

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-414

NOVEMBER TERM, 2020

State of Vermont v. Steve R. Desjardin*	}	APPEALED FROM:
	}	
	}	Superior Court, Addison Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 440-11-18 Ancr
		Trial Judge: Alison S. Arms

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for lewd and lascivious conduct with a child. He argues that the trial court erred in admitting hearsay statements made by the child complainant because she testified about the incident at trial and because the statements were untrustworthy. We affirm.

In November 2018, defendant was charged with lewd and lascivious conduct with a child in violation of 13 V.S.A. § 2602 based on allegations that he touched the vagina of his eight-year-old niece. Prior to trial, the State filed a motion stating that, pursuant to Vermont Rule of Evidence 804a, it intended to introduce out-of-court disclosures about the incident made by the child to her mother, her mother’s friend, and a police detective before defendant was charged. The child’s mother was anticipated to testify that in October 2018, the child had been complaining for several weeks of stomach pain and had not been sleeping at night. One evening, the child was not acting normally and, after her mother put her to bed, came downstairs looking for medicine. The child stated that her mother did not care about her, prompting her mother to ask what was wrong. The child stated that defendant, who is her father’s brother, had touched her privates. She then stated that she was lying, that it never happened, that her dad was going to be mad at her, that she was told not to say anything, and that she was sorry. The child’s mother contacted her friend, who arrived and found the child on the floor crying hysterically. The child told mother’s friend that defendant had touched her.

Two days later, the child met with a detective who specializes in child abuse investigations for a forensic interview. During the interview, the child told the detective that defendant came into her bedroom at her father’s house and touched her vagina under her clothing in a rubbing motion. The child said that defendant told her not to tell anyone.

Defendant objected to the admission of the statements. He “reserve[d] all previous constitutional arguments that have been made by others regarding the patent due process violation that allows any sort of hearsay statements from a child under 12 years old simply because said child is under 12.” He further argued that the State had failed to show that the child was available to testify; the statements to the police detective were taken in preparation for a legal proceeding and were untrustworthy because the child was unable to remember details such as what she was

wearing and the detective asked her leading questions; and the child's statements to her mother were untrustworthy because she immediately recanted her statement. The court held a hearing on the motion and concluded that the statements were admissible under Rule 804a if the child was available to testify.

At trial, the State called the child as its first witness. She testified that at the time of the incident, her father lived with his mother and defendant in Vergennes. She stayed with her father on Wednesdays and weekends and slept in her father's bedroom in the basement. Defendant stayed in another room in the basement. The child testified that she was alone in her father's bedroom putting on her pajamas when defendant came in and touched her on her vagina. The child said defendant told her, "Shh, don't tell anyone." When asked by the State to clarify what she meant by touching her vagina, she stated that he put his hand down under her pants and touched her vagina over her underwear. She stated that he did not put his hand inside her vagina. She said that she did not tell anyone because defendant told her not to and she did not want to get in trouble.

The child's mother and her mother's friend testified as anticipated, and defendant did not object to their testimony. The child's father then testified briefly, followed by the detective. When the State sought to admit the videorecording of the detective's interview of the child, defense counsel interjected, "I'm just preserving my original 804 objection, but other than that, I have no objection at this point to it being played." The State then played the videorecording for the jury.

Defendant testified on his own behalf. He stated that on the day in question, he noticed the child in her father's bedroom looking sad, so he decided to tickle her on the outside of her clothing. She told him that he touched her vagina. He said he told her not to tell anyone that, because it was an accident, and he did not do it on purpose. He denied putting his hands down the child's pants.

The jury found defendant guilty of lewd and lascivious conduct with a child. He was sentenced to serve three to fifteen years. This appeal followed.

Defendant's arguments on appeal turn on the court's interpretation and application of Vermont Rule of Evidence 804a. The rule permits the admission of out-of-court statements made by a person who is under the age of twelve if the court specifically finds that (1) the statements are being offered in a proceeding where the child is a putative victim of certain listed crimes, including lewd and lascivious conduct with a child under 13 V.S.A. § 2602; (2) the statements were not taken in preparation for a legal proceeding and were made prior to the defendant's initial appearance before a judicial officer; (3) the child is available to testify; and (4) "the time, content, and circumstances of the statements provide substantial indicia of trustworthiness." V.R.E. 804a(a)(1)-(4). This exception to the hearsay rule is necessary because child victims are often unable to repeat the facts of abuse in court due to the intimidation of the process. State v. Gallagher, 150 Vt. 341, 346 (1988). Another main purpose of the rule is to protect the defendant's right to confrontation " 'while at the same time curing the frequent problem of lack of corroboration caused by the traditional hearsay rules.' " Id. at 347 (1988) (quoting Reporter's Notes, V.R.E. 804a).

Defendant's primary argument on appeal is that the court should not have admitted the hearsay statements under Rule 804a because the child testified "easily and fully" about all the facts of the abuse at trial. According to defendant, Rule 804a is limited by Rule 403 and therefore should be construed to permit hearsay testimony of details of prior disclosures only when the complainant is unable to provide effective testimony in court, and it was unfairly prejudicial to defendant to admit repetitive hearsay statements because they added nothing to the child's testimony.

It is clear from the record that defendant did not preserve this argument for review. “An issue is not preserved for appeal unless a party raises it with specificity and clarity below, thereby ensuring that the trial court will have an opportunity to fully develop the relevant facts and to reach considered legal conclusions.” State v. Ovitt, 2005 VT 74, ¶ 13, 178 Vt. 605 (mem.). Defendant objected prior to trial to the admission of the statements on the grounds that they were untrustworthy and prepared in anticipation of legal proceedings, and therefore did not meet the requirements of Rule 804a. He also argued generally that Rule 804a violates due process. However, he did not argue then or during trial that Rule 804a is limited to situations where the complainant testifies ineffectively in court. Nor did he ever invoke Rule 403.

Defendant claims that, even if he failed to object below, the verdict is reversible for plain error. The plain-error standard requires us to find that there is an error, that the error is obvious, and that it affected substantial rights and resulted in prejudice to the defendant. State v. Yoh, 2006 VT 49A, ¶ 39, 180 Vt. 317. The standard is not satisfied here. Rule 804a does not, by its terms, limit the admission of child-complainant disclosures to situations where the child is unable to testify effectively at trial. Nor does defendant identify any case in which we have interpreted the rule this way. Cf. id. ¶ 40 (finding plain error where trial court used sentencing procedure this Court had previously ruled to be unconstitutional); State v. Weeks, 160 Vt. 393, 400 (1993) (finding plain error where court permitted physician who treated child victim to identify defendant as perpetrator and imply that child’s allegations were true; testimony went beyond statements allowed by Rule 804a and violated long line of precedent prohibiting expert from opining that victim’s story was true). Thus, even if the court erred in failing to adopt defendant’s narrowing interpretation, the error was not obvious. See Weeks, 160 Vt. at 400 (“In order to be ‘obvious,’ an error must be one that the trial court should easily recognize.”).

Furthermore, even in cases where we have found the admission of a child victim’s hearsay statements to be error, we have concluded that the error was harmless where, as here, the testimony was merely cumulative and the child was available for cross-examination. See State v. Babson, 2006 VT 96, ¶¶ 10-11, 180 Vt. 602 (mem.) (concluding that improper admission of doctor’s hearsay testimony in sexual assault trial did not amount to plain error, in part because it was merely cumulative to testimony of child victim, who testified at trial as the State’s first witness, was subject to cross-examination, and testified to abuse in detail); see also Gallagher, 150 Vt. at 349 (concluding, in prosecution for sexual assault on child, that trial court erred in admitting child’s statements to physician under Rule 803(4), but that “in view of the merely cumulative nature of the physician’s testimony, and the fact that the child declarant was available for cross-examination, the resulting error was harmless”). Indeed, defendant argues here that the 804a statements should not have been admitted because they were mere recitations of the child’s own testimony. Accordingly, we decline to reverse the verdict on this basis.

Defendant also argues that the trial court erred in finding that the hearsay statements were sufficiently trustworthy to be admitted. We review the trial court’s decision to admit a child complainant’s statements under Rule 804a for abuse of discretion. State v. Reid, 2012 VT 65, ¶ 20, 192 Vt. 356. “We uphold the trial court’s conclusion that hearsay statements are trustworthy under Rule 804a(a)(4) if it is supported by the findings, which must be supported by credible evidence in the record.” Id.

In assessing the trustworthiness of disclosures, the trial court may consider factors including: “the circumstances of the initial disclosure, including the setting and person to whom the disclosures were made; internal consistency and detail of disclosures; timing and conduct of interviews, including whether nonleading questions were asked; freshness and spontaneity of disclosures; appropriate body language; risk of fabrication” and “evidence of coercion or

manipulation” as well as “accuracy of peripheral detail; the child’s affect, intelligence, memory, and concern for the truth; and corroboration by medical and other evidence.” State v. Pratt, 2015 VT 89, ¶ 7, 200 Vt. 64. “[T]his list is not exhaustive, and the court need not consider all the factors in finding the testimony admissible.” Id.

The trial court’s findings that the child’s statements to her mother and her mother’s friend bore sufficient indicia of trustworthiness are not clearly erroneous. The court found that the statements were made in response to mother’s general inquiries about what was bothering the child and were not the product of coercion or manipulation. While mother suggested various things that could be upsetting the child, none of them involved criminal wrongdoing by defendant or anyone else. The timing of the child’s symptoms aligned generally with the alleged timing of the incident. Both mother and her friend reported that the child was extremely upset, as might be expected of a child reporting such a disclosure. Further, although sparse in detail, the child’s disclosures were consistent. These findings are supported by the record and support the court’s findings of reliability. See State v. Lawton, 164 Vt. 179, 190 (1995) (holding that child’s statement to mother was trustworthy where disclosure was made in response to first time mother asked child about incidents involving defendant, and was not product of repeated interviewing or coercion or manipulation); Reporter’s Notes, V.R.E. 804a (explaining that “[t]he child-victim’s early communications are often highly trustworthy”).

Defendant argues that the child’s mother was involved in a custody dispute with her father, creating a risk of fabrication by mother. He also argues that mother’s testimony about when she took the child to the doctor was contradicted by the child, further undercutting the reliability of her statements. Defendant failed to object to the admission of the child’s statements on these grounds below. In any event, these arguments involve mother’s credibility, rather than the trustworthiness of the child’s statements themselves, which was the proper focus of the court. See V.R.E. 804a(a)(4) (requiring court to find that “the time, content, and circumstances of the statements provide substantial indicia of trustworthiness”).

Likewise, the trial court’s finding that the child’s statements to the detective were trustworthy is not clearly erroneous. The court found that the child’s statements were consistent with what she had told her mother and her mother’s friend only two days before. The court found that the detective set clear ground rules to help ensure that the child testified truthfully, explaining at the beginning of the interview that if the child did not understand something, she should say so, and stated that she would rather have the child say “I don’t know” than make something up. She then tested whether the child understood the meaning of telling the truth, and the child gave an example about not going somewhere else if she told her mother she was going to the park.

The court also found that the detective’s questions were not impermissibly suggestive. Although the detective offered some options for the child’s answers, these were in response to the child’s requests for clarification after the detective first attempted to elicit information using open-ended questions. The detective’s questions were balanced and did not suggest desired answers. See United States v. Lewis, 705 F. App’x 234, 239 (5th Cir. 2017) (holding that prosecutor’s question to victim, “Were they more partners or was she under his control?” was not leading because it did not suggest answer victim should give). For example, the detective asked whether the touching occurred under or over the child’s clothing. The child said, “Under.” The detective asked how defendant’s hand got under her clothing. The child responded, “Like, what?” and the detective said, “I guess my question is, did he pull your clothing down or did he put his hands inside your clothing, or—.” The child responded, “He put my hand—his hand inside my clothes.” The court found that because the touching could only occur over or under the child’s clothing, it was not impermissibly suggestive to offer two options. Similarly, when the detective asked the

child to describe the touching, and the child asked for clarification, the detective asked whether it was a grab, a pinch, a rubbing, a slapping, or something else. The child responded, “Like, a rub kind of.” The court found that the child’s answer did not simply parrot the detective’s question, and that this and her repeated requests for clarification indicated the child was thinking about her answers and following the rules of the interview. The court’s findings are supported by the record and in turn support its conclusion that the child’s statements to the detective were sufficiently trustworthy to be admissible under Rule 804a.

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice