This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1108

State of Minnesota,
Respondent,

vs.

Melissa Jean Stern,
Appellant.

Filed June 10, 2013
Affirmed
Rodenberg, Judge

Stearns County District Court
File No. 73-CR-11-7364

Lori Swanson, Attorney General, St. Paul, MN; and

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Tania K.M. Lex, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.[*]

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

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

RODENBERG, Judge

On appeal from her conviction of gross misdemeanor criminal abuse by a caregiver of a vulnerable adult, appellant argues that the district court (1) abused its discretion in admitting the deceased complainant's statements under the residual exception to the rule against hearsay and (2) erred in failing to exclude those hearsay statements as violating the Confrontation Clause of the United States Constitution. We affirm.

FACTS

Heritage House is an assisted-living facility located in Kimball, housing approximately 18 residents. On April 10, 2011, injuries were discovered on one of the residents. In August 2011, Heritage House employee appellant Melissa Stern was charged with one count of gross misdemeanor criminal abuse by a caregiver of a vulnerable adult in violation of Minn. Stat. § 609.2325, subd. 1(a) (2010).[1] Following a jury trial in January 2012, appellant was found guilty.

At the time the victim, M.G., was injured, he was in his mid-70s and had been a Heritage House resident for approximately five years. M.G. suffered from Parkinson's disease and needed assistance with many activities of daily living. M.G. also suffered

[1] At trial, the state was required to prove that appellant was a "caregiver who, with intent to produce physical or mental pain or injury to a vulnerable adult, subject[ed] a vulnerable adult to any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion." Minn. Stat. § 609.2325, subd. 1(a).

from mild dementia. Heritage House staff described M.G. as a kind soul with a "terrific sense of humor" who was fun, but who could also be challenging from time to time.

On the morning of April 10, Patrice Nixon, a Heritage House aide, arrived before her shift began and was outside smoking a cigarette. Appellant, who typically worked as an aide during the overnight shift, approached Nixon and explained that she "had a rough night" with M.G. Appellant told Nixon that she could not get M.G. "off the toilet so she grabbed him by his junk." When appellant said "junk," Nixon understood her to mean that she had grabbed M.G. by his genitals. Initially, Nixon did not know how to respond to appellant's comments. After the brief conversation, she went inside and started getting ready for her day.

That same morning, when Carrie Reynolds, another Heritage House aide, arrived at work, appellant also approached her to give an update regarding what had happened with the residents during her overnight shift. Appellant told Reynolds that M.G. had made her "very upset" and that she had reacted by grabbing his genitals and twisting them with her hand. At trial, Reynolds testified that hearing this from appellant shocked her because she had never heard another employee at Heritage House say anything similar about a resident.

When Nixon first saw M.G. that morning around 7:30 a.m., he was acting abnormal and was "agitated." Reynolds also noticed that M.G. did not come to breakfast, which was unusual for him. Reynolds first went into M.G.'s room around 9:00 a.m. but did not examine him at that time. When Nixon went to get M.G. from his room for lunch at around 11:30 a.m., he was still "not acting normal" and was throwing things, was

uncooperative, and continued to act out. Reynolds and Nixon were discussing M.G. when they realized that each had been told by appellant that appellant had grabbed and twisted M.G.'s genitals. As a result, the two aides decided to check further on M.G.

Nixon and Reynolds went to M.G.'s room, and Nixon asked him what was wrong. Nixon testified that M.G. responded that he "hurt down there." Nixon and Reynolds asked M.G. permission to look at his genitals. M.G. agreed. The two aides saw blood and observed a laceration on M.G.'s penis. Nixon and Reynolds then called Joyce Quast, who had been the nurse manager at Heritage House for six years. Reynolds informed Quast that appellant had told her that M.G. had been uncooperative overnight and would not get off the toilet, which made appellant mad, and that she had grabbed M.G.'s "scrotal area." Quast then spoke with Nixon, who also conveyed that appellant had told her that she grabbed M.G.'s genitals.

After speaking with Nixon and Reynolds, Quast called the local police[2] and her direct supervisor before going to Heritage House, where she and Nixon went into M.G.'s room. Quast testified that, in situations where a resident is alleged to have been injured, typically she sees the resident to "check the situation over" and determine what "follow-up" is appropriate and necessary. Depending on what she discovers, Quast either treats the injury or calls a doctor for further medical attention. Quast testified that when she was told on April 10 that M.G. had been injured, her "primary focus and concern" was to make sure he was "okay and didn't need . . . immediate medical attention."

[2] As a registered nurse in an assisted-living facility, Quast is a mandated reporter under Minnesota's vulnerable adult protection statute. Minn. Stat. §§ 626.557, .5572, subd. 16 (2012).

At trial, when the prosecutor asked Quast what M.G. told her when she arrived in his room to assess the situation, defense counsel objected on the grounds of hearsay. Because M.G. was unavailable, the district court ruled that M.G.'s out-of-court identification of appellant as the person who had caused his injury was not admissible. But the district court also ruled that Quast's testimony regarding M.G.'s other statements to her was not barred by the Confrontation Clause and that those limited statements were admissible under the residual exception to the hearsay rule, Minn. R. Evid. 807. The state limited its questioning of Quast to M.G.'s statements about what had happened and did not elicit M.G.'s identification of appellant as the person who had caused his injury.

Quast testified: "I talked to [M.G.] and I asked him how he was and he just kind of sat there with his head hanging down and I said, 'Do you have something you want to tell me?' and . . . he said . . . 'she hurt me.'" M.G.'s response, according to Quast's testimony, was that "she got mad" and "grabbed" him.[3] Quast explained that she then asked M.G. where he was grabbed. M.G. did not say anything in response and instead "just sat there with his head down" for a while until he pointed at his groin area. Quast did not examine M.G. at that time and instead "sat there for a while with him because he was very quiet and withdrawn at the time, and we just sat there together." Quast then asked M.G. whether he would permit the police to look at his injury, and M.G. agreed. When a police officer arrived, the officer and Quast examined M.G. and observed a

[3] In his statement to Quast, M.G. did not name who "she" was, and by that time M.G. had been seen by at least three female aides.

scratch and blood on the underside of M.G.'s "scrotal area." The officer testified that the injury was "new looking."

After Quast had examined M.G., she called appellant and asked whether she had caused M.G.'s injuries. Appellant responded by laughing. Quast asked appellant why she was laughing, and appellant replied that "I was just kidding. I didn't do it." At trial, appellant agreed that there is not "anything funny about saying that you grabbed a seventy-seven-year-old man with Parkison's by the genitals and twisted."

Appellant testified at trial that she was the only aide assisting Heritage House residents during the overnight shift from April 9–10. She explained that she was helping M.G. prepare for his day around 5:30 a.m. on April 10. It took her between 30 and 45 minutes to get M.G. to stand up from the toilet. She testified that at the time she was not "frustrated," but that she was "mad" because she was worried M.G. might fall and get hurt. Appellant denied ever grabbing M.G.'s genitals. Appellant also claimed that she had not noticed any new or unreported injuries on M.G. during her shift, and that if she had, she would have notified Quast. Appellant denied ever telling anyone that she had inappropriately grabbed M.G. She claimed that she made the statement to Nixon about grabbing "junk" in response to something that Nixon had said. Appellant recalled making some "twisting hand motions" when she was later speaking with Reynolds but claimed that she was only repeating her previous conversation with Nixon.

At trial, Heritage House staff testified that M.G. never fully recovered following his injury and that, between the time he was injured and when he passed away from

natural causes a few weeks later, he lost the "spark" and the "bubbly" happy personality he had previously exhibited. This appeal followed.

D E C I S I O N

I.

Appellant contends that the district court abused its discretion by admitting much of M.G.'s statement to Quast under the residual exception to the hearsay rule. *See* Minn. R. Evid. 807. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A district court's evidentiary ruling, even if erroneous, "will not be reversed unless the error substantially influenced the jury's verdict." *State v. Gatson*, 801 N.W.2d 134, 150 (Minn. 2011).

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182–83 (Minn. 2002). An out-of-court statement is not admissible as substantive evidence unless it is non-hearsay or is within an exception to the rule against hearsay. *State v. Greenleaf*, 591 N.W.2d 488, 502–03 (Minn. 1999). A hearsay statement is admissible under the residual exception to the rule against hearsay if it has circumstantial guarantees of trustworthiness equivalent to other exceptions. Minn. R. Evid. 807. The court must also determine whether (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence; and (3) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. *Id.*

Appellant argues that the hearsay statements made by M.G. to Quast do not fit within the residual exception because they lack circumstantial guarantees of trustworthiness. To determine whether a hearsay statement has circumstantial guarantees of trustworthiness, we apply a totality-of-the-circumstances approach. *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998); *State v. Byers*, 570 N.W.2d 487, 492 (Minn. 1997). In doing so, we look "to all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). Relevant factors include, but are not limited to,

> [t]he character of the witness for truthfulness and honesty, and the availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross-examination and a penalty for perjury; the witness' relationship with both the defendant and the government and his motivation to testify . . . ; the extent to which the witness' testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness' unavailability.

Keeton, 589 N.W.2d at 90 (omission in original) (quotation omitted); *see also State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007) (applying caselaw addressing the old Minn. R. Evid. 803(24), which also required a consideration of the totality of the circumstances).

In *State v. Robinson*, the Minnesota Supreme Court concluded that statements given by a victim to nurses at a hospital had sufficient circumstantial guarantees of trustworthiness because they were given voluntarily, were made to two separate nurses at two separate times, and because the victim had no motive to lie. 718 N.W.2d 400, 410 (Minn. 2006). Here, as in *Robinson*, M.G.'s statements were given to Quast voluntarily,

the statements M.G. made to Quast were consistent with those he made to the aides, and M.G. had no apparent motive to lie. Moreover, the fact that M.G. was agitated throughout the day before he made the statements to Quast indicates he was in pain and was disturbed by what had happened. There is no evidence that M.G. knew his statements would lead to police involvement, which is also an indicator of trustworthiness. *See id*. The district court prohibited use of that portion of M.G.'s statements to Quast that implicated appellant as the cause of his injuries. As so limited by the district court, the hearsay testimony only involved the statements of M.G. as to his injury and how it occurred.

On this record, M.G.'s statements to Quast had sufficient guarantees of trustworthiness to be admissible under rule 807, and the district court did not abuse its discretion in admitting the limited hearsay testimony.

II.

Appellant further argues that the district court erred in concluding that M.G.'s statements to Quast were not testimonial hearsay. She argues that the statements were testimonial and thus inadmissible under the Confrontation Clause. Whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law, which we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54,

124 S. Ct. 1354, 1365 (2004). In a *Crawford* analysis, the court must first determine whether the hearsay statement at issue is testimonial. *See Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006) (holding that nontestimonial out-of-court statements are subject to hearsay limitations but are not subject to the Confrontation Clause).

Ultimately, whether a statement is testimonial turns on the primary purpose served by the questioning:

> Statements are nontestimonial . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822, 126 S. Ct. 2273–74. While the *Davis* Court declined to hold "whether and when statements made to someone other than law enforcement personnel are testimonial," it indicated that such statements may be testimonial if the party is acting as an agent of law enforcement. *Id*. at 823 n.2, 126 S. Ct. at 2274 n.2 (quotation omitted); *see also State v. Scacchetti*, 711 N.W.2d 508, 514 (Minn. 2006) (explaining that when the questioner is not a police officer, we must determine whether the questioner was "acting in concert with or as an agent of the government," and that it is "significant" to the question of whether statements are testimonial whether a government actor initiated, participated, or was involved in any way with the questioning).

In *Scacchetti*, the supreme court concluded, in part, that a nurse practitioner at Midwest Children's Resource Center (MCRC) who assessed a child for possible sexual abuse was not a government actor or acting in concert with or as an agent of the government; therefore, the child's statements to the nurse were not testimonial. 711 N.W.2d at 514–15. The supreme court emphasized that the nurse's questioning of the child took place at a hospital, no law enforcement officers were present during questioning, and law enforcement did not refer the child to MCRC or otherwise participate in organizing the assessment. *Id.*; *see also Bobadilla v. Carlson*, 575 F.3d 785, 792-93 (8th Cir. 2009) (affirming the federal district court's conclusion that a child's statements to a MCRC nurse were testimonial because the interview was initiated by a police officer, took place several days after the crime was committed, was conducted for investigatory purposes, was attended by a police officer, involved structured questioning, and was recorded).

Under the facts of this case, and as their use was limited by the district court, M.G.'s statements to Quast were not testimonial. When M.G. spoke with Quast, he was in pain, upset, and communicating these things to a person responsible for his care. Quast is not a law enforcement officer. She is a nurse employed by a private health-care facility. Quast's exchange with M.G. occurred in M.G.'s room at Heritage House and not at a police station. The police were not present during questioning and the police were not involved with organizing Quast's interaction with M.G. The conversation was informal—Quast began with a very open-ended question: "Do you have something you want to tell me?" The conversation was not recorded. When Quast spoke with M.G., her

"primary focus and concern" was to make sure he was "okay and didn't need . . . immediate medical attention." There is no evidence that Quast was somehow acting as a proxy or surrogate for law enforcement, and "the mere fact that [a nurse] may be called to testify in court regarding . . . abuse cases does not transform the medical purpose of the assessment into a prosecutorial purpose." *Sacchetti*, 711 N.W.2d at 515.

In sum, M.G.'s comments were admissible under Minn. R. Evid. 807 and were nontestimonial and therefore did not implicate the Confrontation Clause.

Affirmed.