STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0866

State of Minnesota,
Respondent,

vs.

Jacob Schoonover Collins,
Appellant.

Filed May 31, 2022
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Morrison County District Court
File No. 49-CR-19-679

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brian Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his convictions for first-degree and second-degree criminal sexual conduct, arguing that the district court erred by (1) admitting a forensic interview of the victim without an applicable exception to the hearsay rule, and (2) entering a

judgment of conviction for the included offense of second-degree criminal sexual conduct. We affirm the district court's decision to admit the victim's forensic interview at trial but reverse and remand for the district court to vacate appellant's conviction for the lesser-included offense of second-degree criminal sexual conduct.

FACTS

In May 2019, respondent State of Minnesota charged appellant Jacob Schoonover Collins with one count of first-degree criminal sexual conduct, alleging that Collins engaged in sexual contact with his five-year-old daughter, G.E. The state later amended the charges against Collins to include one count of second-degree criminal sexual conduct. The district court conducted a jury trial. The jury heard testimony from ten witnesses including then seven-year-old G.E., and a forensic interviewer employed by Midwest Children's Resource Center (MCRC). The witness list also included G.E.'s other family members, law enforcement, members of the Minnesota Bureau of Criminal Apprehension (BCA), and a child protection case manager.

The evidence established that on April 26, 2019, G.E. was at her family home with Collins, her biological mother, and her cousin. Cousin's grandmother, C.M., came to pick up cousin and saw G.E. and Collins alone in Collins's bedroom. Outside of Collins's presence, C.M. asked G.E. what she and Collins were doing alone in the bedroom. After speaking with G.E., C.M. drove to the police station to file a sexual assault report against Collins on behalf of G.E. G.E. then went to stay with other family members.

G.E.'s mother and C.M. brought G.E. to the Children's Hospital MCRC for a forensic interview. The interview was videotaped. The interviewer began by asking G.E.

if she knew why she came to MCRC. Although G.E. stated at first that she did not know why, G.E. then stated that "my daddy pulled his shorts down" and "takes his little thingy and he put it in there." G.E. told the interviewer that "little thingy" meant the place "that his pee comes out," that Collins asked her to drink his pee, and that he pulled his shorts down to reveal his "private" before taking off her clothes. G.E. told the interviewer that this happened only one time. When asked how her "private parts" felt when this happened to her, G.E. responded that "[i]t kinda hurted." The interviewer then conducted a physical examination which showed some redness and swabbed G.E.'s perineal and rectal areas. The interviewer sent the swabs to the BCA. The BCA examined the swabs and found no semen or seminal fluids but did obtain a partial Y-Chromosomal profile which could not exclude Collins or any of his paternally related relatives as the source of DNA.

At trial, the prosecution sought to introduce the recording of the forensic interview. The defense objected based on hearsay. After hearing arguments from both parties, the district court denied the objection and admitted the recording into evidence. Before playing the recording for the jury, the interviewer testified that she had been a pediatric nurse practitioner for almost five years, that she was certified in Child First training,[1] and that she had conducted around 50 forensic interviews by April 2019. She testified that she asks children open-ended questions to try and "elicit a narrative summary." She testified that

[1] According to the interviewer's testimony, Child First is a forensic interviewing method that teaches professionals how to interview children who may have experienced sexual or physical abuse. The training teaches interviewers to first build rapport with the child through sample questions and general conversation before asking the child open-ended questions, which allows the child to detail their story.

she does not make credibility determinations in her role but tries to get the child to say what happened in their own words. The interviewer testified that she first established a rapport with G.E. before asking her what happened. She then showed G.E. an anatomically correct diagram and asked her to label the diagram with the words she used for the various body parts. After laying foundation, the prosecution played the forensic interview for the jury.

The jury found Collins guilty of both counts: first-degree criminal sexual conduct and second-degree criminal sexual conduct. At sentencing, the district court entered a conviction on both counts.

This appeal follows.

DECISION

I. The district court did not abuse its discretion by admitting the video interview into evidence.

Collins argues that the district court abused its discretion by admitting G.E.'s recorded forensic interview because the interview constituted inadmissible hearsay. We review a district court's evidentiary rulings for an abuse of discretion. *State v. Nunn*, 561 N.W.2d 902, 906-07 (Minn. 1997). A district court abuses its discretion if its ruling is "based on an erroneous view of the law or is against logic and the facts in the record." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). On appeal, the defendant has the burden of proving both that the district court abused its discretion in admitting the evidence and that he was thereby prejudiced. *Nunn*, 561 N.W.2d at 907. "Reversal is warranted only when the error substantially influences the jury's decision." *Id.*

A. Minn. Stat. § 595.02, subd. 3

The district court found G.E.'s forensic interview to be admissible under Minn. Stat. § 595.02, subd. 3 (2020), which permits the admission of statements describing sexual conduct by children under the age of ten in certain circumstances. We analyze the admissibility of a child-victim's out-of-court statements about sexual abuse pursuant to this statute by applying the same analysis set forth in Minn. R. Evid. 807.[2] *State v. Hollander*, 590 N.W.2d 341, 346 (Minn. App. 1999). We need not rely on the statute if the evidence is admissible under Rule 807. *Id.* (quotation omitted). For that reason, we first consider whether the forensic interview was admissible as hearsay under Minn. R. Evid. 807.

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). "Hearsay is not admissible except as provided by [the rules of evidence] or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802. There are several exceptions to the rule against hearsay. Statements not covered under a specific hearsay-exception rule may still be admissible under the residual exception of rule 807. Statements that have "equivalent circumstantial guarantees of trustworthiness" to those admissible under the specific hearsay exceptions are not excluded by the hearsay rule if the district court determines that:

> (A) the statement is offered as evidence of a material fact;
> (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can

[2] *State v. Hollander* cites to Minn. R. Evid. 803(24). 590 N.W.2d at 346. But the substance of rule 803(24) was combined with Minn. R. Evid. 804(b)(5) to create Minn. R. Evid. 807 in the year 2006.

> procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Minn. R. Evid. 807.

In considering the trustworthiness of an out-of-court statement, this court focuses on the totality of the circumstances:

> These circumstances include, but are not limited to, whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate.

Hollander, 590 N.W.2d at 346 (quoting *State v. Larson*, 472 N.W.2d 120, 125 (Minn. 1991)). We may also consider "the mental state of the child at the time the statements were made and the consistent repetition of the child's statements during the same interview or conversation." *Id.* (quotation omitted).

The district court found that the forensic interview had these guarantees of reliability: the forensic interview occurred less than a day after the allegations, G.E. used anatomically correct diagrams to describe what Collins did to her, the interviewer asked nonleading open-ended questions, G.E. had a greater sexual knowledge than what would be expected of a typical five-year-old child, and G.E.'s statements were consistent throughout the forensic interview.

Collins argues that G.E.'s statements were not spontaneous because they were only made after C.M. questioned her. He also contends that any statements made during the interview are unreliable because G.E. had only a few hours of sleep before the interview

which affected her mental state. We disagree. The guarantees of reliability found by the district court satisfy the trustworthiness requirement of Minn. R. Evid. 807. After talking with C.M., G.E. spoke one-on-one with a nurse trained in child-forensic interview protocols. She asked G.E. nonleading questions to gather information and G.E. provided consistent statements throughout the interview. There is no evidence in the record to support Collins's assertion that her mental state was impaired. Thus, the district court did not abuse its discretion in admitting G.E.'s forensic interview into evidence. And because the interview is admissible under Rule 807, we need not decide whether the admission violated Minn. Stat. § 595.02, subd. 3. *See Hollander*, 590 N.W.2d 346-47.

B. Remaining evidentiary arguments

Collins also argues that G.E.'s statements were not admissible under any other hearsay rules and that the admission greatly prejudiced him. But Collins cannot meet his burden to show that the admission of this evidence was erroneous. As a result, we need not analyze the prejudice against him, if any. *See State v. Stone*, 784 N.W.2d 367, 370 (Minn. 2010) (determining that if a district court abuses its discretion in admitting evidence, the "evidentiary ruling will not be reversed unless the error substantially influenced the jury's verdict"). Because we conclude that the district court did not err in admitting the forensic interview under Minn. R. Evid. 807, we need not address Collins's remaining evidentiary arguments.

II. The district court erred by entering a conviction on both counts.

Collins next argues that the district court erred in entering a conviction for second-degree criminal sexual conduct, and the state concedes that this was error. "Upon

prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2020). An included offense under the statute includes a "lesser degree of the same crime." *Id.*

We conclude that the district court erred when it entered a conviction on both count one, first-degree criminal sexual conduct, and count two, second-degree criminal sexual conduct, because count two is a lesser degree charge of the same crime. Both charges arose out of the same behavioral incident against victim G.E. A person may only be convicted of one of the two criminal-sexual-conduct offenses if the offenses arise out of the same incident. *State v. Bowser*, 307 N.W.2d 778, 779 (Minn. 1981); *see also State v. Beard*, 380 N.W.2d 537, 542 (Minn. App. 1986) (applying this principal to vacate a conviction of criminal sexual conduct), *rev. denied* (Minn. Mar. 3, 1986). Thus, we remand to the district court to vacate Collins's conviction for criminal sexual conduct in the second degree.

Affirmed in part, reversed in part, and remanded.