STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0738

State of Minnesota,
Respondent,

vs.

Joseph Richard Wersinger, IV,
Appellant.

Filed May 26, 2020
Reversed and remanded
Florey, Judge

Stevens County District Court
File No. 75-CR-18-222

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

Aaron K. Jordan, Stevens County Attorney, Allison T. Whalen, Assistant County Attorney, Morris, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

FLOREY, Judge

This is a direct appeal of a conviction, following a jury trial, for domestic assault. Appellant challenges the district court's evidentiary ruling permitting the state to admit the

victim's recorded statement to police; claims he was deprived of a fair trial by the admission of prejudicial evidence; and challenges the overall sufficiency of the evidence to support all elements of the crime for which he was convicted. We reverse and remand for a new trial.

FACTS

In August 2018, C.E. called her mother in the morning and told her that Joseph Wersinger, her boyfriend at the time and the appellant herein, assaulted her in the apartment unit they shared the night before, and then left the apartment. After that phone call, C.E.'s mother called the police to report what C.E. told her. A police officer responded to C.E.'s apartment that afternoon, and C.E. described what had transpired. The officer later had C.E. describe the events again so that the audio of her statement could be recorded (the recorded statement). Her recorded statement included a description of their "rough" relationship, the assault that took place and the injuries she sustained, and the fact that Wersinger had assaulted her before and served time in prison for it. The officer asked C.E. whether she feared Wersinger. In support of her affirmative answer, C.E. recounted a time when Wersinger told her brother that if she ever made a report to the police that resulted in his imprisonment again, he would "find a way to kill [her.]"

Later that night, the officer met and spoke with Wersinger. He denied assaulting C.E., claiming that she assaulted him and that he only pushed her off of himself in self-defense. When the officer asked whether he considered calling the police, Wersinger said no because he "didn't feel like he was injured or anything." Wersinger was arrested, charged with two counts of domestic assault, and stood trial.

At the trial, the state called three witnesses—C.E., her mother, and the responding officer. The state also sought to admit the recorded statement and play it for the jury. During a pretrial hearing with the court, the state indicated its intent to admit the recorded statement. The court responded, "I'll allow it if she turns out to be substantially contradicting what she had said in the earlier statement." The prosecution then explained to the court that it intended to offer the recorded statement as substantive evidence and that "the specific rule that we'd be offering it under is the catch-all exception under the hearsay rule 807." The court replied that, if C.E. testified in a way contrary to her statement to police, as the prosecution anticipated she would, the court would allow it. The recorded statement was admitted and played for the jury, which returned a guilty verdict on one of the two counts.

Wersinger now appeals his conviction. He challenges the district court's decision to permit the recorded statement to be admitted as substantive evidence; argues that the admission of other evidence was prejudicial and deprived him of a fair trial; and asserts that the evidence was insufficient for the state to prove every element of the crime—specifically that Wersinger was not acting in self-defense.

D E C I S I O N

"We review a district court's evidentiary rulings for an abuse of discretion." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). A district court abuses its discretion if its evidentiary ruling rested on an error of law or is contrary to logic and the record. *Id.* Hearsay describes a statement, excluding those made while testifying at a trial or hearing, that is offered to prove the truth of the matter asserted. *Id.* (citing Minn. R. Evid. 801(c)).

While generally inadmissible, hearsay may be admitted pursuant to one or more exceptions. *Id.* Relevant here is the "residual exception" described in rule 807, as that is the exception relied upon by the state for the admission of the recorded statement. While the district court did not specify the basis on which it permitted the evidence, the parties agree that the rule 807 residual exception is the proper subject for analysis in this appeal.

The residual exception requires the court to engage in two sets of inquiry. *See State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013). First, the court must examine whether the statement in question has "circumstantial guarantees of trustworthiness" that are equivalent to those guarantees demanded by the other exceptions to the rule against hearsay. *Id.* Answering that question requires that the court apply a totality-of-the-circumstances test which considers the following non-exhaustive list of factors:

> [W]hether 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.

Hallmark, 927 N.W.2d at 292. "The totality of the circumstances test used to evaluate trustworthiness under Rule 807 requires a careful balancing of all relevant circumstances surrounding the making of the statement." *Id.*

If the court is satisfied that there exist sufficient guarantees of trustworthiness, the second inquiry requires that the court determine whether the three conditions enumerated in rule 807 are met. *Id.* at 293. Rule 807 requires that:

> (1) the statement is offered as evidence of a material fact; (2) the statement is "more probative on the point for which it [is] offered than any other evidence" procurable "through reasonable efforts" by the proponent; and (3) the general purpose behind the Minnesota Rules of Evidence and the interests of justice are served by the admission of the statement into evidence.

Id. at 293-94 (quoting *Griffin*, 834 N.W.2d at 693-94). In *Hallmark*, the supreme court instructed that, with respect to the three conditions of rule 807, "the offered evidence need not be essential . . . . Rather, the rule requires that the district court consider whether other admissible evidence on the same point could be obtained through reasonable efforts." *Id.* at 294 (quotation omitted). And, specifically with respect to the third, the supreme court "noted that the Minnesota Rules of Evidence should be construed to secure fairness and to promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.* (quotation omitted). Finally, the *Hallmark* court concluded its instruction on rule 807 analyses as follows: "Overall, evaluating the admissibility of a statement under Rule 807 requires a district court to carefully balance all of the relevant circumstances surrounding the making of the statement at issue, while also considering each of the three prongs set forth within the language of the rule." *Id.*

Here, the district court did not engage in any of the aforementioned analyses—at least not explicitly and on the record. During their pretrial discussion with the court, the parties discuss the admissibility of the recorded statement at length, towards the end of which the court stated, "I'll allow it if she turns out to be substantially contradicting what she had said in the earlier statement . . . You're—you're impeaching your own witness,

and you can do that." The prosecution responded with the first—and the last—reference to the rule against hearsay or its exceptions anywhere in this record; explaining that "the specific rule that we'd be offering it under is the catch-all exception under the hearsay rule 807, and we would be offering it as substantive evidence." The extent of the court's reply to the prosecution's clarification was to say that, in reference to the prosecution's belief that C.E. would present contradictory testimony at trial, "[i]f the circumstances present themselves in the way that you've suggested, then I'll allow it."

As an initial matter, we must consider whether the district court's omission of any analysis from the record is itself erroneous. Wersinger does not appear to argue that the lack of explicit 807 analysis is itself erroneous—only that it raises doubts as to whether the court considered the requisite factors at all; but the state invokes *State v. Hallmark* to argue that a district court's failure to explicitly engage in the rule 807 analysis is not an automatic abuse of discretion. We agree that *State v. Hallmark* is instructive here, but our analysis thereof differs from that of the state.

In *Hallmark*, the district court admitted a witness's recorded statement to police and allowed it to be played after that witness testified. *Hallmark*, 927 N.W.2d at 924. As the supreme court put it, "[t]he court . . . concluded, without discussing the three prongs of Rule 807 itself, that [the witness's] prior statement to police was admissible as substantive evidence." *Id.* Here, the state echoes *Hallmark*'s holding:

> We agree that the district court should have explicitly considered all relevant factors showing circumstantial guarantees of trustworthiness and addressed each of the three prongs of Rule 807.

> Nonetheless, the court's failure to explicitly consider all relevant circumstances under Rule 807 is not automatically an abuse of discretion.

Id. Finally, the *Hallmark* court noted that under certain circumstances, the reviewing court can "independently evaluate[] whether the statement at issue is admissible under Rule 807," which it proceeded to do. *Id.* at 294-95. Here, even if the state is correct in its premise that *Hallmark* is not distinguishable in kind, it is undeniably distinguishable in degree.

The *Hallmark* court's primary concern was that the district court "appears to have based its holding almost entirely on the *Ortlepp* factors," which the supreme court "had previously identified as a nonexhaustive list of considerations relevant to Rule 807."[1] *Id.* at 294 (citing *State v. Ortlepp*, 363 N.W.2d 39 (Minn. 1985)); *accord State v. Vangrevenhof*, 941 N.W.2d 730 (Minn. 2020) ("We have stated—and reiterate here—that the four *Ortlepp* factors are not the *only* relevant factors to consider but merely represent an application of the totality of the circumstances approach to satisfy the equivalent circumstantial guarantees of trustworthiness element of the residual hearsay exception." (quotations omitted)). In considering the *Ortlepp* factors, the district court in *Hallmark* acknowledged that the statement in question was hearsay, expressly considered the rule 807 hearsay exception, concluded that there were "sufficient guarantees of

[1] The "*Ortlepp* factors" refers to four factors the supreme court considered in *State v. Ortlepp*. 363 N.W.2d 39, 44 (Minn. 1985). These are: (1) whether a confrontation-clause problem exists; (2) whether the declarant denies making the statement; (3) whether the statement is against the declarant's penal interests; and (4) whether the statement is inconsistent with all other evidence. *Id.*

trustworthiness," and listed the factual circumstances that provided those guarantees. *Id.* In the instant case, the district court did none of the above.

Here, from the portion of the transcript devoted to the issue, the district court appears to have been under the impression that the prosecution intended to introduce the recorded statement as impeachment evidence. All of the court's questions, remarks, and decisions on this matter implicate considerations relevant to impeachment evidence—not substantive, 807-excepted hearsay.[2] At no point in the record does the district court recognize—directly or indirectly—that the rule against hearsay might be implicated by any evidence in this case. This falls short of "carefully balanc[ing] all of the relevant circumstances surrounding the making of the statement at issue, while also considering each of the three prongs set forth within the language of the rule." *Id.*

The state argues that even if the district court did insufficiently analyze the admissibility of the recorded statement, *Hallmark* and other cases permit this court to independently consider the evidence and infer the district court's reasoning. The *Hallmark* court, however, did not specify whether its ability to independently consider the

[2] For example, (1) the court's first substantive comment on this issue was to ask the defense attorney whether she would object to admitting the recorded statement if the witness "gets on the stand and back pedals substantially from what she allegedly told the officers at the time;" (2) when the state indicated that it intended to keep the witness on the stand while playing the statement and question her about it, the court commented, "[o]kay. It gives her a chance to explain it. I'll allow it if she turns out to be substantially contradicting what she had said in the earlier statement. . . . You're impeaching your own witness, and you can do that;" and (3) when the prosecution clarified that it was the rule against hearsay potentially keeping the statement out and that it was being submitted as substantive evidence under an exception, the district court only reaffirmed it prior response—that it will allow it if C.E. did in fact testify differently.

admissibility issue was due to the type of deficiency in the district court's analysis, or the degree of that deficiency. We need not consider that question here, however, as the result is the same in either case. If the *Hallmark* court could independently address the rule 807 question because the extent of the deficiency in the district court's analysis was minor enough to be effectively supplemented by the reviewing court, the greater degree of the defect here—the lack of any analysis pertinent to rule 807—surely distinguishes this case. Likewise, if *Hallmark* declares that a reviewing court can independently consider the 807 issue whenever the district court errs, we could not do so here.

The district court provided no legal analysis on rule 807, and the record is also devoid of any findings or analysis concerning the recorded statement itself—such as the effect of the parties' "rough" relationship, C.E.'s motivations and personal knowledge at the time, the significance of her apparent attempts to recant, and her character "for truthfulness and honesty." *Id.* at 292. The court of appeals does not make factual findings; and with virtually nothing on point in the record, we are incapable of discerning whether there exist sufficient guarantees of trustworthiness.

At a minimum, the *Hallmark* court unambiguously announced that, to admit a statement under the residual exception to the rule against hearsay, the district court *must* consider the totality of the circumstances and is *required* to determine whether the enumerated elements of rule 807 are met; and as Wersinger argues, there is nothing in the record supporting the district court's analysis of either. *Id.* We therefore conclude that the district court abused its discretion in admitting the statement. We emphasize that we reach this conclusion *not* because we believe the district court erred in concluding that the

recorded statement was admissible, but because the court's analysis of the issue is insufficient for it, or us, to reach any decision on the matter. Nothing herein should be interpreted as this court passing upon the actual admissibility of the recorded statement. A proper hearsay analysis may or may not reveal that the statement is admissible; but that analysis must first be performed by the trial court.

Evidence admitted erroneously is prejudicial if there is a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008). "When determining whether evidence significantly affected the verdict, we consider whether the State presented other evidence on the issue, as well as whether the district court issued cautionary instructions. We also consider whether the State relied on the inadmissible evidence to make its case during its closing argument." *State v. Jaros*, 932 N.W.2d 466, 474 (Minn. 2019) (citation omitted).

Here, in addition to periodic references throughout, the prosecution directly addressed the contents of the recorded statement during its closing argument at appreciable length. The only instructions the district court provided with respect to the recording were for the jury to treat the audio, not the transcript, as though it was live testimony. No cautionary instruction was given.

Wersinger asserts that the district court's error "was unquestionably prejudicial," and the state does not offer an argument on the issue of prejudice. We agree that the recorded statement was certainly not an insignificant component of the state's case. Had the trial proceeded without the recorded statement, the prosecution's only notable evidence would have been limited to two non-eyewitness testimonies, Wersinger's own inconsistent

versions of the events, and a photo of a bruise on the victim's torso. While a guilty verdict may be conceivable on this evidence, it is far from overwhelming evidence of guilt. *State v. Riddley*, 776 N.W.2d 419, 428 (Minn. 2009). This is especially true given that C.E. put her own sobriety, competency, memory, and credibility into considerable doubt with her in-court testimony. We conclude, therefore, that the erroneously admitted recorded statement had a prejudicial effect; and Wersinger is accordingly entitled to a new trial.

Because we reverse on the issue concerning the recorded statement, we need not address the remainder of Wersinger's arguments. However, because Wersinger's argument with respect to the sufficiency of the evidence to support the conviction implicates double jeopardy, we will briefly address that argument.

Wersinger argues that, because he claimed self-defense, the state was required and failed to disprove that element. The elements of self-defense are "(1) the absence of aggression or provocation on the part of the defendant; (2) the defendant's actual and honest belief that he or she was in imminent danger of bodily harm; [and] (3) the existence of reasonable grounds for that belief." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014) (quotation omitted). While Wersinger levies a number of arguments on each of these elements, they are all based on factual assertions that were disputed; and on appeal, this court views the evidence in favor of the verdict and assumes that the jury believed all the state's witnesses and disbelieved any evidence to the contrary. *State v. Jarvis*, 665 N.W.2d 518, 521 (Minn. 2003). Moreover, the prosecution need only disprove one of the self-defense elements, and Wersinger's own statement to police—that he did not call the police because he did not feel as if he was injured—as repeated by the prosecution in its closing

argument, supports the jury's verdict that rejected self-defense. Given that this court assumes that the jury believed the state's evidence, we conclude that the state did introduce sufficient evidence to prove every element of the crimes charged and disprove any claim of self-defense beyond a reasonable doubt. We therefore reverse the conviction and remand for a new trial.

Reversed and remanded.