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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1824**

State of Minnesota,
Respondent,

vs.

Bernard Neal,
Appellant.

**Filed August 28, 2017
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-16-2643

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his conviction of first-degree criminal sexual conduct, arguing that the evidence was insufficient to support the conviction and that the district court committed reversible plain error by failing to determine that the child victim was a competent witness before the child testified. We affirm.

FACTS

In January 2016, respondent State of Minnesota charged appellant Bernard Neal with first-degree criminal sexual conduct. The complaint alleged that Neal lived with C.O.'s grandmother and that C.O. slept at her grandmother's house on October 31, 2015. The complaint further alleged that on November 1, Neal brought C.O. to the living room of the home, blindfolded her, and put his penis in her mouth. C.O. was five years old at the time.

The case was tried to a jury. C.O. testified as follows. In 2015, she went to her grandmother's house for Halloween. She and her cousins slept at her grandmother's house that night. The next day, while her grandmother was at the store, Neal called her into the living room from the playroom where she and her cousins had been and told her to sit on the couch. C.O. complied, and Neal wrapped a green towel around her head as a blindfold. Neal offered her a piece of candy and placed a piece of candy in her mouth. Neal offered her a second piece of candy, but instead of placing a piece of candy in her mouth, he inserted his "dingdong" inside her mouth. C.O. testified that it tasted "[n]asty" and that she said "yuck." C.O. testified that Neal gave her a piece of candy and told her to return

to the playroom. C.O. admitted that she did not see Neal's penis during the incident, but she testified that she had previously seen Neal's penis when he was sleeping unclothed in her grandmother's house.

C.O. told her grandmother what happened when her grandmother returned from the store, and her grandmother did not believe her. C.O. later told her grandfather and her mother that Neal played a game with her and that "he put [a] green towel on [her] head and then he put his dingding in [her] mouth."

C.O. was interviewed by a forensic interviewer from CornerHouse, and an audiovisual recording of the interview was admitted into evidence and played for the jury. During the interview, C.O. said that while her grandmother was at the store, Neal called her over to a couch in the living room, covered her eyes with green fabric, gave her chocolate, and placed his "dingaling" inside her mouth. C.O. told the interviewer that she heard him "zip something" before he removed the covering from her eyes and that she thought it was probably his pants. C.O. stated that her cousins were in the playroom when the incident occurred. C.O. also stated that she had previously seen Neal's penis when he was sleeping unclothed at her grandmother's house, and she described Neal's penis to the interviewer.

C.O.'s mother testified that C.O. told her that when C.O.'s grandmother was at the store, Neal asked C.O. to choose which of his hands held a piece of candy. C.O. chose one of Neal's hands, and the candy was not in that hand. Neal next placed a blanket over C.O.'s head and inserted his penis in her mouth. C.O. told her mother about the incident on November 13, at a gathering at C.O.'s grandfather's house. C.O. also told her grandfather

about the incident on November 13, during his birthday celebration at his apartment. C.O.'s grandfather testified that C.O. told him that after her grandmother went to the store, Neal called her into a room, gave her candy, and placed his "thing" in her mouth.

Lastly, Minneapolis Police Department Officer William John Palmer testified regarding Neal's post-arrest, *Mirandized* statement to the police. Neal initially denied that C.O. had been at his home on Halloween 2015, but later admitted that she was there. Officer Palmer testified that Neal said that

he played a game with his older grandchildren where he would have the children sit on their hands, close their eyes or where he would blindfold them with something, and then he would give them tastes of various things and he specified bananas, Reese's Pieces, Mountain Dew, chocolate, like hot sauce, and then he would have the children guess what it was that they tasted.

Neal indicated that on November 1, C.O.'s grandmother went to a store and he played the tasting game with C.O. and her cousins. Neal told Officer Palmer that around that time, one of C.O.'s cousins told him that C.O. claimed that she had seen Neal's penis. Neal stated that he knew that C.O. had reported something to C.O.'s grandmother and asked C.O. "if she had seen his penis and she told him yeah, I did see it." Neal explained that sometimes he would "wrap himself in a blanket with no clothes under and fall asleep" in the living room of C.O.'s grandmother's house. Neal said that to the best of his knowledge C.O. had never seen his penis.

Neal's defense at trial was based on the theory that C.O.'s mother prompted her to fabricate the allegation and that C.O.'s accusation therefore was not credible. Neal's trial attorney explored this defense in cross-examination but did not call any witnesses.

In closing argument, the state argued that C.O. was credible and that the evidence refuted Neal's theory that C.O. fabricated the allegation. Neal argued that the state did not prove that the object in C.O.'s mouth was Neal's penis, emphasizing that C.O. did not see the object and did not explain how she knew it was Neal's penis. Neal suggested that C.O.'s mother or grandfather prompted her to fabricate the sexual-abuse allegations. In rebuttal, the state argued that the evidence did not support a conclusion that the object was anything other than Neal's penis. The state also argued that the "inconsistencies and failings" in C.O.'s mother's and grandfather's trial testimony indicated that it was unlikely that they could have orchestrated a false accusation.

The jury found Neal guilty as charged, and the district court sentenced him to serve 234 months in prison. This appeal follows.

D E C I S I O N

I.

Neal contends that his "conviction must be reversed because a rational juror would have reasonably doubted whether [C.O.] accurately identified the object placed inside her mouth, where no objective fact supported her conclusory identification." Neal argues that C.O. "acknowledged that she never saw or felt the object" and that she did not describe why the object's "'yucky' taste" led her to conclude that the object was Neal's penis. Neal concludes that "[b]ecause the state failed to establish . . . objective observations that led to [C.O.'s] identification, the evidence is legally insufficient to support the conviction."

When considering an insufficient-evidence claim, this court carefully analyzes the record to determine whether the evidence was sufficient to permit the jurors to reach their

verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court “view[s] the evidence in a light most favorable to the verdict and assume[s] that the jury believed the state’s witnesses and disbelieved contrary evidence.” *State v. Brooks*, 587 N.W.2d 37, 42 (Minn. 1998). This court will not disturb the jury’s verdict “if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

The state charged Neal under Minn. Stat. § 609.342, subd. 1(a) (2014). Under that provision, a person is guilty of criminal sexual conduct in the first degree if the person (1) engages in sexual penetration with another person, (2) the other person is under 13 years of age, and (3) the actor is more than 36 months older than the complainant. Minn. Stat. § 609.342, subd. 1(a). “Sexual penetration” includes “fellatio.” Minn. Stat. § 609.341, subd. 12(1) (2014).

The trial evidence showed that on November 1, 2015, C.O.’s grandmother left Neal alone with C.O. and her cousins while she went to a store. Neal called C.O. into the living room where she was separated from her cousins. Neal covered C.O.’s eyes with a green towel such that she could not see. Neal placed a piece of candy in C.O.’s mouth. Neal then placed another object in C.O.’s mouth. Although C.O. did not see the second object, she testified that she believed it was Neal’s penis. C.O. had seen Neal’s penis before and described it during her CornerHouse interview. C.O. reported the incident to her

grandmother, mother, and grandfather. C.O. also described the incident to the CornerHouse interviewer.

Because C.O. had previously seen Neal's penis, she was aware of its appearance. That firsthand knowledge provided an objective basis for C.O. to conclude that the object that Neal placed in her mouth was his penis. The jury's verdict indicates that it credited C.O.'s conclusion. Given the secretive circumstances of Neal's "tasting game," it was reasonable for the jury to do so. This court will not reweigh the evidence regarding this issue or ignore the jury's implicit determination that C.O.'s identification of the object was credible. *See State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010) (stating that juries are in the best position to weigh the credibility of evidence).

Neal argues: "Without any supporting facts, there is no reasonable basis to conclude that the object was a penis and not some other 'yucky' tasting object, like a finger or an unfamiliar food."¹ The record refutes Neal's argument. C.O.'s testimony that she had seen Neal's penis before the incident establishes firsthand knowledge that justified her conclusion that the object was Neal's penis.

The record also refutes Neal's argument that C.O.'s conclusion was "unsubstantiated" and lacking corroboration. Neal admitted that he played a "tasting game" with C.O., in which he had her sit on her hands, blindfolded her or told her to close

¹ In making this argument, Neal relies on caselaw setting forth the standard necessary to establish a constitutional basis for a warrantless search or seizure based on reasonable suspicion or probable cause. These cases are inapposite because the issue here is not whether the police violated Neal's constitutional right to be free from an unreasonable search or seizure.

her eyes, and put objects in her mouth. There is no dispute that Neal played this tasting game with C.O. on the date of the charged offense. On that date, Neal initiated the tasting game after C.O.'s grandmother had left the home. In addition, he called C.O. away from her cousins to a room where they would be alone for the game. A reasonable jury could view these uncontested, clandestine circumstances as substantiating and corroborating C.O.'s conclusion that the object in her mouth was Neal's penis.

Neal's last argument on this issue is that "[e]vidence suggesting that [C.O.'s] allegations may have been influenced by her mother cast further doubts on her testimony." Neal argues that C.O.'s mother "had a motive to harm [Neal], after he secured an order for protection that caused [C.O. and her mother] to lose their housing." Neal's defense at trial was based on the theory that C.O.'s mother prompted her to fabricate the allegation and that C.O.'s accusation therefore was not credible. Neal's trial attorney explored this defense in cross-examination and emphasized it in closing argument. The jury rejected this challenge to C.O.'s credibility, and we defer to the jury's credibility determination.

In sum, having reviewed the evidence in the light most favorable to the verdict, we conclude that there was sufficient evidence to establish, beyond a reasonable doubt, that Neal engaged in sexual penetration with C.O., as charged in the complaint. We therefore do not disturb the jury's guilty verdict.

II.

Neal next contends that "[t]he district court committed plain error by waiting until after [C.O.] testified before finding her to be competent."

“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.” Minn. Stat. § 595.02, subd. 1(n) (2016). When a child’s competency is challenged, the district court considers whether the child has “(1) the capacity to tell the truth and (2) the ability to recall facts.” *State v. Sime*, 669 N.W.2d 922, 926 (Minn. App. 2003). Typically, the district court determines whether a child is competent to testify by conducting a preliminary examination of the child to ascertain whether “the [child] understands the obligation of the oath and is capable of narrating the events about which the [child] will testify.” *Id.* However, the district court “must assess the child’s ability to remember and relate facts generally, rather than ask about the specifics of any anticipated testimony.” *State v. Munt*, 831 N.W.2d 569, 585 (Minn. 2013). For example, the district court should ask the child questions such as whether the child knows her name, where she goes to school, how old she is, whether she knows who the judge is, whether she knows what a lie is, and whether she knows what happens when one tells a lie. *State v. Scott*, 501 N.W.2d 608, 615 (Minn. 1993) (citing *Kentucky v. Stincer*, 482 U.S. 730, 741-42, 107 S. Ct. 2658, 2665-66 (1987)).

“Where the court is in doubt as to the 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). This court reviews the district court’s determination regarding the competency of a child to testify for an abuse of discretion. *Munt*, 831 N.W.2d at 585. A district court abuses its discretion when it fails to follow the required procedure for determining a child’s competency to testify. *See Sime*, 669 N.W.2d at 927 (holding that district court abused its

discretion by determining a child witness to be incompetent without “performing the requisite inquiry to determine [the child’s] competency”).

Neal challenged C.O.’s competency as a witness before she testified. The district court addressed the competency challenge by questioning C.O. in the courtroom outside of the jury’s presence. The district court asked C.O. whether she knew the difference between telling a lie and telling the truth, what it meant to tell the truth, and why it is important to tell the truth. C.O. answered “[h]mm-um” when the district court asked whether she knew “the difference between telling a lie and telling the truth.” C.O. explained that a lie would be saying that she had broken a glass when she had not broken a glass. C.O. indicated that it was important to tell the truth and that she would “get a whooping” if she did not tell her mother the truth.

The district court did not announce its competency ruling on the record after questioning C.O. However, the district court immediately called the jury into the courtroom and allowed C.O. to testify after its competency inquiry. After C.O.’s testimony, the district court excused the jury and invited counsel to make a record regarding the competency issue. Defense counsel noted his objection but acknowledged that the district court had already made its ruling:

We had had a discussion off the record at the bench regarding the competency of [C.O.] who just testified, and it’s been our position that she didn’t adequately explain to the Court that she understood the difference between a truth and a lie and the importance of telling the truth, and we thought that that should make her not competent to testify. *Your Honor made the ruling* but we just wanted to make a record of our objection.

(Emphasis added.)

After hearing arguments from the state and from defense counsel, the district court ruled, on the record, that C.O. was competent to testify:

[Defense counsel] is right, the Court's ruling is that [C.O.] is competent to testify or was competent to testify. She did appear to the Court to have the ability to relate stories, the ability to remember things, and I am satisfied that she knew the difference between a truth and a lie and the consequences of telling a lie. . . .

The law and Minnesota statutes . . . presume[] [C.O.] to be competent and that presumption was not overborne by any of my questions or her testimony and eventually her testimony that she gave here today.

Neal argues that “the district court improperly admitted [C.O.’s] testimony at trial without first making a threshold finding that [C.O.] was a competent witness.” He further argues that C.O.’s “statements during the pre-trial hearing left grave doubts about whether she was a competent witness” and that “[g]iven the weakness of [C.O.’s] pre-trial statements, the district court could not have found her competent unless it relied on her subsequent trial testimony.” Neal concludes that “[b]ecause the court’s competency decision improperly rested on [C.O.’s] trial testimony, it is legally invalid” and “the district court erred by admitting [C.O.’s] testimony at trial without first finding her competent.”

This court reviews the alleged error under the plain-error standard because Neal did not object to the district court’s failure to announce a competency ruling before C.O. testified. See Minn. R. Crim. P. 31.02 (“Plain error affecting a substantial right can be considered by the court on . . . appeal even if it was not brought to the trial court’s attention.”); *State v. Ramey*, 721 N.W.2d 294, 297 (Minn. 2006) (“On appeal, an unobjected-to error can be reviewed only if it constitutes plain error affecting substantial

rights.”). Under the plain-error test, this court will not grant relief unless (1) there is an error, (2) the error is plain, and (3) the error affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). “An error affects substantial rights if the error is prejudicial—that is, if there is a reasonable likelihood that the error substantially affected the verdict.” *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002). If these three parts of the plain-error test are met, this court may correct the error only if it is necessary to “ensure fairness and the integrity of judicial proceedings.” *Griller*, 583 N.W.2d at 742.

As to the first part of the plain-error test, it is not clear that the alleged error occurred. Although the district court did not announce its ruling regarding C.O.’s competency before she testified, the record suggests that the district court determined C.O. was competent before it allowed her to testify.² For example, before the district court announced its competency ruling, Neal’s counsel stated, “Your Honor made the ruling but we just wanted to make a record of our objection.” Even though the district court referred to C.O.’s trial testimony when announcing its ruling, defense counsel’s statement indicates that the district court made and communicated its competency decision before C.O. testified, based on her answers during the court’s competency inquiry.

Even if the district court plainly erred by making its competency decision after C.O. testified, the alleged error did not affect Neal’s substantial rights. C.O. initially answered “[h]mm-um” when the district court asked her if she knew “the difference between telling

² We remind the district court of the importance of making a timely record of its rulings, to create an adequate record for appeal. *See State v. Sessions*, 621 N.W.2d 751, 756 (Minn. 2001) (“A record is critical to ensure adequate appellate review and a fair process.”).

a lie and telling the truth.” When the district court asked her if she knew what telling the truth was, C.O. answered, “Um-hmm. Yes.” And when the district court asked C.O. to explain what telling the truth is, C.O. stated, “It’s if . . . I broke a glass and then say actually, tricked you, I didn’t,” indicating that it would be a lie to say she broke a glass if she did not break a glass. C.O. also nodded her head when the district court asked whether she thought it was important to tell the truth and said that she would “get a whooping” if she did not tell her mother the truth.

The district court’s inquiry of C.O. established a basis to reject Neal’s competency challenge. Because C.O.’s responses to the district court’s questions during the competency inquiry independently supported the court’s on-the-record competency ruling, the district court’s purported reliance on C.O.’s trial testimony in making its ruling was inconsequential. The record from the competency inquiry satisfies this court that the district court did not abuse its discretion by allowing C.O. to testify. Thus, the district court’s alleged failure to find C.O. competent before she testified did not affect Neal’s substantial rights. Neal therefore is not entitled to relief under the plain-error standard.

Affirmed.