STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1954

State of Minnesota,
Respondent,

vs.

Gatwech Yiek Thach,
Appellant.

Filed September 11, 2017
Affirmed
Hooten, Judge

Stearns County District Court
File No. 73-CR-14-6841

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

Cynthia R. Kirchoff, St. Cloud City Attorney, Mark C. Hansen, Assistant City Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Randall, 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

HOOTEN, Judge

Appellant challenges his conviction of second-degree driving while impaired (DWI), arguing that the district court violated the Confrontation Clause and the rule against hearsay by admitting the out-of-court statements of a nontestifying witness. We affirm.

FACTS

On the evening of August 13, 2014, T.M. called police to report that her vehicle had been rear-ended by another vehicle and that the other driver had fled the scene. The responding officer called T.M. on the way to the scene "to gather further details as to what occurred." T.M. told the officer that, when the other driver failed to pull over and stop, she followed him and saw him hit "a parking sign in a parking lot." T.M. also told the officer that the other driver was "a tall black male" and that she saw him "walk into the . . . patio door to the right of the south entrance" to the apartment building adjoining the parking lot.

About ten minutes later, the officer arrived at the reported location and found a car in the parking lot with a license plate number that matched the one that T.M. had provided. A parking sign that was situated directly in front of the car had been "bent forward," and its base had "been moved through the ground." Next to the base of the parking sign was what appeared to be a tire groove in the grass with "dirt ripped up." The car had "front-end damage," including green "paint transfer" from the sign, and the sign had "matching" paint transfer from the car. The officer also noticed that the car was parked over the "two white parking lines."

The officer then walked into the apartment building and knocked on the door to the apartment that T.M. had described. Appellant Gatwech Yiek Thach, who is a black male, answered the door. The officer observed that Thach smelled of alcohol, was acting "extremely confused," and was "bumping into furniture and walls." Thach at first seemed confused by the officer's questions, but then admitted that he had just returned home, the parked car was his, and he had hit the sign when he came home. Thach denied drinking alcohol that day. The officer recorded the conversation with Thach, which the state played for the jury during trial.

After additional investigation, the officer arrested Thach for DWI. Thach later refused to submit to blood or urine testing, and the state charged him with second-degree test refusal, second-degree DWI, and driving after revocation.[1]

At the outset of trial, the state informed the court that T.M. would not testify because it was "unable to serve" her with a subpoena, and it did not know her whereabouts. Citing the Confrontation Clause and the rule against hearsay, Thach moved to exclude testimony about T.M.'s out-of-court statements to police. The district court denied the motion, concluding that admission of T.M.'s out-of-court statements did not violate the Confrontation Clause because they were "made in response to an on-going emergency," nor did it violate the rule against hearsay because the state offered the statements to establish "that there was a complaint made and how this led to the investigation" of Thach,

[1] The state also charged Thach with failure to stop for an accident but dismissed that charge on the first day of trial because T.M. was unavailable to testify. Regarding the other charges, Thach stipulated that his driving privileges were revoked on August 13, 2014, and that he had two prior DWI convictions.

not to establish the truth of the matter asserted relative to the DWI charge. Over Thach's objections, the responding officer testified about T.M.'s out-of-court statements. Thach did not testify or present any witnesses in his defense.

The jury found Thach guilty of all charged counts. The district court adjudicated Thach guilty of the test refusal charge and sentenced him to a stayed sentence for that count.

On direct appeal, we reversed Thach's test refusal conviction because the test refusal statute violated his substantive due process rights. *State v. Thach*, No. A15-0177, 2016 WL 363417, at *2 (Minn. App. Feb. 1, 2016). We declined to consider Thach's argument that admission of T.M.'s out-of-court statements violated his Confrontation Clause rights and the rule against hearsay because the district court had only adjudicated him guilty of test refusal. *Id.* at *3. We stated that, if the district court adjudicated Thach guilty of either of the two unadjudicated counts on remand, then "he would have an opportunity at that time to take a direct appeal from a final, appealable judgment." *Id.*

After the first appeal, the district court vacated Thach's test refusal conviction and sentence, adjudicated him guilty of second-degree DWI, and sentenced him to a stayed sentence for that count. Thach appeals.

D E C I S I O N

Thach argues that admission of T.M.'s out-of-court statements violated his Confrontation Clause rights and, alternatively, the rule against hearsay. We generally review a district court's evidentiary rulings for a clear abuse of discretion. *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007). But, we review de novo whether the

admission of evidence violates a defendant's rights under the Confrontation Clause. *Id.* Erroneous admission of evidence in violation of the Confrontation Clause does not mandate reversal if the error was harmless beyond a reasonable doubt. *State v. Swaney*, 787 N.W.2d 541, 555 (Minn. 2010).

I.

The Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *accord* Minn. Const. art. I, § 6; *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (stating that analysis of Confrontation Clause claim is the same under either the United States or Minnesota Constitution). The Confrontation Clause prohibits "the admission of testimonial out-of-court statements" unless: (1) "the declarant is unavailable," and (2) "the defendant had a prior opportunity to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). "A successful Confrontation Clause claim has three prerequisites: the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Id.*

The state concedes that Thach was unable to cross examine T.M. Thus, T.M.'s out-of-court statements were inadmissible if they were testimonial and offered to prove the truth of the matter asserted. As discussed below, assuming without deciding whether T.M.'s statements were offered for the truth of the matter asserted, we conclude that they were nontestimonial and, therefore, do not implicate the Confrontation Clause.

Whether a declarant's statement to police was testimonial depends on the primary purpose of the police questioning. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822, 126 S. Ct. at 2273. But, statements are testimonial when "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 822, 126 S. Ct. at 2273–74. The state bears the burden of proving that a statement was nontestimonial. *Andersen*, 830 N.W.2d at 9.

"To determine whether the primary purpose of an interrogation is to enable police assistance to meet an ongoing emergency," appellate courts must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 1156 (2011) (quotation omitted). The United States Supreme Court has held that the scope of an ongoing emergency can extend beyond an immediate threat to a victim if the objective circumstances indicate that the parties perceived a threat to officer safety or the public at large. *Id.* at 370–71, 131 S. Ct. at 1162; *see also Hughes v. State*, 815 N.W.2d 602, 607 (Minn. 2012) (stating that relevant inquiry is "whether the information the parties knew at the time of the encounter would lead a reasonable person to believe there was an emergency, even if that belief was later proved incorrect" (quotation omitted)).

The parties disagree whether there was an ongoing emergency during T.M.'s conversation with the responding officer. The state argues there were two ongoing

emergencies: (1) Thach posed a potential threat to himself and the public, and (2) Thach might have been experiencing a medical condition needing attention. Thach argues that by the time that T.M. talked to police for a second time, any ongoing emergency had ceased. We disagree.

From the officer's standpoint, the only information she had after T.M.'s initial report was that a woman had been "rear-ended and the vehicle [had] left the scene." The officer called T.M. "to gather further details as to what occurred." Thus, the circumstances of the accident and the driver's whereabouts were unknown to the officer. *See Bryant*, 562 U.S. at 375–76, 131 S. Ct. at 1165–66 (concluding that objective circumstances of police questions indicated primary purpose was to assist in aiding emergency because police asked questions that allowed them "to assess the situation" and potential threat to public safety (quotations omitted)).

From T.M.'s standpoint, she told the officer that she had not been harmed nor had her car been damaged, but she was "concern[ed] for Thach." T.M. "had more concern about Thach's welfare than having charges pressed" against him. T.M. also told the officer that she left the scene because she had to go to work and was unable to remain on the scene, which objectively supports her stated purpose of wanting police to check on Thach's welfare. *See id.* at 375, 131 S. Ct. at 1165 (concluding that objective circumstances of victim's statements to police indicated primary purpose was not "to establish or prove past events" (quotation omitted)); *id.* at 395, 131 S. Ct. at 1176 (Ginsburg, J., dissenting) (dissenting because she would hold that only the "declarant's intent is what counts" (quotation omitted)).

Additionally, T.M. provided relevant information to assist police in investigating Thach's well-being, including his physical description, where his car was parked, and which apartment Thach had entered. When the responding officer arrived at Thach's apartment, she followed up on T.M.'s concerns. The officer told Thach that she was there "to check" on him, and that a woman had called saying "[s]he was concerned about you" and "thought maybe you're having some sort of medical issue." The officer also asked Thach whether he was "okay" and whether he had diabetes. We conclude that the circumstances of the witnesses' statements objectively indicate that the primary purpose of the conversation was to aid police in assisting with an emergency.

Moreover, T.M.'s conversation with police is distinguishable from a "formal station-house interrogation." *Id.* at 366, 131 S. Ct. at 1160. The officer spoke with T.M. briefly and informally over the phone within ten minutes of the initial report to police. *See id.* (considering formality of police interrogation in determining its primary purpose). In sum, the totality of the circumstances of T.M.'s encounter with police and the witnesses' statements and actions objectively indicate that the primary purpose was to enable police assistance to meet two ongoing emergencies involving Thach's potential threat to himself and the public at large and the possibility that he was suffering from a medical condition. Therefore, T.M.'s out-of-court statements were nontestimonial and not subject to the Confrontation Clause.

II.

Even if admission of T.M.'s out-of-court statements violated the Confrontation Clause, any error was harmless beyond a reasonable doubt. *Swaney*, 787 N.W.2d at 555.

Because we conclude that the state met its burden under the heightened harmless error standard for constitutional errors, we need not address whether any error in admitting T.M.'s out-of-court statements requires reversal under the less stringent harmless error standard for hearsay rule violations. *See State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (providing that erroneous admission of hearsay testimony that does not have constitutional implications is not reversible error "if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." (quotation omitted)).

"An error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was surely unattributable to the error." *Id.* (quotations omitted). In other words, reversal is required if "the error reasonably could have impacted upon the jury's decision." *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) (quotation omitted). The state bears the burden of proving beyond a reasonable doubt that erroneous admission of evidence was harmless. *State v. Barajas*, 817 N.W.2d 204, 220 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012).

To determine whether the erroneously admitted evidence reasonably could have impacted the verdict, we examine the record as a whole and consider: (1) how the evidence was presented, (2) "whether the evidence was highly persuasive," (3) whether the evidence was highlighted in closing arguments, and (4) whether the defendant effectively countered the evidence. *State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007) (quotation omitted). Other evidence of guilt is relevant but not controlling. *Id.*

First, the state presented T.M.'s out-of-court statements through the responding officer who only briefly testified about the relevant details of T.M.'s report and then

focused on describing her own observations and investigation. *See Andersen*, 830 N.W.2d at 10 (concluding error was harmless, in part, because inadmissible evidence "was a very small portion" of witness' testimony). Therefore, the first factor weighs in favor of harmless error.

The second factor is the persuasiveness of the out-of-court statements. The state argues T.M.'s statements were not probative. We disagree. T.M.'s statements were probative because only T.M. saw Thach driving, and the statements corroborated officer testimony. For instance, the officer testified that she identified a car parked in the parking lot that had a license plate number matching the number T.M. had given her, and that Thach was a "black male," which matched the physical description of the driver who T.M. reported had rear-ended her. T.M.'s statement that she saw the driver hit a parking sign also corroborated the officer's testimony that the parked car had "front-end damage" with matching paint transfer from the sign in front of it, the sign was "bent forward," and there was a tire groove in the grass next to the sign.

Nevertheless, the persuasive value of T.M.'s statements was limited by other cumulative evidence, including Thach's admissions. *See Caulfield*, 722 N.W.2d at 314–15 (considering whether evidence was cumulative in determining its persuasiveness). Importantly, because the state supplemented the officer's testimony with a recording of Thach's conversation with police in which he made his admissions, the officer's credibility played a less significant role at trial. Given the cumulative nature of T.M.'s statements, the second factor weighs in favor of harmless error.

Third, the state mentioned T.M.'s "complaint" three times during closing. The state argued that the officer went into the apartment complex to look for a "tall, thin black man," and pointed out that the officers observed "a sign that [had] been hit, which is consistent with the complaint." These references to T.M.'s statements, however, were brief. The state focused its argument on Thach's admissions to establish the offense elements. Therefore, the third factor weighs in favor of harmless error.

Fourth, Thach argues that he was unable to "effectively counter" T.M.'s out-of-court statements. We disagree. In response to questions on cross-examination, the officer testified that she did not see Thach driving or see anyone else drive the parked car. Thach also elicited testimony from the officer that he was highly intoxicated, he acted "confused" in response to questions, there might have been a language barrier, and the officer did not use an interpreter.[2] Thach later used this testimony during closing to argue that his admissions should not be considered because he was "too out of it to understand the questions and too out of it to respond" to the officer.

Thach also successfully sought a curative instruction. During the final jury instructions, the district court instructed the jury that it could only consider testimony about "a report to the police . . . for the purpose of establishing what the police officer reasonably believed had occurred," not "as substantive evidence of [Thach's] guilt." During closing, defense counsel read this instruction to the jury for a second time and argued that the state could not prove that Thach drove a motor vehicle.

[2] The officer testified that she believed Thach understood and could appropriately respond to questions. Thach had an interpreter during trial proceedings.

Thach argues that the curative instruction should be disregarded because it pertained only to the test refusal charge, not to DWI. But, the instruction expressly stated that the jury was not to consider the report as substantive evidence of guilt; it did not specify that it applied only to the test refusal charge.

Thach also argues that the curative instruction was insufficient because the jury indicated that it did not understand the instruction when it submitted a question during deliberations asking, "Can we use the officer's testimony of the complainant's call as evidence?" The district court directed the jury back to the curative instruction and to the instruction on direct and circumstantial evidence. Thach argues that the district court did not adequately answer the jury's question. But, juries are presumed to follow instructions. *State v. Hill*, 801 N.W.2d 646, 658 (Minn. 2011). Because Thach countered T.M.'s out-of-court statements, and the district court provided a curative instruction, the fourth factor weighs in favor of harmless error.

The final factor in the harmless error analysis is other evidence of guilt. Thach was convicted of second-degree DWI, which required the state to prove that Thach drove a motor vehicle while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1) (2014). The state offered substantial evidence of Thach's guilt, including: his admissions to just returning home and hitting the sign, the officer's observations of his impairment, the short ten-minute period between T.M.'s initial report and the officer arriving at Thach's apartment, property damage to Thach's car and to the sign, and the grass "ripped up" directly in front of his car.

Thach argues that his admissions should not count against him because he was intoxicated when he made them, and he has limited understanding of English. But, the jury heard the recording of Thach's conversation with police, and the officer testified that she believed Thach understood and responded appropriately to her questions. *See State v. Munson*, 380 N.W.2d 229, 232 (Minn. App. 1986) (rejecting argument that defendant was too intoxicated to admit to driving because record showed that defendant "was drunk but he knew what was going on"). Thach also presented this argument to the jury during closing, but the jury rejected it. *See State v. Caldwell*, 803 N.W.2d 373, 384 (Minn. 2011) (stating that this court presumes that jury believed state witnesses and disbelieved contrary evidence).

Thach also argues that he did not specifically admit to driving on the day in question. But, the recorded conversation establishes that Thach admitted that the parked car was his, he had just arrived home, he hit the sign when he "came home," he "hit the sign when . . . *pulling in* a spot," and he had not drank alcohol since returning home. (Emphasis added.) These admissions, together with the other evidence of Thach's impairment, were sufficient evidence for the jury to conclude that Thach was driving while impaired. *See State v. Starfield*, 481 N.W.2d 834, 838 (Minn. 1992) (stating that defendant may be convicted of DWI based on circumstantial evidence).

Based on the record as a whole, we conclude that any error in admitting T.M.'s out-of-court statements was harmless beyond a reasonable doubt.

Affirmed.