made other sexual assault allegations or that she has had prior sexual experience that would provide knowledge of sexual interaction similar to her account of the cunnilingus. HLL gave detailed testimony at trial and the primary issue for the jury was what happened when HJN was out of the

room, which HJN's out-of-court statements do not resolve. Newell has not shown that the error had a substantial influence on the jury's verdict and reversal is not required.

III

Finally, Newell argues that he should have been permitted to review medical records from HLL's two-day hospitalization from late in the evening on December 10 until about noon on December 12. A witness's medical records are protected by privilege. Minn. Stat. § 595.02, subd. 1(d), (g) (2008). At the same time, a criminal defendant's right to prepare and present a defense is part of the constitutional right to a fair trial. *State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998). The competing interests between the medical privilege and the defendant's rights are balanced by a process in which the district court reviews the records in camera. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987) (concluding that in-camera approach fairly balances interests and comports with rule for criminal discovery). To obtain review of this kind, the defendant must make some plausible showing that the information sought could be both material and favorable to his defense. *State v. Hummel*, 483 N.W.2d 68, 71 (Minn. 1992). The district court determined that Newell made this initial showing and granted the in-camera review.

The district court listed the eight documents that it reviewed and concluded that the records "do not contain relevant evidence to the matter alleged in the [c]riminal [s]exual [c]onduct complaint." The district court emphasized that it had taken into account that the medical care had been provided only a short time before the incident that gave rise to the criminal-sexual-conduct charge against Newell. Based on the district

court's review of each of the documents, it concluded that "[t]he medical records contain no information which would tend to negate or reduce the guilt of the [d]efendant as to the crime charged." Accordingly, the district court denied disclosure of the records to the defendant and the state.

The district court's assessment of the records is subject to appellate review. *Paradee*, 403 N.W.2d at 642. We review the district court's determination under an abuse-of-discretion standard. *State v. Evans*, 756 N.W.2d 854, 871 (Minn. 2008). We have carefully reviewed the medical records of HLL's hospitalization that preceded the incident. Primarily, the records consist of standard progress notes on hourly observations of HLL during her hospitalization. The notes indicate that HLL's stay in the hospital was uneventful. Other documents include a record of her vital signs, release forms, and ancillary information. A number of assessment forms are included, covering inconsequential details of HLL's skills, habits, attitudes, daily activities, and medical history.

The file also includes a psychological consultation and psychiatric evaluation. These reports include some individual comments about HLL's personality or perceptions that, if taken in isolation, might provide a basis for further questioning. In context, however, the medical records provide little additional information. Although the evaluation concludes that HLL has "school functioning" issues, her prescription for Adderall was referred to at trial. The psychiatric evaluation provides only "impaired mood" and "danger to self" as the basis for keeping her at the hospital overnight for further evaluation. The psychiatric evaluation specifically states that HLL has no

auditory or visual hallucinations, and the admitting report indicates that there are no indications of psychosis, delusions, or hallucinations. HLL's father, who was the only parent interviewed after HLL's admission to the hospital, did not report any markedly unusual conduct other than HLL's extreme reaction to her parents' discipline on the night of the belt-strangling incident. HLL's father also said that in addition to bad grades, HLL had also received some good grades, but she was in a new school and having trouble with her current teacher. HLL's discharge summary does not include information that raises questions of HLL's ability to perceive or relate events on December 15. Nor do the reports indicate psychological diagnoses that relate to veracity. Newell knew HLL had been hospitalized for a suicide attempt after an argument with her parents. The reports do not contain any significant information that would expand the inquiry beyond what the defense could have raised based on the information the state had already provided.

Sealing the medical records did not curtail Newell's opportunity to cross-examine HLL about the cause of the hospitalization, and the records were cumulative of this information in many respects. *See State v. Morgan*, 477 N.W.2d 527, 530 (Minn. App. 1991) (affirming district court decision not to disclose complainant's medical records because they were cumulative), *review denied* (Minn. Jan. 17, 1992). Newell and his defense attorney apparently made a strategic choice not to cross-examine any of the witnesses based on what they knew about the cause of HLL's hospitalization. When asked a question about HLL's medications, her father indicated that she may have been taking Adderall. No further questions were asked about the reasons for taking the medication or the causes of her recent hospitalization. Speculative questions propounded

on any of the general comments on the evaluation would have created a potential for distraction, confusion of issues, and a misguided focus on the unrelated event that triggered the brief hospitalization. *See* Minn. R. Evid. 403 (limiting evidence if its probative value is substantially outweighed by danger of confusion of issues or misleading jury).

The privileged status of medical records encourages honesty with care providers, reporting and detection of problems, and effective treatment. The purpose of confidentiality would be frustrated if privileged records had to be disclosed on demand. *See Paradee*, 403 N.W.2d at 641-42 (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61, 107 S.Ct. 989, 1003-04 (1987)). Instead, district courts are charged with balancing this interest against a defendant's right by reviewing confidential records and ensuring that any evidence that is favorable and material is disclosed. *Id.* at 642 (stating that "[district] courts, who by training and experience are qualified for the task of determining matters of relevancy, are capable of determining what if any of the information in the records might help in the defense"). "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Wildenberg*, 573 N.W.2d at 698-99 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)). Minnesota has specifically rejected an approach that discloses all confidential information to the defendant to argue for its admissibility. *Paradee*, 403 N.W.2d at 641

(reversing this court's holding that defendants must be given access to records to determine relevancy).

Newell obtained all of the medical records relating to the criminal-sexual-conduct charges. The district court did not err in determining that the medical records of HLL's brief hospitalization preceding the charged criminal sexual conduct contained no exculpatory evidence that would assist Newell in preparing his defense, that the records do not contain evidence that is relevant to the charges in the complaint, and that nothing in the medical records provides information that would tend to negate or reduce Newell's guilt of the charged offenses. The district court's ruling was well within its discretion.

And, finally, we reject Newell's suggestion that the records might have been relevant to HLL's competency to testify. The state moved for a hearing on competency, and Newell knew about the earlier hospitalization of HLL when that motion was made. Newell nonetheless took no position on whether competency hearing should be held, with his counsel stating that "the information we have at this point [gave him] no reason to assert that . . . she wouldn't be competent as a witness." Newell's counsel stated that "in-camera review may lead any party to think otherwise," but the district court performed that review and did not find anything in the records compelling enough to require a hearing on HLL's competency. A full review of the records supports that determination. The hospital release notes state that HLL was physically and mentally stable for release. The transcript of her testimony at trial provides no indication of any lack of competency.

Affirmed.

STAUBER, Judge (dissenting)

I respectfully dissent. Discovery of all relevant information is critical for a full and complete defense, but it is balanced by a victim's right to privacy. *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

Here, appellant moved the district court for an in camera review of medical records relating to a suicide attempt by the victim-child, HLL, just days before the alleged sexual assault. The court granted the motion and reviewed medical records, concluded that the hospitalization records did not contain information relevant to the sexual assault, and denied the release of any information to the defense. The issue here is whether the district court abused its discretion in denying appellant access to all of HLL's recent psychiatric hospitalization records.

While we defer to the credibility decisions of the district court, this court may review the district court's decision for abuse of discretion. *State v. Reese*, 692 N.W.2d 736, 742–43 (Minn. 2005). My review and analysis of the medical records differs from that of the majority. While the majority is accurate that "…HLL's stay in the hospital was uneventful," HLL's own reports of serious psychotic experiences, coupled with notations of HLL's parents' observations are compelling. HLL's parents shared with hospital staff that HLL displays serious educational, behavioral and emotional issues and deficits.[1]

[1] For continuing confidentiality of medical records I have refrained from quoting HLL, her parents, hospital staff or test results.

Additionally, the medical diagnosis and test results paint a picture of a very troubled child. And this information is fresh–having been obtained only a few days before HLL's overnight at appellant's mother's house where the assault allegedly occurred. Therefore, I conclude that at least some of the evidence from HLL's confidential medical records would be material and favorable to appellant's case. At a minimum, the parents' reports would provide a basis for expanded cross examination.

I make no comment on the admissibility of the medical information or reports and only dissent on the sealing and nondisclosure of medical records which deprived appellant of a complete defense.