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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1430**

State of Minnesota,
Respondent,

vs.

Leopoldo Chavez-Flores,
Appellant.

**Filed July 30, 2012
Affirmed
Halbrooks, Judge**

Otter Tail County District Court
File No. 56-CR-10-2093

Lori Swanson, Attorney General, Michael T. Everson, Assistant Attorney General, St. Paul, Minnesota; and

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Veronica Walther, Edwin Goss, Goss & Walther Law Group, LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his convictions of six counts of criminal sexual conduct involving his four-year-old daughter on the grounds that (1) the district court erred in

denying appellant's motion for a mistrial after failing to swear in the minor complainant and (2) the victim's out-of-court statements were improperly admitted as evidence and appellant's confrontation rights were violated because the minor victim was unavailable for cross-examination. We affirm.

FACTS

Appellant Leopoldo Chavez-Flores is the biological father of I.M.U. He had a brief sexual relationship with B.B. that resulted in B.B. becoming pregnant with I.M.U. but their relationship ended before I.M.U. was born. Appellant had no contact with I.M.U. for the first three years of her life. In the summer of 2009, with B.B.'s permission, appellant's sister-in-law started babysitting for I.M.U., and, unbeknownst to B.B., appellant was slowly introduced into his daughter's life. Eventually B.B. became aware that appellant was seeing I.M.U. and agreed that I.M.U. could start spending time at appellant's house.

In 2010, I.M.U. began spending most Saturdays with appellant, his wife, and their daughter, G.C., who was about I.M.U.'s age. By late spring 2010, I.M.U. was spending most Saturdays at appellant's home and going over to play with G.C. during the week. This pattern abruptly changed in September 2010, when I.M.U. suddenly refused to go to appellant's home, started acting angry and withdrawn, and started experiencing night terrors.

In November 2010, B.B. brought I.M.U. to her nurse practitioner Carrie Affield because of greenish discharge, pain, and mild odor coming from her vagina. B.B. told Affield that I.M.U. had experienced similar symptoms about a month earlier. Affield

noted a change in I.M.U.'s demeanor from previous medical appointments and testified that "[a]ny time a four-year-old has greenish vaginal drainage, you have to raise a red flag." Affield asked B.B. about possible sexual abuse, but B.B. indicated that she did not have any specific concerns. Affield then asked I.M.U. if anyone had touched her in a bad way, and I.M.U. "covered her face and hugged herself and said yes." After consulting with a sexual-abuse expert, Affield performed a vaginal swab on I.M.U. Affield had conducted genital checks on I.M.U. as part of previous well-child checks without incident, but this time I.M.U. became very upset and combative.

Affield reported I.M.U.'s disclosure to Otter Tail County Social Services, and Theresa Melmer, a social worker with Otter Tail County Human Services, interviewed I.M.U. The interview was conducted consistent with CornerHouse protocol specifically designed for interviewing young children. I.M.U. said "Polo" (her name for appellant) was "bad" and "mean." When asked if anyone had ever touched her on her parts of the body that are covered by a swimsuit, I.M.U. answered "[j]ust only Polo." I.M.U. said that appellant had touched her with his hand on her "bottom," which was the term she used to refer to her vagina, and that his fingers went inside her. She said that Polo took her pants off and that he had all of his clothes off. I.M.U. told Melmer that this had happened more than once. Arne Graff, M.D., from the Red River Children's Advocacy Center also conducted a forensic interview and medical exam of I.M.U. I.M.U. told Dr. Graff that appellant "put his fingers inside where she goes pee."

Appellant moved for a determination that I.M.U. was incompetent to testify, but the district court denied the motion and issued an order finding that I.M.U. had the ability

to recall facts, an understanding of the difference between the truth and a lie, and the capacity to tell the truth.

I.M.U. had difficulty testifying at trial. I.M.U. initially refused to sit in the witness chair, even after the district court allowed a support person to accompany her. But following a recess and after clearing the courtroom of all but essential parties,¹ I.M.U. took the stand and the district court attempted to swear her in as a witness:

THE COURT: [I.M.U.], it's important that you tell the truth.
Will you tell us the truth here today?

I.M.U.: (Inaudible.)

THE COURT: Is that a yes or a no?

I.M.U.: (Shakes head side to side.)

THE COURT: Can you answer out loud?

I.M.U.: (Long pause with no verbal response.)

With the district court's permission, the prosecutor then addressed I.M.U. and was able to extract accurate answers to questions about I.M.U.'s family, age, home, and school. The prosecutor then again asked I.M.U. if she was able to tell the truth,

PROSECUTOR: And did you hear the Judge ask if you would tell the truth here today? Can you do that?

I.M.U.: I can't.

PROSECUTOR: You can?

I.M.U.: (Shakes head side to side.)

PROSECUTOR: How come?

I.M.U.: Because I'm scared.

At this point, the prosecutor tried a different approach:

PROSECUTOR: [I.M.U.], can you tell me, if I told you the Judge—do you know which one the Judge is? Where is she at?

¹ Minn. Stat. § 631.045 (2010) permits the trial court in a child sexual-abuse case to clear the courtroom of all but those who have a direct interest in the proceedings if “closure is necessary to protect a witness or ensure fairness in the trial.”

I.M.U.: (Pointing.)

PROSECUTOR: If I told you she was a boy, would that be a truth or a lie?

I.M.U.: A lie.

PROSECUTOR: Would it? If I said I was a girl, would that be a truth or a lie?

I.M.U.: A truth.

PROSECUTOR: Can you tell us the truth even if you're scared?

I.M.U.: Very scared.

PROSECUTOR: You're very scared?

I.M.U.: (Nods affirmatively.)

Appellant objected to I.M.U.'s testimony on the ground that I.M.U. had not taken a formal oath. The district court overruled the objection, but indicated that I.M.U. would eventually need to promise to tell the truth. The prosecutor then proceeded with her direct examination of I.M.U.

At the end of I.M.U.'s direct examination, the district court again questioned I.M.U. about whether she had told the truth:

THE COURT: [D]id you tell us any lies today?

....

I.M.U.: I tell lies to my mom.

THE COURT: To your mom? How about to—

I.M.U.: Sometimes she even lies to her mom. She has her own mom.

THE COURT: Did you tell any lies today when you were here with us?

I.M.U.: (Shakes head side to side.)

THE COURT: No?

I.M.U.: (Shakes head side to side.)

THE COURT: Did you tell us the truth?

I.M.U.: I don't know how to tell the truth.

THE COURT: You don't.

I.M.U.: (Shakes head side to side.)

THE COURT: Did you make anything up when you were talking to us today?

I.M.U.: I just want to be over and done.

Outside of the presence of the jury, the day following I.M.U.'s testimony, the district court explained why it found that I.M.U. had taken a sufficient oath:

[T]he compilation of the responses of the child . . . are significant and sufficient to determine that she was aware of her requirement to tell the truth and that she did tell the truth by, again, relying on her negative response or her "no" response to [my questions asking whether she told] lies.

The district court went on to state that it was "mindful that . . . the next question was, 'Did you tell the truth?' and she stated that she didn't know how to tell the truth." But the district court concluded by stating that

based on the entirety of the proceedings yesterday and the obvious stress experienced by [I.M.U.] from the moment she came into the courtroom and we had the initial early attempts for her to be responsive to the need for a support person to the closure of the courtroom and the Court's opportunity to see her as she tried to cope with the stress of the situation, I'm going to characterize that response of not knowing how to tell the truth to be an act basically of self-preservation. Her emotional and psychological stress was significant, visible, and reasonable given her age and what she faced as she walked into the courtroom that first time and will not apply that comment, the last comment about not knowing how to tell the truth, to the analysis of whether or not she took the equivalent of an oath in terms of telling the truth during her testimony.

Appellant then moved for a mistrial, claiming that "the child's actions on the witness stand may now lead to a different conclusion" regarding whether I.M.U. was competent to testify. The district court denied appellant's motion.

B.B., Carrie Affield, Officer Ross Blakeway, Theresa Melmer, and Dr. Graff also testified for the state, and the videotape of I.M.U.'s CornerHouse interview was played

for the jury. The jury found appellant guilty of three counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying appellant's motion for a mistrial because I.M.U. was never properly sworn. Denial of a motion for mistrial is ordinarily reviewed for an abuse of discretion. *State v. Jorgensen*, 660 N.W.2d 127, 133 (Minn. 2003). But if a party fails to specify the basis of the mistrial motion, the reviewing court applies a plain-error standard. *See State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007) (noting that a reviewing court should only consider those arguments presented and considered by the district court). Although appellant initially objected to I.M.U.'s testimony claiming that she had not been properly sworn, appellant based his mistrial motion on I.M.U.'s alleged incompetency to testify. On appeal, appellant argues that the district court erred by denying a mistrial because I.M.U. did not testify under oath. Because this basis for a mistrial is a different basis than the one argued to the district court, we apply the plain-error standard of review. To establish a plain error, appellant must demonstrate that (1) there was error, (2) the error was plain in the sense of being "clear" or "obvious" under current law, and (3) the error affected appellant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686, 688 (Minn. 2002). Even then, this court "may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 686 (quotation omitted).

Minn. R. Evid. 603 provides that prior to giving testimony, “every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.” Rule 603 “is designed to afford the flexibility required in dealing with . . . children. Affirmation is simply a solemn undertaking to tell the truth; *no special verbal formula is required.*” *State v. Mosby*, 450 N.W.2d 629, 633 (Minn. App. 1990) (quoting Fed. R. Evid. 603 advisory comm. note), *review denied* (Minn. Mar. 16, 1990).

In *Mosby*, this court considered the adequacy of the oath given by a ten-year-old victim of alleged acts of sexual abuse. *Id.* As with I.M.U., the prosecutor asked the child to explain the difference between the truth and a lie. *See id.* And as with I.M.U., the child was able to distinguish between the two. *Id.* But unlike I.M.U., the child answered “yes” when the prosecutor asked, “[Y]ou know that here you’re supposed to tell the truth?” *Id.* This court held that the child’s answers in *Mosby* were sufficient to meet the oath requirement because she indicated her understanding of the obligation to be truthful. *Id.* Similarly, in *State v. Morrison*, a five-year-old child-abuse victim “indicated she knew what a lie was, what the truth was, and nodded her head when asked to promise to tell the truth,” and this court determined that “[t]he child was administered the equivalent of an oath.” 437 N.W.2d 422, 428 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1989).

Appellant concedes that “it appears that the state satisfied the requirement to establish that I.M.U. knew the difference between a truth and a lie.” But he argues that

I.M.U. failed to take the equivalent of an oath because, contrary to the alternate oaths in *Mosby* and *Morrison*, the district court here failed to elicit a promise from I.M.U. to tell the truth in advance of her testimony. We disagree. A district court has considerable discretion in fashioning the specific procedure used to administer the equivalent of an oath. See *Mosby*, 450 N.W.2d at 633 (emphasizing that “no special verbal formula is required”). The district court clearly stated at the outset of I.M.U.’s testimony: “[I.M.U.], it’s important that you tell the truth.” I.M.U. also indicated to the district court after her direct examination that she had not lied.² The district court stated that

at the conclusion of [I.M.U.’s] testimony, I did ask her if she told any lies, and at that point, she did respond not verbally but with physical movement by shaking her head to the side back and forth, not up and down. And I saw that and will interpret that as a “no” response with movement rather than with words.

The district court had the opportunity to observe I.M.U. and assess whether she was impressed with her duty to tell the truth. The district court made extensive on-the-record findings about I.M.U.’s obvious stress and demeanor as she attempted to take the oath. The district court reasonably concluded that I.M.U.’s responses about telling the truth were not an indication that she was not taking her duty to tell the truth seriously, but rather “an act basically of self-preservation.” We conclude that appellant has not

² Appellant contends that because the district court used the past tense when asking I.M.U. whether she lied, the question was not sufficient to guarantee the veracity of her subsequent testimony during cross-examination. But the district court had already discussed the general importance of truthful testimony with I.M.U. when it asked her about the direct examination. And as respondent observes, it seems implausible to assume that I.M.U. was aware of the verb tense of the question and that she therefore intended to carve out an exception for the testimony that took place after the question was asked.

demonstrated that it was plain error, that is, error that is “clear” or “obvious,” for the district court to have accepted as the equivalent of an oath the combination of (1) I.M.U.’s non-verbal assurance that she had not lied during her testimony, (2) her understanding of the difference between a truth and a lie, and (3) the district court’s admonishment to her to tell the truth.

Appellant also argues that because I.M.U. did not take a valid oath before testifying, she was unavailable as a witness at trial, and any out-of-court testimonial statements were improperly admitted in violation of appellant’s rights under the Confrontation Clause. Appellant did not object to the admission of the out-of-court statements due to an inadequate oath, so a plain-error standard of review applies. *See Bailey*, 732 N.W.2d at 623. Appellant’s entire Confrontation Clause argument hinges on his assumption (for which he cites no legal authority) that an invalid oath renders a witness “unavailable” for cross-examination. Because we conclude that the district court’s decision to accept I.M.U.’s statements as the equivalent of an oath was not plain error, I.M.U. was available for cross-examination as a witness and appellant’s argument fails.

Affirmed.