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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0819**

State of Minnesota,
Respondent,

vs.

Kevin Joseph Hibbler,
Appellant.

**Filed June 26, 2023
Affirmed
Bratvold, Judge**

Anoka County District Court
File No. 02-CR-20-2211

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

Brad Johnson, Anoka County Attorney, Robert I. Yount, Assistant County Attorney,
Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting expert testimony about the typicality of and reasons why children delay reporting sexual abuse. Appellant contends

this testimony did not help the jury and amounted to vouching for the credibility of the victim. Appellant also argues the erroneous admission of this expert testimony substantially affected his rights. We conclude the district court did not abuse its discretion in admitting the challenged testimony. Thus, we affirm.

FACTS

These facts summarize the evidence received at the November 2021 jury trial. In March 2020, 12-year-old A.H. was living in an apartment in Coon Rapids with her father, mother, brother, sister, uncle, and appellant Kevin Joseph Hibbler, father's cousin. Hibbler goes by the nickname "Cisco." A.H. shared a bedroom with her brother.

On a night in March 2020, father, mother, and Hibbler were at the apartment drinking alcohol and "in the living room partying." A.H. was in her room "watching YouTube on [her] phone." A.H.'s brother and sister were in the room sleeping. As A.H. was lying in bed on her side, she felt someone "rubbing up and down" on her back and side. A.H. did not turn around to see who was touching her because she was "too scared." A.H. heard someone from the living room call, "Cisco," and the person in her room "got up and left."

Later, A.H. heard her door open and close. She felt someone touch and squeeze her side and butt. A hand then "went up to [her] boob area" under her clothes and was "squeezing." This went on for about two minutes. Mother walked in and asked the person what he was doing. The person responded that he was looking for his charger that A.H. had borrowed. The person left the room after getting his charger.

Later still, A.H. heard the door open again and “felt someone touching [her] again.” A.H. felt fingers trying to reach “in [her] shorts” and “under” her panties. A.H. next felt fingers first touching “the lips” of her vagina before being put “inside.” The person touching A.H. flipped her over so she was lying on her back, and then the person removed A.H.’s shorts and underwear. The person “tried to put his private part inside [A.H.’s]. He kept pushing and . . . it started hurting and [A.H.] started crying.” A.H. felt a bigger pinch “every time he tried to push his thing in.” A.H. could not see the person’s face until he put his face close to A.H. and “told [her] to be quiet.” At that point, A.H. recognized Hibbler. A.H. kept crying, and Hibbler “gave [A.H.] 20 bucks” and, a bit later, “another 20 bucks” before leaving the room. A.H. left the bedroom, looking for her mother or father, and returned to her room after finding her father asleep.

The next morning, A.H. wanted to tell her mother but “didn’t . . . because [she] was too scared.” A.H. later told her “auntie,” who is two years older than A.H., that she was “touched by Cisco.”¹ A.H. also told auntie she was “just kidding.” A.H. later testified that she said she was kidding because she “was too scared to tell someone.” A.H. stated that she did not want to tell her parents because she “knew that [her] dad would be very angry and [she] didn’t know what [her] dad was going to do” to Hibbler.

About “three or four weeks” later, on April 1, 2020, Hibbler was at a party at the apartment and A.H. “thought [a sexual contact] was going to happen again.” A.H. pulled mother aside and told mother that Hibbler had “touched” her. Mother encouraged A.H. to

¹ A.H.’s testimony did not state when the conversation with her aunt occurred.

tell father. A.H. told father that she “was touched by Cisco.” A.H. also told mother and father that Hibbler gave her money after touching her. Father confronted Hibbler, who denied touching A.H. and then left the apartment.

Later that night, A.H. told her grandmother what happened, and grandmother called the police. The next day, A.H. participated in a recorded forensic interview with a detective. A.H. described Hibbler touching her and trying to put his penis in her vagina.

On April 8, 2020, respondent State of Minnesota initiated a criminal complaint, amended November 13, 2020, charging Hibbler with three counts of criminal sexual conduct: sexual penetration of a victim under 13 by an actor more than 36 months older, under Minn. Stat. § 609.342, subd. 1(a) (Supp. 2019) (count one), and sexual contact with a victim under 13 by an actor more than 36 months older, in the first degree under Minn. Stat. § 609.342, subd. 1(a) (count two), and in the second degree under Minn. Stat. § 609.343, subd. 1(a) (Supp. 2019) (count three).

In a pretrial motion, the state asked the district court to allow the admission of expert testimony about children’s delayed reporting of sexual abuse. Hibbler opposed the motion and moved to exclude the evidence. Following a hearing and arguments on the motions, the district court allowed expert testimony on the “typicality” of delayed reporting of sexual abuse by child victims.

During trial, the state offered testimony from A.H., father, mother, grandmother, a neighbor, an apartment-complex caretaker, the interviewing detective, and the expert witness. The state also played for the jury a redacted version of A.H.’s recorded forensic interview. Hibbler testified in his own defense and denied any sexual contact. The jury

found Hibbler guilty of all three counts. The district court imposed a sentence of 144 months on count one. Hibbler appeals.

DECISION

Hibbler argues he is entitled to a new trial because the district court admitted, over his objection, expert testimony about the delayed reporting of sexual abuse by child victims. Although the district court limited the evidence to “typicality,” Hibbler still argues the evidence should have been excluded altogether.

An appellate court reviews “evidentiary rulings, including those related to the admissibility of expert testimony, for an abuse of discretion.” *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Garland*, 942 N.W.2d 732, 742 (Minn. 2020) (quoting *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017)). On appeal, Hibbler has the burden to show that the district court abused its discretion by admitting the challenged expert testimony and that the error led to prejudice. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

An expert may testify in the form of an opinion if their “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Minn. R. Evid. 702. Expert testimony is admissible under rule 702 if it meets four criteria: “(1) the witness is qualified as an expert; (2) the expert’s opinion has foundational reliability; (3) the expert testimony is helpful to the jury; and (4) if the testimony involves a novel scientific theory, it must satisfy the *Frye-Mack* standard.” *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011).

Hibbler contends that the challenged expert testimony at his trial failed the third criterion and did not help the jury because A.H.'s delayed reporting was "well within the jury's knowledge and understanding." Hibbler relies on caselaw establishing that "[e]xpert testimony is not helpful if the expert opinion is within the knowledge and experience of a lay jury and the testimony of the expert will not add precision or depth to the jury's ability to reach conclusions." *Id.* (quotations omitted).

The Minnesota Supreme Court's decision in *State v. Hall*, 406 N.W.2d 503 (Minn. 1987), offers guidance on this issue. There, the supreme court affirmed a conviction after it rejected a challenge to a district court's decision to admit expert testimony that described "characteristics commonly exhibited by sexually abused adolescents," including the expert's testimony that "a delay in reporting" often occurs because of "the victim's fear of being harmed." *Hall*, 406 N.W.2d at 504. The supreme court explained that it did "not intend to establish a categorical rule that expert testimony concerning all characteristics typically displayed by adolescent sexual assault victims is admissible." *Id.* at 505. It concluded, however, that "[t]he admissibility of expert testimony lies within the sound discretion of the trial court." *Id.*

Here, the challenged expert testimony is like that discussed in *Hall*. The expert in Hibbler's trial testified that "[c]hildren frequently, when they give their initial disclosure about abuse, may give limited or less than full facts." The expert also testified that a child victim's delayed disclosure of abuse is more common than an immediate report. The expert explained that a child may delay disclosure because the child is concerned about their own physical and emotional safety. And the expert opined that child victims may have a "level

of confusion” about “how [the report of abuse] is . . . going to affect maybe a non-offending parent.”

Hibbler argues that the challenged expert testimony is not helpful for three reasons, which we discuss in turn. First, Hibbler contends that the expert testimony was not helpful because A.H. was not a young child when she testified and her own testimony explained why she delayed reporting. This argument is unpersuasive. While a jury may be able to understand the reasons A.H. gave for her delay in reporting, most jurors do not understand the frequency of delay or the typicality of those reasons among child abuse victims. *See State. v. Myers*, 359 N.W.2d 604, 610 (Minn. 1984) (“Background data providing a relevant insight into the puzzling aspects of the child’s conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children . . .”).

The state argues that the challenged expert testimony “was helpful to understand A.H.’s conduct in the days and weeks” following Hibbler’s abuse. We agree with the state. Although the expert did not testify about A.H., the testimony illuminates A.H.’s behavior. For example, A.H. first reported the abuse to her “auntie” by saying that Hibbler touched her and then saying that she was “just kidding.” The challenged expert testimony explains that child abuse victims often give limited facts when they first report abuse.

Second, Hibbler contends that based on A.H.’s testimony, “the jury was quite capable of understanding why a child who was almost a teenager when the events occurred might be embarrassed or have concerns about talking to her parents about such a sensitive topic and why she might be concerned about the consequences of sharing such

information.” A.H. testified that she waited weeks before disclosing the sexual contact to her mother and worried about what her father would do if she told him about the sexual abuse. The challenged expert testimony discussed that child abuse victims often delay reporting abuse and worry about a parent’s response if the child reports abuse. We discern no abuse of discretion in admitting this evidence.

The state also notes that “[t]his is a curious argument because by asserting [the expert’s] testimony was not needed to understand the victim’s testimony, Hibbler is effectively conceding that A.H.’s testimony was so understandable and coherent that the jury could have convicted [Hibbler] without the expert testimony.” We agree that Hibbler’s argument, at best, would establish only harmless error. *See State v. Peltier*, 874 N.W.2d 792, 802 (Minn. 2016) (“Under the harmless-error standard, an appellant who alleges an error in the admission of evidence that does not implicate a constitutional right must prove that there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” (quotation omitted)).

Third, Hibbler argues that the expert testimony “unfairly influenced the jury’s determination of A.H.’s credibility.” We recognize that vouching testimony is inadmissible: “[O]ne witness may not vouch for or against the credibility of another witness.” *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (quotation omitted). Caselaw instructs, however, that an expert may opine about the common behaviors of child victims of sexual abuse without crossing the line into impermissible vouching. *See, e.g., id.* at 689-90 (“[T]he therapist’s statement in this case was a comment on the general characteristics of abused children and therefore not vouching.”). Here, the expert’s

testimony was limited to the “typicality” of delayed disclosure by child victims of abuse. The expert also testified that he did not “know any specifics about this case,” and he did not testify about A.H. We conclude that the expert did not impermissibly vouch for A.H.’s credibility.

Because the admission of expert testimony lies within the sound discretion of the district court and the challenged expert testimony helped the jury’s understanding of the evidence, the district court did not abuse its discretion by admitting the expert testimony. We need not consider Hibbler’s arguments about the prejudicial effect of admitting the testimony because we discern no abuse of the district court’s discretion. *See State v. DeShay*, 669 N.W.2d 878, 888 (Minn. 2003) (considering prejudice only after determining that expert testimony was inadmissible).

Affirmed.