STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0935

State of Minnesota,
Respondent,

vs.

Sunday Htoo,
Appellant.

Filed May 5, 2014
Affirmed
Rodenberg, Judge

Nobles County District Court
File No. 53-CR-12-1117

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

Kathleen Kusz, Nobles County Attorney, Travis J. Smith, Assistant County Attorney, Worthington, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

RODENBERG, Judge

Appellant Sunday Htoo challenges his convictions of third-degree assault and malicious punishment of a child, arguing that the district court erred in admitting the

victim's out-of-court statements to her mother, teacher, and doctor, and that the district court plainly erred in admitting a police officer's opinion testimony that the victim's injury was not accidental. We affirm.

FACTS

Appellant and A.A.T. are the parents of S.M., who suffered burn injuries in October 2012 while in appellant's care. S.M. was then five years old. Appellant was charged with second-degree assault with a dangerous weapon, third-degree assault inflicting substantial bodily harm, malicious punishment of a child, and domestic assault. Appellant was eventually convicted of third-degree assault and malicious punishment of a child in violation of Minn. Stat. §§ 609.223, subd. 1, .377, subd. 5 (2012), and domestic assault in violation of Minn. Stat. § 609.2242, subd. 1(2) (2012).

In October 2012, and while A.A.T. was hospitalized, appellant held S.M.'s hand over a flame from a gas stove as punishment for the child not listening to him. When A.A.T. returned home from the hospital on October 25, she noticed burns on S.M.'s hand. S.M. told A.A.T. that appellant had "put [her] hand onto the fire" because she did not listen to him. A.A.T. realized that "fire" referred to the family's gas stove. A.A.T. asked appellant why he had burned S.M. and he said, "because she never listen[s] to me." A.A.T. treated S.M.'s burns with diaper cream.

S.M. was absent from school on October 24, 25, and 26. When she returned to school on Monday, October 29, her teacher asked S.M. where she had been. The teacher, concerned that S.M. had been sick, spoke to S.M. through an older student who spoke Karen (S.M.'s first language) and English. S.M. responded that her father had been mean

to her, and she showed her hand to the teacher. S.M.'s teacher stopped the conversation, realizing that she "needed to have a more professional interpreter involved." When an adult Karen interpreter arrived, the teacher asked S.M. "how she got the sore on her hand." S.M. responded that "her dad had burned it over the stove."

Worthington Police Officer Jacki Dawson responded to a report from the school regarding S.M.'s burns. Officer Dawson observed "an opened sore or burn mark on the top of [S.M.'s] thumb and also on the top and almost a little bit towards the inside of her index finger." The wound was open, discolored, and had "black char marks." Officer Dawson went to the family's home and examined the stove. She determined that S.M. was 31 inches tall and that the stove was 36 inches tall. And she observed an "open flame" when she turned on the stove's burners.

Officer Dawson then interviewed appellant, who told her that S.M. was standing on a step stool in order to help him cook. Appellant explained that S.M. was stirring a pot on one burner when he accidentally turned on another burner, burning S.M.'s hand. He maintained that the injury was accidental, but stated that "he may have told [S.M.] that maybe she got burnt because she was bad." According to A.A.T., appellant's explanation of the incident to her differed from what appellant told Officer Dawson. And A.A.T. testified that the family did not own a step stool, S.M. cannot reach atop the stove, and S.M. is not allowed to help with the cooking.

S.M. was taken to the emergency room, where she was examined by Dr. Bharat Patel. Dr. Patel observed three burns on the back of S.M.'s right hand: (1) S.M.'s middle finger had a first-degree burn and was already healed; (2) S.M.'s index finger had a

second-degree burn with an open blister but was healing; and (3) S.M.'s thumb had a second-degree burn that was healing. Dr. Patel asked S.M. how she had been burned. He testified that he always asks this question of patients to determine how they were injured and to treat them appropriately. S.M. responded in English that she "got a burn on the stove" from appellant.

Dr. Patel testified that he sees one or two burn cases in the emergency room each month, with about 30% of those cases involving children. He stated that he had only seen one or two other cases involving burns to the top of the hand. Dr. Patel explained that he has seen many accidental burns on hands, but none to the part of the hand where S.M. was burned, because accidental burns to the hand usually occur on the palm when something hot is touched.

Officer Dawson testified that she has observed a variety of accidental and intentional injuries, including burns, and has never seen accidental burns on the top of a person's hand. She testified that the injury was unusual because children usually burn their palms when they "touch things that are hot." She explained that, to receive these burns, S.M.'s hand was turned over, and concluded that the position of the burns "is not consistent with an accidental injury."

Before the second day of trial, the state sought to admit the out-of-court statements that S.M. made to her mother and teacher regarding the cause of her burns. After a hearing to determine S.M.'s competency as a witness, the district court concluded that S.M. was not competent to testify, and was therefore unavailable. After the close of the state's case, the district court ruled that S.M.'s statements to her mother and teacher were

not testimonial. And it concluded that the statements were admissible under both Minn. R. Evid. 807 and Minn. Stat. § 595.02, subd. 3 (2012). The district court also ruled that S.M.'s statement to Dr. Patel regarding the source of her injury was admissible as "a statement . . . made in support of medical treatment."

On February 6, 2013, the district court found appellant not guilty of second-degree assault with a dangerous weapon and guilty of third-degree assault inflicting substantial bodily harm, malicious punishment of a child, and domestic assault. In its detailed order and memorandum, the district court reiterated that S.M.'s statements to her mother, teacher, and doctor were nontestimonial. The district court concluded that S.M.'s statements to her mother and teacher were admissible under Minn. R. Evid. 807 and that S.M.'s statements to Dr. Patel were admissible as statements made for the purpose of medical diagnosis or treatment under Minn. R. Evid. 803(4). Alternatively, it concluded that S.M.'s statements were admissible under Minn. Stat. § 595.02, subd. 3.

At sentencing, the district court vacated appellant's conviction of domestic assault and sentenced appellant to one year and one day in jail on the third-degree assault charge. This appeal followed.

D E C I S I O N

I.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that [the] appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003)

(citations omitted). "A determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). "But whether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law this court reviews de novo." *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Confrontation Clause "bars at trial all 'testimonial' out-of-court statements when the accused is not afforded 'a prior opportunity to cross-examine' the declarant." *State v. Bobadilla*, 709 N.W.2d 243, 249 (Minn. 2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370 (2004)). "If a statement is not testimonial, then the Confrontation Clause is not implicated because the declarant is not a witness under the terms of the Sixth Amendment." *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010). On appeal, appellant does not challenge either the district court's determination that S.M. was not competent to testify or its conclusion that S.M.'s statements to her mother, teacher, and doctor were nontestimonial. Therefore, the Confrontation Clause is not implicated here. *See id.* And, because the Confrontation Clause is not implicated, an abuse-of-discretion standard applies to our review of the district court's evidentiary rulings. *See Holt*, 772 N.W.2d at 483.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Generally, hearsay statements are not admissible. Minn. R. Evid. 802. S.M.'s statements to her mother, teacher, and doctor are hearsay because they were offered "to prove the truth of the matter asserted," that appellant intentionally burned S.M.'s hand. *See* Minn. R. Evid. 801(c). We therefore

review the district court's determination that S.M.'s out-of-court statements were admissible under exceptions to rule 802 for an abuse of discretion.

Medical-diagnosis exception

Appellant argues that the district court erred in admitting S.M.'s out-of-court statement to Dr. Patel that she was burned by appellant under the medical-diagnosis-hearsay exception.

Hearsay statements are admissible if they are "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803(4). But "statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible." *State v. Robinson*, 718 N.W.2d 400, 404 (Minn. 2006). Nevertheless, statements made by a child-abuse victim identifying the individual who caused an injury may be admissible. *Id.* at 404-05. A child's statements to a doctor identifying the accused perpetrator of child abuse "are admissible only if 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).[1]

[1] Appellant argues that, in order to admit a child-abuse victim's statement attributing fault, the doctor must clearly explain that the identity of the abuser is important to diagnosis and treatment and the victim must manifest an understanding of this necessity. *See United States v. Beaulieu*, 194 F.3d 918, 921 (8th Cir. 1999). But no Minnesota appellate case has cited this standard from the Eighth Circuit. And the Minnesota Supreme Court has set forth the standard we apply. *See Salazar*, 504 N.W.2d at 777.

The record does not clearly establish whether S.M. knew that she was speaking to a medical doctor or knew that it was important to tell the truth. *See id.* However, appellant did not raise to the district court whether there was evidence that S.M. knew that she was speaking to medical personnel and knew that she needed to tell the truth. In *Salazar*, the defendant similarly did not object "that the child did not know that it was important to tell the truth when being interviewed by a medical professional." *Id.* at 778. The supreme court concluded that the district court thus "had no opportunity to reach this issue and the court of appeals properly did not address it." *Id.* So it is here: the district court did not have an opportunity to address appellant's argument that S.M. did not know that she was speaking to medical personnel or that it was important to tell the truth. *See id.* Because the issue was not raised at the district court, we decline to address this argument on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (explaining that an appellate court will not consider matters not argued to and considered by the district court).

We do not presume error on appeal. *Loth v. Loth*, 227 Minn. 387, 392, 35 N.W.2d 542, 546 (1949); *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). And, based on the record as constituted, we cannot say that the district court abused its discretion in admitting S.M.'s out-of-court statement to Dr. Patel under rule 803(4). *See Salazar*, 504 N.W.2d at 778.

Residual-hearsay exception

Appellant argues that the district court erred in admitting S.M.'s out-of-court statements to her mother and to her teacher under Minn. R. Evid. 807, the residual-

hearsay exception. Specifically, appellant argues that S.M.'s statements to her mother and teacher lacked the necessary "circumstantial guarantees of trustworthiness." He does not challenge whether the other requirements of rule 807 were met.

Under the residual-hearsay exception:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807. The district court must make explicit findings regarding these requirements. *Ahmed*, 782 N.W.2d at 259. To determine whether a statement is attended by circumstantial guarantees of trustworthiness, "courts follow the totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness." *Id.* at 260 (quotation omitted). The state bears the burden to establish "that the totality of the circumstances surrounding the making of the statements show[s] the statements were sufficiently trustworthy—that is, that it is particularly likely that the declarant was telling the truth at the time of making the statements." *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990) (quotations omitted). In a child-abuse case, the relevant circumstances include:

> whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to

> fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

Ahmed, 782 N.W.2d at 260.

Although it did not explicitly list the factors it was considering, the district court found that S.M.'s statements "were given in response to open ended questions from adults" and that both her mother and teacher did not have a preconceived idea of what S.M. would say. The district court determined that neither adult asked S.M. leading questions and that the record did not suggest that S.M. "had any apparent motive to fabricate" her statements. The district court also found that S.M.'s statements were made at reasonable times and remained consistent over time.

Appellant argues that S.M.'s statements were made in response to leading questions from her mother and teacher. In *Ahmed*, we concluded that questions like "what is wrong?" and "who did this?" were open-ended rather than leading. *Id.* at 261. Here, S.M.'s mother and teacher asked S.M. what happened, why she had missed school, and "how she got the sore on her hand." These questions, like those in *Ahmed*, are not leading.

Regarding the other factors, there is no evidence that S.M.'s mother or teacher had a preconceived notion of what S.M. would say. S.M.'s teacher testified that she initially inquired of S.M. why she had been absent from school, thinking that S.M. had probably been sick. We similarly see no evidence that S.M. had any motive to fabricate her statements or that her statements were of the type a five-year-old child would fabricate.

And S.M.'s statements remained consistent over time. The record supports the district court's conclusion that S.M.'s statements to her mother and teacher have the required "circumstantial guarantees of trustworthiness" under rule 807.

Appellant argues that S.M.'s statements were inconsistent because she provided inconsistent statements regarding whether her mother was home at the time of the injury. This argument depends on a brief reference to S.M.'s Child's Voice interview during the cross-examination of S.M.'s social worker. But the Child's Voice interview was not offered into evidence and its contents are not part of the record. There are no inconsistent statements by S.M. in the record regarding whether her mother was or was not home at the time of the incident. What the record does reveal is a series of consistent statements by S.M. regarding how she was burned. Under the totality of the relevant circumstances, the district court did not err in concluding that S.M.'s statements are sufficiently trustworthy. *See id.* at 260.

Finally, appellant challenges the reliability of S.M.'s teacher because "she did not testify about any experience she had in interviewing child witnesses." But rule 807 "focuses on whether the statement itself is reliable, not whether the person to whom the statement is made" or the person testifying is reliable. *Id.* at 261. The reliability or expertise of S.M.'s teacher is irrelevant under the residual-hearsay-exception analysis.

Because the district court acted within its discretion in admitting S.M.'s out-of-court statements to her mother and teacher under rule 807, appellant is not entitled to appellate relief on this ground.[2]

II.

Appellant argues that the district court plainly erred in admitting into evidence and relying on Officer Dawson's opinion testimony that the location of S.M.'s burns was "not consistent with an accidental injury." Because appellant did not object to Officer Dawson's opinion testimony at trial, we review the admission of that testimony for plain error. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). "If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings." *Griller*, 583 N.W.2d at 740. "An error is plain if it is clear and obvious; usually this means an error that violates or contradicts [caselaw], a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010).

Appellant suggests that "it is unclear whether [Officer] Dawson was testifying as an expert or as a lay witness." An expert witness provides "scientific, technical, or other

[2] Because we have determined that the district court did not abuse its discretion in admitting S.M.'s out-of-court statements under rules 803(4) and 807, we need not determine whether appellant was prejudiced by the admission of the statements. *See Amos*, 658 N.W.2d at 203 (explaining that the appellant has the burden to establish both an abuse of discretion and prejudice). And we need not address whether the district court erred in alternatively admitting S.M.'s statements under Minn. Stat. § 595.02, subd. 3.

specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. A lay witness may provide opinion testimony if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701. Opinion testimony may concern an ultimate fact issue if the testimony is helpful to the jury, but may not concern "legal analysis or mixed questions of law and fact." Minn. R. Evid. 704 1977 comm. cmt. In general, opinion testimony regarding the identity of an abuser is not proper. *State v. Hollander*, 590 N.W.2d 341, 349 (Minn. App. 1999). A witness may properly opine "on whether . . . abuse has occurred" but not on "who it was who abused the children." *State v. Dana*, 422 N.W.2d 246, 250 (Minn. 1988). Officer Dawson's observation regarding where most people burn their hands does not require "scientific, technical, or other specialized knowledge." *See* Minn. R. Evid. 702. It is evident to us that Officer Dawson testified as a lay witness on the subject of where hands are usually burned, and her testimony was unremarkable, sensible, and based on her life experiences.

Appellant argues that Officer Dawson's testimony "interfered with the district court's role as [the] trier of fact." But a lay witness may provide an opinion concerning an ultimate fact issue without interfering in the role of the fact finder. *See* Minn. R. Evid. 704 1977 comm. cmt. Officer Dawson provided her observation that the location of S.M.'s burns was "not consistent with an accidental injury." Officer Dawson did not opine about who caused S.M.'s injury. *See Dana*, 422 N.W.2d at 250. She did not provide legal analysis. *See* Minn. R. Evid. 704 1977 comm. Cmt (stating that opinions

involving legal analysis are "not deemed to be of any use to the trier of fact"). She did not state that appellant was guilty of any or all of the charges. Her testimony concerned the fact issue of whether S.M.'s burns were accidental. For all of these reasons, the admission of Officer Dawson's testimony was not barred by any caselaw, rule, or standard of conduct. *See Matthews*, 779 N.W.2d at 549. And the district court did not plainly err in admitting Officer Dawson's lay opinion testimony.

Even if we were to determine that the district court plainly erred in admitting Officer Dawson's opinion testimony, which we do not, the testimony did not affect appellant's substantial rights. *See Strommen*, 648 N.W.2d at 686. The district court mentioned Officer Dawson's opinion in its written memorandum, but also discussed the opinion of Dr. Patel. Dr. Patel offered similar opinion testimony, not challenged on appeal, explaining that he has treated many accidental hand burns, but that accidental burns usually occur on the palm when something hot is touched. And he stated that an accidental burn would not normally be "found where [S.M.'s] burns were located." Dr. Patel's statements are remarkably similar to those of Officer Dawson, who testified from her experience that burns usually occur on the palm of the hand and that the position of S.M.'s burns was "not consistent with an accidental injury." Given all of the evidence in this case and the district court's reference to Dr. Patel's opinion, it is unlikely that Officer Dawson's opinion testimony affected the outcome of the case or prejudiced appellant.

In sum, we hold that the district court acted within its discretion in all of its challenged evidentiary rulings at trial. S.M.'s out-of-court statements to her mother, her teacher, and Dr. Patel were properly admitted under rules 807 and 803(4). Officer

Dawson's testimony concerning the atypical burn to the back of S.M.'s hand was properly admitted as lay opinion testimony under rule 701 and, in any event, did not affect appellant's substantial rights.

Affirmed.