STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1711

State of Minnesota,
Respondent,

vs.

Charles Steven Turman,
Appellant.

Filed November 20, 2017
Affirmed
Halbrooks, Judge

Becker County District Court
File No. 03-CR-16-243

Lori Swanson, Attorney General, Karen B. McGillic, Assistant Attorney General, St. Paul, Minnesota; and

Tammy L. Merkins, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

On appeal from his convictions of threats of violence, fifth-degree assault, and domestic assault, appellant argues that (1) his conviction of domestic assault must be

vacated because the complainant's out-of-court statement to police was erroneously admitted into evidence because it did not bear a "sufficient indicia of reliability" or "circumstantial guarantees of trustworthiness" and (2) his conviction of threats of violence must be vacated for insufficient evidence because his statements were the product of transitory anger and were not made with the aim, objective, or intention of causing extreme fear. We affirm.

FACTS

Appellant Charles Turman, Sr. is married to A.T., who has three children, including a son, D.S. Appellant is not D.S.'s biological father, but they have maintained a father-son relationship since D.S.'s birth. On February 2, 2016, appellant and A.T. visited M.J., a family friend, at her house. When appellant and A.T. arrived, M.J. and her three children, her father, and her stepbrother were present. Appellant's biological son, C.T. Jr., was not at the house; but the mother of C.T. Jr.'s child, K.N., and their child, were there.

Appellant started drinking alcohol soon after he arrived. Approximately one hour later, D.S. arrived, walked up to A.T., and hugged her. Appellant came out of the bathroom, pushed D.S. into the kitchen, punched him repeatedly, and grabbed him around his neck. A.T. stayed in the living room, and the fight continued until M.J.'s father and stepbrother intervened to stop it. As a result of the fight, D.S.'s lip was cut and appellant's knuckles were bleeding.

After this incident, M.J. told A.T. that they could not behave that way in her home. A.T. drove to a gas station with M.J. and appellant and left appellant at the gas station. After returning to M.J.'s house, A.T. prepared to go home. But before she left M.J.'s house,

appellant arrived. As appellant exited the vehicle, A.T. drove away with K.N.'s child. Appellant, K.N., and M.J. went inside the house. Appellant was angry that A.T. had left him at the gas station and made everyone in the house call A.T.'s phone. Appellant was only able to speak with A.T. for a brief moment before she hung up on him. Appellant then started punching the air, refused to let K.N. leave the house, blocked the door, and stated that he would have someone beat her up if she tried to leave. He also said he had "killers" who could sit outside M.J.'s house and yelled that he was angry at those inside the house because he believed that they knew A.T. was going to leave him there and that they helped her go.

After approximately 20 or 30 minutes, M.J. said she needed to get food for her children. Appellant allowed her to leave as long as she left her phone with him. M.J. then left, unsuccessfully searched for A.T., and returned home. Upon returning, she spoke with her neighbor, T.P., and asked if she could bring the kids over because she did not want them in the house with appellant. M.J. told appellant that the children were going to T.P.'s house to have leftover cake from a birthday party, brought the children to T.P.'s house, and asked T.P to drive her to a gas station so that she could call the police. She did not want to call the police from T.P.'s house because she was concerned that appellant would hear her calling through the shared wall between her home and T.P.'s.

At approximately 7:30 p.m., T.P. drove M.J. to the gas station. M.J. called 911 and informed the dispatcher that appellant was holding someone against their will in her home and asked the police to meet her at the gas station and to follow her home without use of the squad-car sirens. The police followed M.J. to her house and walked in and found

appellant sitting on the couch. Officer Josie Johnson testified that appellant appeared "cold" and that everyone else in the house seemed terrified. Officer Brent Fulton testified that K.N. "couldn't get out of there fast enough."

Later that evening, at approximately 9:20 p.m., D.S. went to the sheriff's office with M.J. to inform Officer Johnson that appellant had assaulted him. D.S. stated that appellant had punched him in the face, head-butted him, and grabbed him around his neck, which made it difficult for him to breathe. M.J. was present while D.S. made the statement. The state charged appellant with threats of violence, two counts of fifth-degree assault, domestic assault, and domestic assault by strangulation.

At trial, D.S. recanted the statement he made to the police that appellant assaulted him and testified that M.J. pressured him into making the statement because she wanted appellant "locked up." He explained that his lip was cut because he fought with his brother that day. The jury also heard M.J.'s 911 call, D.S.'s recorded statement that he made to the police, and testimony from M.J., D.S., M.J.'s stepbrother, and T.P. The officers who arrived at M.J.'s house and the officer who took D.S.'s statement also testified. The jury found appellant guilty of threats of violence against M.J. and K.N., fifth-degree assault against K.N., and domestic assault against D.S. This appeal follows.

D E C I S I O N

Appellant argues that his conviction of domestic assault must be reversed because the district court erred in admitting into evidence D.S.'s statement to Officer Johnson based on Minn. R. Evid. 807—the residual hearsay exception. Appellant reasons that the statement is hearsay and does not satisfy the residual-hearsay-exception requirements

because it lacked "indicia of reliability" or "circumstantial guarantees of trustworthiness." Before trial, the prosecutor filed a notice of intent to introduce D.S.'s statement. During trial, the district court heard arguments from the prosecutor and appellant's counsel regarding the statement's admissibility. Appellant's counsel argued that the statement violated his right to confront witnesses and was prejudicial and duplicative of other evidence in the case.

The district court concluded that the statement was reliable and admitted it. It reasoned that (1) the statement did not violate appellant's right to confront witnesses, (2) it was more probative than prejudicial, (3) D.S. made the statement against his personal interest, (4) the statement was consistent with all of the other evidence in the record, and (5) the general rules of evidence and interests of justice would best be served by admitting the statement. "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) (citation omitted).

We agree that the disputed statement is hearsay. *See* Minn. R. Evid. 801(c) ("'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."). Such statements are generally inadmissible absent an exception. Minn. R. Evid. 802. Under Minn. R. Evid. 807, a district court may admit hearsay that has "equivalent circumstantial guarantees of trustworthiness," if the district 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.

The prosecutor offered D.S.'s statement as evidence of a material fact that appellant assaulted D.S. We agree with the district court's determination that the statement was more probative of this fact than any other evidence that the state could procure. The statement allowed the jury to consider D.S.'s personal knowledge and experience, which was not otherwise available because D.S. recanted his statement while testifying. Other witnesses addressed their perceptions of the assault but not the victim's. Further, we agree with the district court that the general rules of evidence and the interests of justice were served by admitting the statement. The rules of evidence shall be construed "to the end that the truth may be ascertained and proceedings justly determined." Minn. R. Evid. 102. D.S.'s statement allowed the jury to better ascertain the truth by comparing his out-of-court statement with his in-court testimony.

In addition to determining whether the statement satisfies the three requirements in Minn. R. Evid. 807, the district court must also determine whether the statement has "equivalent circumstantial guarantees of trustworthiness." Minn. R. Evid. 807. In *State v. Ortlepp*, the supreme court concluded that a hearsay statement had "circumstantial guarantees of trustworthiness" because (1) the admission of the statement did not violate the Confrontation Clause of the Sixth Amendment given that the declarant testified and was available for cross-examination, (2) it was undisputed that the declarant made the

statement, (3) the statement was against the declarant's penal interest, and (4) the statement was consistent with all of the other evidence the state introduced. 363 N.W.2d 39, 44 (Minn. 1985). Here, the district court did not explicitly determine whether D.S.'s statement satisfied all four *Ortlepp* factors, but it addressed the prosecutor's argument, which focused on the factors. Thus, the district court's on-the-record reasoning allows us to review the district court's analysis of the *Ortlepp* factors and the district court's determination that the statement was admissible.

The first *Ortlepp* factor, whether the statement violates the Sixth Amendment Confrontation Clause, is not at issue here. As the district court noted, D.S. testified at trial and was available for cross-examination. *See Ortlepp*, 363 N.W.2d at 44. The second *Ortlepp* factor is also satisfied, as there is no dispute that D.S. made the recorded statement. *See id.*

The third *Ortlepp* factor similarly weighs in favor of admissibility. This factor is satisfied if the statement is "sufficiently reliable," which can be demonstrated by showing the statement was made against the declarant's interests. *State v. Robinson*, 699 N.W.2d 790, 798 (Minn. App. 2005). A statement made against the declarant's interest in maintaining a personal relationship can satisfy this requirement. *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (reasoning declarant's statement satisfied the third *Ortlepp* factor because it was made against her interest in maintaining a relationship with the defendant). Here, the district court found that D.S. loved appellant and regarded him as his father. Therefore, we agree with the district court's determination that D.S.'s

statement was made against his long-term personal interest in maintaining a father-son relationship with appellant.

The fourth *Ortlepp* factor is also satisfied. The district court determined that D.S.'s statement was consistent with all other evidence introduced by the state. As the district court discussed, the state introduced photographs that showed that D.S.'s lip was cut and that appellant's hand was bleeding. M.J. testified that appellant punched D.S. and put his hands around his neck. M.J.'s stepbrother testified that he came downstairs immediately after the incident and saw D.S. gasping for air with appellant standing nearby. The only evidence that contradicts D.S.'s statement is his own testimony recanting the statement.

Although the *Ortlepp* factors provide guidance for determining the admissibility of evidence under rule 807, they do not constitute a strict test. Rather, the district court must examine the totality of the circumstances in determining whether the statements have sufficient guarantees of trustworthiness. *State v. Martinez*, 725 N.W.2d 733, 737-38 (Minn. 2007). The district court may consider: whether the declarant made the statement voluntarily, under oath, and subject to cross-examination and penalty of perjury; his motivation in making the statement; his personal knowledge; his relationship to the parties; whether he recanted the statement; the existence of corroborating evidence; and his character for honesty. *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013). The district court may also consider whether the declarant volunteered information as opposed to answering leading questions as well as the interval of time between the incident and the statement. *State v. Tate*, 682 N.W.2d 169, 177 (Minn. App. 2004).

D.S. asserts that he gave a statement to the police because M.J. told him that she wanted appellant to go to prison. But the district court stated that "it does not appear to the Court he was told what to say, but rather that his loyalty to his de facto father influenced him to testify differently yesterday." In finding that D.S. made the statement voluntarily, the district court noted that "there was no evidence from [Officer] Johnson that he was coached during the course of the statement." The district court also relied on Officer Johnson's testimony that she believed that D.S. was making the statement voluntarily because he provided detailed answers and corrected her if she misunderstood him.

The district court also discussed that D.S. had personal knowledge about the statement because he was the victim of appellant's violence and that D.S. made the statement in close proximity to the event. A statement made one day after an incident occurred was considered sufficiently reliable. *Id.* The district court determined that D.S. made the statement a few hours after the event occurred. Moreover, the district court considered the fact that D.S. was not "coached" during his statement but provided an account of the incident on his own. *Id.* (noting lack of leading questions shows additional circumstantial guarantees of trustworthiness).

Some factors do not weigh in favor of admissibility. A district court may consider whether the declarant made the statement while under oath and subject to cross-examination and penalty for perjury. *State v. Davis*, 820 N.W.2d 525, 537 (Minn. 2012). A district court may also consider whether the declarant ever recanted the statement. *Id.* Here, D.S. was not under oath or subject to cross-examination while making the statement.

And, as noted by the district court, D.S. recanted his statement on the witness stand and stated that he only made it because M.J. pressured him.

Nevertheless, we agree with the district court's determination that, considering the totality of circumstances, D.S.'s statement was sufficiently reliable. The statement satisfied all four *Ortlepp* factors, and as the district court determined, he made the statement in close proximity to the event, he had personal knowledge of the incident, and he provided his own account of the facts as opposed to answering leading questions. Therefore, the district court did not abuse its discretion by admitting D.S.'s statement as substantive evidence that appellant assaulted D.S.

II.

Appellant argues that there is insufficient evidence to support his conviction of threats of violence because his statements were a product of transitory anger and were not made with the aim, objective, or intention of causing extreme fear. When considering a challenge to the sufficiency of the evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court 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). We will not disturb the verdict "if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a]

defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (alteration in original) (quotation omitted).

Minnesota law provides that "[w]hoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of making a threat of violence. Minn. Stat. § 609.713, subd. 1 (2016). The essential elements of a threat of violence are that "(1) the accused made threats (2) to commit a crime of violence (3) with purpose to terrorize another or in reckless disregard of the risk of terrorizing another." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). Intent is inherently subjective but may be inferred from the surrounding circumstances. *Id.* at 401, 237 N.W.2d at 614.

Minnesota's threats-of-violence statute is not intended "to authorize grave sanctions against the kind of verbal threat which expresses transitory anger [but] which lacks the intent to terrorize." *State v. Jones*, 451 N.W.2d 55, 63 (Minn. App. 1990) (quotation omitted), *review denied* (Minn. Feb. 21, 1990). Appellant contends that he had no intent to terrorize but merely expressed transitory anger. He argues that he was "drunk and angry at his wife for leaving him" and his "behavior and words were erratic." But the evidence demonstrates that appellant engaged in angry, violent behavior not just when A.T. left him but over the course of several hours. M.J. testified that appellant "was balling up his fist like he wanted to fight . . . [and] was punching the air." When K.N. tried to leave the house, appellant told her he was going to have someone beat her up and then stood in front of the door to prevent her from leaving. Appellant also said that he had "killers" and could arrange for people to sit outside of the house. M.J.'s stepbrother testified that while

appellant was yelling at K.N., he was "jumping in her face, jumping out of her face, [and] jumping back in her face, and walking around the house, steady pacing."

A victim's reaction may provide circumstantial evidence relevant to the element of intent. *Schweppe*, 306 Minn. at 401, 237 N.W.2d at 614. M.J. testified that appellant turned "into a demon after [A.T.] didn't pick up [the] phone," T.P. testified that M.J. was "in hysterics" when she asked her neighbor for help, and Officer Johnson testified that K.N. and M.J.'s stepbrother looked "terrified" when the police arrived. We conclude that the record contains sufficient evidence to support the jury's determination that appellant had the necessary intent to be convicted of threats of violence against M.J. and K.N.

Affirmed.