STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0465

State of Minnesota,
Respondent,

vs.

Jeremy Donald Schwartz,
Appellant.

Filed March 4, 2013
Affirmed
Chutich, Judge
Dissenting, Worke, Judge

Stearns County District Court
File No. 73-CR-10-6439

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

Janelle P. Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant Jeremy Donald Schwartz argues that the district court abused its discretion by (1) admitting out-of-court statements of the child victim; (2) allowing the victim's mother to testify that she believed her child; and (3) imposing the presumptive sentence rather than placing him on probation. Schwartz also contends that the evidence was insufficient to sustain his conviction. We conclude that the district court properly exercised its discretion in admitting all but one of the challenged statements and in imposing a presumptive sentence. Because the erroneous admission of one out-of-court statement was harmless error, and the evidence is sufficient to sustain Schwartz's conviction, we affirm.

FACTS

The night before Thanksgiving 2009, C.C. tucked his five-year-old daughter, A.C., into bed. He talked to her about the day, and then A.C. suddenly told C.C. that Schwartz, the son of A.C.'s daycare provider, "licked his finger and stuck it up [her] big butt." Before C.C. could ask any follow-up questions, A.C. fell asleep.

C.C. immediately told his wife, J.C., about their child's disclosure. They were uncertain how to handle this news. The next morning, when the family drove to the home of A.C.'s aunt to celebrate Thanksgiving, C.C. asked A.C. to tell her mother, J.C., what she told him about Schwartz. A.C. then repeated her earlier disclosure.

When the family arrived at the aunt's home, J.C. told the aunt, who had a close relationship with her niece, that A.C. had mentioned something to them about day care. A.C.'s parents did not tell the aunt any specifics about the child's earlier disclosure, but just asked the aunt to talk with A.C. about day care. A.C.'s aunt brought her into a private room, and as they were putting on play makeup, asked her about day care. A.C. responded that Schwartz touched her "in private spots and not in good spots." When her aunt asked her where Schwartz touched her, the girl responded in her "butt crack," and also pointed to that area on her body. Her aunt asked her what Schwartz did then, and A.C. said that he "would lick his finger and then put it in her butt, and then when it got dried out, he would take his finger out and lick it again." A.C. told her aunt that Schwartz touched her during naptime in Schwartz's room.

Later that day, A.C.'s father spoke with Diane Schwartz, appellant's mother, about the disclosures. Ms. Schwartz said that she would talk with her son about the allegations. In the next day or so, A.C.'s parents also contacted Stearns County Social Services, which began an investigation into the abuse allegations, as did the St. Cloud police department.

On December 2, 2009, A.C.'s parents brought A.C. to see her doctor, Dr. Kimberly Spaulding, for a physical examination. Dr. Spaulding has taken care of A.C. since A.C. was born. Dr. Spaulding later testified that A.C. calls her "Dr. Spaulding" and knows that she is a doctor.

During the visit, Dr. Spaulding asked A.C. if she had been touched at daycare, and A.C. replied that Schwartz touched her "in her big butt," which the doctor said is the term

A.C. uses for her anus, and on her "little butt," the term that A.C. uses for her vagina. A.C. told Dr. Spaulding that Schwartz "would lick his finger and place it on her big butt and then lick it again." A.C. further told Dr. Spaulding that Schwartz told A.C. to be "very, very quiet" when he was touching her, and that Schwartz asked her a number of times to suck on his thumb, which A.C. refused to do. Dr. Spaulding conducted a physical exam that revealed no injury; the doctor later testified that any injury to the anus or vagina would have healed quickly.

Three days later, Detective David Missell conducted a CornerHouse-style interview of A.C.[1] When Detective Missell asked A.C. if anyone touched her, she replied that Schwartz touches her at daycare. She said that Schwartz "always touches me on my butt" at rest time. A.C. told the detective that Schwartz pulls her pants down, licks his finger and then "pushes up in my butt" with his finger. She told the detective that she did not want Schwartz to do that again. A.C. also told Detective Missell that Schwartz pushes up on her with his penis when she is lying on her side and he is lying in back of her. She said that Schwartz's penis is "big" and that he went "pee" when this happened.

In mid-December 2009, A.C.'s parents took her to see Catherine Palmer, Ph.D., a clinical psychologist. Dr. Palmer saw A.C. a total of 13 times. Without Dr. Palmer asking her a question about touching, A.C. told the psychologist that Schwartz "pressed on [her] big butt and little butt and it hurt." She said that Schwartz put his finger and

[1] A CornerHouse-style interview is a protocol for questioning young children and involves, among other things, the use of anatomically correct dolls and open-ended questions.

penis into her butt, and that Schwartz "made her feel scared, angry, and a little sad, and that what he did to her hurt."

The state ultimately charged Schwartz with four counts of first-degree criminal sexual conduct for inappropriately touching A.C. sometime between September 1, 2008, and November 24, 2009. Before trial, the state moved to admit A.C.'s out-of-court statements, including the interview Detective Missell conducted with A.C. and statements A.C. made to Dr. Spaulding. The district court ruled that the video-recorded interview was admissible if A.C. testified because A.C. provided spontaneous details and had little motivation to lie. The district court further concluded that the relevant circumstances rendered A.C.'s statements reliable and trustworthy.

In addition, the district court ruled that the statements that A.C. made to Dr. Spaulding were admissible if made for purposes of medical diagnosis or treatment. The district court also made a pretrial ruling that the state could offer "opinion evidence of A.C.'s truthfulness" if Schwartz "'opened the door' by offering reputation and opinion evidence of A.C.'s untruthfulness."

At Schwartz's jury trial, A.C., then six years old, testified that at daycare she had quiet time in Schwartz's room and slept on the top bunk while another child slept on the bottom bunk. A.C. testified that Schwartz came into his room during her naptime and touched her "[i]n the butt," and put his finger in her butt. She replied "no" when the prosecutor asked her if Schwartz ever licked his finger. A.C. told the jury that Schwartz wiggled his finger when he put it in her butt, and said that it hurt "[r]eally bad." A.C. said that she felt "[m]ad and sad" about the touching.

A.C. did not identify Schwartz in the courtroom. She did identify Diane Schwartz as "Jeremy's" mother and testified that "Jeremy" was the person who touched her during naptime. A.C. testified that she told her parents that Schwartz put his finger in her butt, but she could not recall telling her aunt, Dr. Spaulding, or Dr. Palmer about the touching.

A.C.'s father testified about her spontaneous disclosure the night before Thanksgiving 2009, that Schwartz had "licked his finger and stuck it up [her] big butt." A.C.'s aunt also testified about her conversation with A.C. on Thanksgiving Day. In addition, Dr. Spaulding testified about her examination of A.C., and Dr. Palmer testified about her sessions with A.C. Detective Missell testified during the state's case and the state showed the jury the videotape of the detective's interview with A.C. which, along with the transcript of the videotape, was admitted into evidence. Just before resting its case, the state also called Vicki Nauschultz, Ph.D., who testified about the variety of ways that children disclose child abuse. Nauschultz also testified that preschool children do not think chronologically and have a difficult time answering how many times something has happened. Nauschultz further testified that it is not common for children to have sexual content in their fantasies.

The defense called A.C.'s mother, who testified that about two weeks before A.C.'s disclosure to her father, A.C. had told her something unbelievable about Schwartz, "something . . . like he could fly or something." J.C. admitted that she initially had a hard time believing A.C. about the sexual abuse because she did not want the abuse to be true and because of this silly comment that A.C. made about Schwartz. J.C. testified, however, that she now believed A.C.

Schwartz, then age twenty, denied A.C.'s allegations. When asked, however, if his testimony was that he never had an opportunity to touch A.C. during quiet time in his bedroom, he hedged and said, "from what I remember, no, but I can't say that just a flat-out no just because there could have been an opportunity. Say, like, if I was in my room for a split second, and—no."

The jury convicted Schwartz of first-degree criminal sexual conduct—digital-anal penetration—and acquitted him of the remaining three counts of first-degree criminal sexual conduct. At sentencing, Schwartz moved for a downward dispositional departure, arguing that substantial and compelling factors supported placing him on probation.

The district court found that Schwartz was not amenable to probation and denied his motion. It then sentenced Schwartz to a presumptive sentence of 144 months, and this appeal followed.

D E C I S I O N

I. Out-of-Court Statements

Schwartz first contends that the district court abused its discretion in admitting A.C.'s out-of-court statements to Detective Missell, Dr. Spaulding, and Dr. Palmer. Hearsay is not admissible except as provided by the Minnesota Rules of Evidence. Minn. R. Evid. 802; *see* Minn. R. Evid. 801(c) (defining hearsay 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"). "A determination that a statement meets the foundational requirements of a hearsay exception is reviewed for an abuse of discretion." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). Schwartz "has the burden of

establishing that the [district] court abused its discretion and that [he] was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Interview with Detective Missell

Schwartz contends that A.C.'s statements during the interview with Detective Missell were not reliable. The district court ruled that A.C.'s statements to Detective Missell were substantively admissible under Minn. Stat. § 595.02, subd. 3 (2008), and Minn. R. Evid. 807—the residual exception to the hearsay rule.

Minn. Stat. § 595.02, subd. 3 provides:

> An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child . . . is admissible as substantive evidence if:
>
> (a) the court . . . finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and
>
> (b) the child . . . either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable . . . and there is corroborative evidence of the act[.]

The rule of evidence provides:

> [A] statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the 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 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.

Admitting a hearsay statement under rule 807 requires that the statement have "circumstantial guarantees of trustworthiness." *Id.* "In considering the reliability of statements offered under the residual exception, courts follow the 'totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness' equivalent to other hearsay exceptions." *State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (quoting *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006)).

Relevant circumstances under rule 807 "are those circumstances actually surrounding the making of the statements." *Id.* (quotation omitted). These circumstances include:

> whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

Id. These same circumstances are relevant to determining the admissibility of a child's out-of-court statements regarding sexual abuse under Minn. Stat. § 595.02, subd. 3, as well as the evidentiary rule. *State v. Hollander*, 590 N.W.2d 341, 345–46 (Minn. App. 1999).

Here, the district court determined that A.C.'s statements to Detective Missell were admissible because A.C. made spontaneous allegations and had no apparent motivation to fabricate the statements. The district court found that "the interview was close in time to the alleged abuse,"[2] "witnesses and investigators have corroborated the details about [Schwartz's] bedroom and the daycare," "Detective Missell has training in interviewing child-sex-abuse victims," and "Detective Missell used anatomical drawings to determine what words [A.C.] used for each body part."

The district court did not abuse its discretion by admitting A.C.'s statements made during the interview because the record sufficiently supports the district court's findings. While Schwartz attacks the district court's characterization of A.C.'s statements to Detective Missell as "spontaneous," he concedes that the initial disclosure of sexual abuse to A.C.'s father was spontaneous. The context of the initial disclosure matters when evaluating the admissibility of out-of-court statements. *See, e.g.*, *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990) (finding child's statements reliable after noting, among other considerations, that her initial statements about the abuse were made spontaneously), *cert. denied*, 111 S. Ct. 693 (1991).

Moreover, the record shows that A.C. volunteered the allegations against Schwartz without the detective's prompting. When the detective explained at the beginning of the interview that part of his job is talking to kids about touches, A.C. interjected that nobody touches her brothers. Detective Missell followed up with the general question, "Does

[2] The complaint listed the dates of the offenses as "on or about September 1, 2008 through November 24, 2009." At trial, however, Diane Schwartz testified that A.C. did not begin napping in Schwartz's bedroom until June 2009.

somebody touch you?" A.C. responded, "Yes, touch me everywhere at daycare. Jeremy—his name is Jeremy. He does this stuff to me. He's a boy." As the trial court noted, A.C., and not the detective, first introduced Schwartz and daycare into the conversation. Thus, the district court's finding that the spontaneity of the reports of abuse made them reliable is supported by the record.

Similarly, the district court's finding that A.C. had no reason to fabricate these sexual allegations is well supported by the record. Schwartz contends that A.C.'s story about Schwartz being able to fly shows that she had a motive to lie about him. But A.C.'s mother reasonably explained her belief that the previous story about Schwartz was A.C.'s way of "reaching out to me that something's not right."

And the record shows that no animosity existed between A.C.'s family and Schwartz's family, or between A.C. and Schwartz. A.C.'s mother testified that she "liked Diane [Schwartz]. I liked her a lot as a day care provider." Schwartz himself testified that "all the kids loved me" and that he and A.C. "were friends." A.C. also showed no hostility toward Schwartz in her interview with Detective Missell. In fact, she expressed concern that "Jeremy will wonder why I'm not coming [to daycare] any more." Along with this evidence was Dr. Nauschultz's testimony that it "is not common at all for children to have sexual content in their fantasy."

In addition, the conduct described by A.C. is of the nature that a five-year-old child would not know unless she had experienced it. She described how Schwartz licked his finger before putting it in her anus, how he wiggled his finger in her anus, how he asked her to suck his thumb, and how he admonished her to be "very, very quiet." A

child her age would not understand the sexual significance of this conduct without experiencing it. *See State v. Lonergan*, 505 N.W.2d 349, 355 (Minn. App. 1993) (finding statement reliable where child described sexual acts that "a child his age would not be expected to know"), *review denied* (Minn. Oct. 19, 1993).

Furthermore, A.C.'s reports about the digital-anal penetration were consistent. After her initial spontaneous disclosure to her father, A.C. consistently described the sexual abuse to her mother, her aunt, Dr. Spaulding, Detective Missell, Dr. Palmer, and at trial. To be sure, some of the details concerning the abuse varied. For example, at trial, A.C. said that Schwartz had not licked his finger when he put it in her butt. Nor did she testify about Schwartz putting his finger in her vagina or pressing his penis against her, as she had reported to Dr. Spaulding and Detective Missell. But the essence of A.C.'s recounting of Schwartz putting his finger in her anus remained unchanged from her initial disclosure to her father through trial. *See Lanam*, 459 N.W.2d at 661 (finding that child's statement was reliable even though "[d]etails varied" because the "basic story remained unchanged"). And, importantly, the jury convicted Schwartz only on the one count that alleged digital-anal penetration.

Schwartz tries to undercut the reliability of A.C.'s statements to Detective Missell by asserting that the detective lacked training and conducted the interview improperly. While the detective did ask a number of non-open-ended questions, these leading questions came after A.C. voluntarily disclosed that Schwartz had touched her inappropriately. The transcript shows that many of these closed-ended questions were made simply to ensure that the detective heard A.C. correctly or to follow-up on what

A.C. disclosed. Although the interview did not precisely adhere to the CornerHouse protocol, a careful review of the entire transcript conclusively demonstrates that Detective Missell was not putting words in A.C.'s mouth or leading her to provide particular answers.

In sum, sufficient evidence in the record supports the district court's finding that, given the totality of circumstances, A.C.'s statements were reliable and trustworthy. The record shows that A.C. spontaneously told her father about Schwartz putting his finger in her anus; A.C. consistently reported this digital-anal penetration to relatives, her doctor, and a police officer and then testified about it at trial; A.C. had no apparent motive to fabricate this abuse and children her age do not commonly have sexual content in their fantasies; and, finally, a child A.C.'s age would not understand the sexual significance of the conduct she described without having first experienced it. The trial court thus properly exercised its discretion in admitting A.C.'s out-of-court statements to Detective Missell.

Medical Professionals

Schwartz next challenges the admission of A.C.'s statements to Dr. Spaulding and Dr. Palmer. Out-of-court statements to medical professionals may be admissible if they are "made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Minn. R. Evid. 803(4). "The rationale behind the rule is the patient's belief that accuracy is essential to effective treatment." *Robinson*, 718 N.W.2d at 404

(quotation omitted). "[A child's] statements are admissible only if the evidence suggests that the child knew she was speaking to medical personnel and that it was important she tell the truth." *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993); *see e.g.*, *State v. Larson*, 472 N.W.2d 120, 126 (Minn. 1991) (holding that a three-year-old child, who was taken to a family-practice clinic to be examined after complaining of vaginal soreness and burning urination, had "the same 'selfish' treatment-related motive to speak the truth that anyone has when one goes to a doctor's office sincerely inquiring about one or more symptoms" (footnote omitted)), *cert. denied*, 112 S. Ct. 965 (1992).

Dr. Spaulding testified that she has taken care of A.C. since A.C. was born, that A.C. calls her "Dr. Spaulding," and that A.C. knows that she is a doctor. Thus, the evidence shows that A.C. knew that she was speaking to medical personnel. And A.C. knew that it was important to tell the truth to receive "effective treatment," because she had been seeing Dr. Spaulding for medical care since she was born and knew that she saw Dr. Spaulding to treat illness. Accordingly, the district court properly found that A.C.'s statements to Dr. Spaulding fell within the medical-diagnosis exception to the hearsay rule.

By contrast, A.C. did not know Dr. Palmer. The prosecutor asked A.C.: "Did you go and talk to Cathy Palmer about your feelings?" A.C. replied: "Who's Cathy Palmer?" The prosecutor asked A.C.: "Do you remember ever talking with Cathy Palmer about what [Schwartz] did to you?" A.C. replied: "No, because I don't know who Cathy Palmer is." Moreover, her parents did not tell her why she was seeing Dr. Palmer. Thus, the record does not establish that A.C. knew that she was speaking to a doctor.

Therefore, this evidence was inadmissible under the medical-diagnosis exception. Schwartz fails to show the required prejudice, however, from the erroneous admission of A.C.'s statements to Dr. Palmer. *See Amos*, 658 N.W.2d at 203 (requiring a showing of both an abuse of discretion and resulting prejudice).

Schwartz's conviction will stand if the district court's error was harmless beyond a reasonable doubt. *See State v. King*, 622 N.W.2d 800, 809 (Minn. 2001). An error is harmless if "the verdict is surely unattributable to the error." *Id.* (quotation omitted). From this record, we conclude that the jury's verdict was not attributable to Dr. Palmer's testimony because it was cumulative of other evidence that supported Schwartz's conviction. Because A.C.'s statements to Dr. Palmer were similar or identical to those she made to Dr. Spaulding and Detective Missell, Dr. Palmer's testimony was not unduly prejudicial. Further, A.C.'s trial testimony and the testimony of A.C.'s father and aunt alone supported Schwartz's conviction of digital-anal penetration. Because more than sufficient evidence was presented that Schwartz digitally penetrated A.C., any error in admitting Dr. Palmer's testimony did not substantially influence the verdict.

II. Vouching Testimony

Schwartz next contends that the district court abused its discretion by admitting the vouching testimony of A.C.'s mother. Even though the defense did not object to the vouching testimony at trial, because the district court issued a pretrial ruling on this issue, we review this claimed evidentiary error for an abuse of discretion. *See State v. Litzau*, 650 N.W.2d 177, 183 (Minn. 2002) (stating that when a district court rules on motions in

limine, a party need not renew an objection to the admission of evidence to preserve a claim of error for appeal).

While "one witness cannot vouch for . . . the credibility of another witness," *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998), the state is allowed to respond with material that may otherwise be deemed inadmissible when a defendant introduces material that "opens the door." *State v. Bailey*, 732 N.W.2d 612, 622 (Minn. 2007). Allowing the state to respond after the defendant opens the door prevents the defendant from gaining an unfair advantage by introducing potentially misleading information. *Id.*

The district court ruled before trial that "[a]fter [Schwartz] has offered reputation and opinion evidence of A.C.'s untruthfulness, the [s]tate may ask about specific instances relating to truthfulness or untruthfulness on cross[-]examination." At trial, Schwartz's attorney asked numerous questions suggesting that A.C.'s mother did not believe her daughter's accusations. Schwartz's attorney asked J.C. if A.C. had ever told her a lie about Schwartz. J.C. replied that weeks before A.C. made her allegations against Schwartz, A.C. had told her something "unbelievable, weird" about Schwartz, that "he could fly or something." J.C. asked A.C. if she made up this particular statement, and A.C. admitted that she made it up.

Schwartz's attorney then asked J.C., over objection by the prosecution, if she "had a hard time believing what [A.C.] had said on November 25th . . .?" Defense counsel persisted in asking A.C.'s mother at least twice more whether she told Detective Missell that she had a hard time believing what A.C. was reporting. Defense counsel then quoted J.C. as saying to Detective Missell, "I had my doubts because she told that outrageous

lie." J.C. admitted that she had doubts about A.C.'s accusations, partly because of A.C.'s earlier story and also because she did not want A.C.'s accusations to be true.

In response, on cross-examination, the prosecutor asked a single question: "You've testified . . . that you had disbelief. Did your feeling of disbelief about [A.C.] and what she was saying, did that change over time?" J.C. testified: "Oh, yes. Absolutely. I really believe her." The defense did not object to this single question or ask to strike any portion of J.C.'s answer.

Under the facts of this case, where Schwartz opened the door to this line of questioning, J.C.'s response to a single question was permissible. *See State v. Maurer*, 491 N.W.2d 661, 662 n.1 (Minn. 1992) ("In certain cases it may be proper for the prosecutor to elicit opinion testimony . . . on the specific issue of whether the complainant's testimony is truthful if the defense 'opens the door' to such evidence." (citing *State v. Myers*, 359 N.W.2d 604, 611–12 (Minn. 1984))).

The testimony elicited by the defense did not just focus on the mother's testimony about a *specific instance* of untruthfulness by A.C.—that Schwartz could fly. Rather, defense counsel purposefully elicited J.C.'s testimony that she disbelieved her daughter about the sexual abuse. Under these circumstances, where a main theme of the defense was to discredit A.C.'s testimony by showing that not even her mother believed her,[3] fairness dictated that the prosecution be allowed to ask whether J.C. continued to

[3] In its closing argument, defense counsel's final words highlighted this disbelief, stating that A.C.'s "own parents doubted whether or not [the abuse] had occurred."

disbelieve the allegations. Absent the prosecutor's single question, the jury would be left with the incorrect impression that J.C. still disbelieved her daughter.

This case is similar to *State v. Myers*. In that prosecution concerning abuse of a seven year old, the defendant elicited testimony on cross-examination from the victim's mother that she did not initially believe her daughter. 359 N.W.2d at 611. In response, the trial court permitted the victim's clinical psychologist to testify that the victim's behavior was consistent with that of many sexual-abuse victims and that, in her opinion, the victim's allegations were truthful. *Id.*

The Minnesota Supreme Court upheld the trial court's evidentiary ruling. Noting that, "[a]s a general rule . . . we would reject expert opinion testimony regarding the truth or falsity of a witness' allegations about a crime," it was willing to allow such testimony in that case. The court explained:

> Having sought, however, to discredit the child's credibility by showing that the child's mother (the ultimate 'expert' with respect to the complainant) did not believe her for several months, the defendant must be said to have waived objection to responsive opinion testimony even though elicited from an expert of a different kind.

Id. at 611–12. This reasoning and the circumstances present here convince us that the district court did not abuse its discretion in declining to sua sponte limit or to strike J.C.'s testimony.[4]

[4] Even assuming that the district court abused its discretion in permitting this response to stand, considering the testimony of A.C. at trial and the numerous other witnesses who testified, Schwartz cannot show that the jury's verdict was affected by a brief, single-sentence statement from A.C.'s mother.

III. Sufficiency of the Evidence

Schwartz also argues that the evidence is insufficient to sustain his conviction of first-degree criminal sexual conduct because A.C. was not a credible witness and her testimony was uncorroborated.

In considering a claim of insufficient evidence, this court's review is limited to an analysis of the record to determine whether the evidence, viewed in a light most favorable to the conviction, is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004). We assume that "the [fact-finder] believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). And we defer to the fact-finder's credibility determinations. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002).

Schwartz was convicted of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). A person is guilty of first-degree criminal sexual conduct under that subdivision if he "engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age . . . and the actor is more than 36 months older than the complainant." *Id.*

First, no dispute exists regarding the ages of Schwartz and A.C. Next, Schwartz contends that A.C. was not credible concerning the required sexual penetration. But

construing the evidence in favor of the verdict, we must credit A.C.'s testimony that Schwartz touched her "[i]n the butt" and that Schwartz put his finger in her butt and wiggled it. The jury found A.C.'s testimony credible; this direct evidence from A.C. that Schwartz engaged in sexual penetration with her is sufficient to support Schwartz's conviction. *See State v. Foreman*, 680 N.W.2d 536, 539 (Minn. 2004) (stating that "a conviction can rest on the uncorroborated testimony of a single credible witness" (quotation omitted)).

Schwartz also contends that A.C.'s testimony was not corroborated, making it further unreliable. But even though the testimony of a victim of criminal sexual conduct need not be corroborated, A.C.'s testimony was corroborated. *See* Minn. Stat. § 609.347, subd. 1 (2008). Even without considering A.C.'s statements to the detective and Dr. Spaulding, her trial testimony was corroborated by her prior consistent statements to her father and aunt. A.C.'s father testified that A.C. told him that Schwartz "licked his finger and stuck it up [her] big butt." A.C.'s aunt testified that A.C. told her that Schwartz "would lick his finger and then put it in her butt, and then when it got dried out he would take his finger out and lick it again." The evidence sufficiently supports the conviction.

IV. Sentence

Finally, Schwartz argues that the district court abused its discretion by imposing the presumptive sentence rather than sentencing him to a downward dispositional departure and placing him on probation.

A district court must impose the presumptive guidelines sentence unless the case involves "identifiable, substantial, and compelling circumstances" in support of

departure. Minn. Sent. Guidelines II.D (2008). "Substantial and compelling circumstances are those . . . that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). We review de novo whether substantial and compelling circumstances allow a departure. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But we review the district court's decision to deny a departure for abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001).

Even when substantial and compelling circumstances exist, the district court has "broad discretion" in deciding whether to grant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The district court's decision to impose the presumptive sentence must be affirmed "as long as the record shows [that] the [district] court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 81 (Minn. App. 1985). Thus, only a "rare case" will merit reversal of a district court's refusal to depart. *Kindem*, 313 N.W.2d at 7.

In considering whether to grant a dispositional departure, the district court must consider the defendant's "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Relevant factors may include the defendant's age, prior record, remorse, cooperation, attitude in court, and the available support network of friends or family. *Id.* at 31. In considering these circumstances to the extent they are relevant, the district court "can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983).

Schwartz asserts that the district court abused its discretion because it failed to analyze the *Trog* factors. The district court stated that "the *Trog* factors are [not] to be mechanically applied," and that the court must look "beyond amenability to treatment and the amenability to probation." The court stated that it needed to consider public safety, and whether a departure would unduly depreciate the seriousness of the offense. The court determined that it could not depart because it could not find that Schwartz is, "at a minimum, amenable to treatment."

We must affirm the imposition of a presumptive sentence "as long as the record shows [that] the [district] court carefully evaluated all the testimony and information presented before making a [sentencing] determination." *Van Ruler*, 378 N.W.2d at 81. The record shows that the district court "carefully evaluated" the relevant information here. Among other findings, the court noted that Schwartz demonstrated poor judgment and an unwillingness to avoid high-risk situations when, pending trial, he lived with a family member in a home with two young children. We conclude, therefore, that the district court properly exercised its discretion by imposing the presumptive sentence.

Affirmed.

WORKE, Judge (dissenting)

I respectfully dissent. The cumulative effect of the erroneous evidentiary rulings resulted in prejudice, and appellant is entitled to a new trial. *See State v. Johnson*, 441 N.W.2d 460, 466 (Minn. 1989) (stating that cumulative error exists when a defendant is prejudiced by the cumulative effect of trial errors and "indiscretions," none of which alone might have been sufficient to cause prejudice or mandate a new trial). Appellant showed that the district court abused its discretion by admitting A.C.'s out-of-court statements to Detective Missell and to Dr. Palmer, and that the admission of these statements prejudiced him. *See State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (stating that we review evidentiary rulings for an abuse of discretion and resulting prejudice). Further, the improper admission of the vouching testimony of A.C.'s mother warrants a new trial.

Out-of-Court Statement to Detective Missell

The district court admitted as evidence the videotape of A.C.'s interview with Detective Missell. In doing so, the court determined "the interview was close in time to the alleged abuse," "witnesses and investigators [have] corroborated the details about [appellant's] bedroom and the daycare," "Detective Missell has training in interviewing child-sex-abuse victims," and "Detective Missell used anatomical drawings to determine what words [A.C.] used for each body part." Based on these factors, the majority upholds the district court's discretionary ruling to admit A.C.'s out-of-court interview with Detective Missell under Minn. Stat. § 595.02, subd. 3 (2008), and the residual exception to the hearsay rule, Minn. R. Evid. 807. Although the majority concludes that

A.C.'s statement demonstrated "circumstantial guarantees of trustworthiness," a closer analysis of the relevant factors shows that the interview with Detective Missell falls short of meeting the requisite guarantees of a trustworthiness required by law. *See id.* The district court's analysis is incomplete, inaccurate in many respects, and fails to consider additional relevant factors.

The record does not sufficiently support the court's underlying findings. First, the interview was not close in time to the alleged abuse because it remains unclear when the alleged abuse occurred. The abuse supposedly occurred sometime between September 2008, when A.C. turned four years old, up to the date she reported the alleged abuse to her parents in November 2009, when she was five years old. This is a significant span of time, especially for a young child. A.C. was never able to state when or how many times the alleged abuse occurred. Second, no one ever contested that A.C. napped during daycare in appellant's bedroom on a top bunk; thus, the fact that detailed information about appellant's bedroom and A.C.'s daycare was corroborated is irrelevant. Such facts do not bolster the reliability of A.C.'s statement. Third, Detective Missell's training consisted of a one-week CornerHouse seminar that he took two years prior to the child's interview. And A.C.'s interview was notably unusual; the detective wore his gun throughout the interview and the interview lasted 45 minutes, much longer than is suggested for a five-year-old child.

Evaluation of the relevant factors that are considered germane to the reliability of A.C.'s out-of-court statement cast further doubt on the district court's ruling on the admissibility of A.C.'s statement. At the start of the interview, Detective Missell

introduced himself as a police officer and stated that his "job is to talk to kids." He then led A.C. into a general conversation before he again stated: "Well, I'm gonna [sic] talk about touches here in a minute." After A.C. identified anatomical parts, the detective stated: "Well, my job is to talk to kids about touches and we're gonna [sic] talk about touches." When A.C. then stated that nobody touches her brothers, the detective asked: "Does somebody touch you?" A.C. then stated that appellant "touch[ed] her everywhere at daycare." Contrary to the majority's conclusion, this is not a spontaneous remark; A.C. responded to a question about "touch," and she was clearly familiar with the context because she later disclosed that her mother described for her good touches and bad touches. Further review of the interview transcript demonstrates that A.C. understood at the start of the interview, if not prior to the interview, that she was specifically speaking to a police officer about appellant's touching her. A.C. was prepared to discuss appellant because she immediately assumed that the detective wanted to discuss with her "bad touches" before he even raised the topic of good versus bad touches. Based on this record, A.C.'s statements lack spontaneity because they were the product of pre-interview prompting.

It is also difficult to credit A.C.'s out-of-court statement as spontaneous when the record demonstrates that A.C. and the detective both understood that they were in a room together to discuss appellant. Unlike the majority's interpretation that A.C. "volunteered the allegations against Schwartz without the detective's prompting," a truly spontaneous statement regarding "touching" could not occur after the detective introduced the idea by stating: "I'm gonna [sic] talk about touches here in a minute," and then a short while later

stating: "[M]y job is to talk to kids about touches and we're gonna [sic] talk about touches."

Consideration should also be given to whether Detective Missell had a preconceived notion of what A.C. would say and whether A.C.'s replies were in response to leading questions. Detective Missell read reports regarding the allegations before the interview. And the record is replete with leading questions from Detective Missell who admitted that he failed to use only open-ended questions. The Detective asked multiple yes/no leading questions that elicited agreeable responses from A.C. Specifically, the detective asked A.C.: "[D]oes somebody touch you?" A.C. replied: "Yes, [appellant] touches me everywhere at daycare. . . . He does this stuff to me." The detective asked A.C. if appellant touched her anywhere else, and she replied: "[N]o." But then the detective asked A.C. if appellant ever used his "pee sack [penis]." And A.C. replied: "[S]ometimes." The detective asked if appellant "put his pee sack inside of [her] butt." Again, A.C. replied: "[S]ometimes." The detective asked A.C.: "[D]oes [appellant's] pee sack go inside of your butt?" She replied: "[Y]ep." The detective asked: "[Appellant] just use[d] his finger and his pee sack?" A.C. replied: "Yep." The detective asked: "To go inside your butt?" A.C. replied: "Yep." The detective asked: "Does he touch your vagina?" A.C. replied: "Not at all." The detective asked: "Does he touch your boobs?" A.C. replied: "Um, no. Sometimes he touches my vagina." The detective asked: "Sometimes he touches your vagina?" A.C. replied: "Yep." The detective asked: "[D]oes he go inside your vagina?" A.C. replied: "[Y]eah." These leading questions are not the type of open-ended questions that are designed to elicit an untainted response.

Adequate consideration should also be given to whether the child had any apparent motive to fabricate. The district court did not thoroughly analyze whether A.C. was likely to fabricate the allegations. The district court stated merely that A.C. did not have a motivation to lie because she did not claim to dislike the daycare or appellant. But there are other reasons that children fabricate stories—such as a way to garner attention. As appellant points out, A.C.'s parents recently had twin boys, which may have diminished the parents' attentiveness to A.C. A.C.'s mother testified that in another instance, A.C. told her an "unbelievable" lie about appellant. This fabrication occurred before A.C.'s allegations of abuse. It is, thus, possible that A.C. invented a second story that included stronger allegations against appellant to garner a more favorable reaction from her parents.

The majority concludes that A.C. had no motivation to lie because there was no demonstrated animosity between her and appellant. But A.C. reported to Detective Missell that appellant frequently stuck his tongue out at her, hit her, and was mean to her, and he never apologized for this behavior. While not a good reason to create sexual-abuse allegation against someone, we must remember that this was a five-year-old child. And there was also testimony that A.C. stated in a session with a psychologist that "she was now in charge and appellant and [appellant's mother] had to do what she said" and that appellant "now needs to listen to her." The district court did not completely consider or weigh A.C.'s motivation to fabricate the allegations.

Finally, A.C.'s statements were inconsistent. A.C. claimed that she and appellant were alone in the bedroom, but she later stated that another child was sleeping on the

bottom bunk. She claimed that appellant sometimes took off his shirt and pants; later, she claimed that he did not take off his clothes. She claimed that appellant put his penis in her butt, but then she claimed that he used just his finger. She claimed that appellant did not touch her vagina, but then she claimed that he sometimes touched her vagina with his finger and his penis.

A.C.'s trial testimony was very brief and included scarce detail; conversely, the interview here lasted 45 minutes and was laden with detail. The jury watched the video recording of the interview during trial and requested to watch the video again during deliberations. Although the district court denied the request, the fact that the jury made the request suggests that it relied on this evidence.

Based on the complete record, and what is an imprecise and incomplete analysis of the relevant reliability factors, the district court abused its discretion by admitting the videotape of A.C.'s interview with Detective Missell. And such error was not harmless, because the verdict may have been largely attributable to that error. *See State v. King*, 622 N.W.2d 800, 809 (Minn. 2001) (stating that an error is harmless if "the verdict is surely unattributable to the error.")

Out-of-Court Statement to Dr. Palmer

The second trial error occurred in the admission of Dr. Palmer's testimony. The majority agrees that Dr. Palmer's testimony should have been excluded because the record failed to show that A.C. knew that she talked to a doctor. The majority, however, determined that the erroneous admission of this evidence was not prejudicial to appellant because the jury's verdict was not attributable to Dr. Palmer's testimony. But if you

eliminate from the record the collective evidence that should have been excluded, the jury's verdict was not surely unattributable to the erroneous admission of Dr. Palmer's testimony.

Dr. Palmer testified that A.C. brought up "on her own" what appellant did to her. This inadmissible testimony supports the state's claim that A.C. spontaneously reported the incident. Dr. Palmer also testified regarding the alleged touching—that appellant penetrated A.C.'s anus with his fingers; this is the only charged offense on which the jury found appellant guilty. Dr. Palmer also testified that A.C. reported that she was "scared during nap time at day care." This was the only evidence that A.C. was scared. The doctor also testified that A.C. reported that the alleged abuse occurred over 100 times. A.C. was not able to tell anyone else how many times the alleged abuse occurred. The error in admitting this evidence was not harmless, because the evidence provided key support to establish the elements of the offense and the state's theory of the case, which led to a guilty verdict.

Vouching Testimony of A.C.'s mother

The third trial error was the erroneous admission of A.C.'s mother's vouching testimony, which was precluded by pretrial rulings. The district court ruled that "[w]hether A.C. is telling the truth is the *most important fact issue* in this case." (Emphasis added.) The court stated that if appellant offered reputation and opinion evidence of A.C.'s untruthfulness, the state could introduce "specific instances relating to truthfulness or untruthfulness on cross-examination of the state's witnesses of [appellant's] character witnesses." The court specifically stated:

> the state suggested that it may ask a witness whether she believes that A.C. is telling the truth about [appellant] abusing A.C. The state's rationale was that, if [appellant] can present evidence relating to truthfulness, the [c]ourt should allow the state to ask about A.C.'s truthfulness too. This analogy misses the mark by a wide margin. Whether a witness believes A.C.'s allegation of abuse is wholly irrelevant as to whether A.C. is telling the truth. The rules do not allow this type of testimony. . . . [T]he state may not ask a witness about her opinion of A.C.'s specific allegation in this case.

This ruling clearly precluded the prosecutor from asking A.C.'s mother: "You've testified . . . that you had disbelief. Did your feeling of disbelief about A.C. and what she was saying, did that change over time?" And it likewise precluded the mother from responding: "Oh, yes. Absolutely. I really believe her." This testimony was impermissible and highly prejudicial because, as the district court stated: "Whether A.C. is telling the truth is the most important fact issue in this case." While it can be assumed that a mother would readily believe her child's allegation of abuse, it was improper for A.C.'s mother to testify that she "really believe[s]" A.C. And because credibility of A.C. was the central trial issue, this error tainted the verdict. *See Van Buren v. State*, 556 N.W.2d 548, 551-52 (Minn. 1996) (holding that the appellant was denied a fair trial as a result of improper vouching testimony when the central issue at trial was credibility).

The majority states that appellant opened the door to the vouching testimony. But the district court specifically ruled that the state could not ask a witness about her opinion of A.C.'s truthfulness. Additionally, the majority states that the district court ruled that after appellant offered evidence of A.C.'s untruthfulness, the state could ask about "*specific instances* relating to truthfulness or untruthfulness on cross-examination."

(Emphasis added.) The question "Did your feeling of disbelief about A.C. and what she was saying . . . change over time?" is not a *specific instance* relating to truthfulness. While the majority concluded that appellant opened the door, it does not appear that he did. The question was impermissible and the response was prejudicial.

As a reviewing court, we are asked to determine whether evidence was wrongly admitted. The majority takes a hindsight approach and determines that the other evidence sufficiently supports the verdict; thus, there is no reason to remand for a new trial. But we are to determine whether the jury should have even heard this evidence. Because the evidence should not have been presented to the jury, one cannot say that the verdict would have been the same if it had been properly excluded. Appellant should be granted a new trial, with appropriate evidentiary rulings to guarantee that the verdict was not reached based on consideration of impermissible evidence. For these reasons, I respectfully dissent from the majority opinion.[5]

[5] It is also noteworthy that the majority determined that Dr. Palmer's testimony was cumulative, which supports my conclusion that the testimony was prejudicial. Finally, the majority cites to *State v. Myers*, to support its contention that the mother's vouching testimony was an appropriate response to a challenge to A.C.'s credibility after appellant "opened the door" to such questioning. 359 N.W.2d 604 (Minn. 1984). However, *Myers* concerned a mother who testified about disbelieving her child and the district court determined that the defendant opened the door to the prosecutor asking a doctor, serving as an expert witness, whether the child was truthful in making her allegations. *Id.* at 611. Here, we have a pretrial ruling permitting the state to introduce *specific instances* of truthfulness if appellant offered opinion evidence of A.C.'s untruthfulness. The prosecutor's question exceeded the limited scope of questioning and permitted inadmissible testimony to be heard by the jury. *Myers* is not controlling here.