

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1205**

State of Minnesota,
Respondent,

vs.

David Howard Kollars,
Appellant.

**Filed July 17, 2023
Affirmed
Slieter, Judge**

Washington County District Court
File No. 82-CR-20-3577

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

Kevin Magnuson, Washington County Attorney, Kayla K. Wengronowitz, Keshini M. Ratnayake, Assistant County Attorneys, Stillwater, Minnesota (for respondent)

Mark D. Nyvold, Fridley, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Segal, Chief Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges his conviction for first-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting into evidence the victim's forensic interview as a prior consistent statement. Appellant claims that the victim's

forensic interview was not consistent with her trial testimony because the victim ended her direct examination by denying the sexual assault occurred in the summer of 2019. Because the victim's trial testimony was reasonably consistent with her forensic interview, the district court acted within its discretion by admitting the forensic interview, and we affirm.

FACTS

Respondent State of Minnesota charged appellant David Howard Kollars with first-degree criminal sexual conduct involving a child under the age of 13 when the actor is more than 36 months older, in violation of Minn. Stat. § 609.342, subd. 1(a) (2018), and first-degree criminal sexual conduct involving a child under 16 years of age when the actor has a significant relationship to the victim, in violation of Minn. Stat. § 609.342, subd. 1(g) (2018). The case proceeded to trial in May 2022. This appeal arises out of Kollars' convictions following a jury's guilty verdict for sexually assaulting his granddaughter on or about June 1 and July 30, 2019. The following facts derive from Kollars' jury trial.

The victim was born in January 2009. Kollars is the victim's paternal grandfather. He and his wife were the victim's primary caregivers until she was four years old, and they had court-awarded visitation thereafter. Pursuant to the visitation order, the victim stayed with her grandparents for one month during the summer and every other Christmas.

In August 2020, the Cottage Grove Police Department received a report that Kollars had been sexually assaulting the victim "for several years during [her] visits to Minnesota." According to the report, the last occurrence was in June or July 2019. An officer referred the victim for a sexual assault examination and a forensic interview. The sexual assault

examination revealed a complete transection to the victim's hymen, which is indicative of child sexual abuse.

The jury heard testimony from several witnesses including the victim, the investigating officer, the nurse practitioner who conducted the victim's sexual assault examination, and the forensic interviewer. Following the victim's testimony, the state sought to introduce the victim's forensic interview as a prior consistent statement. The district court reviewed the forensic interview transcript to determine whether it was admissible as a prior consistent statement. The district court admitted part of the forensic interview over Kollars' objection and played the redacted recording for the jury.

Kollars moved for a judgment of acquittal following submission of the state's case, which the district court denied. The jury found Kollars guilty of both counts of first-degree criminal sexual conduct. The district court imposed a single sentence of 144 months' imprisonment with a ten-year conditional-release term. Kollars appeals.

DECISION

Kollars argues that the district court abused its discretion by admitting the victim's forensic interview as a prior consistent statement pursuant to Minnesota Rule of Evidence 801(d)(1)(B) and, without the victim's prior statement, there was insufficient evidence to sustain his conviction. *See State v. Slaughter*, 691 N.W.2d 70, 75 (Minn. 2005) (holding that denial of a motion to acquit is proper if "the state's evidence, when viewed in the light most favorable to the state, [is] sufficient to sustain a conviction").

Evidentiary rulings are 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). In general, “[a]ll relevant evidence is admissible.” Minn. R. Evid. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Minn. R. Evid. 401. “When the admissibility of evidence is challenged on appeal, [appellate courts] defer to the district court’s exercise of discretion in the conduct of the trial, and [appellate courts] will not lightly overturn a district court’s evidentiary ruling.” *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005).

The hearsay rule generally prohibits out-of-court statements from being admitted as substantive evidence. Minn. R. Evid. 802. A witness’ prior statement is not hearsay if “[t]he declarant testifies at the trial . . . 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 as a witness.” Minn. R. Evid. 801(d)(1). Before admitting a prior consistent statement into evidence, a district court must (1) make a threshold determination that the witness’ credibility has been challenged, (2) determine whether the prior statement would bolster the witness’ credibility, and (3) determine whether the witness’ prior statement and trial testimony are consistent with each other. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *rev. denied* (Minn. Feb. 24, 2000). The trial testimony “need not be verbatim” or exact in every detail, *id.*, as long as it is “reasonably consistent” with the prior statement, *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998).

Kollars does not dispute that the victim’s credibility had been challenged and that the statement bolstered her credibility. Rather, Kollars claims that the victim’s prior

statement and trial testimony were not consistent, as required by the third *Bakken* factor. *See Bakken*, 604 N.W.2d at 109. Kollars argues that the victim, “while still on direct examination, . . . repudiated her testimony that Kollars had sexually penetrated her” during the charged timeframe and, therefore, her prior statement was inconsistent with her testimony. Thus, Kollars argues, the district court’s decision to admit her prior statement was an abuse of discretion. We are not persuaded.

During direct examination, the victim testified that she was 13 years old at the time of trial and that, starting when she was three years old, Kollars “would touch [her] and he would do mean things to [her]” during visits. According to the victim, Kollars touched her “chest area, down in the pelvic region and [her] mouth” with his mouth and “down male part.” The victim stated that Kollars touched her breast area with his hands and “put his fingers inside of [her],” which she clarified meant that he put his fingers inside her vagina. The victim also testified that, on more than one occasion, Kollars had put his “man part,” meaning penis, “inside of [her],” meaning in her vagina. The court granted the prosecutor’s request for a recess after the victim described the foregoing incidents.

The victim was not asked when the incidents occurred before the recess. After the recess, the prosecutor asked the victim how long the incidents typically lasted and where they occurred. The victim indicated the incidents lasted “about 30 minutes to an hour” and usually occurred in her bedroom. The prosecutor then asked the victim if she remembered when the last incident occurred. The victim responded:

A: No, I do not.

Q: Okay. I could be a little bit more clear. Do you remember, like, what year was the last time?

A: Oh, yeah. 2019.

Q: 2019. Okay. And do you remember when in 2019 you had gone to their house?

A: Late June, early July.

Q: Okay. Of 2019?

A: I think it was late June, yeah.

....

Q: Okay. So, when you were there during the summer of 2019 did the touching happen?

A: Yes.

The prosecutor then returned to questioning the victim about other details related to the incidents. When asked to describe what she usually wore to bed when Kollars sexually penetrated her and how those incidents typically started, the victim indicated that she wore nightgowns to bed but she could not remember if Kollars had to do anything to the nightgown to touch her. The prosecutor asked the victim what it felt like when Kollars penetrated her. The victim said it felt “[d]isgusting” and “hurt.” The victim could not remember if Kollars told her not to tell anyone about the incidents and, when asked why she waited to report the incidents, she said that she “thought it was normal.”

This next portion of the victim’s testimony is what Kollars refers to as a repudiation of her earlier testimony. The prosecutor returned to the timing of the incidents, asking:

Q: [Victim], you mentioned that the last time that you were at your grandparents’ home in 2019 that your grandfather touched you. Did he touch you inside of your vagina?

A: No.

Q: Okay. Did he – where did he touch you?

A: I don’t remember, actually.

Q: Okay.

A: Sorry about that.

Q: It's okay. You don't have to apologize. Did he touch you – the last time you were there in 2019 did he touch you with his penis?

A: No or not that I remember.

Kollars conflates inconsistencies in witness testimony with recantation (or, repudiation, the synonymous phrase here used by Kollars). What occurred here is the former. *See State v. Reichenberger*, 182 N.W.2d 692, 694-695 (Minn. 1970) (affirming a conviction of having sexual intercourse with a child despite the child-victim's conflicting statements at various times before trial because, at trial she testified positively that the intercourse occurred and "the task of weighing credibility was for the jury, not this court.")). Here, the jury heard the victim's conflicting testimony regarding whether Kollars penetrated her during the charged timeframe and weighed the victim's credibility. Ultimately, the jury heard the victim's testimony regarding whether Kollars penetrated her in 2019 and determined, based upon its verdict, that her testimony was credible. We defer to the jury's credibility determination. *Id.*

Having concluded that the victim did not recant her testimony, we next consider whether the district court abused its discretion by admitting the victim's forensic interview as a prior consistent statement. A careful review of the victim's prior statement and the victim's trial testimony, compels our conclusion that the district court acted well within its discretion.

The victim's forensic interview occurred in August 2020. During the interview, the victim indicated that Kollars began sexually abusing her when she was three years old. The victim described acts constituting sexual penetration during the interview and stated that the last time Kollars penetrated her was during her summer trip to visit her grandparents "last year." Before determining whether to admit the victim's forensic interview into evidence, the district court compared its notes of the victim's trial testimony with the 45-page transcript of her forensic interview and observed that the victim described acts constituting penetration during trial and the forensic interview. But, the district court also observed that the victim made statements during the last part of her forensic interview which were not consistent with her trial testimony.

The district court determined that the first 35 pages of the victim's forensic interview was reasonably consistent with her trial testimony, citing *State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (stating that a prior statement "need not be identical to be consistent"), and *Bakken*, 604 N.W.2d at 109 (noting that a prior statement "need not be verbatim"). Having reviewed the interview transcript and trial testimony, we agree that the forensic interview was reasonably consistent with the victim's trial testimony. Thus, the district court acted within its discretion by admitting part of the victim's forensic interview into evidence as a prior consistent statement.

Affirmed.