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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0931**

State of Minnesota,
Respondent,

vs.

Sammy Antonio White,
Appellant.

**Filed June 19, 2017
Affirmed
Bratvold, Judge**

Goodhue County District Court
File No. 25-CR-15-2237

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Stephen Betcher, Goodhue County Attorney (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Schellhas, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant was convicted of engaging in criminal sexual conduct with a six-year-old child after a court trial at which out-of-court statements by the child were admitted into

evidence under Minn. Stat. § 595.02, subd. 3 (2014). Appellant argues that the child's statements were not reliable and, therefore, the district court abused its discretion. Because we conclude that the child's statements bore sufficient indicia of reliability, we affirm.

FACTS

In fall 2015, Goodhue County Services received a report of bruising on the body of S.W., the two-year-old daughter of appellant Sammy White and his wife. The couple's three children were then removed from the home and the county initiated an investigation of potential physical abuse. A social worker interviewed White, his wife, and H.D., who is the daughter of White's wife and was six years old at the time.

The social worker interviewed H.D. on September 8, 2015, and again on October 5, 2015. Both interviews were audio- and video-recorded. In the first interview, H.D. revealed that White "whoops" her and her siblings with a belt and yells at her if she cries. After the first interview with the social worker, H.D.'s foster parents reported that H.D. engaged in sexualized play with her cousins. The social worker then conducted a second interview.

During the second interview, the social worker asked H.D. about where and how she had touched her cousins. After H.D. explained that she had grabbed her cousin's "boobies," the social worker asked her, "Has someone ever touched your boobies?" H.D. responded, "No. But somebody has done touched this part," gesturing to her genital area, and telling the social worker that she calls that area her "hoo hoo." H.D. initially told the social worker that her grandparents had touched her hoo hoo, but then clarified that her grandmother had touched it multiple times, but her grandfather did not touch her hoo hoo.

She explained that when her grandmother touched her hoo hoo she “squeezed me really hard.”¹

When asked if anyone else had touched her hoo hoo, H.D. said “no,” but then immediately added that White “likes to check” her hoo hoo to “see if she broke anything.” She explained that White has her lie down, pulls down her pants and shines a light when he checks her. She also demonstrated how White uses his fingers to spread her vagina open, and told the social worker that his nail goes inside, but not all the way inside. She explained that when she cries, White tells her “to be quiet.” She also said that if she does not cry when he checks her, he gives her a juice box.

On October 9, 2015, White was charged with two counts of first-degree criminal sexual conduct, three counts of second-degree criminal sexual conduct, fifth-degree criminal sexual conduct, and misdemeanor domestic assault. On December 1, 2015, the state moved to admit H.D.’s out-of-court statements under Minn. Stat. § 595.02, subd. 3. After hearings on December 18 and 21, 2015, the district court issued findings of fact, conclusions of law, and an order granting the state’s motion to admit the out-of-court statements because the statements were given under circumstances that provided sufficient indicia of reliability to allow their admission as substantive evidence at trial.

White waived his right to a jury trial and a four-day court trial was held in January 2016. White’s wife testified that she and White checked H.D.’s vaginal area for redness

¹ The social worker later testified at trial that H.D. had a bed-wetting problem, and the grandmother would use “her hand over the pants on [H.D.’s] vaginal area and squeezed like that to check if her Pull-Up was wet or dry. . . . [T]hat is how a caregiver would check to see if a child had wet themselves . . . [a]nd that is not considered sexual abuse.”

and bumps due to bed-wetting, but that she would “usually” make White look away or wear a blindfold. White testified that he had never checked H.D.’s vaginal area. But White’s videotaped statement to the police was also admitted. In his statement he admitted to checking to see if H.D. had been “tampered with.” White explained that this meant seeing if she had “open holes” in her hymen. He insisted that “[s]he’s always had her hymen.” White said he never checked her alone, he and his wife asked H.D. to pull down her underwear, and “we’d shine the light” “just to make sure.” A doctor from a child abuse center testified that “it would be impossible to view a child’s hymen by simply having the child lie down and spread her legs open; physical manipulation would be necessary.”

The video of H.D.’s second interview was received into evidence and both the social worker and H.D. testified. H.D. testified that White had hit her with his belt, but denied that anyone had ever touched or checked her hoo hoo. When asked about her conversation with the social worker, H.D. testified that she had told “the truth about who touched [her] hoo hoo.”

The district court found that H.D. “understood that she was promising to tell the truth in the courtroom,” but “was frequently distracted” by White’s presence and often stared at him for seconds at a time after the prosecutor asked her a question. White, who was sitting at counsel table, was “visibly sobbing throughout the majority of H.D.’s testimony,” and “often made eye contact with H.D. while sobbing.”

The district court expressly found H.D.’s statements regarding the molestation to be credible, and noted that her allegations “are further corroborated by [White]’s admission that he had viewed H.D.’s hymen,” because the doctor had “testified credibly that it would

be impossible to view a child's hymen without physical manipulation." The district court stated:

[White] touched and penetrated H.D.'s vagina, ostensibly for the purpose of "checking" her for injury or to confirm that her hymen was intact. These are not legitimate reasons for [White] to touch, much less, penetrate H.D.'s vagina. No reasonable intent other than sexual intent can be inferred from [White]'s actions.

The district court issued a verdict on January 14, 2016, finding White guilty of two counts of first-degree criminal sexual conduct, two counts of second-degree criminal sexual conduct, and one count of fifth-degree criminal sexual conduct. White was later sentenced to 156 months imprisonment for one count of first-degree criminal sexual conduct.

White appeals, arguing that the district court erred in admitting the statements from H.D.'s second interview.

D E C I S I O N

The district court admitted H.D.'s out-of-court statements under Minn. Stat. § 595.02, subd. 3, which is "a statutory scheme for the evaluation of the admissibility of statements made by children regarding sexual abuse." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 169 (Minn. 1999). Section 595.02, subdivision 3, provides that an out-of-court statement made by a child under the age of ten that is not otherwise admissible may be received as substantive evidence if (1) the statement "alleg[es], explain[s], den[ies], or describ[es] any act of sexual contact or penetration performed with or on the child," (2) the court holds a hearing outside the presence of the jury and determines "that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is

made provide sufficient indicia of reliability,” (3) the child testifies at the proceedings,² and (4) the proponent of the statement informs the adverse party of its intention to submit the statement “sufficiently in advance of the proceeding.” Minn. Stat. § 595.02, subd. 3(a)-(c).

We reverse a district court’s evidentiary rulings only for abuse of discretion. *State v. Bobadilla*, 709 N.W.2d 243, 256 (Minn. 2006). White argues that because the admissibility of H.D.’s statements depended on their reliability, we should review the district court’s determination de novo. *See State v. Salazar*, 504 N.W.2d 774, 776-77 (Minn. 1993). But in *Salazar*, the supreme court assessed reliability to analyze admission of evidence under the Confrontation Clause. *Id.* Appellate courts generally review claims of alleged constitutional violations de novo. *State v. Sewell*, 595 N.W.2d 207, 211 (Minn. App. 1999), *review denied* (Minn. June 1, 1999). In this case, H.D. testified and was subject to cross-examination and accordingly there was no confrontation issue. *See State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (“The Confrontation Clause is satisfied by a declarant’s appearance at trial for cross-examination.”). Accordingly, we apply the abuse-of-discretion standard, and White “has the burden on appeal of proving both that the trial court abused its discretion when it made the evidentiary ruling and that the defendant was thereby prejudiced.” *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013).

White argues that the circumstances surrounding H.D.’s second interview do not bear sufficient indicia of reliability to support admissibility of her out-of-court statements.

² If the child is unavailable to testify, there must be “corroborative evidence of the act.” Minn. Stat. § 595.02, subd. 3(b)(ii).

The state argues that the district court did not abuse its discretion in admitting the statements.

“The circumstances relevant to the determination of the admissibility of a child-victim’s out-of-court statements regarding sexual abuse are basically the same whether the court is determining admissibility pursuant to Minn. Stat. § 595.02, subd. 3, or pursuant to Minn. R. Evid. 803(24).” *State v. Hollander*, 590 N.W.2d 341, 345-46 (Minn. App. 1999); *see also State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992). Minnesota appellate courts have articulated a number of “factors to consider in evaluating the reliability of out-of-court statements by young children” including “spontaneity, consistent repetition, mental state of the declarant, use of terminology unexpected of a child of similar age, and lack of motive to fabricate,” as well as “the knowledge of the declarant, the motives of the declarant and witnesses to speak truthfully and the proximity in time between the statement and the events described.” *L.E.P.*, 594 N.W.2d at 170 (quotation omitted). It is also relevant “whether the person talking with the child had a preconceived idea of what the child would say” and whether the questions were leading or suggestive. *Id.* Reliability of a statement is to be determined based on the totality of the circumstances. *Edwards*, 485 N.W.2d at 915.

White makes three arguments, which we consider in turn. First, White argues that the social worker used leading questions when she questioned H.D. The district court determined that the social worker “generally did not use leading questions,” and even those questions that may have been “a bit suggestive . . . were offered as one of several options and were not overly suggestive.” The district court did not abuse its discretion. The

questioning that led H.D. to disclose White's molestation was not leading. H.D. was never asked whether White had touched her, only whether *someone else* had touched her. This question did not suggest a response. See *L.E.P.*, 594 N.W.2d at 172 (concluding that an interviewer's statement that the child's mother said "she thought maybe something happened with your cousin" was not leading).

Second, White argues that the social worker had a preconceived notion that H.D. had been sexually abused "based on her knowledge of White's status as a sex offender." The district court determined that the social worker had no preconceived notions about what H.D. would say. Importantly, the district court determined that the social worker "was not informed of any physical abuse directed toward [H.D.] until [H.D.] spontaneously mentioned it." The district court did not abuse its discretion. The social worker testified that she was "surprised" when H.D. informed her that White had "checked" her hoo hoo because the disclosure was "very spontaneous." White does not point to any evidence in the record as suggesting that the social worker knew or believed that H.D. had been sexually abused by White before the second interview.

Third, White argues that H.D.'s statements were "not consistent, and were often contradictory." Consistency with other statements is relevant to reliability. *Bobadilla*, 709 N.W.2d at 256 (finding reliability where statements were made soon after the event, were consistent with prior reporting, in response to non-leading questions, and there was no motive to fabricate). White argues that H.D.'s statements during the second interview were inconsistent because H.D. initially told the social worker that both of her grandparents had touched her, but later said that her grandfather had not, and told the social worker that

White had touched her only after she had been asked multiple times. We are not persuaded, in part because H.D. spontaneously added that White “checks” her to see if “she broke anything.” When asked for more detail, H.D. provided internally consistent details about White’s behavior. Accordingly, we conclude that H.D.’s clarification about her grandfather does not render unreliable her other statements about White.

White mistakenly asserts that “[t]here were no other indicia of reliability.” In fact, the district court made several additional determinations regarding the reliability of H.D.’s statements. The district court found that “[t]he language and phraseology used by H.D. during the interviews was age appropriate”; “[t]he sexual touching described by H.D. is not something normally experienced by a typical six year old child and would be difficult to fabricate”; and “H.D.’s demeanor became expectedly sad and quiet when she was describing the incidents of physical or sexual abuse.” The district court also noted that in portions of the interview, H.D. expressed feelings of happiness regarding White, and “showed no motive to fabricate any allegations” relating to White’s conduct.

Additionally, we note that other evidence admitted at trial bolsters the reliability of H.D.’s out-of-court statements. White and his wife corroborated H.D.’s statements by admitting that White had checked H.D.’s vagina. H.D.’s trial testimony also corroborated the statements. Although H.D. denied at trial that anyone had touched her hoo hoo, the district court found that “H.D. was frequently distracted by the presence of [White] in the courtroom,” and there is evidence that White had instructed H.D. not to “talk about our household.” When asked about her statements to the social worker, H.D. testified that she had told the truth.

Accordingly, we conclude that the district court did not abuse its discretion in admitting H.D.'s out-of-court statements because the circumstances of the statements were supported by sufficient indicia of reliability. We therefore need not address the state's additional argument that the admission of the statements did not prejudice White because he admitted to checking H.D.'s hymen and a doctor testified that doing so would require physical manipulation.

Affirmed.