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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2073

State of Minnesota,
Respondent,

vs.

Fred Banjo,
Appellant.

Filed December 24, 2018
Affirmed
Bratvold, Judge

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

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Thomas N. Kelly, Wright County Attorney, Buffalo, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

BRATVOLD, Judge

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.

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.

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.

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.

D E C I S I O N

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

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

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.

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.

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.

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.