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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1964**

State of Minnesota,
Appellant,

vs.

Charles Edward Glover,
Respondent.

**Filed May 7, 2018
Reversed and remanded
Smith, Tracy M., Judge**

Ramsey County District Court
File No. 62-CR-17-959

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

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Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Rodenberg, Judge.

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

SMITH, TRACY M., Judge

On appeal from a pretrial suppression order in a case alleging sexual assault of a
five-year-old child, appellant State of Minnesota challenges the district court's ruling that
the child's statements to a nurse at the Midwest Children's Resource Center (MCRC) were

testimonial and therefore inadmissible at trial under the Confrontation Clause. We conclude that the district court erred in determining that the primary purpose of the nurse's interview of the child was prosecutorial and that the child's statements were therefore testimonial. Because admission of the statements was not barred by the Confrontation Clause, we reverse and remand.

FACTS

According to the complaint, on January 20, 2016, St. Paul Police responded to a report of alleged sexual abuse of five-year-old I.V. An adult family friend reported that I.V. told her that, the previous summer, he had been driven in a van to Mounds Park, where a man named "Carlos" had touched his penis. The friend gave police a short recording she made of I.V. telling her what happened. "Carlos" was ultimately identified as respondent Charles Glover, who was employed by the bus company that transported I.V.

On January 22, 2016, having learned of the alleged abuse and based on a referral by St. Paul police, I.V.'s mother brought I.V. to the MCRC. MCRC is a specialty clinic within Minneapolis Children's Hospital that assists in the assessment and treatment of child abuse. At MCRC, Nurse Margaret Carney performed a video-recorded interview of I.V. During the interview, I.V. recounted what had happened the previous summer, telling the nurse that "Carlos" (Glover) had taken him to Mounds Park, unbuckled I.V.'s seatbelt, pulled down I.V.'s shorts, and then touched and squeezed the skin of I.V.'s penis. I.V. also said that Glover had shown him a cellphone picture of Glover's penis. Following the interview, a physician conducted a medical examination of I.V. After the examination, MCRC recommended that I.V. have no further contact with Glover and re-enter therapy, but did

not recommend further treatment from a medical doctor at that time. MCRC sent a copy of its report and the nurse's recorded interview of I.V. to the St. Paul police.

Glover was charged with second-degree criminal sexual assault. After the district court found I.V. incompetent to testify, the state gave notice of its intent to introduce the video of I.V.'s interview with the MCRC nurse. Glover moved to suppress I.V.'s interview statements as barred by the Confrontation Clause. The district court concluded that the interview statements were testimonial and inadmissible at trial.

The state appeals this suppression of the MCRC interview.

D E C I S I O N

I. The pretrial suppression has a critical impact on the state's case.

On appeal from a pretrial order suppressing evidence, the state "must clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotations omitted). "[T]he critical impact of the suppression must be first determined before deciding whether the suppression order was made in error." *Id.*

When analyzing critical impact, we first examine the state's evidence as a whole to determine what impact the absence of the suppressed evidence will have. *See State v. Zanter*, 535 N.W.2d 624, 630-31 (Minn. 1995). "Critical impact is met when the suppression of the evidence significantly reduces the likelihood of a successful prosecution." *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999). As a rule, "when a young child is found incompetent to testify and is thus unavailable the suppression

of the child's statements describing the alleged sexual abuse reduces the likelihood of a successful prosecution and meets the critical impact test." *Id.*

Here, other than the MCRC interview by I.V., the only substantive evidence of the alleged sexual contact is the 2-minute-and-16-second recording made by the family friend during I.V.'s initial disclosure. In this recording, I.V. was not asked about, and did not provide, such relevant information as whether the touching was over or under the clothes or whether Glover had shown I.V. any of his private parts. In the MCRC interview, on the other hand, I.V. gave more detail about the touching and also stated that Glover had shown I.V. a picture of Glover's penis on his phone. The latter statement is important corroborating evidence for the state because pictures of an adult male penis were found on Glover's cellphone. Because I.V.'s statements were the state's strongest evidence against Glover, the district court's order suppressing I.V.'s recorded statements to the MCRC nurse will have a critical impact on the trial's outcome.

II. I.V.'s statements to the MCRC nurse were not testimonial under the Confrontation Clause.

The state argues that the district court erred in determining that I.V.'s statements in the MCRC interview were testimonial and must therefore be suppressed under the Confrontation Clause. While the parties disagree as to the legal significance of the underlying facts, the facts themselves are not disputed. When the facts are undisputed in an appeal from a pretrial order suppressing evidence, we independently review the facts and apply de novo review to the district court's legal conclusion that the evidence must be suppressed. *See State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI. In the leading case of *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause bars the admission of out-of-court “testimonial statements” of a declarant unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant about the statement. 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365-66 (2004). Thus, “[t]he threshold question for a *Crawford* analysis is whether the statements at issue are testimonial.” *State v. Vang*, 774 N.W.2d 566, 577 (Minn. 2009). *Crawford* gave examples of types of testimonial statements and described “testimony” as typically a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” 541 U.S. at 51-52, 61, 124 S. Ct. at 1364 (quotations omitted). However, *Crawford* “did not offer an exhaustive definition of ‘testimonial’ statements.” *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015).

Since *Crawford*, the Minnesota Supreme Court has twice considered whether a child victim’s statements to a medical provider—in both cases, a nurse at MCRC—were testimonial under the Confrontation Clause. *See State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006). In both cases, the court considered whether the nurse-questioner was a government actor or acting as a proxy for law enforcement, and whether the primary purpose of the interview was prosecutorial, considering the perspective of both the declarant and the questioner. *See Scacchetti*, 711 N.W.2d at 514-15; *Krasky*, 736 N.W.2d at 641.

In *Scacchetti*, a mother took her three-and-a-half-year-old child to Minneapolis Children’s Hospital, where the child’s examining doctor called a nurse practitioner from MCRC to assess the child for possible physical and sexual abuse. 711 N.W.2d at 511. When interviewed by the nurse practitioner, the child made statements indicating that the defendant had engaged in sexual contact with her. *Id.* The supreme court concluded that the nurse practitioner was not a government actor or “acting in concert with or as an agent of the government,” and that, in any event, the nurse practitioner’s purpose in interviewing the child was to assess the child’s medical condition. *Id.* at 514-15. Because the primary purpose of the assessment was medical and not prosecutorial, the court held that the child’s statements were not testimonial. *Id.*

In *Krasky*, a police detective and social worker, after receiving a child-protection report, decided to have the six-year-old child interviewed and examined by MCRC. 736 N.W.2d at 638. The child’s foster mother brought the child to MCRC. *Id.* at 638-39. While the child’s social workers watched from an observation room, the MCRC nurse interviewed and examined the child.¹ *Id.* at 639. The supreme court observed that, although the referral to MCRC was a joint decision by social services and the police, there was no indication that the MCRC nurse who conducted the assessment was “acting as a proxy for law enforcement.” *Id.* at 641. And, similar to *Scacchetti*, the *Krasky* court concluded that “the primary purpose of [the child victim’s] statements to [the MCRC nurse] was to assess and protect [the child victim’s] health and welfare.” *Id.*

¹ The MCRC nurse who performed the assessment in *Krasky* was Nurse Margaret Carney—the nurse in the present case.

The state asserts that *Scacchetti* and *Krasky* control, arguing that, here, as in those cases, the MCRC nurse was not a government questioner or a surrogate for the government and that the primary purpose of her interview was medical, not prosecutorial. Glover urges the opposite—that Nurse Carney was acting as a government questioner or a government surrogate and that her primary purpose in interviewing the child was prosecutorial, not medical. We turn to those questions.

Government questioner or surrogate

The state asserts that Nurse Carney was not a government questioner. Although Glover characterizes her as such, there is no basis to conclude that a nurse employed by MCRC is a government actor. The supreme court in *Krasky* concluded that “a nurse practitioner employed by MCRC is not a government actor.” 736 N.W.2d at 641 (citing *Scacchetti*, 711 N.W.2d at 514-15).

But, Glover argues, Nurse Carney was acting as “the surrogate police-interviewer” when she interviewed I.V. Glover relies on MCRC’s participation in the Ramsey County Multidisciplinary Team. That team, which is made up of MCRC, child-protective services, and law enforcement agencies, has a memorandum of understanding and a set of guidelines for responding to child victims of abuse. Those documents incorporate the principle that those agencies should coordinate their efforts to minimize trauma and prevent child victims from having to undergo duplicative interviews, and describe MCRC’s role in performing forensic interviews as part of its medical examinations. The memorandum of understanding and the guidelines, Glover argues, establish that MCRC acts as a police surrogate when it interviews child victims of abuse.

In *Krasky*, the supreme court concluded that MCRC was not “acting as a proxy for law enforcement” even though law enforcement and child-protective services “jointly concluded that the best way to proceed with the investigation was to have MCRC do an interview with [the child] along with a medical exam.” 736 N.W.2d at 641-42 (quotation omitted). Here, the fact that agencies have documented their coordinated approach in responding to child abuse does not distinguish this case from *Krasky* and convert MCRC into a surrogate of law enforcement.

Glover argues, however, that a federal habeas decision following *Krasky* requires a different conclusion. A year after its decision in *Scacchetti*, the Minnesota Supreme Court decided *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006) (*Bobadilla I*). In *Bobadilla I*, the supreme court held that a child’s recorded interview by a child-protective-services social worker at law-enforcement headquarters was not a testimonial police interrogation. *Id.* at 256. On Bobadilla’s petition for writ of habeas corpus, however, the Minnesota federal district court—in a decision affirmed by the Eighth Circuit—held that it was objectively unreasonable for the Minnesota Supreme Court to have concluded that the interview was not testimonial. *See Bobadilla v. Carlson*, 570 F. Supp. 2d 1098, 1107 (D. Minn. 2008) (*Bobadilla II*), *aff’d*, *Bobadilla v. Carlson*, 575 F.3d 785 (8th Cir. 2009) (*Bobadilla III*). Glover argues that the federal decision dictates that MCRC was acting as a proxy for law enforcement here.

Bobadilla II, however, is distinguishable from the case before us. In *Bobadilla*, the interview was conducted by a child-protective-services social worker (a government employee responsible for investigating allegations of abuse of minors), the interview took

place at a police station with an officer present at the interview, and the social worker performed the interview at the direct request of the police. *Bobadilla II*, 570 F. Supp. 2d at 1100-01. In this case, an MCRC nurse performed the interview, the interview took place at the hospital with only the nurse present, and the MCRC nurse performing the interview did not act at the direct request of the police but because the child's mother brought him to MCRC following police referral. Moreover, the child in the *Bobadilla* cases had already had a medical examination by a doctor five days before the interview with the social worker, whereas this was the first time that I.V. was seen by a medical professional, reinforcing the conclusion that MCRC was acting as a medical provider, not a police surrogate. *Bobadilla II*, 570 F. Supp. 2d at 1100. We conclude that *Bobadilla II* does not require departure from the conclusions in *Scacchetti* and *Krasky* that an MCRC nurse does not act as a proxy for law enforcement when interviewing a child victim as part of a medical examination.

Primary purpose

The state further argues that I.V.'s statements were not testimonial because Nurse Carney's questions were not directed at producing a statement for trial but were "geared at assessing I.V.'s welfare." Glover argues that, regardless of whether Nurse Carney was acting in concert with or as an agent of the government, she was questioning I.V. with the primary purpose of producing a statement for trial and the statements are thus testimonial.

In *Scacchetti*, the supreme court explained that, even if the questioner was acting as an agent of the government, elicited statements may nonetheless be nontestimonial if the questioner's purpose was medical. 711 N.W.2d at 515. We examine the specific

circumstances under which the statements were made in order to determine whether they were testimonial. *See Scacchetti*, 711 N.W.2d at 513-15. We focus our analysis on whether prosecutorial motivations were the primary purpose for the interview from the perspectives of both the declarant and the questioner. *Krasky*, 736 N.W.2d at 641; *see also Clark*, 135 S. Ct. at 2180 (“[U]nder our precedents, a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.”).

Glover argues that the nature of Nurse Carney’s questions, the absence of an ongoing health emergency, and the length of time since the incident compel the conclusion that Nurse Carney’s purpose was primarily prosecutorial.

Regarding the nature of her questions, Nurse Carney testified that the purpose of MCRC, the center within the hospital where I.V. was interviewed, is for “the assessment and treatment of child sexual abuse and physical abuse victims.” She explained that, within her role, “I don’t do investigation of child abuse.” Nurse Carney described the protocol for interviewing children, which includes techniques for assuring that children provide truthful information about what happened to them. Nurse Carney’s questions were not directed by law enforcement. Her testimony indicates that, while she knew that I.V. had been referred to MCRC by the police, any substantive information she received on the nature of the allegations came from I.V.’s parent and the family friend on the day of I.V.’s appointment and law enforcement did not provide any input on the questions she asked I.V. In questioning I.V., Nurse Carney thus was seeking truthful answers about what had happened to I.V. for the purpose of assessing his health and making recommendations for treatment.

As for the absence of a health emergency and the length of time since the incident, Nurse Carney discussed the medical importance of conducting an interview and examination, even many months after the alleged abuse occurred:

[T]here could be multiple reasons for doing it. If a child is talking about any kind of exchange of bodily fluids you might want to do sexually-transmitted-disease testing. Then also children as they grow and develop who are exposed to sexual abuse are often concerned that something may have happened to their body that is going to be damaging in some way or that other people would be able to tell that something had happened to their body. And thirdly, to allow younger children to show through demonstration what happened to their body because they sometimes don't have the language to explain it very well.

The circumstances in this case lead to the conclusion that Nurse Carney's primary purpose was medical. As a medical professional, Nurse Carney's objective was assessing I.V.'s health and welfare and connecting him and his family with further treatment resources as necessary. Without questioning I.V., Nurse Carney could not know what help he might need. The absence of a medical emergency and the length of time since the incident do not undermine this primarily medical purpose. *See Krasky*, 736 N.W.2d at 642 (recognizing that mental and physical health were MCRC's primary concern); *id.* at 647 (Page, J., dissenting) (indicating that the last contact between defendant and child was 18 months before the interview).

The possibility of Nurse Carney being called to testify does not transform the primarily medical purpose of a nurse-questioner's examination into a primarily prosecutorial purpose. *See Scacchetti*, 711 N.W.2d at 515. Nor does Minnesota's mandatory-reporting statute, which requires medical providers, including MCRC, to report

suspected child abuse to a local law enforcement or welfare agency, make the child's statements in the examination testimonial. *See* Minn. Stat. § 626.556 (2016); *see also* *Krasky*, 736 N.W.2d at 642-43 (explaining that compliance with Minnesota's mandatory-reporting law regarding child abuse "does not render the statements of a child sexual abuse complainant testimonial").

Glover argues, however, that MCRC's participation on the Multidisciplinary Team converts MCRC's role to primarily prosecutorial rather than primarily medical because MCRC is aware—given team protocols—that its interview of the child may be relied upon by law enforcement as the sole interview of the child. Glover asserts that the Eighth Circuit in *Bobadilla III* reasoned that the child-protective-services social worker in that case acted as a police surrogate in part because Minnesota's mandatory-reporting statute requires law enforcement and child-protective services to coordinate and avoid duplication of interviews. *See Bobadilla III*, 575 F.3d at 793; *see also* Minn. Stat. § 626.556, subd. 10(a). Glover argues the Multidisciplinary Team protocols have the same effect with respect to MCRC. In fact, at oral argument, Glover confirmed that, under his view, because of MCRC's participation on the Multidisciplinary Team, its primary purpose is *always* prosecutorial, not medical, even when a child comes directly to the hospital with no involvement whatsoever with law enforcement.

We disagree. The Eighth Circuit in *Bobadilla III* made clear that "[i]t is the circumstances of the interview at issue which must control, not just the purpose of the statute itself." 575 F.3d at 792. Consistent with that principle, the Multidisciplinary Team protocols do not make the primary purpose of every MCRC interview prosecutorial—the

circumstances of the interview at issue are what matters. As discussed above, we conclude that, as in *Scacchetti* and *Krasky*, the circumstances of the particular interview here show that the MCRC nurse's primary purpose was medical, not prosecutorial.

Moreover, we note that it is doubtful that I.V. knew or understood the purpose of his statements to the MCRC nurse. As the United States Supreme Court has articulated:

Statements by very young children will rarely, if ever, implicate the Confrontation Clause. Few preschool students understand the details of our criminal justice system. Rather, research on children's understanding of the legal system finds that young children have little understanding of prosecution.

Clark, 135 S. Ct. at 2182 (quotation omitted). Here, the record indicates that (1) I.V. had no direct contact with law enforcement, (2) Nurse Carney introduced herself to I.V. as a "nurse that works here at the doctor's office," and (3) Nurse Carney told I.V. that they were going to "talk for a little while" and then "do a check-up on [his] body to make sure [he was] healthy." Given the circumstances under which the interview and examination were conducted, we cannot say that a reasonable five-year-old would expect that his statements would be available for later use at trial.

Because Nurse Carney examined the child victim with the primary purpose of providing medical treatment and a reasonable five-year-old in I.V.'s situation would not likely expect that his statements would be used for prosecutorial purposes, we conclude that the district court erred in finding that I.V.'s statements to her were testimonial. Admission of those statements is therefore not barred by the Confrontation Clause.

Reversed and remanded.