STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1662

State of Minnesota,
Respondent,

vs.

Deddrick Terrell Whitaker,
Appellant.

Filed October 22, 2018
Affirmed
Bratvold, Judge

Hennepin County District Court
File No. 27-CR-16-31022

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

BRATVOLD, Judge

Appellant challenges his convictions of, and sentences for, driving while impaired (DWI) and fifth-degree controlled-substance possession, raising two issues. First, he seeks a new trial based on the district court's decision to exclude hearsay evidence. Second, he asks this court to vacate one sentence, arguing his convictions arose from the same behavioral incident and the district court erred in determining the order of sentencing. Because the district court did not abuse its discretion in excluding hearsay evidence and did not err in its application of the law during sentencing, we affirm.

FACTS

In August 2016, 911 dispatch received two phones calls at approximately 11:30 p.m. regarding a single-car accident. The first caller reported seeing a "smok[ing]" car that had hit a tree with someone still inside the vehicle. The second caller said that he saw a car hit a tree, and had tried to speak with the driver, who was still in the car and "freakin' out." He also stated that the driver did not respond to him.

Officers found the car crashed into a tree, as reported. They also found one individual—later identified as appellant Deddrick Terrell Whitaker—seatbelted in the driver's seat. According to officers, Whitaker acted erratically—he rocked back and forth, yelled gibberish, flailed his arms, and did not respond to officers. The officers noted that the car was still running and in drive. Eventually, the fire department removed Whitaker from the car, and he was transported to the hospital. Officers meanwhile searched the car and found two bags containing suspected controlled substances.

Officers obtained a search warrant, and Whitaker's blood was drawn and tested; his blood test revealed the presence of phencyclidine, a controlled substance more commonly known as PCP. Whitaker was charged with driving while impaired (DWI)—presence of a controlled substance—under Minn. Stat. § 169A.20, subd. 1(7) (2016).

In January 2017, Whitaker notified the state by motion that he intended to "rely on the affirmative defense of 'someone else was the driver of the motor vehicle.'" The day before trial was scheduled to begin, the district court conducted a pretrial hearing. Whitaker stated that the "true driver" of the vehicle was in the courtroom. The district court inquired further, the witness stated his name—K.A.—and left the courtroom at the district court's direction because he was a potential witness. Later, K.A. gave statements to investigators for the state and the defense.

During the pretrial hearing, the state requested leave to amend the complaint, which the court granted. The amended complaint added fifth-degree possession of synthetic marijuana under Minn. Stat. § 152.025, subd. 2(1) (2016), and fifth-degree possession of phencyclidine under Minn. Stat. § 152.025, subd. 2(1), based on the Minnesota Bureau of Criminal Apprehension's (BCA) test results of the substances found in the two bags removed from the car.

During the three-day jury trial, the state offered testimony from the responding officers, a hospital employee, investigators, BCA employees, and an individual who testified that he sold the car involved in the accident to Whitaker, who was not the registered owner. After the state rested, and outside the jury's presence, the defense said it intended to call K.A. to establish that he, not Whitaker, drove the car. The district court

appointed counsel to advise K.A. before he testified. After a recess, and outside the jury's presence, K.A. took the witness stand, and, under questioning from his counsel, invoked his Fifth Amendment right against self-incrimination. The district court released K.A. from the defense subpoena.

Still outside the jury's presence, Whitaker asked to introduce K.A.'s out-of-court statements through either the defense or the state's investigators under an exception to the hearsay rule. The state objected and argued the out-of-court statements were not reliable. After determining that K.A. was unavailable, as required by the applicable rule of evidence, the district court considered several factors and excluded the evidence as inadmissible hearsay.

Whitaker then testified, stating that he had been sleeping in the car for a few days before the accident, he did not own the car, and K.A. drove the car the day of the accident. He also testified that he remembered the car hitting a tree and he was then knocked unconscious. He denied driving or knowing any drugs were in the car. He testified that he had used phencyclidine about a day or two before the accident.

The jury found Whitaker guilty of DWI (presence of controlled substance) and guilty of possession of phencyclidine; the jury also found Whitaker not guilty of possession of synthetic marijuana. The district court imposed a sentence of 54 months in prison for the DWI to run concurrently with a 13-month sentence for possession of phencyclidine. Whitaker appeals.

D E C I S I O N

On appeal, Whitaker contends that the district court erred when it: (1) excluded K.A.'s out-of-court statements because the statements were admissible under an exception to the hearsay rule; (2) imposed sentences for both possession of phencyclidine and DWI because the offenses occurred during the same behavioral incident; and (3) assuming the multiple sentences were proper, imposed the sentence for the possession-of-phencyclidine conviction before the sentence for the DWI conviction.

I. The district court did not err when it excluded K.A.'s out-of-court statements as hearsay.

Whitaker argues that K.A.'s out-of-court statements were admissible under the statement-against-interest exception to the hearsay rule. Whitaker made an offer of proof that these statements asserted that K.A. was driving the car, the accident was the result of a failed u-turn, and K.A. was not at the scene of the accident when officers arrived because he had gone to get help. This court will not reverse a district court's evidentiary ruling absent a clear abuse of discretion. *State v. Fraga*, 898 N.W.2d 263, 271 (Minn. 2017).

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). Generally, hearsay is not admissible unless an exception applies. Minn. R. Evid. 802. One exception allows the admission of hearsay by an unavailable declarant when the statement is against the declarant's interest. *See* Minn. R. Evid. 804(b)(3). Under this exception, a hearsay statement that is against the declarant's penal interest may be admissible to exculpate the defendant only if: (1) the declarant is unavailable to testify;

(2) the statement tended to "subject the declarant to civil or criminal liability" at the time the statement was made, so that a reasonable person would not have made the statement unless they believed it to be true; and (3) "corroborating circumstances clearly indicate the trustworthiness of the statement." *Ferguson v. State*, 826 N.W.2d 808, 813 (Minn. 2013) (quoting Minn. R. Evid. 804(b)(3)) (other citations omitted).[1]

Here, the parties dispute only the third requirement: whether corroborating circumstances clearly indicate the trustworthiness of K.A.'s statements to investigators.[2] In *Ferguson v. State*, the Minnesota Supreme Court directed district courts to examine six factors to determine the trustworthiness of a hearsay statement against interest: "(1) whether other evidence corroborates the facts in the hearsay statement; (2) the extent to which the hearsay statement is consistent with the declarant's prior testimony and other statements; (3) the relationship between the declarant and other witnesses and parties, including the defendant; (4) whether the declarant has reason to fabricate the statement; (5) the overall credibility and character of the declarant; and (6) the timing of the statement." 826 N.W.2d at 813. It is not necessary to address all six factors in every case; the trustworthiness of the hearsay statement under rule 804(b)(3) "depends on the totality

[1] "When a statement against [a declarant's] penal interest is offered to *inculpate* the accused, then its trustworthiness need not be clearly indicated by corroborating circumstances, but its admission must be consistent with the requirements of the Confrontation Clause. . . ." *Dobbins v. State*, 845 N.W.2d 148, 152 n.1 (Minn. 2013) (emphasis added) (citations omitted). Here, K.A.'s hearsay statement is offered to exculpate Whitaker, so the Sixth Amendment's Confrontation Clause is not implicated.

[2] We note that the first prong, that the declarant was unavailable to testify, was satisfied because K.A. invoked his Fifth Amendment right against self-incrimination. *See State v. Durante*, 406 N.W.2d 80, 84 (Minn. App. 1987).

of the circumstances, and the relevance of each of the six factors will vary depending on the facts of each case." *Id.* at 814.

Based on two factors—the lack of corroborating evidence and the timing of the statements—the district court decided to exclude K.A.'s statements. The district court considered other admitted evidence, specifically, the 911 call "that only identified one occupant in the vehicle," the responding officers' statements that they "did not see any other individuals," and that Whitaker "was buckled into the driver's seat" and "[t]he car was still in drive." The district court concluded that no "other information" corroborated K.A.'s statement. We agree with the district court. Whitaker contends that his trial testimony corroborated K.A.'s statements, but this is insufficient. *See Dobbins*, 845 N.W.2d at 153 (determining that the absence of corroborating evidence weighed against admission of hearsay statement when most evidence contradicted the statement, even though some evidence corroborated it); *see also 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.").

The district court also determined that the late disclosure of the hearsay statements weighed against their trustworthiness. Here, K.A. did not provide any statements—or even come forward as a witness—until the day before trial. And, as the district court noted, neither investigator was listed as a witness. Unlike a statement against interest that is made immediately after a crime, or under circumstances tending to increase its credibility, K.A.'s statements were made on the eve of trial.

Because two *Ferguson* factors support the district court's conclusion that corroborating circumstances did not "clearly indicate the trustworthiness" of K.A.'s statements, as required under rule 804(b)(3), the district court did not abuse its discretion in excluding K.A.'s out-of-court statements.

II. The district court did not err when it sentenced Whitaker for both possession of phencyclidine and DWI.

Whitaker argues that the district court erred when it sentenced him for both the possession-of-phencyclidine offense and the DWI offense because the offenses arose in the same behavioral incident. Minn. Stat. § 609.035, subd. 1 (2016), provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." When the facts are not in dispute, this court reviews de novo "whether multiple offenses form part of a single behavioral act." *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012), *review denied* (Minn. Oct. 24, 2012). Here, the district court did not determine whether Whitaker's offenses were part of a single behavioral incident. *See generally Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007) (stating that the failure to raise the same-behavioral-incident challenge at sentencing did not result in forfeiture).

To resolve this issue, we apply one of two tests, depending on whether the offenses have an intent element. *State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011). Here, the parties seem to agree that possession of a controlled substance is an intentional crime, but they disagree whether DWI is an intentional crime. Caselaw establishes that DWI is a "nonintentional traffic offense." *See State v. Clement*, 277 N.W.2d 411, 412 (Minn. 1979);

see also State v. Sailor, 257 N.W.2d 349, 352 (Minn. 1977) (holding misdemeanor DWI is not an intentional crime). Accordingly, because one of Whitaker's offenses was not intentional, the proper test is whether the offenses "(1) occurred at substantially the same time and place and (2) arose from 'a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.'" *State v. Bauer*, 776 N.W.2d 462, 478 (Minn. App. 2009) (quoting *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991)), *aff'd*, 792 N.W.2d 825 (Minn. 2011).

First, we examine the time and place of Whitaker's offenses. *Id.* The record shows that the possession offense occurred before the DWI offense. In his trial testimony, Whitaker stated that he used phencyclidine "a day" before the accident. The record also established that Whitaker possessed packaged phencyclidine; the possession of the packaged drug was complete when it was placed in the car. The possession offense, therefore, occurred the day before the accident. *See State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016) (stating a possession crime, while continuous, "is complete when the offender takes possession of the prohibited item"). On the other hand, the DWI offense occurred on the day of the accident when Whitaker drove, operated, or was in physical control of his car while under the influence of phencyclidine. *See* Minn. Stat. § 169A.20, subd. 1 (2016).

The second prong—whether the crimes arose from a continuing and interrupted course of conduct, which manifested in an indivisible state of mind—also suggests that Whitaker's two offenses were distinct from one another. *See Bauer*, 776 N.W.2d at 478. As already mentioned, the possession offense was complete the day before the accident, and the purpose appears to have been to personally use the phencyclidine. *See State v.*

Zimmerman, 352 N.W.2d 452, 454 (Minn. App. 1984) (stating, in the absence of other facts, the criminal objective of possession is the "personal use of mind-altering drugs"). In fact, Whitaker testified that when he "consumed the PCP," he was "around old friends . . . and [they] were all just hanging out or whatever." The DWI offense arose the next day, while Whitaker was driving or controlling the car on the evening of the accident. Based on both prongs, we conclude that Whitaker's two offenses occurred at separate times and arose from separate causes of conduct.

Whitaker argues that a recent unpublished opinion from this court reached a different conclusion. We disagree. First, unpublished opinions are not precedent. *See State v. Mayl*, 836 N.W.2d 368, 372 n.2 (Minn. App. 2013), *review denied* (Minn. Nov. 12, 2013). Second, the unpublished opinion is distinguishable from the facts before us. There, this court emphasized that the drug the defendant possessed *caused* the impairment. *State v. Guscette*, No. A13-2402, 2015 WL 506363, at *7 (Minn. App. Feb. 9, 2015). Here, however, there is no evidence establishing that the packaged phencyclidine found in Whitaker's possession was the phencyclidine that caused his impairment.

Because we determine that the DWI and possession offenses were not part of the same behavioral incident, the district court did not err in sentencing Whitaker for both offenses.

III. The district court did not err when it sentenced the possession-of-phencyclidine offense before the DWI offense.

Whitaker contends that the DWI occurred first, and therefore, should have been sentenced first. The Minnesota Sentencing Guidelines state that "[w]hen multiple current

offenses are sentenced on the same day before the same court, sentencing must occur in the order in which the offenses occurred." Minn. Sent. Guidelines cmt. 2.B.107 (2016); *see also State v. Anderson*, 345 N.W.2d 764, 766 (Minn. 1984). This court reviews sentencing decisions for abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 312 (Minn. 2014).

No evidence in the record suggests that possession occurred after Whitaker began driving while under the influence. As the state explained in its brief, there "is no plausible argument that the phencyclidine somehow appeared or was put into the car after, rather than before, the time of the impaired-driving offense." Because record evidence establishes that the possession offense occurred before the DWI offense, the district court did not err when it sentenced the possession offense first.

Affirmed.