2011 WL 6306675
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Marie Fierck PRZYNSKI, Respondent.

No. A11–790.
|
Dec. 19, 2011.

Hennepin County District Court, File No. 27–CR–10–18266.

Attorneys and Law Firms

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Considered and decided by KALITOWSKI, Presiding Judge; PETERSON, Judge; and COLLINS, Judge. *

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

UNPUBLISHED OPINION

PETERSON, Judge.

***1** In this pretrial prosecution appeal, appellant state argues that the district court erred in granting respondent's motion to suppress evidence pursuant to *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967), and dismissing the complaint. We reverse and remand.

FACTS

Minneapolis Police Department Inspector Eddie Frizell became aware of a $1,500 withdrawal from a checking account of the International Association of Women Police (IAWP) and believed that respondent Lieutenant Marie Przynski was the only person who could have made the withdrawal. Przynski was on vacation when Frizell learned about the withdrawal, and, when she returned from vacation, Frizell, who was Przynski's commanding officer, called her into his office to speak to her about the withdrawal.

What occurred in Frizell's office is disputed. According to Frizell, he and Przynski engaged in a few minutes of general pleasantries, and then he calmly asked her whether she had recently made any transactions on the IAWP checking account. Frizell testified that after an "awkward silence," Przynski responded, "no," and then volunteered to retrieve the IAWP checkbook from her office. Frizell said, "okay, go to your office and get the checkbook," and Przynski left. When Przynski had not returned after about ten minutes, Frizell knocked on her office door and found that the lights were off and she was gone. Frizell called Przynski, and she said that she was at the bank. Frizell told Przynski that he needed her back at the station because internal affairs investigators were arriving. Przynski returned and met with the investigators, but Frizell was not present at the meeting and did not know what occurred.

According to Przynski, Frizell's tone of voice changed when he asked her about recent financial transactions on the IAWP checking account, and she responded that she made "possibly two deposits and a withdrawal." Przynski first testified that she felt compelled to answer this question, but she later testified that she answered the question because she "had nothing to hide," and she did not feel compelled. Przynski testified that when Frizell asked her what she spent the withdrawal on, she responded that she had not used that money and did not understand what his questions were about, and she asked him what the questions were about. She told Frizell that she was not refusing to answer the question and that she wanted to seek a legal opinion about whether the Minneapolis Police Department had the right to ask about the IAWP's finances. Przynski testified that, in response, Frizell told her that if she did not answer the question, she would be relieved of duty. Przynski testified that rather than answer Frizell's question, she left his office to get the financial records because her first thought was to contact an attorney to find out whether the department had a right to the records.

Przynski was charged with one count of theft by swindle of over $1,000 in violation of Minn.Stat. § 609.52, subds. 2(4), 3(3)(a) (2008 & Supp.2009). Przynski moved to suppress the statements that she made to Frizell, claiming that because the statements were compelled, they are not admissible under *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967). Following a hearing where Przynski and Frizell testified, the district court rejected Przynski's testimony that Frizell told her that she would be relieved of duty if she did not answer and determined that because there was no express threat of police discipline, it was necessary to determine whether Przynski was compelled to answer a question under an implicit threat of discipline for failure to respond. The district court then reviewed the totality of the circumstances to determine whether Przynski's statements were compelled and concluded that Przynski's statements in response to Frizell's questions were compelled. The court concluded further that Przynski's belief that she was under an implicit threat of discipline if she failed to respond was objectively reasonable, based on

> ***2** the timing and location of the conversation, ... closed door, the demeanor of the questioner, the tone of the questioner's questions, and the knowledge of the policies and procedures of the department, the references in many of the cases and also during the testimony of the paramilitary structure of the police department and the consequences of failing to obey an order or command.

The court suppressed Przynski's statements because it determined that they were not freely and voluntarily given and were compelled. The court concluded that the state failed to meet its burden of establishing probable cause based on evidence wholly independent of the *Garrity* statements, and, therefore, dismissed the complaint. This appeal followed.

DECISION

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). The Fifth Amendment to the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself."[1] U.S. Const. amend. V. The United States Supreme Court has explained

> [1] The Fifth Amendment privilege against "self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 1492 (1964).

that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322 (1973)). In any proceeding,

> "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.... Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution ."

Id. (omission in original) (quoting *Lefkowitz*, 414 U.S. at 78, 94 S.Ct. at 322).

In *Murphy*, the respondent Murphy was placed on three years' probation. 465 U.S. at 422, 104 S.Ct. at 1139. The terms of his probation required "that he participate in a treatment program for sexual offenders ..., report to his probation officer as directed, and be truthful with the probation officer 'in all matters .' " *Id.* Murphy was told that failing to comply with these conditions could result in a probation-revocation hearing. *Id.* During Murphy's probation, a treatment-program

counselor told Murphy's probation officer that, during the course of treatment, Murphy had admitted to committing a rape and murder several years earlier. *Id.* at 423, 104 S.Ct. at 1140. The probation officer determined that the police should have this information, and she wrote to Murphy and asked him to contact her to discuss a treatment plan for the remainder of his probation. *Id.* Murphy arranged to meet with the probation officer, and the officer began the meeting by telling Murphy about the information she had received from the treatment counselor. *Id.* at 423–24, 104 S.Ct. at 1140. During the meeting, Murphy admitted that he committed the rape and murder, and the officer told Murphy that she had a duty to relay the information to the police. *Id.* at 424, 104 S.Ct. at 1140. About one month after the meeting, a state grand jury returned an indictment charging Murphy with first-degree murder. *Id.* at 425, 104 S.Ct. at 1141.

***3** Murphy sought to suppress testimony about his confession on the ground that it was obtained in violation of the Fifth and Fourteenth Amendments. *Id.* The district court found that Murphy was not in custody at the time of the confession and that the confession was neither compelled nor involuntary even though Murphy had not been given a *Miranda* warning. *Id.* The Minnesota Supreme Court reversed on federal constitutional grounds. *State v. Murphy*, 324 N.W.2d 340 (Minn.1982), *rev'd*, 465 U.S. 420, 104 S.Ct. 1136 (1984). The supreme court recognized that the Fifth Amendment privilege generally is not self-executing but, nevertheless, concluded that, although Murphy was not in custody in the usual sense during the meeting with his probation officer, his failure to claim his Fifth Amendment privilege when he was questioned was not fatal to his suppression claim because of the compulsory nature of the meeting, because he was under court order to be truthful with the probation officer, and because the officer had substantial reason to believe that his answers were likely to be incriminating. *Id.* at 342, 344. The supreme court concluded that the officer's failure to warn Murphy of his privilege against compelled self-incrimination before she questioned him, when she had already decided to report his answers to the police, barred using Murphy's confession at his trial. *Id.* at 344.

The United States Supreme Court reversed and began its analysis by noting

> that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

Murphy, 465 U.S. at 427, 104 S.Ct. at 1142.

The Supreme Court then explained that its earlier opinions make clear that

> "[t]he [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment."

Id. (alterations in original) (quoting *United States v. Monia*, 317 U.S. 424, 427, 63 S.Ct. 409, 410 (1943) (footnote omitted)). If a witness "asserts the privilege, he 'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding." *Id.* at 429, 104 S.Ct. at 1143 (quoting *Maness v. Meyers*, 419 U.S. 449, 473, 95 S.Ct. 584, 598 (1975) (emphasis in original)). "But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Id.*

*4 After explaining the general rule that to avoid self-incrimination, a witness must assert the Fifth Amendment privilege rather than answer a question, the Supreme Court acknowledged that there are certain well-defined situations in which applying the rule is inappropriate. *Id.* One of these well-defined situations occurred in what the Supreme Court described as the "penalty" cases, which are cases where "the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' " *Id.* at 434, 104 S.Ct. at 1146 (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S.Ct. 2132, 2136 (1977)). *Garrity v. New Jersey* is one of the "penalty" cases that the Supreme Court expressly addressed in *Murphy*. *Id.* at 434–35, 104 S.Ct. at 1146.

In *Garrity,* several police officers were questioned during an investigation of alleged traffic-ticket fixing. 385 U.S. at 494, 87 S.Ct. at 617. Before being questioned, each officer "was warned (1) that anything he said might be used against him in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office." *Id.* Also, a New Jersey statute provided that any person holding public employment "who, having been sworn, refuses to testify or to answer any material question upon the ground that his answer may tend to incriminate him or compel him to be a witness against himself" shall be removed from employment. *Id.* n. 1.

The police officers answered the questions; no immunity was granted because no immunity statute applied; and, over the officers' objections, some of their answers were used in later prosecutions for conspiracy to obstruct the administration of traffic laws. *Id* . at 495, 87 S.Ct. at 617. The officers were convicted, and the convictions were affirmed over the officers' claim that their answers were coerced because, if they refused to answer, they could lose their positions with the police department. *Id.*, 87 S.Ct. at 617–18.

The Supreme Court determined that "[t]he choice given [the officers] was either to forfeit their jobs or to incriminate themselves," *Id.* at 497, 87 S.Ct. at 618, and that the officers had not waived the privilege against self-incrimination by answering the questions because "[w]here the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Id.* at 498, 87 S.Ct. at 619 (quotation omitted). The court then held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic" and reversed the officers' convictions. *Id.* at 500, 87 S.Ct. at 620.

*5 When addressing *Garrity* in *Murphy,* the Supreme Court explained that, in *Garrity,* "the Court held that an individual threatened with discharge from employment for exercising the privilege [against self-incrimination] had not waived it by responding to questions rather than standing on his right to remain silent." 465 U.S. at 434–35, 104 S.Ct. at 1146. The Supreme Court then explained why *Garrity* presented one of the well-defined situations in which it is inappropriate to apply the general rule that to avoid self-incrimination, a witness must assert the Fifth Amendment privilege rather than answer the question and why Murphy was not within this well-defined situation:

> The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary cases in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that *if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation,* it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.
>
> Even so we must inquire whether Murphy's probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. Because we conclude that Minnesota did not attempt to take the extra, impermissible step, we hold that Murphy's Fifth Amendment privilege was not self-executing.

Id. at 435–36, 104 S.Ct. 1146–47 (footnote omitted) (emphasis added). [2]

2 In the district court and on appeal, the parties disputed whether an explicit or implicit threat of discipline is needed to invoke protection under *Garrity.* The emphasized language in this quotation indicates that either an express or implied assertion is sufficient. But the assertion must threaten discipline for invoking the Fifth Amendment privilege, not simply for refusing to answer a question.

Przynski contends that because she subjectively believed that she could be fired for refusing to answer Frizell's questions and her subjective belief was objectively reasonable, her answers were compelled and, therefore, under *Garrity,* they are inadmissible in a criminal prosecution. But in our careful review of the record we have found nothing that distinguishes the situation that Przynski faced in Frizell's office from the ordinary case in which a witness is merely required to appear and give testimony. Przynski was not expressly told that she would be disciplined if she asserted her Fifth Amendment privilege, and, if she harbored a belief that asserting the privilege would lead to discipline, that belief was not reasonable.

Just as Murphy was required to meet with his probation officer and answer questions truthfully, Przynski was required to attend the meeting in Frizell's office and Minneapolis Police Department regulations required that she truthfully answer Frizell's questions. And, as in *Murphy,* these circumstances may have created a sense of compulsion. But, given the district court's finding that there was no express threat of police discipline during the exchange between Przynski and Frizell, there is no basis to conclude that Frizell or the Minneapolis Police Department took the extra, impermissible step of requiring Przynski to choose between making incriminating statements and losing her employment.

***6** In fact, Minneapolis Police Department Policy and Procedure Manual § 2–106, which Przynski urges us to consider on appeal, provides: "All employees shall answer all questions truthfully and fully render material and relevant statements to a competent authority in [a Minneapolis Police Department] investigation when compelled by a representative of the Employer, *consistent with the constitutional rights of the individuals.*" (Emphasis added.) This regulation expressly requires an employee to answer questions only to the extent that answering is consistent with the employee's constitutional rights. In other words, if Przynski was asked a question that could reasonably be expected to elicit incriminating evidence, the regulation expressly permitted her to assert the Fifth Amendment privilege and refuse to answer. Consequently, we cannot conclude that Przynski was deterred from asserting her Fifth Amendment privilege by a reasonable fear that asserting the privilege would lead to discipline. Therefore, the privilege was not self-executing, Przynski's failure to assert the privilege is fatal to her suppression claim, and the district court erred in excluding Przynski's answers as compelled within the meaning of the Fifth Amendment and dismissing the complaint.

Reversed and remanded.

All Citations

Not Reported in N.W.2d, 2011 WL 6306675

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2018 WL 6729824
Only the Westlaw citation is currently available.

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Fred BANJO, Appellant.

A17-2073

Filed December 24, 2018

Review Denied February 27, 2019

Wright County District Court, File No. 86-CR-17-40

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Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

***1** Appellant challenges his judgment of conviction for first-degree criminal sexual conduct. Appellant is married to the victim, who called 911 and reported that appellant had raped her and threatened her life; the victim made similar statements to a police officer, and to a sexual assault nurse. The victim also described the assault to a detective at the hospital. Approximately two weeks after appellant's arrest, the victim asked the state to drop all charges, and stated that she suffered from post-traumatic stress disorder (PTSD) and made the reports against appellant while re-experiencing an earlier assault, but that appellant was "innocent of these charge[s]." Following a motion in limine and a hearing, the district court decided that three of the victim's statements were admissible under recognized exceptions to the hearsay rule and allowed the state to call the victim as a witness before receiving the fourth statement under the residual exception to the hearsay rule. Appellant argues that the district court abused its discretion when it allowed the state to impeach the victim with her prior inconsistent statements. Because the district court did not abuse its discretion in admitting the victim's prior statements as substantive evidence, we affirm.

FACTS

Appellant Fred Banjo and E.N. have been married for five years and have two children together. At the time of the trial, Banjo and E.N. lived in Waverly, Minnesota with E.N.'s seven children. E.N. is from Liberia, and came to the United States in 2001.

On January 2, 2017, at around 5:00 a.m., E.N. called 911 and told them that her life was in danger and that she had been assaulted by her husband. During the 911 call, E.N. stated that Banjo was "telling me he's gonna do what he always do to me and ... [h]e was [going to] kill me."

Wright County Sheriff Deputy Boverhuis responded to the 911 call. When he arrived, E.N. was "barricaded" in the bathroom, "visibly upset," and dressed only in a bath towel. E.N. went outside, in "below freezing" temperatures, and sat on the stairs in her towel. Boverhuis persuaded E.N. to come inside, where she cried "uncontrollably" and "collapsed to the floor." Boverhuis later testified that E.N. told him that she had been "assaulted by [Banjo] physically, that he had choked her with one hand and using his other hand had penetrated her vagina." E.N. told Boverhuis that it felt like Banjo "was trying to pull out her uterus," she felt a "burning sensation inside her vagina," and the choking "restricted her breathing nearly to the point of not being able to breathe." Boverhuis later testified that E.N. demonstrated a "hook shape" that Banjo had made "with his fingers" during the assault. Banjo also told E.N. that if she told "anybody about this that he would kill her ... and her kids."

Another deputy spoke to Banjo. The second deputy later testified that Banjo seemed calm and was "wondering why [the police] were there." The deputy also stated that Banjo

told him that he had "been in his bedroom the entire night" and "kept on showing us his hands" in an effort to prove that he did not assault E.N.

***2** Police transported E.N. to the hospital. During a 7:00 a.m. recorded interview with Detective Fladung at the hospital, E.N. stated that she had been sleeping in her daughter's room, when, around 3:00 a.m., Banjo came into the room and told her to get up and take a shower. E.N. told Fladung that she "knew that meant that he was going to assault her" because this "was typically kind of the routine that [he] would put her through." After she showered, Banjo ordered her "out of the shower to put a towel on," then put his right hand "against her throat" and used "his left hand to reach up into her vaginal area and was kind of clawing and scratching at her." E.N. told Fladung that Banjo used his hands in a "hook type of motion."

A sexual assault nurse examined E.N. at about 8:00 a.m. and later testified that E.N. was, at times, "shaking with fear"; E.N. told the nurse that Banjo demanded she take a shower, then "pulled on" her cervix and used his other hand and "choked her during the assault." During the sexual assault examination, the nurse saw "red marks" and "petechiae," or "little tiny bruises," on E.N.'s vagina. Additionally, the nurse observed a blood stain on E.N.'s underwear.

On January 4, 2017, the state charged Banjo with four counts stemming from the January 2 incident: (1) first-degree criminal sexual conduct (force or coercion causing personal injury) under Minn. Stat. § 609.342, subd. 1(e)(1) (2016); (2) third-degree criminal sexual conduct (force or coercion) under Minn. Stat. § 609.344, subd. 1(c) (2016); (3) domestic assault–strangulation under Minn. Stat. § 609.2247, subd. 2 (2016); and (4) threats of violence (reckless disregard of the risk) under Minn. Stat. § 609.713, subd. 1 (2016).

On January 16, 2017, E.N. wrote a letter requesting that the state drop the charges against Banjo. The letter stated that she had recently been diagnosed with post-traumatic stress disorder (PTSD). E.N.'s letter also stated that, "during the civil war in [her] birth country Liberia," and while she was pregnant, soldiers kidnapped and sexually assaulted her. The letter stated that, recently, E.N. had been having nightmares about her kidnapping, and in her nightmares, Banjo was part of the "bad thing" and she felt as though "the traumatic event [was] happening again." E.N.'s letter also stated that Banjo was a loving, nonviolent person and was "innocent of these charge[s]."

In February 2017, the state served and filed notice of its intent to introduce E.N.'s out-of-court statements at trial. In April 2017, Banjo filed motions in limine, asking the district court to exclude E.N.'s statements as inadmissible hearsay. On April 18, 2017, the district court conducted a pretrial hearing and determined that E.N.'s statements during the 911 call and to Boverhuis at the scene were admissible as excited utterances. The district court also concluded that E.N.'s statements to the nurse were admissible as statements made for the "purposes of medical diagnosis or treatment." Finally, the district court determined that E.N.'s statements to Fladung were prior inconsistent statements, and were only admissible if E.N. was "afforded the opportunity to explain or deny" the statements, and Banjo was able to cross-examine her.

During trial, the jury heard E.N.'s recorded 911 call, E.N.'s testimony, and received evidence of E.N.'s other statements through the testimony of Boverhuis and the nurse. In addition, the jury heard E.N.'s recorded interview with Fladung. E.N. testified that she called the police from her bathroom "between 4 or 5" in the morning in early January, because she thought her life was in danger and she thought she had been raped. In her testimony, E.N. acknowledged that she made statements to Boverhuis, Fladung, and the nurse as described above.

***3** But E.N. testified that the statements she had made to Boverhuis, the nurse, and Fladung were not true. E.N. testified that soldiers assaulted her during the civil war in Liberia, she suffered PTSD stemming from that event and, at the time of the January 2 incident, she experienced a flashback and confused the present with her traumatic experience. E.N. also testified that, on January 2, she was upset with Banjo because he was not paying his "fair share" of the bills, she was assisting him with his immigration process, and he spoke to her immigration lawyer without her knowledge. Finally, E.N. testified that she was diagnosed with PTSD after the January 2 incident and her injuries, as documented during the sexual-assault examination, were self-inflicted.

In his defense, Banjo called Deputy Barto, who testified that on December 28, he responded to a "domestic disturbance" call at E.N. and Banjo's home, and when he arrived Banjo was in the driveway and his head was bleeding. Barto testified that Banjo told him that, after an argument regarding an immigration lawyer, E.N. threw an alarm clock at Banjo's head. [1] Banjo testified that he did not touch or harm E.N. on January 2. Banjo testified that he and E.N. had relationship

problems because of E.N.'s "flare up[s]" and hallucinations, and that, before January 2, he had applied for housing to move out of their home.

1 E.N. and Boverhuis also testified about the December 28, 2016 incident.

On April 24, 2017, the jury found Banjo guilty of all four offenses. On October 18, 2017, the district court convicted Banjo of count 1, first-degree criminal sexual conduct, and imposed an executed sentence of 144 months in prison. Banjo appeals.

DECISION

Banjo argues that the district court abused its discretion by admitting E.N.'s out-of-court statements in the 911 call, to Boverhuis, to the nurse, and to Fladung because the statements did not have the "circumstantial guarantees of reliability." Banjo also argues that admitting E.N.'s statements was not harmless error, and asks this court to "reverse and dismiss the proceedings." The state responds that the district court did not abuse its discretion and asks this court to affirm Banjo's judgment of conviction.

Generally, hearsay evidence is not admissible, except as provided by the rules of evidence. Minn. R. Evid. 802. Hearsay is a statement, "other than one made by the declarant while testifying at the trial," which is offered in evidence "to prove the truth of the matter asserted." Minn. R. Evid. 801(c). We review rulings on the admission of evidence for an abuse of discretion. *State v. Zumberge*, 888 N.W.2d 688, 694 (Minn. 2017). "The burden is on the [appellant] to show that the district court abused its discretion and that the [appellant] was prejudiced thereby." *State v. Ahmed*, 782 N.W.2d 253, 259 (Minn. App. 2010).

In this case, the parties agree that the following evidence is hearsay: E.N.'s recorded statements during the 911 call, her statements to Boverhuis while at the house, her recorded interview with Fladung at the hospital, and her statements to the nurse. Consequently, this evidence is properly admitted only if it falls under an exception to the hearsay rule. *See generally* Minn. R. Evid. 803, 807.

Banjo argues that the district court abused its discretion by allowing the state to call E.N. to testify solely to impeach her with her prior inconsistent statements. The supreme court has referred to this situation as "the *Dexter* problem." *See Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993). The *Dexter* problem occurs when:

> [A] prosecutor calls a witness who has given a prior statement implicating the defendant, but that witness has since retracted the statement and signified an intent to testify in defendant's favor if called by the prosecutor. If the prosecutor is permitted to call this witness and use the prior statement for impeachment purposes, there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.

*4 *State v. Ortlepp*, 363 N.W.2d 39, 42-43 (Minn. 1985).

Banjo contends that the *Dexter* problem is only avoided if the impeachment evidence is admitted under the residual exception to the hearsay rule, as provided in Minn. R. Evid. 807. In fact, Banjo does not argue that the district court erred in ruling that three of E.N.'s prior statements were admissible under recognized exceptions to the hearsay rule. Instead, Banjo contends that E.N.'s statements during the 911 call, to Boverhuis, and to the nurse lacked the required "circumstantial guarantees of trustworthiness," *see* Minn. R. Evid. 807; and the district court abused its discretion by admitting the three out-of-court statements.

We do not agree. As pointed out by the state, the *Dexter* problem arises only if E.N.'s prior inconsistent statements were otherwise inadmissible, but is avoided if E.N.'s prior statements were admissible as substantive evidence under any exception to the hearsay rule. *See State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978) (observing that the state was "seeking ... to present, in the guise of impeachment, evidence which is not otherwise admissible"); *Oliver*, 502 N.W.2d at 778 (holding that if prior statement is admissible as nonhearsay or under an exception to the hearsay rule, then "the *Dexter* problem is not present and defendant has no legitimate cause to complain"). Caselaw makes clear that evidence admitted under a recognized exception to the hearsay rule is inherently trustworthy. *See State v. Daniels*, 380 N.W.2d 777, 782-83 (Minn. 1986). Thus, evidence that is admitted under a recognized exception does not need

to be considered under the rule 807 standard to determine whether "it has the equivalent circumstantial guarantees of trustworthiness." Minn. R. Evid. 807.

Thus, if we conclude that E.N.'s out-of-court statements were admissible as substantive evidence under hearsay exceptions, then there was no *Dexter* problem in this case. We will consider this evidence in two groups. First, we review the admission of E.N.'s recorded statements during the 911 call, to Boverhuis, and to the nurse, because the district court determined that specific exceptions to the hearsay rule allowed their admission. Second, we review the admission of E.N.'s recorded statement to Fladung because the district court determined it was admissible under the "residual exception" to the hearsay rule.

Turning to the first group, the prior statements admitted under recognized hearsay exceptions, we begin with the district court's conclusion that E.N.'s statements during the 911 call were excited utterances. Under Minn. R. Evid. 803(2), a statement is not excluded as hearsay if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Minn. R. Evid. 803(2); *see also State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992). During the 911 call, E.N. stated that Banjo had assaulted her and described the assault. E.N.'s statements in the 911 recording, therefore, described and related to a startling event. Also, the 911 call occurred in the "aura of excitement" because E.N. said during the call that Banjo was still in the home and was "gonna hurt me again." The district court did not abuse its discretion by admitting the 911 recording as an excited utterance.

***5** The district court also determined that E.N.'s statements to Boverhuis were admissible as excited utterances because E.N. was still under the "aura of excitement." We observe that "there are no strict temporal guidelines for admitting an excited utterance." *State v. Martin*, 614 N.W.2d 214, 223-24 (Minn. 2000) (quotation omitted). The deputies testified that they arrived at the scene "a little after five in the morning." Boverhuis testified that, when he arrived, E.N. was "visibly upset" and still in the bathroom where she had made the 911 call. Boverhuis also testified that, shortly after he arrived and spoke to E.N., she began "crying uncontrollably." He also testified that E.N. told him that "she had been assaulted by [Banjo] physically." E.N.'s statements to Boverhuis were made soon after the startling event; the 911 call was placed at 4:54 a.m., and deputies spoke with E.N. at around 5:05 a.m. Based on the record, the district court did not abuse its discretion in determining that these statements qualified as excited utterances because E.N. was still under the stress from the event.

Additionally, the district court concluded that E.N.'s statements to the nurse were admissible under Minn. R. Evid. 803(4) as statements made for the purpose of medical diagnosis or treatment. These statements, made "where the declarant knows that a false statement may cause misdiagnosis or mistreatment," "contain special guarantees of credibility." *State v. Salazar*, 504 N.W.2d 774, 777 (Minn. 1993) (quotations omitted). The nurse testified that she informed E.N. that she would perform a sexual-assault examination, provide medical treatment, and "care for any injuries that may have happened during the assault." Thus, E.N.'s statements to the nurse were appropriately admitted under Minn. R. Evid. 803(4), and the district court did not abuse its discretion.

Because E.N.'s out-of-court statements in the first group were admissible as substantive evidence under exceptions to the hearsay rule, there was no *Dexter* problem. Accordingly, we conclude that the district court did not abuse its discretion in admitting E.N.'s out-of-court statements during the 911 call, to Boverhuis, and to the nurse at the hospital.

Next, we consider Banjo's argument that the district court erred by admitting E.N.'s statements to Fladung under Minn. R. Evid. 807. Banjo contends that these statements do not have the "circumstantial guarantees of trustworthiness" because they resulted from E.N.'s PTSD and flashbacks. *See State v. Robinson*, 718 N.W.2d 400, 408-10 (Minn. 2006). Banjo also argues that the "interests of justice were not served" by admitting the statements. The state responds that the district court did not abuse its discretion by admitting E.N.'s statements to Fladung under the residual exception. Alternatively, the state argues that even if the district court abused its discretion, Banjo has failed "to demonstrate sufficient prejudice to warrant a new trial."

Minnesota Rule of Evidence 807 provides that "[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 certain conditions are met. Minn. R. Evid. 807. The court may admit such a statement if (1) it is offered as evidence of a material fact; (2) it is more probative than any other evidence the proponent can find with reasonable effort; and (3) "the general purposes of these rules

and the interests of justice will best be served by admission of the statement into evidence." *Id.*

In determining whether a statement has "sufficient guarantees of trustworthiness," the court examines the totality of the circumstances, using several factors. *State v. Martinez*, 725 N.W.2d 733, 737-38 (Minn. 2007). These factors include: (1) whether the declarant testified and was available for cross-examination; (2) whether a dispute exists as to whether the declarant made the statement or concerning its contents; (3) whether the declarant made multiple consistent versions of the statement; (4) whether the statement is against the declarant's penal interest; (5) whether other evidence corroborates the statement; and (6) whether other evidence discredits the recanted version. *See id.* at 737 (citing *Ortlepp*, 363 N.W.2d at 44); *see also Robinson*, 718 N.W.2d at 410.

***6** Based on the totality of the circumstances, we conclude that the district court did not abuse its discretion in determining that E.N.'s out-of-court statements to Fladung were sufficiently trustworthy under rule 807. First, Banjo had the opportunity to cross-examine both E.N. and Fladung regarding the statements. Second, neither party disputes that E.N. made these statements nor do they dispute the content of the statements. Indeed, E.N. testified that she made the statements to Fladung. Third, E.N. testified that the statements she made to Fladung during the interview were the same as those she made to Boverhuis and the nurse.

The fourth factor generally requires that the prior statements be against E.N.'s "penal interests." We have held that this factor may be satisfied if the declarant is now hostile to the state and supportive of the defendant. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). Here, E.N. testified that she wanted the charges to be dismissed so that she could continue her relationship with Banjo and he could help support their family. Accordingly, E.N.'s statements to Fladung are against her current relationship interests. *See id.* (finding that a statement is against a declarant's relationship interests when the declarant and defendant "were trying to reconcile things" at the time of trial).

Fifth, E.N.'s statements to Fladung were consistent with other evidence that the state presented, including, as discussed above, E.N.'s recorded statements in the 911 call and to other witnesses. The state also presented evidence of the relationship problems between E.N. and Banjo, including a previous domestic assault, fights about Banjo's immigration, and Banjo's failure to pay his "fair share" of the bills. In addition, during the sexual assault examination, the nurse testified about injuries to E.N.'s vagina. These injuries corroborate E.N.'s statements to Fladung.

Sixth, only E.N.'s letter, E.N.'s testimony at trial, and Banjo's testimony at trial discredit E.N.'s recanted statements to Fladung. We have already discussed E.N.'s potential reasons for recanting her testimony, and the substantial evidence corroborating E.N.'s recorded statement to Fladung. *See Riley v. State*, 819 N.W.2d 162, 169 (Minn. 2012) ("The purpose of the corroborating evidence requirement is to protect against the possibility that a statement will be fabricated to exculpate the accused.").

After considering the totality of the circumstances in light of all six factors, we conclude that E.N.'s statements to Fladung had "circumstantial guarantees of trustworthiness" and the district court did not abuse its discretion by admitting them, and there was no *Dexter* problem.

In sum, the district court did not abuse its discretion by admitting E.N.'s out-of-court statements. Consequently, we need not consider Banjo's harmless error argument, and we affirm Banjo's judgment of conviction.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 6729824

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2019 WL 2415253
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Sam James LEMIEUX, Appellant.

A18-1509

Filed June 10, 2019

St. Louis County District Court, File No. 69DU-CR-18-508

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

*1 CONNOLLY, Judge

Appellant challenges his conviction of felony fifth-degree assault, arguing that the district court erred when it admitted hearsay statements given by a victim to a 911 dispatcher in violation of the Confrontation Clause. Because the district court did not err when it concluded that the statements were nontestimonial and qualified as an excited utterance, we affirm.

FACTS

In February 2018, a witness saw a man and woman walking near a hospital in Duluth. The pair was observed arguing and, at some point during the argument, the man struck the woman several times in the face with his fist. The witness observed the woman, later identified as C.R. (who appeared distraught), proceed to the hospital's emergency room as the man hurried away.

Once inside, C.R. called 911. C.R. told the dispatcher that her assailant was appellant Sam James Lemieux and provided information about his physical description, potential location, and whether he was armed with any weapons; she also described her current medical condition. Multiple police officers responded to the call, and appellant was located and arrested. The state charged appellant by amended complaint with one count of felony domestic assault and one count of felony fifth-degree assault. He pleaded not guilty.

C.R. did not appear at trial, and the state sought to admit a recording of the 911 call in her absence. Appellant filed a motion in limine to exclude the statements made by C.R. during the 911 call, arguing that this evidence would violate his constitutional right to confront his accuser and that the statements in the call were inadmissible hearsay. The district court determined that portions of the 911 call were admissible. The jury found appellant guilty of both charges, and the district court imposed a sentence of 26 months in prison only on the felony fifth-degree assault. Appellant challenges his conviction, arguing that the district court erred when it determined that portions of the 911 call were not barred by the Confrontation Clause or the hearsay rule.

DECISION

This court reviews evidentiary rulings, including a finding that a statement is admissible under a hearsay exception, for abuse of discretion. *See State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013). Claims that the admission of evidence violated the Confrontation Clause are subject to de novo review, and factual findings are reviewed for clear error. *State v. Lopez-Ramos*, 913 N.W.2d 695, 701 (Minn. App. 2018). "When the error implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). "An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." *Id.* But if an error does not

implicate a constitutional right, a new trial will not be granted unless the error substantially influenced the jury's verdict. *Id.*

Confrontation Clause

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. If a statement is testimonial, it violates the Confrontation Clause and is inadmissible in a criminal trial, unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004). If a statement is nontestimonial, it is not barred by the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 840, 126 S. Ct. 2266, 2284 (2006). The testimonial nature of statements is reviewed case-by-case. *See e.g.*, *State v. Wright*, 726 N.W.2d 464, 473-74 (Minn. 2007).

***2** This court employs a "primary purpose" test when examining whether statements made to 911 dispatchers are testimonial, focusing on whether statements in a 911 call were made "under circumstances objectively indicating that the primary purpose ... [was] to enable police assistance to meet an ongoing emergency. *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273. If the primary purpose of the call was to enable police to meet an ongoing emergency, the statements are nontestimonial. *Id.* But if the primary purpose of the statements were made to prove past events, which may be relevant to a criminal prosecution, then the statements are testimonial. *Id.* at 2274. It is the state's burden to prove that a statement is not testimonial. *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013).

Appellant argues that the statements made to the 911 dispatcher were testimonial because the statements described a completed event, there was not an ongoing emergency, the call was made while C.R. was safely in the hospital, the assailant was not armed with a weapon, and C.R. was calm during the call. Appellant's argument is not persuasive.

First, it is clear from the recording of the call that the questions asked and the answers given were not directed at trying to prove past events. *See Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74. On the contrary, almost all the statements in the recording focused on determining appellant's *current* whereabouts, his *current* physical description, and whether he was *currently* armed with a weapon, as well as C.R.'s *current* need for medical treatment. Thus, the record establishes that the primary purpose of the statements was to enable the police to aid an assault victim and to locate a potentially dangerous and at-large suspect, not to prove past events.

Second, appellant argues that, even if the statements were not made for the primary purpose of establishing past events, they were still made absent an ongoing emergency because C.R. was safe in the hospital and calm when she talked with the dispatcher. But appellant's assertion that C.R. was calm during the call is unsupported by the record and by the district court's findings, which indicate that, while C.R. was at times calm during the call, she was also agitated, frustrated and, often cursing. This finding is not clearly erroneous. *See Lopez-Ramos*, 913 N.W.2d at 701. Moreover, "[t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties ... *at the time*, not with the benefit of hindsight. *Michigan v. Bryant*, 562 U.S. 344, 361 n.8, 131 S. Ct. 1143, 1157 n.8 (2011) (emphasis added). At the time of the call, the suspect's location was unknown and it was unclear what his intention was, whether he had a weapon, and where he was headed. Consequently, at the time of the call there was an ongoing emergency.

The district court did not err when it concluded that the primary purpose of the statements in the 911 call was to enable the police to meet an ongoing emergency and were therefore nontestimonial.

Excited Utterance

Appellant also objected to the introduction of the 911 call on the grounds that the information in the call was hearsay not within any exception. The district court determined that the statements were admissible under the excited-utterance exception to the hearsay rule. Minn. R. Evid. 803(2) provides that a statement relating to a startling event or condition, made while the declarant was under the stress of excitement caused by the event or condition, is excluded by the hearsay rule.

To qualify as an excited utterance, a declarant's statement must satisfy three requirements: "(1) there must be a startling event or condition; (2) the statement must relate to the startling event or condition; and (3) the declarant must be under a sufficient aura of excitement caused by the condition to ensure the trustworthiness of the statement." *State v. Daniels*, 380 N.W.2d 777, 782 (Minn. 1986) (quotation omitted). It is within a district court's discretion to admit the evidence if the district court determines that "the declarant was sufficiently under the aura of excitement" when the

statement was made to insure that it is trustworthy. *State v. Edwards*, 485 N.W.2d 911, 914 (Minn. 1992) (quotation omitted). In considering these requirements, courts examine "the length of time elapsed, the nature of the event, the physical condition of the declarant, [and] any possible motive to falsify." *Daniels*, 380 N.W.2d at 782-83 (quotation omitted).

***3** Consideration of these factors supports the district court's determination to admit C.R.'s statements in this case. First, C.R. made the call only a few minutes after the incident. *See, e.g., id.* (statements made within one hour after fatal house fire admissible). The subject of the call—a physical assault—is a startling event. C.R.'s physical and emotional state—voice and pitch changes, frequent cursing, and a hurt face and headache—also support the admission of the statements. Finally, the circumstances surrounding the statements tend to show trustworthiness. The district court determined prior to trial that it had to "make a judgment call on the demeanor and everything of the ... caller" and found that C.R. was still under the "impact of the startling event." *See Griffin*, 838 N.W.2d at 693 (evidentiary rulings are generally within the discretion of the district court). Moreover, the record indicates that C.R. had outstanding warrants for her arrest, which make it unlikely that she would have contacted police falsely to report an assault.

Consequently, the district court properly exercised its discretion when it admitted the statements as excited utterances.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2019 WL 2415253

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2014 WL 684665
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Edward Leon FIELDS, Appellant.

No. A13–0679.
|
Feb. 24, 2014.

Hennepin County District Court, File No. 27CR1230708.

Attorneys and Law Firms

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Considered and decided by HALBROOKS, Presiding Judge; STONEBURNER, Judge; and SCHELLHAS, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge.

***1** Appellant challenges his convictions of felony domestic assault and felony violation of an order for protection, arguing that (1) the evidence is insufficient to support the convictions; (2) the district court erred by admitting testimony about his abusive conduct toward another girlfriend as relationship evidence; and (3) the district court and the prosecutor improperly urged jurors to misuse the relationship evidence as propensity evidence. We affirm.

FACTS

On a September afternoon in 2012, Z.A. called 911 from the intersection of Lyndale Avenue North and Dowling Avenue North in Minneapolis and reported that appellant Edward Leon Fields, the father of her children, had assaulted her when she went to his house to see their children. At the time of the assault, Z.A. and Fields had dated intermittently for eight years, had two children together, and Z.A. was eight-months pregnant with their third child. In a 911 call interrupted several times by sounds of distress and crying, Z.A. told the 911 operator that the incident had happened just before she called. In the middle of the call, Fields's mother, M.B. came on the line, described Z.A.'s injuries, and pleaded for law enforcement to respond.

Officer David Honican arrived within minutes of the 911 call and found Z.A. emotional, with injuries to her face and forehead. Z.A. told Officer Honican that Fields had assaulted her, hitting her in the face three to six times and kicking her in the stomach. M.B. confirmed Z.A.'s report, and told Officer Honican that she had witnessed the assault. After he took photographs of Z.A.'s injuries, Officer Honican called an ambulance, and Z.A. was taken to a hospital. She later testified that she "probably" told medical personnel that Fields assaulted her.

After speaking to Z.A. and M.B., who provided the address where the assault occurred, Officer Honican went to the address to find Fields. When no one responded to his knock, Honican entered the house with a key provided by M.B. He found Fields but no other adults in the house. He arrested Fields.

Fields was charged with felony domestic assault in violation of Minn.Stat. §§ 609.2242, subd. 4, and .101, subd. 2. Later, the state amended the complaint, adding a charge of felony violation of an order for protection (OFP) under Minn.Stat. § 518B.01, subd. 14(a), (d)(1).

Two days after his arrest, Fields made a telephone call from jail. The call was recorded, according to standard jail procedures. Fields asked the answering party, who has not been identified, whether an unnamed female had been contacted. Fields concedes that the reference was to Z.A. Fields asked the party to "text them again" because "really all they gotta do is not show." He asked the party to "tell her that ... I truly am sorry.... That wasn't me. I don't know who the f-ck that was. Tell her I'm truly, truly sorry. If she can find it somewhere in her heart to forgive me and let's move past this stupid sh-t." He explained that Z.A. "don't have too much

of a right to be mad at me because of what she did to me.... [S]he threw sh-t at me [and] I never hit her in her stomach." He concluded by telling the other party that "all I really need is for her not to come to none of the dates ... 'cuz if they ain't got no none of that sh-t they gonna dismiss this sh-t anyway."

*2 Later in September, Z.A. told a prosecutor's investigator that it was Fields who had assaulted her. But in October, she recanted. In letters to the district court and Fields's counsel, she claimed that her injuries were caused by a fight with an unidentified woman she encountered at Fields's house, that she and the other woman were fighting over Fields, and that she had accused Fields because she was angry at him for not taking her side in the fight. M.B. also recanted, telling a defense investigator that she had lied to police.

In spite of the recantations, the state proceeded with the prosecution. On the witness stand, Z.A. established foundation for the 911 recording, which was admitted into evidence and played for the jury without objection. At the time the call was admitted, Z.A. had not testified to anything inconsistent with her statements in the 911 call. Fields did not request, and the district court did not give, an instruction limiting the purpose for which the call was admitted. After the jury heard the 911 call, Z.A. testified that she identified Fields as her attacker to the responding officer, and probably identified Fields as her attacker to medical personnel who examined her on the day of the assault, and that she later confirmed to a prosecutor's investigator that Fields had assaulted her. She then testified that an unidentified woman, rather than Fields, had assaulted her and that she recanted because she "wanted the truth to be told."

M.B. also testified at trial that there was an unknown woman in the house that day, and that the fight was between Z.A. and the unknown woman. M.B. acknowledged that her voice was on the 911 recording and that there are inconsistencies between the statements she made on the day of the assault and her trial testimony, but she said that she had lied to police because she was angry with her son for having another girlfriend and for taking that woman's side when the fight broke out.

The prosecution called three other witnesses. A deputy sheriff, whose testimony is not at issue here, established foundation for the jailhouse phone call. The recording of the telephone call was admitted into evidence and played for the jury without objection. Officer Honican testified about the statements Z.A. and M.B. made to him at the scene, noting that neither mentioned an unidentified woman being involved. Officer Honican testified that when he apprehended Fields there were no other adults in the house. The photographs that Officer Honican took of Z.A.'s injuries were admitted into evidence and shown to the jury without objections. Fields did not object to any part of Officer Honican's testimony or request any limiting instructions, and the district court did not give any instructions limiting the use of Officer Honican's testimony about statements made to him by Z.A. and M.B.

The state's final witness was M.P., who testified, over Fields's objections, about incidents of domestic abuse by Fields while she was in a significant romantic relationship with him in 2005. The district court overruled Fields's objections and admitted M.P.'s testimony as relationship evidence under Minn.Stat. § 634.20. The district court gave a limiting instruction before M.P. testified and repeated the instruction at the close of evidence before the jury started deliberations.

*3 The district court's jury instructions included the standard instructions regarding impeachment and credibility determinations, including an instruction that prior inconsistent statements were admitted to impeach witness testimony. The jury convicted Fields on both counts, and he was sentenced. This appeal followed.

DECISION

I. Admission of out-of-court statements

Fields argues on appeal that there is insufficient evidence to support his convictions because Z.A.'s and M.B.'s out-of-court statements that he committed the assault could only be used to impeach their trial testimony, leaving no direct evidence that he assaulted Z.A. or violated the order for protection. But Fields failed to object to the out-of-court statements when they were admitted and failed to seek an instruction limiting admissibility to impeachment evidence. And "hearsay admitted into evidence without, or over, objection becomes substantive evidence in a trial." *State v. Jackson*, 655 N.W.2d 828, 833 (Minn.App.2003) (explaining that this is because a party is limited on appeal to objections raised during trial proceedings). The supreme court has cautioned that:

> [t]he number and variety of exceptions to the hearsay exclusion

> make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process.... The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.

State v. Manthey, 711 N.W.2d 498, 504 (Minn.2006). But in the absence of an objection to admission of out-of-court statements as hearsay, we may review the admission of the evidence for plain error. *Id.* (citing Minn. R.Crim. P. 31.02).

The plain-error standard requires the party asserting error to show that there was an error, that it was plain, and that it affected the defendant's substantial rights. *Id.* (citations omitted). "If those three conditions are satisfied, we ... determine whether it is necessary to address the error to ensure the fairness and integrity of the judicial proceedings." *Id.* (citations omitted).

The state argues that there is no plain error because Z.A.'s and M.B.'s statements in the 911 call and to the responding officer were admissible as substantive evidence under the excited-utterance exception to the hearsay rule. We agree. The excited-utterance exception permits admission of a hearsay statement that "relat[es] to a startling event or condition [and was] made while the declarant was under the stress of the excitement caused by the event or condition." Minn. R. Evid. 803(2). "Relevant factors in determining whether an out-of-court statement qualifies as an excited utterance include 'the length of time elapsed, the nature of the event, the physical condition of the declarant, and any possible motive to falsify.' " *State v. Hogetvedt*, 623 N.W.2d 909, 913 (Minn.App.2001) (quoting *State v. Daniels*, 380 N.W.2d 777, 782–83 (Minn.1986)), *review denied* (Minn. May 29, 2001).

***4** It is undisputed that Z.A. and M.B. were under the stress of excitement caused by the event when they spoke to the 911 operator and Officer Honican. Their distress is evident in the 911 recording, and Officer Honican and Z.A. testified that Z.A. was in distress during their interaction. Though Z.A. and M.P. later claimed a motive to falsify, the other factors all favor admission. The length of time that elapsed between the assault and the statements is a particularly strong factor here. Z.A. made the 911 call immediately after the assault, and Officer Honican arrived within minutes of the 911 call. Minnesota courts have upheld admission of excited utterances after much longer periods. *E.g., Daniels*, 380 N.W.2d at 783 (one hour); *State v. Berrisford*, 361 N.W.2d 846, 850 (Minn.1985) (90 minutes); *Hogetvedt*, 623 N.W.2d at 913 (three hours). In view of these facts and circumstances, we conclude that Z.A.'s and M.B.'s out-of-court statements were admissible as excited utterances, and the district court did not commit plain error by admitting the statements as substantive evidence.

We find no merit in Fields's argument that, because the district court instructed the jury that prior inconsistent statements were admitted as impeachment evidence, all of Z.A.'s and M.B.'s statements were admitted only as prior inconsistent statements for impeachment. Fields is seeking to construe the use of this standard jury instruction as the district court's ruling on the basis for admission of the statements, citing *State v. Plantin*, 682 N.W.2d 653, 660 (Minn.App.2004), *review denied* (Minn. Sept. 29, 2004), to support this construction. Fields asserts that in *Plantin* we held that the giving of an impeachment-evidence instruction "was sufficient to preclude jurors from using witness' prior statements as substantive evidence." But he mischaracterizes the holding.

In *Plantin*, the district court had permitted three witnesses and a police interviewer to testify about the victim's out-of-court statements without explicitly ruling on how the jury could use the testimony. *Id.* Before deliberations began, the district court instructed the jury that some of the testimony was for impeachment only, read the impeachment-evidence instruction, and told the jury that "any statement [the victim] may have made to [the police interviewer] may be considered by you for all purposes." *Id.* We held that the instructions adequately distinguished between the impeachment-only testimony given by the three witnesses, and the for-all-purposes testimony of the police interviewer. *Id.* We did not hold that giving an impeachment-evidence instruction limits the use of unobjected-to hearsay.

In this case, Z.A.'s statement to medical personnel on the day of the assault and later statement to the prosecutor's investigator identifying Fields as her assailant were not admissible as excited utterances, and the state has not advanced any other exception that would have permitted admission of these statements as other than prior inconsistent statements for the purpose of impeachment. But even if admission of these statements without a limiting instruction

constituted plain error, that error could not have affected the verdict given the overwhelming evidence, including admissions in Fields's telephone call from the jail that Fields assaulted Z.A.

II. Admission of relationship evidence.

***5** "We review for an abuse of discretion the district court's decision to admit evidence of similar conduct by the defendant against an alleged domestic-abuse victim under Minn.Stat. § 634.20." *State v. Lindsey*, 755 N.W.2d 752, 755 (Minn.App.2008) (citing *State v. McCoy*, 682 N.W.2d 153, 161 (Minn.2004)), *review denied* (Minn. Oct. 29, 2008). A defendant challenging a district court's decision to admit evidence must show that the decision was both erroneous and prejudicial. *State v. Bartylla*, 755 N.W.2d 8, 20 (Minn.2008).

Minn.Stat. § 634.20 (2012) provides that "[e]vidence of similar conduct by the accused against a victim of domestic abuse, or against other family or household members, is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury." Section 634.20 adopts the definition of "family or household members" found in the Minnesota Domestic Abuse Act, Minn.Stat. §§ 518B.01–.02 (2012). *Id.* That definition includes "persons involved in a significant romantic or sexual relationship." Minn.Stat. § 518B.01, subd. 2. Evidence admitted under section 634.20 need not meet the clear-and-convincing-evidence standard required for admission of character or *Spreigl* evidence, but need only be more probative than prejudicial. *McCoy*, 682 N.W.2d at 161.

In *McCoy*, the supreme court expressly adopted section 634.20 as a rule of evidence. *Id.* There, the evidence in question involved acts of abuse toward the same victim. *Id.* at 156. Fields asserts that the supreme court did not adopt section 634.20 to the extent that it might authorize admission of similar acts of abuse against a third party, and urges this court "not to extend *McCoy's* holding." But *McCoy's* holding has already been extended. In *State v. Valentine*, this court held that when a defendant was charged with domestic abuse against one of his two girlfriends, section 634.20 authorized admission of abusive incidents involving his other girlfriend because the statute relates to family or household members of the accused, not of the victim. 787 N.W.2d 630, 637–38 (Minn.App.2010), *review denied* (Minn. Nov. 16, 2010). Fields is effectively asking us to reverse *Valentine*. We decline to do so.

Fields also argues that the probative value of M.P.'s testimony was substantially outweighed by the potential for unfair prejudice because it did not involve his relationship with Z.A. But this is precisely the issue we resolved in *Valentine*, in which we noted that "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." *Valentine*, 787 N.W.2d at 637. We conclude that the district court did not abuse its discretion by admitting evidence of Fields's relationship with a former girlfriend.

III. Sufficiency of the evidence.

***6** When considering a claim of insufficient evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn.1989). We will not disturb the verdict if the jury, 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 must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). This is especially true when resolution of the matter depends mainly on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn.1980). We do not review a jury's credibility determinations. *State v. Watkins*, 840 N.W.2d 21, 31 (Minn.2013).

The only element of the crime of felony domestic assault at issue here was the identity of Z.A.'s assailant. Because Z.A.'s and M.B.'s identifications of Fields as the attacker were admissible for all purposes, the evidence was plainly sufficient to prove that element. Fields's telephone call from the jail corroborates much of what Z.A. told the responding officer and the relationship evidence was consistent with Z.A.'s account of the incident and Fields's conduct after the incident.

Fields makes a separate argument that the evidence is insufficient to support his OFP-violation conviction. To prove that offense, the state had to prove, in relevant part, that Fields "knowingly" violated the OFP. Minn.Stat. § 518B.01, subd. 14(d) (2012). In other words, the state had to show that Fields "intentionally engaged in prohibited contact, knowing that

such contact was prohibited." *State v. Gunderson*, 812 N.W.2d 156, 158 (Minn.App.2012). Fields specifically argues, based on his contention that there is insufficient evidence to support his assault conviction and some evidence that Z.A. came to his house believing that he would not be present, that the evidence does not show a knowing violation of the prohibition from having contact with Z.A. But because there is sufficient evidence to prove that Fields physically assaulted Z.A., the same evidence is sufficient to prove that Fields knowingly and intentionally violated the OFP.

IV. Jury instructions and prosecutorial conduct.

Fields argues that the district court erred by admitting M.P.'s testimony "because the court and prosecutor urged jurors to misuse the evidence as propensity evidence." This argument is misplaced because it relates to the use, rather than the admission of the relationship evidence. We therefore consider this argument as a challenge to the jury instructions and an assertion of prosecutorial misconduct.

A. Jury instructions.

***7** Before M.P. testified, the district court proposed CRIMJIG 2.07 as a limiting instruction. Fields did not object or comment, and the district court gave this instruction:

> Members of the jury, the State is about to introduce evidence of alleged conduct by the defendant, Mr. Fields, in 2005. This evidence is being offered for the limited purpose of demonstrating the nature and extent of the relationship between the defendant, Mr. Fields, and [M.P.][,] [i]n order to assist you in determining whether Mr. Fields committed those acts for which he is charged in the complaint. The defendant, Mr. Fields, is not being tried for [ ] and may not be convicted of any behavior other than the charged offenses. You are not to convict the defendant on the basis of conduct occurring between himself and [M.P.]. To do so might result in unjust double punishment.

The court repeated this instruction before the jury started deliberations.

In the absence of an objection, we review jury instructions for plain error. *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn.2001). Plain error exists only where an error affects substantial rights, and this requirement is satisfied only if the error affected the outcome of the case. *State v. Griller*, 583 N.W.2d 736, 741 (Minn.1998). The defendant bears a "heavy burden" on this point. *Id.* District courts are allowed substantial latitude in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn.2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn.1988). "An instruction is in error if it materially misstates the law." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn.2010).

The instruction given did not reference propensity evidence or instruct the jury *not* to use M.P.'s testimony as such. But the instruction did not materially misstate the law because the instruction is consistent with section 634.20 and the appellate courts' interpretations of that section. *See* Minn.Stat. § 634.20 (providing for admission of evidence of prior incidents of domestic abuse); *McCoy*, 682 N.W.2d at 161 (adopting section 634.20 as a rule of evidence); *see, e.g., Valentine*, 787 N.W.2d at 637 (permitting relationship evidence from relationships with third parties because such evidence may illuminate how a defendant treats those close to him, including the victim).

Additionally, Fields has failed to show that this instruction affected the outcome of the trial. *See Griller*, 583 N.W.2d at 741 (relief based on plain error warranted only if error affected the outcome). Fields points to no facts suggesting that this instruction affected the outcome, asserting only that the prosecutor's closing argument, "combined with the district court's deficient instruction, virtually assured that jurors misused [M.P.]'s improperly-admitted testimony as propensity evidence when finding Fields guilty." Fields has failed to establish that the district court committed plain error by giving this instruction.

B. Prosecutorial conduct.

***8** The prosecutor's complained-of use of the relationship evidence occurred in closing argument. After discussing the recantations of Z.A. and M.P., and their revised story

that Z.A.'s injuries were caused by an unidentified woman in Fields's home, the prosecutor turned to the relationship evidence:

> And that's where you need to look at the testimony of [M.P.], ... because she gave you some more insight into her relationship with [Fields], and how he acts or how he acted at the time they were together. And she described—she called it a wishy-washy relationship. And remember [Z.A.] described her relationship with this defendant, up and down, on and off. It's because he would cheat on them, it's because he would abuse them that it was on and off. And [M.P.] described a whole host of abusive actions by this defendant: Emotional, physical, mental. And she finally, after a year, had enough. But she stayed with him for a while even knowing about [Fields's ongoing relationship with Z.A.]. She thought he would change.
>
> And just like the defendant in his phone call from the jail, "Tell her I'm sorry. If she could just forgive me and we can get past this." This is the cycle of his relationship with women. He abuses them, begs for their forgiveness, and we move on. And they all thought that that's what would happen this time, but you can't go on and cause the injuries that he caused and have somebody not say, You know what enough is enough. There was nobody else in that house.

Fields did not object. Because he did not, we review this claim under the *Griller* plain-error standard as modified by *State v. Ramey*, 721 N.W.2d 294, 299–300 (Minn.2006). Under this modified standard, we determine whether there was an error and whether the error was plain, meaning whether it was "conduct the prosecutor should know is improper." *Id.* If there was plain error, we assume that the error affected the defendant's substantial rights and the burden shifts to the state to show that the error *did not* affect substantial rights. *Id.*

Here, the prosecutor encouraged the jury to use the relationship evidence in a manner consistent with *Valentine,* in which we held that "evidence showing how a defendant treats his family or household members, such as his former spouses or other girlfriends, sheds light on how the defendant interacts with those close to him, which in turn suggests how the defendant may interact with the victim." 787 N.W.2d at 637. Because encouraging a use of evidence that is consistent with caselaw does not rise to the level of "conduct the prosecutor should know is improper," we conclude that no clear error occurred and we need not consider whether the defendant's substantial rights were affected.

Affirmed.

All Citations

Not Reported in N.W.2d, 2014 WL 684665

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2007 WL 2177334
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Timothy R. HANSON, Appellant.

No. A06-567.

|

July 31, 2007.

|

Review Denied Oct. 16, 2007.

Washington County District Court, File No. K7-05-3366.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, and Doug Johnson, Washington County Attorney, Michael Hutchinson, Assistant County Attorney, Stillwater, MN, for respondent.

John M. Stuart, State Public Defender, Jessica Godes, Assistant Public Defender, Minneapolis, MN, for appellant.

Considered and decided by HALBROOKS, Presiding Judge; LANSING, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** On appeal from his conviction of gross-misdemeanor harassment and first-degree burglary, appellant argues that the evidence was insufficient to support the convictions. In addition, appellant argues that the district court committed plain error in allowing the state to call the victim for the sole purpose of impeaching her with her statements to the 911 operator, the police, and in her affidavit in support of an order for protection (OFP). We affirm.

FACTS

Appellant Timothy R. Hanson and Elizabeth Sheridan were involved in a romantic relationship and lived together for approximately five months before the relationship ended. Sheridan changed the locks after appellant moved out, but she hid the spare key in the same location. On May 18, 2005, appellant drove to Sheridan's neighborhood and parked his car on an adjacent street so that it was not visible from Sheridan's home. Appellant stood on Sheridan's driveway for several minutes and then opened the garage door. As it grew dark, a neighbor noticed that lights were on in the home, but Sheridan had yet to return. When Sheridan got home, she saw appellant, who appeared to be under the influence of alcohol, coming out of her home. Nonetheless, she invited him back inside.

When Sheridan saw an empty bottle of liquor on the living room floor, she "went absolutely hysterical" because appellant's alcohol consumption had been a reason for their break-up. She demanded that appellant leave; but he refused and slapped Sheridan on the left side of her face. Sheridan pushed appellant out the door and locked it. She immediately called 911 on her cell phone and reported that "I came home, my door was wide open, and he attacked me" by "slapp[ing] me across the face." She described the slap as "really hard." Sheridan denied needing medical attention, but as she was crying, she said, "I just need help." Sheridan also told the 911 operator that appellant was "freaking out, he's banging on the windows ... [m]y living room windows" and "banging on the door."

Sheridan remained visibly frightened when the police arrived at her home. She told police that appellant had rifled through the house, opening her dresser drawers and pulling out her clothes and taking seven $20 bills from a desk drawer. Officer Clausen observed that all the drawers in the bedroom furniture were open and clothing was on the floor. When searched upon entering jail, appellant had seven $20 bills in his pockets. Sheridan also told the police that appellant "got mad, turned around and struck her with his right hand on the left side of her face." Sheridan's subsequent written statement to police corroborated these facts. And Officer Clausen, who responded to Sheridan's 911 call, noticed that the left side of Sheridan's face was "slightly red."

Soon after the 911 call, Officer Foucault found appellant walking less than a mile away from Sheridan's home. Officer Lindeen arrived shortly afterward from Sheridan's home. Appellant smelled of alcohol and was weaving slightly as he walked but otherwise seemed normal. Appellant was charged with first-degree burglary under Minn.Stat. § 609.582, subd.

1(c) (2004); second-degree burglary under Minn.Stat. § 609.582, subd. 2(a) (2004); domestic assault with intent to cause fear in another of immediate bodily harm under Minn.Stat. § 609.2242, subd. 1(1), (2) (2004); and two counts of harassment and stalking under Minn.Stat. § 609.749, subd. 2(a)(1), (3) (2004).

***2** Two days later, Sheridan went to the Harriet Tubman Alliance and spoke to someone about the incident. She completed an affidavit in support of an order for protection (OFP) against appellant that restated the information that she had told the police. Sheridan's affidavit also stated that she had tried to lock herself in the bathroom but that appellant had "pushed his way in." The district court granted the OFP.

Sheridan subsequently wrote a letter to the county attorney and telephoned Officer Clausen to correct what she then stated were inaccuracies in the police report. She stated that she was "hysterical" upon seeing appellant intoxicated in her home but that he is otherwise welcome. Because she was "hysterical," Sheridan stated that she jumped to the conclusion that appellant had opened her dresser drawers and threw her clothes on the floor. Instead, she reported that only the bathroom rugs were in disarray as a result of appellant. Similarly, she reported that she found the missing $140 beneath furniture in the living room. She noted that appellant "would never, ever steal property, nor do I feel he 'assaulted' me. He was so intoxicated he was falling over, and he did bump me as I was hanging onto him." At trial, Sheridan testified consistently with this later version of events.

The jury found appellant guilty of first-degree and second-degree burglary and gross-misdemeanor harassment but acquitted him on the stalking and domestic-assault charges. At sentencing, the district court vacated the second-degree burglary verdict as a lesser-included offense of first-degree burglary and granted appellant's motion for a downward dispositional departure based on appellant's lack of criminal convictions and his general peacefulness. Appellant's 48-month guidelines sentence for burglary was stayed, and he was placed on probation for 20 years with certain conditions, including a 180-day jail term with work release, a $700 fine, completion of an anger-management and domestic-abuse assessments, and treatment for alcohol abuse. On the harassment conviction, the district court sentenced appellant to 365 days in jail, with all but 180 days suspended, and a fine of $3,000, with all but $700 suspended, concurrent with the burglary sentence. This appeal follows.

DECISION

I.

Appellant argues that the evidence was insufficient to convict on the first-degree burglary charge because appellant entered the residence with Sheridan's consent and that the state failed to prove beyond a reasonable doubt that he entered Sheridan's home with the intent to commit the crime of harassment. The state must prove "beyond a reasonable doubt all of the essential elements of the crime with which the defendant is charged." *State v. Ewing*, 250 Minn. 436, 442, 84 N.W.2d 904, 909 (1957). In considering a claim of insufficient evidence, this court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction," was sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn.1989). The reviewing court must assume that "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn.1989). This is especially true when resolution of the matter depends on conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn.1980).

***3** The factfinder has the exclusive function of judging witness credibility and weighing the evidence, *Dale v. State*, 535 N.W.2d 619, 623 (Minn.1995), and this court will defer to the factfinder's credibility determinations. *State v. Kramer*, 668 N.W.2d 32, 37 (Minn.App.2003), *review denied* (Minn. Nov. 18, 2003). This court will not disturb the verdict if the jury, 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).

In addition to time and jurisdictional elements, the elements of first-degree burglary are (1) the defendant entered or remained within a building without the consent of the person in lawful possession; (2) "the defendant assaulted a person within the building or on the building's appurtenant property"; (3) the defendant entered the building with the intent to commit the crime of harassment. 10A *Minnesota Practice*, CRIMJIG 17.04 (2006). "It is not necessary that the intended crime actually was completed or attempted, but it is necessary that the defendant had the intent to commit that crime at the time that the defendant" either entered or remained in the building. *Id.* "Whether the defendant intended to commit

the crime must be determined from all the circumstances, including," the manner and time of entry or remaining in the building, "the nature of the building and its contents," any things the defendant may have had with them, "and all other evidence in the case." *Id.*

Consent requires more than mere admittance into the building by its owner. An owner may limit consent to certain times and conditions. *State v. Larsen*, 442 N.W.2d 840, 843 (Minn.App.1989) (affirming first-degree burglary because appellant brought a friend whom the owner prohibited from the cabin). Consent may be withdrawn after entry. Minn.Stat. § 609.581, subd. 4(c) (2004) (defining "[e]nters a building without consent" to include "to remain within a building without the consent of the person in lawful possession").

An assault is "[a]n act done with intent to cause fear in another of immediate bodily harm or death; or ... [t]he intentional infliction of or attempt to inflict bodily harm upon another." Minn.Stat. § 609.02, subd. 10 (2004).

Appellant was convicted of gross-misdemeanor harassment under Minn.Stat. § 609.749 (2004). As the state accurately argues on appeal, when prosecuting under that statutory section, the state does not have to prove a defendant's specific intent. Minn.Stat. § 609.749, subd. 1a.

Sheridan testified that appellant had been upset with her because she had invited guests, including a male guest, to her house the preceding weekend. Sheridan and appellant had argued about the invitation. She did not want to talk about it then, but she expected that the issue would come up again. Appellant knew that Sheridan did not want to discuss the matter. Nonetheless, appellant drove to Sheridan's home on May 18 and parked his car about 100 yards away, in a location that Officer Foucault testified was not visible from Sheridan's home.

***4** A neighbor, Alexander Holt, testified that he saw appellant standing outside Sheridan's home that evening. Holt knew that Sheridan was not home because, after appellant opened the garage, Holt saw that it was empty. Similarly, lights were on inside the house although there was no indication that Sheridan herself was home. Moreover, appellant walked to the end of the driveway, peered left and right as if "expecting someone to come home."

Further, Sheridan had established ground rules that appellant visit her only when he was sober. That night, he was not. The presence of alcohol limited Sheridan's consent to appellant's presence in her home. And appellant refused to leave after Sheridan asked him to leave.

Moments after being struck by appellant, Sheridan reported that "tonight he smacked me across the face really hard." Officer Clausen, who responded to the 911 call, saw a red mark on the left side of Sheridan's face that he later testified was consistent with being slapped from the right hand of a facing aggressor. When Sheridan subsequently sought to correct the police report, she stated that appellant bumped her as he tripped on a coffee table. Sheridan said then that appellant was "very intoxicated." But Officers Lindeen and Clausen testified that they first saw appellant shortly after the 911 call and that he had only a slightly weaving gait. Viewing the verdict in the most favorable light, there is sufficient evidence in the record for the jury to have convicted appellant of first-degree burglary and gross-misdemeanor harassment.

II.

After failing to object at trial, appellant now argues that the district court committed plain error by allowing the prosecutor to call Sheridan as a witness for the sole purpose of impeachment. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn.2003) (citations omitted).

When a defendant fails to object to the admission of evidence, our review is for plain error. Minn. R.Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn.1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Stromnen*, 648 N.W.2d 681, 686 (Minn.2002) (citing *Griller*, 583 N.W.2d at 740). "An error is plain if it was clear or obvious." *Id.* at 688 (quotations omitted). "An error affects substantial rights if the error is prejudicial-that is, if there is a reasonable likelihood that the error substantially affected the verdict." *Id.* "If those three prongs are met, we may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 686 (quotation omitted).

***5** The prosecution may not seek to admit prior inconsistent statements that are inadmissible hearsay through

impeachment of its own witness. *State v. Dexter*, 269 N.W.2d 721, 721 (Minn.1978). " 'Hearsay' is 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." Minn. R. Evid. 801(c).

There are four statements that Sheridan made that are at issue here: (1) the 911 call; (2) her oral statements to Officer Clausen; (3) her handwritten statement to Officer Clausen; and (4) her affidavit in support of the OFP. All four statements are consistent in their description of appellant's conduct. But Sheridan retracted that account of the incident prior to trial by contacting the county attorney and Officer Clausen approximately two weeks later to advise them that the police report contained inaccuracies. At that time, Sheridan stated that appellant had not slapped her, come by her house at night ringing her doorbell, repeatedly called her in an effort to get back together, taken her money, or rummaged through her bedroom dresser on the night of the incident.

Appellant argues that Sheridan's statements in the 911 call and to responding police officers are inadmissible hearsay. But prior witness statements are not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

Minn. R. Evid. 801(d)(1)(D). Similarly, exceptions to the hearsay prohibition include an excited utterance, which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Minn. R. Evid. 803(2).

At trial, the prosecution played a recording of the 911 call that Sheridan made. On the tape, Sheridan was crying when reporting that appellant had hit her and was then pounding on the windows of her home to get back in. Sheridan's emotional state indicated that she was under the stress of a startling event when she was reporting it. Therefore, we conclude that the 911 recording was admissible as an excited utterance.

Appellant also disputes the admissibility of Sheridan's oral statements to the officers who arrived while Sheridan was on the phone to the 911 operator. But those statements are fairly characterized as descriptions or explanations of an event made while Sheridan was perceiving the event or immediately thereafter. The officer who interviewed Sheridan described her as "scared." As a result, we conclude that those statements were also admissible as excited utterances.

As a third matter, appellant argues that Sheridan's written statement to the police is inadmissible hearsay. Sheridan wrote the statement later on the day of the incident, when she appeared to be calm. The state asserts that this statement is admissible under Minn. R. Evid. 803(24). [1] Hearsay evidence may be admitted if

> ***6** [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, 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. 803(24). In evaluating whether this catchall exception to the hearsay rule is appropriate, Minnesota appellate courts have relied on four factors: (1) whether "there is no confrontation problem presented by the admission of the statement as substantive evidence, since [the witness] testified, admitted making the prior statement, and was available for cross-examination by defense counsel"; (2) whether "there [is] no real dispute over whether [the witness] made it or over what it contained"; (3) whether "the statement was against [the witness'] penal interest, a fact that increases its reliability"; and (4) whether "the statement was consistent with all the other evidence the state introduced." *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn.1985).

First, Sheridan admitted writing the statement and testified about it; appellant had the opportunity to cross-examine Sheridan about it. Second, Sheridan's authentication of the document eliminates any dispute as to whether Sheridan

[1] In 2006, Minn. R. Evid. 802(24) was recodified, along with Minn. R. Evid. 804(b)(5), in new Minn. R. Evid. 807. Minn. R. Evid. 803 2006 comm. cmt. But the substance of the catchall exception remains the same.

made the statement. Third, although no penal interests are implicated here, Sheridan's written statement is consistent with the other evidence provided by the state. Therefore, it could be admitted under the catchall exception.

Finally, appellant claims that the affidavit that Sheridan prepared in support of the OFP is inadmissible hearsay. In requesting an OFP, "[a] petition for relief shall allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought." Minn.Stat. § 518B.01, subd. 4(b) (2004).

A prior inconsistent statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding...." Minn. R. Evid. 801(d)(1)(A). Here, Sheridan testified at trial with opportunity for cross-examination. The affidavit was inconsistent with Sheridan's trial testimony. As the affidavit is a prior inconsistent statement, given under oath, to which Sheridan was available for cross examination, it is admissible as nonhearsay. We conclude that the district court acted within its discretion in its admission of these statements.

Affirmed.

All Citations

Not Reported in N.W.2d, 2007 WL 2177334

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