STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1237

State of Minnesota,
Respondent,

vs.

Robert Joseph Gotchie,
Appellant.

Filed August 26, 2019
Affirmed
Smith, Tracy M., Judge

Itasca County District Court
File No. 31-CR-17-2418

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Matti R. Adam, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and Jesson, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from judgment and conviction for arson, appellant Robert Gotchie argues that the district court abused its discretion by admitting hearsay statements under Minn. R. Evid. 807 because it failed to consider all the relevant circumstances and

because the statements lack "equivalent circumstantial guarantees of trustworthiness." We affirm.

FACTS

According to trial testimony, in September 2017, Gotchie and his nephew, T.W., were living in a trailer home in Itasca County. Early one morning, a fire started in the home, burning clothing, furniture, and some of the interior walls of the home. T.W. was asleep when the fire started. Gotchie woke him up, and, when T.W. awoke, he could see light and smoke from the fire in Gotchie's room. T.W. then woke his cousin, C.G., who was sleeping in another home nearby, and together they put out the fire.

A sheriff's deputy arrived at the scene sometime after the fire was out. About 40 minutes after the deputy arrived, T.W. made a statement to the deputy. In the statement, T.W. indicated that Gotchie had started the fire. Specifically, he said that, when Gotchie woke him up, Gotchie said, "I started it on fire." T.W. also said that, after he and C.G. began putting out the fire, Gotchie returned with a lighter and tried to relight the fire.

Two hours after the first statement, T.W. gave a second statement to the deputy and two other law enforcement officers. This second statement was largely consistent with the first. T.W. said that he awoke when Gotchie called his name and told him, "I lit the house on fire." He again said that Gotchie tried to relight the fire. T.W. also mentioned that he and C.G. had locked the doors to the home to keep Gotchie from reentering and lighting the fire again.

In early November 2017, Gotchie was tried on a single count of first-degree arson. Gotchie waived his right to trial by jury. At the court trial, the state called T.W. as a witness,

but, after brief introductory questioning, T.W. invoked his Fifth Amendment right against self-incrimination. The district court granted T.W. use immunity and ordered him to answer the questions he was asked.

T.W. testified that he was sleeping in the trailer when he was awoken by Gotchie and that Gotchie said there was a fire. T.W. packed his clothes and put them outside. He then woke C.G., and together they used a garden hose to put out the fire. T.W. also testified that, while they were putting out the fire, he saw Gotchie with a lighter. But he said that he or C.G. had given Gotchie the lighter because they could not find a flashlight and it was hard to see in the trailer. T.W. admitted that he may have told deputies that Gotchie lit the fire, but T.W. denied that Gotchie had actually done so and denied that Gotchie had admitted to lighting the fire.

The state moved to admit T.W.'s prior statements to the sheriff's deputy under Minn. R. Evid. 807. Gotchie opposed the motion, arguing that the state wrongly relied on caselaw concerning the previous version of the residual exception—former rule 803(24)—and that none of the requirements of rule 807 were satisfied. The district court allowed the state to introduce T.W.'s prior out-of-court statements as substantive evidence.

The state also introduced the testimony of a fire investigator that there was no evidence that the fire was caused by a nearby propane tank, the furnace, or an electrical malfunction. Rather, the fire investigator opined that the fire had been ignited with the help of an accelerant. In addition, the state introduced testimony from a state forensic laboratory employee and lab reports indicating that a flammable liquid that could have been used as

an accelerant was present in the carpet of the room where the fire started, in the carpet of the hallway outside the room, and in Gotchie's clothing.

The district court found T.W.'s hearsay statements more credible than his in-court testimony, described the physical evidence suggesting that the fire was started intentionally, and found Gotchie guilty. Gotchie was convicted and sentenced in April 2018.

This appeal follows.

D E C I S I O N

Gotchie argues that the district court abused its discretion by admitting T.W.'s prior out-of-court statements.

Appellate courts "review a district court's decision to admit evidence for an abuse of discretion." *State v. Vasquez*, 912 N.W.2d 642, 648 (Minn. 2018). "A [district] court abuses its discretion when it reaches a clearly erroneous conclusion that is against logic and the facts on record." *Id.* (quotation omitted).

"'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). Hearsay is inadmissible unless it falls within an exception to that rule of inadmissibility. Minn. R. Evid. 802. In addition to certain enumerated exceptions, *see* Minn. R. Evid. 803, 804, there is a general exception to the rule against hearsay, known as the residual exception:

> 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 the 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.

Minn. R. Evid. 807.

A two-step analysis is used to evaluate whether to admit a hearsay statement under rule 807. *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019). First, the court "look[s] at the totality of the circumstances to determine whether the hearsay statement has circumstantial guarantees of trustworthiness." *Id.* (quotation omitted). Then it "determine[s] whether the three enumerated requirements of rule 807 are met." *Id.* at 293. Gotchie focuses only on the first step, arguing that T.W.'s statements did not have equivalent circumstantial guarantees of trustworthiness.

A. The district court did not err in relying on *State v. Ortlepp*.

Gotchie's initial argument is that the district court erred in in placing "exclusive reliance" on the factors from *State v. Ortlepp*, 363 N.W.2d 39, 43-44 (Minn. 1985), in determining the trustworthiness of the out-of-court statements.

In *Ortlepp*, the supreme court evaluated whether a hearsay statement was admissible under Minn. R. Evid. 803(24), the substantively identical former version of the residual exception. 363 N.W.2d at 43-44. The supreme court relied on four factors to determine that the hearsay statement was admissible: first, there was no Confrontation Clause problem; second, there was no dispute over whether the witness made the prior statement or what

the prior statement was; third, the statement was contrary to the witness's penal interest; and, fourth, the statement was consistent with the state's other evidence. *Id.*

The supreme court has since held that the factors from *Ortlepp* "are not an exclusive list of the indicia of reliability." *State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007). Instead, courts are to "use a totality of the circumstances test to determine whether the statement has equivalent circumstantial guarantees of trustworthiness." *State v. Davis*, 820 N.W.2d 525, 537 (Minn. 2012) (quotation omitted). In *Davis*, the supreme court identified a number of other circumstances that might be considered among the totality of the circumstances, including:

> whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties; the declarant's motivation to make the statement; the declarant's personal knowledge; whether the declarant ever recanted the statement; the existence of corroborating evidence; and the character of the declarant for truthfulness and honesty.

Id. After briefing for this case was complete but before oral argument, the supreme court clarified that *Davis* does not necessarily require a district court to look beyond the *Ortlepp* factors. *Hallmark*, 927 N.W.2d at 293 (stating that a "district court does not abuse its discretion by admitting [a hearsay] statement as trustworthy" when the *Ortlepp* factors are present). But if other circumstances tend to *weaken* the trustworthiness of the statement, consideration of those factors may be necessary. *Id.*

In arguing that T.W.'s hearsay statements had sufficient circumstantial guarantees of trustworthiness, the state relied on the four *Ortlepp* factors. The district court's ruling on the state's motion essentially adopted that argument, finding the situation in this case to

be "directly on point" with the cases cited by the state and that T.W.'s "statements are trustworthy, that they were made immediately at the time of the incident, the statements were given to police."[1]

Gotchie argues that because the district court did not consider the factors identified in *Davis*, the district court failed to consider the totality of the circumstances and thus abused its discretion. But, as *Hallmark* indicates, the *Ortlepp* factors can be sufficient to support a finding of trustworthiness. 927 N.W.2d at 292-93. Thus, while the district court should have explicitly considered all relevant factors, its reliance on *Ortlepp* was not per se an abuse of discretion. *Id.* at 294.

Gotchie further argues that the additional relevant circumstances identified in *Davis* were not present here and therefore do not tend to guarantee trustworthiness. But the absence of certain guarantees of trustworthiness does not prevent the admission of a hearsay statement so long as the circumstantial guarantees that *are* present are "equivalent" to those in rules 803 and 804. Minn. R. Evid. 807; *see Hallmark*, 927 N.W.2d at 292-93 (describing various combinations of less than all possible circumstantial guarantees of trustworthiness that make a statement sufficiently trustworthy to be admitted). We turn to the circumstances that were present.

[1] We note that, as reflected in its ruling, the district court did not rely exclusively on the *Ortlepp* factors but also considered the additional circumstance that the statements were made soon after the event. Gotchie also challenges the district court's reliance on that factor, which we address below.

B. The district court did not abuse its discretion by concluding that the hearsay statements had adequate circumstantial guarantees of trustworthiness.

Gotchie argues that the factors relied upon by the district court do not provide equivalent circumstantial guarantees of trustworthiness. He identifies five factors—each of the *Ortlepp* factors plus the temporal proximity between the event and T.W.'s statement—and argues that none of them tends to show trustworthiness. He also argues that one additional circumstance—T.W.'s disavowal at trial of his out-of-court statements—tends to show a lack of trustworthiness.

1. Availability for cross-examination

Gotchie first argues that T.W.'s availability for cross-examination does not guarantee the trustworthiness of his prior hearsay statement but only serves to eliminate a constitutional barrier to admission of the hearsay statements. *See* U.S. Const. amend. VI (providing the accused in all criminal prosecutions with the right "to be confronted with the witnesses against him"); *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004) (holding that the Confrontation Clause prohibits the admission of testimonial hearsay by absent declarant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant).

But the utility of the *Ortlepp* factors for showing trustworthiness has recently been reaffirmed. *Hallmark*, 927 N.W.2d at 292-93. Thus, a declarant's availability for cross-examination remains a fact that tends to demonstrate the trustworthiness of a prior hearsay statement.

Further, availability for cross-examination does more than just allow hearsay to be admitted without violating the right to confrontation; it can also help guarantee the trustworthiness of a past statement. *Ortlepp*, 363 N.W.2d at 44 (citing *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935 (1970)). The declarant's presence at trial and availability for cross-examination allows the fact-finder to evaluate the declarant's credibility, which in turn allows an inference as to the credibility of the past statement. *Green*, 399 U.S. at 158, 90 S. Ct. at 1935. Under cross-examination, a witness must either affirm the prior statement, in which case the statement is effectively made under oath, or deny it, in which case the fact-finder can evaluate the witness's explanation for the discrepancy between the statements and determine which is more credible. *Id.* at 158-59, 99 S. Ct. at 1935. Thus, the declarant's availability for cross-examination provides an opportunity for the fact-finder to determine the truth of the hearsay statement. T.W.'s availability for cross-examination in this case supports the trustworthiness of the prior statement.

2. Certainty about the substance of the statements

Gotchie next argues that the fact that T.W.'s statements were audio recorded does not tend to show their trustworthiness, citing the supreme court's statement in a different *State v. Davis* case that "[t]he relevant circumstances under Minn. R. Evid. 807 are those circumstances actually surrounding the making of the statements." 864 N.W.2d 171, 181 (Minn. 2015) (quotation omitted). Gotchie argues that certainty about the substance of a statement is irrelevant to trustworthiness because that certainty is not a circumstance surrounding the making of the statement.

Gotchie's argument is, essentially, that *Davis* abrogated the second *Ortlepp* factor. *See Ortlepp*, 363 N.W.2d at 44 (stating that lack of dispute over what a statement contained is a factor favoring admission). But *Davis* does not truly cast doubt on the continued viability of the second *Ortlepp* factor. In *Davis*, immediately after stating that the relevant circumstances are those surrounding the making of the statement, the supreme court treated a witness's lack of recollection of a hearsay statement as a factor suggesting lack of reliability. 864 N.W.2d at 181. Thus, whatever the supreme court meant by "circumstances actually surrounding the making of the statements," it did not mean that certainty at the time of trial about the substance of the statements is no longer relevant. And, again, *Hallmark* has since reaffirmed the sufficiency of the *Ortlepp* factors, confirming their continued viability. *Hallmark*, 927 N.W.2d at 292-93. The fact that T.W.'s statement was audio recorded, and that its substance was therefore not in dispute, circumstantially guaranteed its trustworthiness.

3. Familial interest

Gotchie's third argument is that the district court should not have relied on the fact that the statement was contrary to the penal interests of T.W.'s relative, Gotchie, as an indicator of trustworthiness. Gotchie admits that "the declarant's relationship to the parties" is a relevant factor. *Davis*, 820 N.W.2d at 537. But he argues that T.W.'s relationship with Gotchie does not provide an equivalent circumstantial guarantee of trustworthiness because it would not make his hearsay statement a statement against interest under Minn. R. Evid. 804(b)(3).

Assuming that Gotchie is correct that T.W.'s statement would not be admissible under Minn. R. Evid. 804(b)(3), his argument nonetheless fails. Gotchie cites no caselaw establishing that rule 804(b)(3) sets the standard for when a declarant's interests may suggest trustworthiness for the purposes of rule 807. And caselaw recognizes that the fact that a statement is contrary to the penal interest of a family member may indicate that it is trustworthy. *See, e.g.*, *Davis*, 820 N.W.2d at 537 (listing "the declarant's relationship to the parties" as a relevant factor); *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (stating that the third *Ortlepp* factor was satisfied because the statement was contrary to the victim's "interests in a relationship with" the defendant), *review denied* (Minn. Sept. 29, 2004).

Gotchie also argues that, even if their familial relationship could make these statements contrary to T.W.'s interest, the statements were not actually contrary to his interest under the circumstances. He argues that T.W.'s main concern was "to make sure the police understood he played no part in causing the fire."

Gotchie is correct that, if a declarant's statement is intended to deflect blame from himself, the fact that it is also contrary to some interest of the declarant (here, because it implicates a family member) will not be a circumstance making it reliable. *Cf. State v. Jones*, 556 N.W.2d 903, 909 (Minn. 1996) (concluding that a statement was not against penal interest when it was designed to "thr[o]w the bulk of the responsibility for the more serious offenses" onto another, even though the statement also implicated the declarant in a crime). Thus, if T.W. implicated his uncle in order to protect himself from legal

consequences, the fact that the statement was contrary to his uncle's penal interest would not be a factor favoring reliability.

But when T.W. disavowed his prior statements, he did not claim to have made them only because he wanted to be sure that he was not a suspect. And in the statements themselves, T.W. never mentioned that he wanted the deputy to know that he didn't start the fire, nor did the deputy suggest that T.W. had done so. Indeed, the far-fetched revision of his previous statement that Gotchie was trying to relight the fire—specifically, that Gotchie was only using the lighter to see because he could not find a flashlight—suggests that, at trial, he was trying to protect his uncle. That fact reinforces the conclusion that the original statement was contrary to his familial interest. The claim that T.W. only blamed the fire on Gotchie in order to protect himself is not supported by the record.

4. Corroboration

Gotchie's fourth argument is that T.W.'s statements were insufficiently corroborated. Gotchie admits that parts of T.W.'s hearsay statements were corroborated; he only argues that nothing corroborated T.W.'s statement that Gotchie admitted to starting the fire.

But corroborating evidence need not corroborate every aspect of a witness's testimony. In *State v. Robinson*, the supreme court affirmed the admission of a prior hearsay statement made by a victim of domestic assault where there was no direct corroboration for the key fact of the statement—that the defendant had hit her in the face. 718 N.W.2d 400, 410 (Minn. 2006). Rather, the supreme court held that there was adequate corroboration based, first, on the consistency of the victim-witness's actions with her

hearsay statement and, second, on the fact that the physical evidence was consistent with her out-of-court statement. *Id.* Similar facts are corroborative here. Evidence showing the place of ignition, the presence of ignitable liquid residues, and the lack of a source of accidental ignition is consistent with Gotchie having intentionally lit the fire. Additionally, both of T.W.'s initial statements to the police suggest, in multiple ways, that Gotchie started the fire. Thus, even if the key part of the statement—Gotchie's admission to starting the fire—was not directly corroborated, the other corroborating evidence was sufficient.

5. Temporal proximity

Gotchie argues that because the statements were made one to two hours after the 911 call, they would not be admissible as excited utterances, and the district court therefore should not have relied on their temporal proximity to the fire as enhancing their trustworthiness.

In *Tate*, this court treated the fact that a statement "was made the day after [an] incident" as a circumstantial guarantee of trustworthiness. *State v. Tate*, 682 N.W.2d 169, 177 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). The circumstances suggest trustworthiness even more strongly in this case than in *Tate* because one statement was given 40 minutes after the 911 call and the second was given about two hours after that. The temporal proximity of the two on-the-scene statements to the event they describe suggests that they were trustworthy.

6. Recantation

Finally, Gotchie argues that T.W.'s statements to police were not trustworthy because T.W. recanted them at trial. *See Hallmark*, 927 N.W.2d at 293 (indicating that

some circumstances may suggest a lack of trustworthiness). The district court did not explicitly analyze T.W.'s decision to recant when determining whether the statements were admissible. However, given the totality of the circumstances—in particular the fact that T.W.'s trial testimony appears to have been intended to protect his uncle, as discussed above—the fact that T.W. recanted his statement does not seriously undermine the trustworthiness of the statements.

In sum, each of the factors relied upon by the district court circumstantially guaranteed the trustworthiness of T.W.'s hearsay statements, and the district court did not abuse its discretion by admitting those statements despite T.W.'s disavowal of them.

Affirmed.