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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0430**

State of Minnesota,
Respondent,

vs.

Scott Allen Germscheid,
Appellant.

**Filed May 13, 2019
Affirmed
Halbrooks, Judge**

Washington County District Court
File No. 82-CR-16-1453

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Kayla K. Wengronowitz, Joseph Tamburino, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of malicious punishment of a child, arguing that the district court abused its discretion in determining that (1) the victim's out-of-court

statement was admissible under the residual exception to the hearsay rule, (2) the admission of the statement violated his right under the Confrontation Clause to confront witnesses against him, and (3) he was denied the opportunity to present a complete defense. We affirm.

FACTS

On April 7, 2016, the nurse at A.S.G.'s elementary school noticed that he had bruises on both of his ears. Sarah Terpstra, a social worker with the school district, met with A.S.G. and asked him about the cause of the bruises. A.S.G. said that "his head hit his bed really hard, and if anybody asked, his dad said to tell them that his ears got stuck in the chair." Appellant Scott Allen Germscheid is A.S.G.'s father. A.S.G. also stated that "when he is punished, it has to hurt really bad." Terpstra subsequently filed a report with Washington County Community Services.

The following day, Gina Solomon, a social worker with Washington County Community Services, interviewed A.S.G. at his elementary school. A.S.G. said that he did not know what happened, but indicated that he and his father noticed the bruises "right after [A.S.G.] had been punished." A.S.G. told Solomon that his father had hit him on the ears and head while punishing him for his behavior at school. A.S.G. stated that his father told him to tell anyone who asked that "he got his head stuck in a chair." Solomon also interviewed J.H., the son of Germscheid's girlfriend, S.H. When Solomon explained that she was a social worker, J.H. stated, "[I]t's not abuse, you know." Solomon had not mentioned abuse.

Solomon then interviewed Gernscheid. Gernscheid denied hitting A.S.G., but admitted to grabbing him by the face. Washington County Community Services referred the matter to the Bayport Police Department. On April 8, Sergeant Jay Jackson interviewed A.S.G. Sergeant Jackson noticed “significant bruising” on A.S.G.’s ears and that A.S.G.’s demeanor changed when asked about the bruises. Sergeant Jackson interviewed Gernscheid later that day. Gernscheid “made a statement that he did not slap [A.S.G.] multiple times.” When asked if he had slapped him once, Gernscheid responded that “he never had any intention of hurting his child.” Gernscheid admitted that it was possible that he had used more force than he thought when disciplining his son. He indicated that, while disciplining A.S.G., he “reached out and grabbed ahold of [A.S.G.’s] head and tilted it up so [A.S.G.] would look at him.”

Respondent State of Minnesota charged Gernscheid with one count of malicious punishment of a child and one count of misdemeanor domestic assault. On September 18, 2017, the district court held a motion hearing. The district court determined that A.S.G. was not competent to testify at trial. Following this determination, the prosecutor conceded that A.S.G.’s statement to Sergeant Jackson was inadmissible as evidence. But he argued that A.S.G.’s out-of-court statements to Terpstra and Solomon should be admitted because they were not testimonial, and therefore admission would not violate the Confrontation Clause. In addition, the prosecutor argued that the out-of-court statements were otherwise admissible under Minn. R. Evid. 807.

Gernscheid objected to the admission of the statements, arguing that they were testimonial in nature and did not contain sufficient indicia of reliability because they were

inconsistent. The district court ruled that the statements were admissible under rule 807. Germscheid then moved to admit evidence of A.S.G.'s past conduct that he argued tended to show that he was dishonest, including school behavioral records showing that he fought with other children, a 911 call in which A.S.G. reported that he was witnessing a domestic dispute between Germscheid and S.H., and an instance in which A.S.G. reported abuse by S.H. The district court ruled that the evidence was inadmissible.

Following a two-day trial, the jury found Germscheid guilty of malicious punishment of a child but acquitted him of domestic assault. The district court sentenced Germscheid to 365 days in jail, stayed 363 days of the sentence, and gave him credit for two days of time served. This appeal follows.

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.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The appellant bears the burden of establishing that the district court abused its discretion and that he was thereby prejudiced. *Id.*

Germscheid argues that the district court abused its discretion by admitting A.S.G.'s out-of-court statement to Solomon under rule 807 after A.S.G. was found not competent to testify. The residual exception to the hearsay rule allows admission of statements not falling under one of the accepted hearsay exceptions that (1) have “equivalent circumstantial guarantees of trustworthiness”; (2) are evidence of a material fact, (3) are more probative on that point than any other evidence that is attainable by reasonable

methods, and (4) serve the interests of justice and the general purpose of the rules of evidence. Minn. R. Evid. 807. “The court should make findings explicitly on the record unless there is a waiver, . . . or the basis of the ruling is obvious.” *State v. DeRosier*, 695 N.W.2d 97, 105 (Minn. 2005) (quotation omitted). Courts examine the totality of the circumstances in determining if the statements have a sufficient guarantee of trustworthiness. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007).

Germerscheid concedes that the statement constituted evidence of a material fact and was more probative on the point for which it was offered than other evidence that could have been obtained through reasonable methods. But he argues that the district court failed to make an explicit finding on the trustworthiness of the statement and that therefore admission of the statement did not serve the interests of justice. In determining that the statement was admissible, the district court stated:

In my view, the primary purpose of both Ms. Terpstra and Ms. Solomon was not prosecution, and I notice a variety of things.

First of all, that when asked about this incident, in what is apparent to me is a non-leading manner in both of these circumstances, the first thing that is reported is that [A.S.G.] said was that if anyone asked he was to say that his head got caught in a chair.

That’s significant to me, because when asked further about his ears, he did talk about the incident in a different manner. I view these statements to be material, to be probative, and more probative than other available evidence or information. I do view [A.S.G.’s] statements to be spontaneous within the meaning of the *Ahmed* case anyway
....

So that due to the spontaneity, the original purpose of the interviews, the probative value, and the interests of justice, I am going to allow that information to come in in a substantive manner.

Germerscheid argues that the district court focused solely on whether A.S.G.'s statement was spontaneous. The district court did determine that A.S.G.'s statement was spontaneous within the meaning of *State v. Ahmed*. 782 N.W.2d 253, 260 (Minn. App. 2010). But the district court's ruling on the statement's admissibility went beyond a spontaneity assessment.

In *Ahmed*, this court observed a variety of circumstances that are relevant in child-abuse cases. *Id.* The factors 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.

Id.

The district court's analysis reflects consideration of the appropriate factors. The district court observed that it was "apparent" that the statements were in response to non-leading questions. The district court also stated that it was "significant" that, in both statements, A.S.G. first reported that he was instructed to say that his head got caught in a chair if he was asked about the bruises. Thus, A.S.G. consistently stated that he was provided with an answer for questions about the bruises.

The district court made findings as to which factors it found persuasive that are relevant to determining trustworthiness. On this record, we conclude that the district court properly exercised its discretion in admitting A.S.G.’s statement under rule 807.

II.

Both the United States and Minnesota Constitutions guarantee a defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to confrontation is violated if testimonial hearsay statements are admitted into evidence, unless the declarant is unavailable and the defendant has had a prior chance to cross-examine the declarant. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). We review de novo a claim that the admission of evidence violated a defendant’s Sixth Amendment right to confrontation. *Id.* The state bears the burden to establish that the challenged statements are not testimonial. *Id.*

Germerscheid contends that the admission of A.S.G.’s out-of-court statement to Solomon violated his rights under the Confrontation Clause. Germerscheid did not have the prior chance to cross-examine A.S.G. He argues that the statement is therefore inadmissible because it is testimonial in nature. In *Crawford*, the Supreme Court 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, 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).

The state argues that this case is analogous to *Clark*. In *Clark*, a preschool teacher noticed that a three-year-old child had several injuries. *Id.* at 2178. When she asked the child who had caused the injuries, the child indicated that Clark was responsible. *Id.* The teacher reported the abuse to a child-abuse hotline, and Clark was later prosecuted. *Id.* The child was found not competent to testify, but his statements were admitted as evidence. *Id.* The Supreme Court of Ohio determined that the admission of the statements violated the Confrontation Clause, but the Supreme Court reversed. *Id.* at 2177. In determining that the statements were nontestimonial, the Supreme Court observed that there was “no indication that the primary purpose of the conversation was to gather evidence for Clark’s prosecution.” *Id.* at 2181. Rather, the primary purpose was to protect the child. *Id.* The Supreme Court noted that the statements “occurred in the context of an ongoing emergency involving suspected child abuse” and that the child’s young age made it unlikely that he “would intend his statements to be a substitute for trial testimony.” *Id.* at 2181-82. Finally, the Supreme Court observed that the questioning took place in the informal setting of the lunchroom and classroom rather than the formal setting of a police station. *Id.* at 2181.

The state asserts that the facts of this case are sufficiently similar to *Clark* to support the determination that A.S.G.’s statement was nontestimonial in nature. Like the child in *Clark*, A.S.G. was interviewed at his elementary school, rather than a police station. There is nothing in the record to suggest that A.S.G. believed the statements would be used to prosecute his father or in lieu of trial testimony. Solomon testified that when interviewing A.S.G. she used a technique of questioning that was designed to avoid leading A.S.G., but rather encourage him to tell the story as best he could. She used non-leading, open-ended

questions, rather than questions directed at Germscheid specifically. Her questions were therefore not designed to gather information about Germscheid, but rather encourage A.S.G. to explain how he got the bruises. And as the state notes, Solomon was required to interview A.S.G. and Germscheid under Minn. Stat. § 626.556, subd. 10(j) (2018), to “ensure the immediate safety of the child.” The primary purpose of the interview was therefore not to gather evidence to prosecute Germscheid.

Germscheid cites to *Bobadilla v. Carlson*, to support his argument that A.S.G.’s arguments were testimonial in nature. 575 F.3d. 785 (8th Cir. 2009). In *Bobadilla*, the Eighth Circuit determined that statements made by a child to a county social worker were testimonial and could not be admitted without violating the Confrontation Clause. *Id.* at 793. Germscheid argues that, as in *Bobadilla*, A.S.G.’s statements were made to a county social worker, rather than a teacher, and that the interview was not conducted on the same day the report was made. But in *Bobadilla*, the county worker did not conduct the interview until five days after the report was made and did so only at the request of a police officer. *Id.* at 787. The *Bobadilla* interview was conducted at the police station, and the officer sat across from the child during the interview. *Id.* at 788. Here, the interview was conducted at A.S.G.’s school, without any police officers present. A.S.G. therefore had no reason to suspect that law enforcement may become involved. And Solomon conducted the interview the morning after she received the report and without being requested to do so by law enforcement.

On this record, the district court did not err in determining that A.S.G.’s statements to Solomon were nontestimonial in nature. The primary purpose of the interview was to

address concerns of abuse, rather than to gather information to be used in prosecuting Gernscheid. Accordingly, we conclude that admission of the statements did not violate Gernscheid's rights under the Confrontation Clause.

III.

A criminal defendant has a constitutional right to “a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). That right encompasses, among other things, “the right to present the defendant’s version of the facts . . . to the jury so it may decide where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923 (1967). But in presenting a defense, the defendant “must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). Evidentiary rulings will not be reversed absent a clear abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997).

Gernscheid argues that several of the district court’s evidentiary rulings denied him the opportunity to present a complete defense. During the pretrial motion hearing, Gernscheid sought to admit evidence of A.S.G.’s school behavioral records, evidence that A.S.G. had previously made a 911 call falsely alleging that a domestic disturbance was occurring, and evidence that the day following the 911 call A.S.G. falsely reported abuse by S.H. Gernscheid also argues that the district court abused its discretion in allowing Solomon to testify that J.H. stated “[I]t’s not abuse” when he was interviewed by Solomon. We address each argument in turn.

At the motion hearing, Gernscheid sought to admit 177 pages of documents that contain various reports and records from A.S.G.'s kindergarten, first-grade, second-grade, and third-grade school years. The reports range in date from 2013 until 2017. Gernscheid argued that the school records were relevant because they demonstrated that there were several instances of A.S.G. "not only having trouble concentrating, having trouble not listening, and being disrespectful to teachers, but also being physical with other students." He argued that A.S.G.'s prior instances of fighting with other students supported his assertion that A.S.G.'s bruises might have resulted from a fight with another student and that A.S.G. would be motivated to lie about it to avoid further punishment.

The district court determined that the school records were "not probative enough or relevant enough" to be admitted. But the district court indicated that it would be willing to reconsider the ruling if additional evidence suggested that the reports were relevant based on the timing of when they were made. No additional evidence was presented to support admission of the reports. Additionally, Terpstra testified that she would have typically been made aware if A.S.G. had been in a fight, and there were no reports that he had been involved in a fight on the day in question. Terpstra testified extensively about A.S.G.'s behavioral issues in school and the various methods that the school had tried to address the behavior. Thus, there was testimony about A.S.G.'s behavioral issues at school.

On this record, we conclude that the district court properly exercised its discretion in determining that the school reports were inadmissible. The district court provided Gernscheid with the opportunity to show why the reports were relevant, but he failed to present evidence linking the reports with his argument that A.S.G. may have been in a fight

with another student. Indeed, the evidence presented suggested that he had not been in a fight during the relevant time frame.

Germerscheid next argues that the district court abused its discretion by ruling that he could not present evidence that, on May 14, 2017, A.S.G. called 911 and falsely reported there was a domestic disturbance occurring between Germerscheid and S.H. and that the following day A.S.G. reported to his school that “he felt there was abuse going on at the home, and said that [S.H.] pulled him out of the bathtub, and it hurt and [he] felt fearful.” Germerscheid argues that these incidents constitute prior false accusations and should have been admissible to impeach the credibility of A.S.G.’s statements and show his propensity for dishonesty.

A defendant may be entitled to present evidence of a victim’s prior false accusation. *State v. Goldstein*, 505 N.W.2d 332, 340 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). Before such evidence may be admitted, the district court “must first make a threshold determination outside the presence of the jury that a reasonable probability of falsity exists.” *Id.* The district court determined that Germerscheid had not made a threshold showing that the reports were false based on “both corroborative evidence and other expected testimony that I am expecting to receive.”

Germerscheid argues that the district court abused its discretion in determining that he had not made the threshold showing that a reasonable probability of falsity exists. To support his assertion that the 911 call and subsequent report of abuse were false, he sought to admit the testimony of K.L., who had been babysitting A.S.G. on the night that he made the 911 call. Germerscheid contends that A.S.G. called 911 to report that he and S.H. were

fighting and that he felt fearful, which A.S.G. would have no way of knowing because he was not at home at the time he made the call. He also alleged that A.S.G. had reported to school officials that S.H. hurt him when she took him out of the bathtub, even though she had not bathed him the night before the report.

The state argued that these statements were general allegations of abuse that were not specific to the time that they were made, and the district court agreed. The district court stated that, after conducting a balancing test, it had determined that Germscheid had not demonstrated a reasonable probability of falsehood because it anticipated that there would be trial evidence that corroborated A.S.G.'s allegations of abuse. Accordingly, the district court treated the statements as general reports of abuse and determined that evidence would support the allegations. The record supports this determination. The statements are consistent with A.S.G.'s report of discipline by Germscheid, and Germscheid himself admitted to grabbing A.S.G.'s head and that it was possible that he had used more force than he had intended to when disciplining A.S.G. The district court therefore did not abuse its discretion in determining that the evidence was inadmissible.

Finally, Germscheid argues that the district court abused its discretion in permitting Solomon to testify that J.H. stated "[I]t's not abuse" during his interview with Solomon. Germscheid argues that the statement constitutes hearsay and therefore was inadmissible. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The state argues that this statement is not hearsay because it was not offered to prove the truth of the matter asserted. We agree. The statement was not offered

to prove that there was no abuse. Rather, the statement was admitted to support the state's assertion that Gernscheid had coached A.S.G. and J.H. how to respond to questions about abuse. Accordingly, the district court properly exercised its discretion in admitting the statement.

Affirmed.