**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-1414**

State of Minnesota,
Respondent,

vs.

Donald Reinhart Frey,
Appellant.

**Filed June 3, 2013**
**Affirmed**
**Stoneburner, Judge**

Stearns County District Court
File No. 73CR113550

Lori Swanson, Minnesota Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

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

Jenny Chaplinski, Special Assistant State Public Defender, St. Cloud, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Rodenberg, Judge; and Klaphake, Judge.[*]

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

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

**STONEBURNER**, Judge

Appellant challenges his convictions of multiple counts of criminal sexual conduct, arguing that the district court committed reversible error by allowing the jury, during deliberations, to review the video recordings of the complainants' police interviews. We affirm.

## FACTS

Four children, A.F., S.S., J.F., and B.F., all loosely affiliated blended-family members of appellant Donald Reinhart Frey who had visited or stayed in Frey's home, reported that Frey had sexual contact with them.[1] During its investigation, police conducted Cornerhouse-type recorded video interviews with each child. Frey was charged by criminal complaint in Stearns County with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1 (2010), and nine counts of second-degree criminal sexual conduct, under Minn. Stat. § 609.343, subd. 1 (2010). Each child testified at trial, and the jury viewed the interview recordings, which were admitted into evidence. The jury also viewed the videotaped recording of Frey's interview with police, in which he denied the allegations.

On the second day of jury deliberations, the jury sent the following question to the district court judge: "May we watch the interview videos again with the transcripts, if

[1] Two of the victims, nine-year-old J.F. and eight-year-old B.F., are the biological grandchildren of Frey's wife, D.F. D.F.'s son, M.F., is the father of these children; M.F. and the children's mother, A.D., dissolved their marriage in July 2010. The third victim, thirteen-year-old A.F., is M.F.'s biological child from another relationship. The fourth victim, S.S., is the biological child of A.D. from another relationship.

possible? We would like to see all the videos. (But we don't need a review of the house layout)." The district court read the question on the record in the presence of counsel and Frey.

Frey's attorney objected, arguing that because the children's interviews were not entirely consistent with the children's testimony, allowing the jury to watch those videos would give the prosecutor "a second bite of the apple" and would give those interviews undue prominence. The prosecutor pointed out that some of the interviews were exculpatory. After a brief recess, during which the district court reviewed the authority cited by counsel, the district court made a detailed record of the factors it considered in reaching its decision to play each video recording for the jury once in open court in one uninterrupted session with Frey and counsel present.

The jury subsequently found Frey guilty of two counts of first-degree criminal sexual conduct and eight counts of second-degree criminal sexual conduct. The district court sentenced Frey to 144-months on a first-degree offense, stayed for 30 years, and placed appellant on probation with conditions, which included a one-year jail term, subject to work release. This constituted a downward dispositional departure from the presumptive sentence. The district court also imposed concurrent sentences on three of the second-degree criminal sexual conduct offenses. This appeal followed.

## D E C I S I O N

On appeal, Frey asserts that allowing the jurors to view the recordings during deliberations constituted reversible error. "A jury may request review of testimony or other evidence after it has retired to deliberate, and the court has discretion to grant the request." *State v. Reed*, 737 N.W.2d 572, 586 (Minn. 2007). The Minnesota Rules of Criminal Procedure set forth the method a district court should employ in handling a jury request to review evidence during its deliberations:

> The court may allow the jury to review specific evidence.
>
> (a) If the jury requests review of specific evidence during deliberations, the court may permit review of that evidence after notice to the parties and an opportunity to be heard.
>
> (b) Any jury review of depositions, or audio or video material must occur in open court. The court must instruct the jury to suspend deliberations during the review.
>
> (c) The prosecutor, defense counsel, and the defendant must be present for the proceedings described in paragraphs (a) and (b), but the defendant may personally waive the right to be present.
>
> (d) The court need not submit evidence beyond what the jury requested but may submit additional evidence on the same issue to avoid giving undue prominence to the requested evidence.

Minn. R. Crim. P. 26.03, subd. 20(2). "The decision to grant a jury's request to review evidence is within the discretion of the district court, and we will not overturn it absent an abuse of that discretion." *State v. Everson*, 749 N.W.2d 340, 345 (Minn. 2008). When a jury makes such a request, the district court should examine three factors in determining whether to grant the request: "(i) whether the material will aid the jury in proper

consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury." *Id*.; *State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991) (applying the same three-factor test).

Here, the district court applied the procedures required by Minn. R. Crim. P. 26.03, subd. 20(2). The court notified Frey and counsel of the jurors' request and gave counsel the opportunity to argue the merits of the issue. The review of the recordings occurred in open court in the presence of Frey and counsel.

At oral argument on appeal, Frey asserted that the specific error he complains of is the district court's failure to make adequate findings on the each factor suggested for consideration by *Kraushaar* and *Evenson*. Particularly, Frey asserts that the district court's statements on the record were insufficient to reflect that it adequately considered the first factor: whether the material will aid the jury in proper consideration of the case. But no authority requires the district court to make formal findings on each factor. And the record reflects that in reaching its decision the district court considered and applied each of the three factors. The court first examined whether the evidence would assist the jury "in proper consideration of the case" and concluded that it would because the jury "obviously . . . think[s] that it is important and they feel that they need it in order to . . . give proper consideration of the case." Second, the court considered whether either party would be prejudiced by submission of the evidence. The court noted that the jury had listened to the recordings very early in the trial and that both sides relied heavily on the recordings during trial and in closing arguments. Third, the court considered whether the

material could "be subjected to improper use by the jury." The court stated that it would institute proper safeguards to prevent this, including bringing the jury to the courtroom to hear the recordings with counsel and Frey present, prohibiting deliberations while the recordings were played, and playing the recordings only once without stopping. We find no merit to Frey's challenge to the adequacy of the district court's record reflecting proper consideration of the appropriate factors.

Frey asserts that playing the recordings during deliberations constituted error because replaying the videos elevated the importance of statements made to police above the importance of sworn testimony presented in court.[2] And he asserts that there is a reasonable possibility that this error affected the verdict.

Frey relies on the dissenting opinions of Justices Tomljanovich and Simonett in *Kraushaar* to argue that replaying the recording during deliberations could improperly affect the jury's credibility determination and that "[a]llowing a jury to view such a videotape at its discretion is tantamount to sending the alleged victim herself into the jury room." 470 N.W.2d at 517. But the majority in *Kraushaar* rejected the reasoning asserted in the dissent, and we are bound by the law as articulated by the majority. *See*

[2] In his brief on appeal, Frey states: "[w]hile not technically depositions, these recordings are memorialized, out-of-court witness statements that are testimonial, as defined under *Crawford v. Washington*. 541 U.S. 36, 52-53[, 124 S. Ct. 1354, 1364-65] (2004). Unlike depositions, however, the DVD recordings of the police interviews are inherently unreliable because the witnesses giving testimony are not subject to cross-examination. *Id.*" To the extent that Frey is attempting to raise any issues under *Crawford*, we find that issue waived for lack of adequate briefing. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5 1997). We note, however, that each of the witnesses testified and was thoroughly cross-examined at trial.

*State v. Martin*, 723 N.W.2d 613, 620 n.7 (Minn. 2006) (rejecting argument put forth by the dissent because "neither our court rules nor our precedent dictate that we adhere to the dissent's standard"); *see also State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998) (stating that appellate court, as an error correcting court, may not correct alleged errors in supreme court precedent). Additionally, as noted in the state's appellate brief, the factual concerns raised by the dissenters in *Kraushaar* are not present in this case because in *Kraushaar* the jury was permitted to review a videotape "at its discretion" during deliberations in the jury room, which did not occur here. 470 N.W.2d at 517. The district court in this case properly applied the procedures required to protect against unwarranted prejudice, and Frey conceded at oral argument on appeal that he is not challenging the procedures involved in replaying the interviews.

**Affirmed.**