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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1966**

State of Minnesota,
Respondent,

vs.

Hector Garcia Garcia,
Appellant.

**Filed November 18, 2019
Affirmed
Florey, Judge**

Ramsey County District Court
File No. 62-CR-17-4156

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and
Peterson, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

FLOREY, Judge

In this direct appeal from his second-degree criminal-sexual-conduct conviction, appellant alleges that two of the district court's evidentiary rulings were erroneous and require reversal. First, he argues that the district court erred by permitting the state to play a video recording of the victim's interview to the jury. Second, appellant contends that the district court abused its discretion by allowing, as relationship evidence, statements made by the victim's sister alleging criminal sexual conduct committed against herself. We affirm.

FACTS

In the spring of 2017, E.B.P., who was approximately eight years old at the time, reported to her school teacher that her adult cousin, Appellant Hector Garcia Garcia, touched her inappropriately. Her school forwarded the report to law enforcement, and Detective Mollner was assigned to the case.

As part of his investigation, Mollner called C.G.P., E.B.P.'s older sister, to ask if she had witnessed the incident involving E.B.P. C.G.P. told Mollner that, while she had not witnessed the incident, she was "not surprised" because appellant had also touched her inappropriately in the past. C.G.P. was approximately sixteen years old when she spoke to Mollner and estimated herself to be around thirteen years old at the time of her encounter with appellant. Mollner arranged for C.G.P. and E.B.P. to meet with Nurse Kimberly Berg at the Midwest Children's Resource Center (MCRC). Berg conducted separate video-recorded interviews with E.B.P. and C.G.P.

C.G.P. told Berg that on the day of the incident, she and her younger brother were in appellant's room watching movies and playing video games, which was not unusual because their mothers were sisters and frequently visited each other. C.G.P. reported that, at some point, appellant touched her intimate parts over her clothes, got on top of her, and eventually touched his semen to her clothes.

In the case involving C.G.P., appellant was charged with second-degree criminal sexual conduct, whereby "the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual contact." Minn. Stat. § 609.343, subd. 1(g) (2012). The state also brought charges for E.B.P.'s allegations against appellant, but those were dismissed after he was convicted in C.G.P.'s case.

At trial, the state sought to admit, inter alia, (1) evidence pertaining to appellant's alleged criminal sexual conduct in E.B.P.'s case and (2) the video of C.G.P.'s interview with Berg at MCRC. Over appellant's objections, the district court allowed the first as relationship evidence and the second under both the medical-diagnosis exception to and the prior-consistent-statement exclusion from the rule against hearsay. The jury returned a verdict of guilty of criminal sexual conduct in the second-degree on two different theories of "sexual contact"—touching another's intimate parts and touching another with one's seminal fluid. On appeal, appellant alleges that the evidentiary rulings described above constitute reversible error. We affirm.

D E C I S I O N

"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). For an evidentiary ruling to be reversible, the appellant has the burden of establishing that the district court abused its discretion and that the error prejudiced the appellant’s substantial rights. *State v. Chavez-Nelson*, 882 N.W.2d 579, 588 (Minn. 2016).

I.

Over appellant’s hearsay objection, the district court permitted the state to play for the jury the entire video of C.G.P.’s interview at MCRC pursuant to two theories: the medical-diagnosis exception and the prior-consistent-statement exclusion. Minn. R. Evid. 803(4), 801(d)(1)(B). Appellant did not object to the medical-diagnosis exception, which would normally limit our review to one for plain error. *State v. Fraga*, 898 N.W.2d 263, 276-77 (Minn. 2017) (providing that the “plain-error rule provides a limited power to correct certain errors that a defendant has forfeited” by failing to timely object (internal quote omitted)). This is of no consequence here, however. Only one of these theories need be affirmed on appeal for the verdict to stand; and because we affirm the admission of MCRC video as a prior consistent statement, we need not reach the medical-diagnosis exception.¹

¹ Nevertheless, we note that the admissibility of this evidence pursuant to the medical-diagnosis exception is questionable at best. The district court focused on the fact that C.G.P. knew she was speaking to a medical professional, but this interview took place years after the encounter and only after Mollner arranged for it. It is not so clear to us that C.G.P. made the statements to Berg “for purposes of medical diagnosis or treatment.” Minn. R. Evid. 803(4). In any event, we need not and do not answer this question here. Even if the district court plainly erred in admitting the evidence under this theory, such would be a non-prejudicial error because the same evidence was properly admitted as a prior consistent statement. See *State v. Kraushaar*, 470 N.W.2d 509, 516-17 (Minn. 1991) (reversing and reinstating judgment of conviction because any error the district court made was non-prejudicial).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible. Minn. R. Evid. 801, 802. However, a prior out-of-court statement is not considered hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility.” Rule 801(d)(1)(B). Therefore, in deciding whether to admit a prior statement under rule 801(d)(1)(B), the district court must consider (1) whether the witness’s credibility has been challenged; (2) whether the prior statement would “bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged;” and (3) whether the prior statement and trial testimony are consistent. *State v. Fields*, 679 N.W.2d 341, 347-48 (Minn. 2004) (internal quotation omitted). Trial testimony and prior statements need not be verbatim to be considered consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Rather, the prior statements must be “reasonably consistent” with the witness’s trial testimony. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). However, less-than-verbatim prior statements that “directly affect the elements of the criminal charge” are considered inconsistent and are not admissible as substantive evidence. *Bakken*, 604 N.W.2d at 110.

Here, the declarant is C.G.P. Appellant does not challenge that she testified at trial, was subject to cross-examination, that her credibility was challenged, nor that the MCRC interview video would be helpful in evaluating her credibility. He argues only that the statements C.G.P. made during the MCRC interview were not sufficiently consistent with

her trial testimony to be properly admitted under rule 801(d)(1)(B). Specifically, appellant points to the following inconsistencies:

- (1) At trial, C.G.P. testified that she was lying in appellant's bed during the encounter. At MCRC, she said it happened "on the floor [because] at the time he didn't have a bed."
- (2) At trial, C.G.P. testified that appellant only touched her breasts over her clothes. At MCRC, she said appellant touched her breasts, buttocks, and vaginal area over her clothes.
- (3) At trial, C.G.P. testified that appellant unzipped his pants. At MCRC, she said she thought appellant had worn basketball shorts during the encounter.
- (4) At trial, C.G.P. testified that appellant did not say anything to her. At MCRC, she reported that appellant said he was "gonna cum all over" her.

These are not the only discrepancies between C.G.P.'s trial testimony and interview answers, but they are representative. Respondent does not dispute the existence of any particular inconsistencies, but argues that they are not so severe as to render C.G.P.'s MCRC interview inadmissible under this rule, and that to the extent that the statements are less than identical, the decision to admit them was properly within the district court's discretion.

In overruling appellant's objection to the admission of the MCRC video under rule 801(d)(1)(B), the district court reasoned that C.G.P.'s statements at MCRC were only more specific and elaborate than her trial testimony, not contradictory. We agree.

While the prior statement was not identical to the trial testimony, any discrepancies between the two were merely of superfluous details or background facts. The facts alleged

in either the in-court testimony or MCRC interview alone, if believed, would support a verdict of guilty. C.G.P. testified at trial and stated in the MCRC interview that appellant was her first cousin; that she was under the age of 16 at the time of the encounter; and that appellant intentionally touched the clothing over her intimate body parts with his hand and touched seminal fluid to the clothing covering her person. This court has affirmed evidentiary rulings in similar circumstances. *E.g.*, *State v. Zulu*, 706 N.W.2d 919 (Minn. App. 2005) (affirming district court because discrepancies between trial testimony and prior interview were not substantial); *In re K.A.S.*, 585 N.W.2d (holding prior videotaped interview admissible despite it containing more detail and more facts than the minor’s trial testimony).

Further, C.G.P. was subject to cross-examination, so the defense counsel had the opportunity to mitigate any prejudice by arguing that the discrepancies *negatively* affected her credibility. In fact, defense counsel did—at length. The majority of the defense’s closing argument was dedicated to discrediting C.G.P.’s testimony precisely because of these discrepancies. See *K.A.S.*, 585 N.W.2d at 76 (considering the question of “impermissibly prejudicial” to be a close call, but affirming nonetheless in part because the declarant was subject to cross-examination). The requirements of rule 801(d)(1)(B) have been met here, and the district court did not err by admitting the video recording of C.G.P.’s interview at MCRC.

Appellant also alleges that the district court erred because it did not analyze the individual statements in the interview to determine consistency. We disagree. In allowing the state to admit the video, the district court explained that it “review[ed] the transcripts

of the interviews” and “took very detailed notes during [C.G.P.’s] testimony.” The authority appellant cites—*State v. Bakken*—does not require that the district court compare every sentence on and for the record. 604 N.W.2d; *see Zulu*, 706 N.W.2d at 924 (“The district court did not specifically address any of the alleged inconsistencies but found the interview ‘substantially consistent’ with [the child’s] trial testimony. We agree.”). Here, the district court found the statements reasonably consistent, and our review does not indicate that it was an abuse of discretion to do so. *See generally Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (“The function of the court of appeals is limited to identifying errors and then correcting them.”).

II.

Appellant also argues that the district court erred by allowing, as relationship evidence under Minn. Stat. § 634.20 (2014), testimony on E.B.P.’s allegations against him. We disagree.

A district court may admit evidence of domestic conduct by a defendant unless the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice” to the defendant, “or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Minn. Stat. § 634.20. The statute requires that the alleged act constitutes “domestic conduct” and that such conduct is alleged to have occurred against a family or household member. *Id.* Relationship evidence is permitted to illuminate the relationship and history between the accused and the alleged victim and contextualize the acts for which the defendant is charged. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). Unlike *Spreigl* or character evidence, evidence offered under

section 634.20 need only be more probative than it is prejudicial. *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn. App. 2008), *review denied* (Minn. Oct. 29, 2008). To be entitled to relief, appellant must show both that the district court abused its discretion and that he was prejudiced as a result. *Id.*

E.B.P. testified at trial that appellant touched her legs and that she was scared, and she described where it happened as well as other minor circumstances surrounding the encounter. Mollner was permitted to testify that he came across the matter concerning C.G.P. because he was investigating a “familial sexual assault” based on E.B.P.’s report to her mother and teacher. Mollner also testified as to additional details that E.B.P. had reported earlier but did not testify to at trial; principally, that appellant also touched her stomach and chest under her shirt. Appellant does not challenge whether the testimony alleges “domestic conduct” against a family or household member. He argues only that the district court abused its discretion in finding that the probative value of the parts of Mollner’s testimony admitted as relationship evidence was not substantially outweighed by the risk of unfair prejudice.

In allowing this relationship evidence, the district court provided a reasonable analysis of the testimony’s conformity to the requirements of the statute; observed that the danger of unfair prejudice here is substantially less than that of evidence we have upheld admission of in prior cases; noted that any prejudice that remains can be mitigated by a cautionary instruction; and gave that instruction. Appellant has not met his burden of

showing that the district court abused its discretion, much less that he was prejudiced by what he contends was erroneous.

Affirmed.