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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1180**

State of Minnesota,
Respondent,

vs.

Rene Mercedes Rivas-Hernandez,
Appellant.

**Filed June 17, 2019
Affirmed in part, reversed in part, and remanded
Reyes, Judge**

Dakota County District Court
File No. 19HA-CR-17-1860

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

In this direct appeal from final judgments of conviction of and sentence for first-degree criminal sexual conduct, appellant argues that (1) the district court abused its

discretion by admitting the alleged victim's inconsistent recorded interview as a prior consistent statement; (2) the district court abused its discretion by admitting expert testimony that did not assist the jury and impermissibly bolstered the alleged victim's credibility; and (3) the warrant of commitment must be corrected to reflect that the district court only adjudicated one count of first-degree criminal sexual conduct. We affirm in part, reverse in part, and remand.

FACTS

In May 2014, 22-year-old A.H.-C., her 11-year-old cousin, N.P.R., and N.P.R.'s mother went to the Burnsville Police Department. A.H.-C. told the police that, approximately one month earlier, she walked into the bedroom of her father, appellant Rene Rivas-Hernandez, and found him kneeling on the ground in front of N.P.R., appellant's niece, who was sitting on appellant's bed wearing no pants. A.H.-C. told the police that she "freaked out" and took N.P.R. out of the room. A.H.-C. said that she asked N.P.R. if appellant had inappropriately touched her, but initially N.P.R. would not tell her anything. A.H.-C. stated that N.P.R. eventually disclosed that appellant had touched her inappropriately. N.P.R. confirmed to police that appellant had penetrated her vagina with his penis and fingers. A detective tried to interview N.P.R. in a forensic interview room, but N.P.R. did not disclose anything. Because N.P.R. refused to talk about the incident, law enforcement placed her case on inactive status.

In January 2017, N.P.R. and her mother returned to the Burnsville Police Department. N.P.R. did not feel comfortable speaking with the male officer who conducted the interview but indicated, through pointing, that appellant touched her vagina. In March

2017, Detective Carpenter, a female detective, visited N.P.R.'s home to conduct an interview. N.P.R. told Detective Carpenter details about appellant's abuse, including one incident when appellant came into N.P.R.'s cousin's bedroom in the morning and touched N.P.R.'s legs while her cousin slept beside her. N.P.R. told Detective Carpenter that she decided to report the incident now because doing so might help her brother, who is in jail, to "get [] a visa or something."¹

The state charged appellant with first-degree criminal sexual conduct (penetration), in violation of Minn. Stat. § 609.342, subd. 1(a) (2016) (count I); first-degree criminal sexual conduct (contact, victim under 13), in violation of Minn. Stat. § 609.342, subd. 1(a) (2016) (count II), and first-degree criminal sexual conduct (penetration, victim under 16, significant relationship, acts committed over an extended period of time), in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2016) (count III). The state noticed its intent to call licensed psychologist Mindy Mitnick as an expert witness to testify regarding the behavior of a child victim of sexual abuse. Appellant moved to exclude Mitnick's testimony, arguing that the jury did not need it. The district court permitted Mitnick to testify.

At trial, N.P.R. testified that appellant began touching her at the age of seven. Since then, appellant had touched the inside and outside of her vagina with his hand and penis over ten times, but she would try to push him away. Appellant touched his mouth to her vagina and he used a towel or napkin to wipe off his body. She testified that the touching sometimes happened in a car or in appellant's bedroom. After her testimony, the state

¹ An immigration attorney testified at trial that the U-Visa grants nonimmigrant status to victims of criminal sexual conduct, as well as the victim's immediate family members.

sought to introduce a recording of N.P.R.’s interview with Detective Carpenter as a prior consistent statement. Appellant objected, arguing that N.P.R.’s statements in the recording were inconsistent with her trial testimony. The district court overruled the objection and played the recording for the jury. Before the close of evidence, the district court permitted the state to amend the complaint to add a lesser-included count of second-degree criminal sexual conduct (significant relationship, multiple acts), in violation of Minn. Stat. § 609.343.1(h)(iii) (2016) (count IV). The jury found appellant guilty on all four counts. The district court sentenced appellant to 144 months in prison on count I. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by admitting N.P.R.’s recorded interview with Detective Carpenter as a prior consistent statement.

Appellant argues that the district court abused its discretion by admitting N.P.R.’s recorded interview with Detective Carpenter as a prior consistent statement because it contradicted N.P.R.’s trial testimony in several ways, including discrepancies concerning the “penetration element of several of the charges.” We disagree.

We review a district court’s evidentiary ruling for an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). Generally, out-of-court statements offered to prove the truth of the matter asserted are considered hearsay and are not admissible. Minn. R. Evid. 802. But a prior statement by a witness is not hearsay if (1) the witness testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is helpful to the jury in evaluating the credibility of the witness; and (3) the statement is

consistent with the witness's testimony. Minn. R. Evid. 801(d)(1)(B); *see also State v. Nunn*, 561 N.W.2d 902, 908–09 (Minn. 1997). “The trial testimony and the prior statement need not be verbatim.” *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000); *see also In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998) (videotaped statement that was “reasonably consistent” with witness's trial testimony admissible under Rule 801(d)(1)(B)).

Appellant challenges only the third factor. Here, the district court compared N.P.R.'s recorded interview to her trial testimony and found them to be consistent. Appellant argues that N.P.R.'s recorded interview is inconsistent with her trial testimony in three ways: First, appellant contends that N.P.R. testified at trial that appellant touched her on the outside and inside of her vagina but in the recorded interview, “N.P.R. said appellant's hand never went inside her body.” The record does not support appellant's argument. When Detective Carpenter asked N.P.R. whether appellant touched the inside or outside of her body, N.P.R. responded “both.” Detective Carpenter then asked N.P.R. whether appellant put his hands inside of her body, and she said “yeah.”

Second, appellant contends that the information N.P.R. provided in the recorded interview “amounted to a different, less-serious offense than those charged in counts I through III,” because N.P.R. told Detective Carpenter that appellant “tried to penetrate her, but she would not let him.” In essence, appellant argues that N.P.R.'s statements in the recorded interview disprove the penetration element of his offenses. The statute under which the state charged appellant defines “sexual penetration” as “any intrusion *however slight* into the genital or anal openings.” Minn. Stat. § 609.341, subd. 12(2) (2016)

(emphasis added). In the recorded interview, N.P.R. told Detective Carpenter that appellant's penis touched the inside of her body "a lot of times" but that he would try and "I would just not let him." Later in the interview, N.P.R. told Detective Carpenter that appellant's penis went "sort of" inside of her body for a "short time," and that "he tried" but "I would, like tell him not to." This is "reasonably consistent" with N.P.R.'s trial testimony, *K.A.S.*, 585 N.W.2d at 76:

Q: I'm going to ask you a different way, okay? Did [appellant] put his penis in your vagina?

...

A: He would just put the tip, that is pretty much it. I would push him away.

Q: [N.P.R.], did you say that he would put it in a little bit?

A: Yes.

N.P.R.'s trial testimony and recorded interview indicate slight penetration by appellant, which meets the penetration element of the statute.

Third, appellant contends that N.P.R.'s recorded interview contains additional assertions that she did not testify to at trial, specifically referencing the alleged incident that occurred in N.P.R.'s cousin's bedroom. Minor inconsistencies between a victim's testimony and her previous statements are not grounds for reversal. *State v. Beard*, 380 N.W.2d 537, 541 (Minn. App. 1986), *review denied* (Minn. Mar. 3, 1986). In *Bakken*, this court held that inconsistencies may become "significant inconsistent statements," and fail to satisfy the requirement of consistency under rule 801(d)(1)(B), when they directly affect the elements of the criminal charge. 604 N.W.2d at 110. Here, although N.P.R.'s testimony that appellant would enter her cousin's bedroom and touch her legs is an

additional assertion missing from her trial testimony, it is a minor inconsistency because it does not directly affect the elements of the criminal charge. *Compare State v. Garden*, 404 N.W.2d 912, 914-16 (Minn. App. 1987), *review denied* (Minn. June 25, 1987) (holding that when victim's trial testimony contained more detail than pretrial testimony, expert witness testimony helpful in providing context).

Even if the jury relied upon N.P.R.'s allegation of the incident in her cousin's bedroom, it did not substantially influence the jury to convict appellant. *State v. Brown*, 455 N.W.2d 65, 69 (Minn. App. 1990), *review denied* (Minn. July 6, 1990). The jury heard, among many other things, live testimony from N.P.R., eyewitness testimony from A.H.-C., and expert testimony from Mitnick, as discussed below. Weighing a witness's credibility is for the jury, not a reviewing court. *State v. Daniels*, 361 N.W.2d 819, 826 (Minn. 1985). The record contained sufficient evidence for the jury to independently determine N.P.R.'s credibility. The district court did not abuse its discretion by admitting N.P.R.'s recorded interview as a prior consistent statement.

II. The district court did not abuse its discretion by admitting Mitnick's expert testimony.

Appellant argues that the district court abused its discretion by permitting Mitnick to testify "to a wide arrange [sic] of topics concerning child sexual abuse," because "the topics Mitnick testified about did not require specialized understanding" and the testimony "had the effect of bolstering N.P.R.'s credibility by casting her questionable behavior as legitimate and scientific." We disagree.

We review a district court's decision to admit expert testimony for an abuse of discretion. *State v. Hall*, 406 N.W.2d 503, 505 (Minn. 1987). "Reversal is warranted only when the error substantially influences the jury's decision." *State v. Chomnarith*, 654 N.W.2d 660, 665 (Minn. 2003) (quotation omitted). Expert testimony on a non-scientific subject is admissible if (1) the witness is qualified as an expert; (2) the opinion has foundational reliability; and (3) the testimony is helpful to the jury. *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011). Here, appellant challenges only the third prong.

Expert testimony is helpful if the opinion is outside the knowledge and experience of a lay jury and the testimony adds "precision or depth to the jury's ability to reach conclusions." *Id.* (quotations omitted). The supreme court has held that the nature of child sexual abuse places lay jurors at a disadvantage, *State v. Meyers*, 359 N.W.2d 604, 606 (Minn. 1984), because a jury may not have the necessary background to assess the credibility of an adolescent victim of sexual abuse. *State v. Reyes*, 890 N.W.2d 406, 412 (Minn. App. 2017). As such, background information providing relevant insight into the complicated aspects of a child victim's conduct and demeanor may be helpful and appropriate in cases of child sexual abuse. *Id.*

The supreme court in *Hall* held that the district court properly admitted expert testimony concerning the behavioral characteristics commonly exhibited by sexually abused adolescents, specifically, delayed reporting and continued contact with the abuser. 406 N.W.2d at 504. Here, Mitnick's testimony consisted of these topics, as well as child victim-abuser relationship dynamics, and the various factors that might impact how a child victim discloses the abuse. This testimony assisted the jury in assessing N.P.R.'s

credibility and in reaching conclusions in light of N.P.R.'s delayed reporting and continued reluctance to disclose details of the abuse. Because the supreme court has held that background data on the various aspects of a child victim's behavior is helpful and appropriate, *Meyer*, 359 N.W.2d at 609, appellant's argument that the jury did not need this testimony to assist in its determinations lacks merit. The district court did not abuse its discretion by admitting Mitnick's testimony.

III. The warrant of commitment must be corrected for counts two through four.

Appellant argues, and respondent agrees, that the warrant of commitment incorrectly reflects a disposition of "conviction" for counts II through IV. We agree.

Even if the parties agree on an issue, it is the responsibility of appellate courts to decide cases in accordance with the law. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). If there is a conflict between an orally pronounced sentence and a warrant of commitment, the oral sentence controls. *State v. Staloch*, 643 N.W.2d 329, 331 (Minn. App. 2002). The district court has the ability to correct a clerical error² in the warrant of commitment at any time. Minn. R. Crim. P. 27.03, subd. 10.

Here, the district court orally pronounced a sentence that "no adjudication would be entered for counts II-IV," only for count I. This controls over the warrant of commitment which reflects that adjudications were entered for all four counts, and this court must correct this error. We reverse to vacate appellant's convictions for counts II through IV

² A clerical error is an error that "cannot reasonably be attributed to the exercise of judicial consideration or discretion." *State v. Pflepsen*, 590 N.W.2d 759, 768 n.4 (Minn. 1999) (quotation omitted).

and remand for the formal adjudication to reflect a disposition of no-adjudication-lesser-included offense for counts II through IV. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984).

Affirmed in part, reversed in part, and remanded.