STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1235

State of Minnesota,
Respondent,

vs.

Kyle Allen Mueller,
Appellant.

Filed September 5, 2023
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Morrison County District Court
File No. 49-CR-21-487

Keith Ellison, Attorney General, Lisa Lodin, Assistant Attorney General, St. Paul, Minnesota; and

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

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, Angela Larsen, Student Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that (1) he is entitled to a new trial because the district court committed reversible error by admitting the victim's out-of-court testimonial statement in violation of appellant's confrontation rights and (2) his conviction of first-degree criminal sexual conduct must be reversed for insufficient evidence because he was not in a position of authority over the victim, who was the teenage daughter of his neighbor. We affirm in part, reverse in part, and remand.

FACTS

In April 2021, C.D. was brought to the Morrison County Sherriff's Office for a Cornerhouse Forensic Sexual Abuse Interview (Cornerhouse interview) after her father learned that she had been texting appellant Kyle Allen Mueller, her 40-year-old neighbor. C.D., who has a traumatic-brain injury and an emotional-behavior disorder, was 15 years old at the time.

In the Cornerhouse interview, C.D. told a Morrison County Child Protection Specialist that appellant had bought her a phone and a tablet and that she had been communicating with appellant every day over FaceTime. While on FaceTime, appellant would ask C.D. to call him "daddy," show her his genitals, and masturbate. He would then make her show her body to him and make her touch her genitals by threatening to harm her friends, family, and her dog. In January 2021, C.D.'s father was in the hospital, and her neighbor V.C. was watching her. One night, V.C. left the home for a couple of hours, and appellant came over uninvited. While at C.D.'s house, appellant touched her breasts and

vagina over her clothes, and appellant then digitally penetrated her vagina and touched her breasts under her shirt.

In April 2021, respondent State of Minnesota charged appellant with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(b) (2020), alleging sexual penetration of a victim while the victim was at least 13 years of age and less than 16 years of age by a perpetrator who is in a position of authority and more than 48 months older than the victim, and with two counts of third-degree criminal sexual conduct under Minn. Stat. § 609.344, subd. 1(b), (c) (2020).

In May 2022, the case was tried to a jury. Before trial, the state moved to admit the video recording of C.D.'s Cornerhouse interview. The district court concluded that the recording possessed sufficient guarantees of trustworthiness and would be admissible depending on how C.D. testified and "what information is provided during cross-examination."

At trial, C.D., C.D.'s father, and the child protection specialist testified. During direct examination, C.D. identified appellant by pointing at him, and when asked if she told the truth during the Cornerhouse interview, she nodded her head yes. On cross-examination, C.D. answered many of appellant's counsel's questions. She testified that her father was in the hospital in January 2021, and that V.C. had been staying with her. She identified appellant as the man who came over that night by pointing at him. She also answered questions about talking to law enforcement.

Right after cross-examining C.D., and after the district court excused the jury, appellant's counsel objected to the district court receiving the video of the Cornerhouse

interview or testimony about what C.D. reported. Appellant's counsel argued that appellant was not able to cross-examine C.D. The district court concluded that "she did point, and the jury will have to decide what that means." During the child protection specialist's testimony, the district court played the Cornerhouse interview for the jury. In his closing argument, appellant's counsel argued that "[C.D.] did not really provide any answers to questions. . . . She did not provide any specific information about what happened. She barely answered any questions at all" and that "[w]hat we do know is that apart from that interview in 2021, no information was presented to you that would support a conclusion that sexual . . . contact occurred."

The jury found appellant guilty of all charges. The district court convicted appellant of first-degree criminal sexual conduct and sentenced him to 172 months in prison and 10 years of conditional release. The district court did not adjudicate the two third-degree criminal sexual conduct charges because they were lesser included offenses of the first-degree criminal sexual conduct.

This appeal follows.

DECISION

I. The introduction of C.D.'s recorded Cornerhouse interview did not violate appellant's Confrontation Clause rights.

Appellant contends that the admission of C.D.'s recorded Cornerhouse interview violated his constitutional right to confront his accuser. Appellant's argument is not persuasive. The Confrontation Clause ensures that a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn.

Const. art. 1, § 6. "The Confrontation Clause prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). The Confrontation Clause also guarantees "an adequate opportunity to cross-examine adverse witnesses." *United States v. Owens*, 484 U.S. 554, 557 (1988).

"The Confrontation Clause is satisfied by a declarant's appearance at trial for cross-examination." *Holliday*, 745 N.W.2d at 568. "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *State v. Gilleylen*, ___ N.W.2d ___, ___, 2023 WL 4611400, at *6 (Minn. July 19, 2023) (emphasis in original) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). While evidentiary rulings are within the district court's discretion, whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law that is reviewed de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Appellant asserts that he did not have an opportunity to cross-examine C.D. about her statement.[1] Appellant cites *Holliday*, asserting that "[i]ts broad language that mere 'appearance' at trial satisfies the constitutional right to an opportunity for effective cross-examination does not control the outcome in this case." In *Holliday*, the state called a

[1] Appellant contends that the recorded statement was testimonial, but we need not decide whether the statement was testimonial because C.D. appeared at trial and was subject to cross-examination.

witness to testify as to statements that he gave to police and county attorneys after witnessing a murder. 745 N.W.2d at 561. The witness viewed reports detailing his statements and claimed that he did not remember the discussions. *Id.* The reports were read into the record. *Id.* The supreme court rejected Holliday's assertion that the admission of the witness's prior statements violated the Confrontation Clause because the witness's memory loss precluded his ability to cross-examine the witness. *Id.* at 565. The court determined that the witness did not need to defend or explain their prior statement and concluded that "[t]he Confrontation Clause is satisfied by a declarant's appearance at trial for cross-examination." *Id.* at 568.

Appellant attempts to distinguish *Holliday* from this case, arguing that *Holliday* is expressly confined to the inability to cross-examine a witness due to a loss of memory. However, we need not decide whether *Holliday* is confined to a witness's loss of memory because, unlike in *Holliday*, C.D. did respond to appellant's cross-examination questions. The following is the entirety of C.D.'s cross-examination testimony:

> Q: [C.D.], my name is David Buchin. I'm an attorney. I just have some questions that I need to ask you. When—in January of 2021 was there—there was a time period that your dad was in the hospital; is that right?
> A: Yes.
> Q: And who was staying with you?
> A: [V.C.]
> Q: And who is [V.C.]?
> A: Our neighbor.
> Q: Was she with you all the time when you were home?
> A: For the most part.
> Q: How long would she have been gone?
> A: I don't remember.
> Q: Did anybody else come to the house?
> A: (No response.)

Q: Do you know if anybody else came to the house?
A: (Nods head in the affirmative.)
Q: Who?
A: (Pointing.)
Q: I need you to say a name.
A: (No response.)
Q: Okay. Let me try this. In April of 2021 you were brought to talk to law enforcement; is that right?
A: Yes.
Q: How many times did you talk to people with law enforcement?
A: I don't remember.
Q: The things that you talked about had happened a few months earlier, though, right?
A: (No response).
Q: Have you—since April of 2021, have you talked to anybody about coming to court?
A: (Nods head in the affirmative.)
Q: You need to answer out loud.
A: Yes.
Q: Who have you talked to?
A: Her.
Q: Okay. How many times?
A: Like—I think like 10 or more maybe.
Q: Okay. So I want to get back to that night in—in January of 2021. Do you remember if [V.C.] was there?
A: What time was it?
Q: I don't know. Do you remember what time it was?
A: I think like 10 or 11.
Q: At night?
A: Uh-huh.
Q: Okay. Was [V.C.] there then?
A: Huh-uh.
Q: How long had she been gone?
A: I think it was like for an hour or something.
Q: Who was there when [V.C.] got back?
A: (Pointing.)
Q: I need you to say—say your answers.
A: (No response.)

Although C.D. was reluctant to answer some questions, she did answer the majority of appellant's counsel's questions. The jury therefore had the opportunity to observe C.D.'s

demeanor under cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("[T]he assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one . . . : the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused."). And defense counsel used C.D.'s reluctance to answer questions to argue in closing that there was insufficient proof that sexual contact occurred.

Appellant also argues that "*Holliday* cannot be squared with the Sixth Amendment . . . in the context of a child witness who physically appears at trial but does not answer questions on direct or cross about the specific acts of the offense, and the [s]tate uses the child's out-of-court testimonial statement to prove the charged conduct." We disagree. In *Holliday*, the court expressly rejected a reading of *Crawford* that required a witness to answer questions on cross about the specific acts of the offense. *See Holliday*, 745 N.W.2d at 565-66 (stating that an interpretation of *Crawford* that requires a declarant actually defend or explain the statement ignores that the Court "focuses on presence and ability to act without requiring that the record show the declarant actually did defend or explain the statement" and is contrary to the Court's assertion that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements" (quotations omitted)). And defense counsel did not ask any questions on cross-examination about the specific acts of the offense.

Appellant's dissatisfaction with C.D.'s testimony does not equate to denial of his constitutional right of confrontation. *See Gilleylen*, 2023 WL 4611400, at *6 ("[T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (emphasis in original) (quotation omitted)). Thus, the admission of C.D.'s recorded Cornerhouse interview did not violate appellant's right to confrontation.

II. The evidence was insufficient to prove that appellant was in a position of authority over C.D.

Appellant contends that the state failed to prove beyond a reasonable doubt that he was in a "position of authority" over C.D. We agree. The state must prove every element of an offense beyond a reasonable doubt in a criminal case. *State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999). Whether a defendant's conduct meets the definition of a particular offense presents a question of statutory interpretation that is reviewed de novo. *See State v. Hayes*, 826 N.W.2d 799, 803 (Minn. 2013). The first step in statutory interpretation is to determine whether the statute is ambiguous. *State v. Thonesavanh*, 904 N.W.2d 432, 435 (Minn. 2017). "If a statute is unambiguous, then we must apply the statute's plain meaning." *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010). Appellate courts "may conclude that [a law] is ambiguous even though neither party argues that it is." *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017).

Appellant was convicted of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b). A person is guilty of first-degree criminal sexual conduct under this subdivision if they "engage[] in sexual penetration with another person, or in sexual contact with a person under 13 years of age," and if "the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a current or recent position of authority over the complainant."

> "Current or recent position of authority" includes but is not limited to any person who is a parent or acting in the place of a parent and charged with or assumes any of a parent's rights, duties or responsibilities to a child, or a person who is charged with or assumes any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of or within 120 days immediately preceding the act.

Minn. Stat. § 609.341, subd. 10 (2020). The statute "does not contain an exclusive list of persons in a position of authority." *State v. Larson*, 520 N.W.2d 456, 461 (Minn. App. 1994), *rev. denied* (Minn. Oct. 14, 1994). Given that the statute is unambiguous we apply its plain meaning. *State v. Loveless*, 987 N.W.2d 224, 250 (Minn. 2023).

Thus, at trial, the state needed to prove beyond a reasonable doubt that appellant "act[ed] in the place of a parent and [was] charged with or assume[d] any of a parent's rights, duties or responsibilities to [C.D.]" or that appellant was "charged with or assum[ed] any duty or responsibility for the health, welfare, or supervision of [C.D.]" Minn. Stat. § 609.341, subd. 10. Appellate courts have generally determined that the evidence was sufficient for the jury to conclude that the defendant was in a position of authority where the victim had been in the care of that defendant at one point. *See State v. Bird*, 292 N.W.2d 3, 4 (Minn. 1980) (uncle cared for his niece); *State v. Rucker*, 752 N.W.2d 538, 546 (Minn. App. 2008) (defendant co-facilitated an after-school program that the victim attended), *rev. denied* (Minn. Sept. 23, 2008). These courts have also found the evidence sufficient where the defendant was the victim's employer, teacher, or coach. *See State v. Hall*, 406 N.W.2d 503, 504 (Minn. 1987) (victim babysat defendant's children); *State v. Fero*, 747 N.W.2d 596, 597 (Minn. App. 2008) (defendant was the victim's direct supervisor at work), *rev.*

denied (Minn. Jul. 15, 2008); *State v. DeLong*, No. C5-00-810, 2001 WL 243254, at *1 (Minn. App. Mar. 13, 2001) (defendant was the victim's coach and her friend's father); *State v. Pannier*, No. C9-98-2283, 1999 WL 1216327, at *4 (Minn. App. Dec. 21, 1999) (stating that "[t]eachers hold a position of authority over their students").

Having concluded that a position of authority requires proof that appellant was acting in the place of C.D.'s parent or was charged with or assumed any of the rights, duties, or responsibilities for the health, welfare, or supervision of C.D., this court next considers whether the state presented sufficient evidence to prove that appellant was in a position of authority. *See Vasko*, 889 N.W.2d at 558 ("Having determined what the ordinance prohibits, we now consider whether the [s]tate presented sufficient evidence to prove that Vasko violated [it]."). When evaluating a claim of insufficient evidence, this court reviews the record "to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *Hayes*, 826 N.W.2d at 805 (quotation omitted). This court assumes "that the jury believed the [s]tate's witnesses and disbelieved any evidence to the contrary." *Id.*

Appellant contends that he was not a "parent, relative, coach, employer, caregiver, teacher or babysitter to C.D.," nor did he "provide C.D. with food or transportation." We agree.

The state points to several pieces of evidence that it asserts supports the conviction. The state contends that appellant "'assumed' certain roles that parents do," such as giving C.D. a phone and a tablet, making C.D. call him every day, and requesting that C.D. call

him "daddy." The state asserts that this evidence makes this case similar to *Larson*, 520 N.W.2d at 461. In *Larson*, we concluded that the defendant was in a position of authority over the victim where the defendant was ten years older than the victim, the victim's parents left appellant alone with her, the victim described the defendant as her "favorite uncle, and he acted as her "confidante." 520 N.W.2d at 459, 461.

The state's argument is not persuasive. This case is distinguishable from *Larson*. Unlike in *Larson*, where the parents left the victim alone with Larson, as far as C.D.'s father knew, appellant had never been left alone with C.D. before the night in early 2021. Appellant did not "assume" a parent's rights, duties or responsibilities by asking C.D. to call him, "daddy" as part of the ongoing abuse over FaceTime. *See* Minn. Stat. § 609.341, subd. 10. He did not make her check in to monitor her welfare or health or safety; instead, on these video calls, he would masturbate and tell C.D. that he would harm her loved ones if she did not do the same. The state is trying to import grooming behavior as an element of the crime, but it is an aggravating factor. *See Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003) (stating that "the defendant's position of authority. . . [was an] inappropriate bas[is] for departure where those facts were already taken into account by the legislature in determining the degree of seriousness of the offense"); *State v. Yaritz*, 791 N.W.2d 138, 146 (Minn. App. 2010) ("A defendant's high degree of planning is a recognized aggravating factor."), *rev. denied* (Minn. Feb. 23, 2011).

Second, the state contends that appellant was a friend of C.D.'s father and the two would socialize two to three times a week. But the state does not explain how, as C.D.'s father's friend, appellant "assume[d] any of a parent's rights, duties or responsibilities to a

child" or was "charged or assum[ed] with any duty or responsibility for the health, welfare, or supervision of [C.D.]." *See* Minn. Stat. § 609.341, subd. 10 (emphasis added). And in *State v. Luna*, in the context of sentencing, our supreme court considered whether the "defendant had been in some sort of position of authority over the victim by virtue of his friendship with the victim's mother." 320 N.W.2d 87, 89 (Minn. 1982). The court noted that "the evidence did not establish that defendant was in a position of authority over complainant." *Id.*

Third, the state contends that the evidence was sufficient to prove that appellant was in a position of authority because appellant was 40 years old and C.D. was 15 years old, but this is a separate element of the offense. *See* Minn. Stat. § 609.342, subd. 1(b) (stating "the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant").

Fourth, the state contends that C.D. had a disability that impacted her ability to comprehend and made her compliant and agreeable. Appellant contends that C.D.'s "disability cannot be used to prove [appellant] was in a position of authority." We agree. The statute does not focus on the victim's perception of the defendant; it focuses on the actions of the defendant. The statutory definition of "position of authority" uses phrases such as "*acting* in the place of a parent," "*charged* with or *assumes*" the duties of a parent, and "a person who is *charged* with or *assumes* any duty or responsibility for the health, welfare, or supervision of a child." Minn. Stat. § 609.341, subd. 10 (emphases added). Thus, C.D.'s disability does not prove that appellant was in a position of authority.

Lastly, the state contends that appellant asserted authority over C.D. on the night of the assault by "stepping in and taking over for the cognitively impaired 15-year-old C.D., who is compliant and agreeable." C.D. had let V.C.'s dogs out, and appellant told her to bring the dogs in, and she brought them in. Appellant asserts that his instructions to C.D. to bring the dogs inside did not amount to being in a position of authority because he went "uninvited and unannounced to C.D.'s house" and had not been "explicitly or implicitly tasked with assuming responsibility for her supervision or care." This is not similar to the cases in which this court has concluded that the evidence was sufficient to prove a position of authority because the victim had been placed in the defendant's care.

We are more than aware of the serious facts and circumstances of this case. Appellant raped a mentally and emotionally challenged minor who was the daughter of a neighbor. Still, we are obligated to follow the law. There is no evidence in the record that appellant was acting in the place of C.D.'s parent or was charged with or assumed any of the rights, duties, or responsibilities for the health, welfare, or supervision of C.D. The "evidence and reasonable inferences drawn therefrom" were insufficient to prove the crime. *Hayes*, 826 N.W.2d at 805 (quotation omitted). We therefore reverse appellant's conviction of first-degree criminal sexual conduct and remand with instructions to formally adjudicate one of the unadjudicated third-degree criminal sexual conduct convictions and impose a sentence. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) ("If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be

formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.").[2]

Affirmed in part, reversed in part, and remanded.

[2] The district court sentenced appellant to 172 months in prison, which was at the highest end of the presumptive sentence range for first-degree criminal sexual conduct with a criminal history score of 0. Minn. Sent'g Guidelines 4.B (2020). The jury also found appellant guilty of two counts of third-degree criminal sexual conduct under Minn. Stat. §§ 609.344, subd. 1(b), (c). The presumptive sentence range for third-degree criminal sexual conduct under section 609.344, subd.1(c) with the same score is 41 to 57 months in prison. Minn. Sent'g Guidelines 4.B (2020). The presumptive sentence for third-degree criminal sexual conduct under section 609.344, subd.1(b) with the same score is a stayed 36-month sentence. Minn. Sent'g Guidelines 4.B (2020). Minn. Stat. § 609.035 (2022) "contemplates that a defendant will be punished for the most serious of the offenses arising out of a single behavioral incident because imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotations omitted).