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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0034**

State of Minnesota,
Respondent,

vs.

Kyle Wally Hilborn,
Appellant.

**Filed December 14, 2020
Affirmed
Worke, Judge**

Becker County District Court
File No. 03-CR-18-1469

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his felony domestic-assault conviction, arguing that the district court abused its discretion by admitting hearsay as substantive evidence. We affirm.

FACTS

On July 25, 2018, appellant Kyle Wally Hilborn and his girlfriend, J.B., got into a physical fight after a day spent drinking with Hilborn's brother. The next day, J.B. went to the hospital. She had bruises, tenderness, and a fractured rib. While J.B. was in the hospital, a deputy interviewed her and she detailed the incident and five other instances of physical assaults that occurred during her relationship with Hilborn.

On July 27, 2018, J.B. filed an affidavit and petition for a harassment restraining order (HRO). J.B. stated that on July 25, 2018, Hilborn was "physically aggressive," and encouraged and watched her engage in sexual intercourse with his brother. J.B. also detailed two past incidents in which she was injured during fights with Hilborn and claimed that Hilborn broke her property and showed nude photographs of her to others.

Hilborn was charged with three counts: third-degree assault—substantial bodily harm; felony domestic assault—harm; and felony domestic assault—fear. Hilborn moved to prohibit the state from introducing J.B.'s statement to the deputy and the HRO petition and affidavit. The district court reserved ruling until after it had the opportunity to hear J.B.'s trial testimony.

At Hilborn's jury trial, J.B. testified that on July 25, 2018, she and Hilborn had his brother and a friend over to their place. She did not "remember very much" because she "drank a lot." She had sex with Hilborn's brother and went to sleep. When she woke up, Hilborn was upset that she had sex with his brother but not with him. She told Hilborn to sleep on the couch. Hilborn would not leave the bedroom and they engaged in a "shoving match." Hilborn pushed her on the bed and she followed him into the kitchen and grabbed a knife. J.B. "went for a swipe," and Hilborn attempted to disarm her by grabbing her wrists and pushing her to the ground. Hilborn pinned J.B. down and she felt a sharp pain in her rib.

J.B. testified that she and Hilborn "very frequently g[ot] violent." J.B. testified about two incidents that she described to the deputy when interviewed at the hospital. When asked if there were other incidents, J.B. replied, "I'm sure there were, but I don't remember all of them." J.B. testified that if she forgot details, her statement to the deputy was accurate. But J.B. also claimed that she lied to the deputy "about several aspects." The prosecutor provided J.B. a transcript of her statement to refresh her recollection. The district court also ruled that the audio recording of J.B.'s statement to the deputy was admissible to assist the jury in judging J.B.'s credibility because she testified that she lied or made misrepresentations.

The district court ruled that the HRO petition and affidavit was also admissible. The district court instructed the jury that the evidence of Hilborn's conduct on other occasions had the limited purpose of demonstrating the nature of his relationship with J.B.

Hilborn testified that on July 25, 2018, he had only a couple drinks, but J.B. continued to drink after he stopped. After J.B. and Hilborn's brother had sex, he and J.B. went to bed. Soon after, J.B. pushed him off the bed and told him to sleep on the couch. He asked if they could just go to bed, but J.B. hit him until he agreed to sleep on the couch. He then heard J.B. rumbling through a drawer and saw that she "was very, very drunk . . . [and] kind of stumbling around, holding [a] knife." Hilborn threw a blanket over J.B.'s head and she took a swipe. He grabbed J.B.'s wrists and tried to pull her down. They eventually fell down and J.B. got injured when he held her down to get the knife away.

Hilborn also testified about two past incidents. Hilborn testified that during each incident, he was sober and J.B. was intoxicated, and J.B.'s injuries were caused by him in self-defense or were accidentally self-inflicted.

The jury found Hilborn not guilty of third-degree assault and domestic assault—harm. But the jury found Hilborn guilty of domestic assault—intent to cause fear. The district court sentenced Hilborn to 36 months in prison. This appeal followed.

D E C I S I O N

Hilborn argues that the district court abused its discretion by admitting hearsay as substantive evidence. This court reviews a district court's admission of 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 bases its decision on a conclusion of law that is clearly erroneous or when its decision is contrary to logic or the facts in the record. *Id.* An appellant must show that the district court abused its discretion by admitting the evidence and that he was prejudiced thereby. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally inadmissible. Minn. R. Evid. 802. But certain out-of-court statements are not hearsay. Minn. R. Evid. 801(d). And there are exceptions to the rule that hearsay is inadmissible. *See* Minn. R. Evid. 803-804. A statement that is not covered by a specific exception may still be admissible under the “residual exception.” *See* Minn. R. Evid. 807.

HRO petition and affidavit

Hilborn first challenges the admission of the HRO petition and affidavit. The district court admitted the HRO petition and affidavit as a prior consistent statement, a prior inconsistent statement, and under the residual exception.

Prior consistent statement

An out-of-court statement is not hearsay when it is a prior consistent statement. Minn. R. Evid. 801(d)(1)(B). A prior statement is consistent when: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement, and (2) the statement is “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility.” *Id.* In considering whether a prior consistent statement is admissible, the district court must make a threshold determination that the witness’s credibility has been challenged, and “the statement must bolster the witness’ credibility with respect to that aspect of the witness’ credibility that was challenged.” *See State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Feb. 24, 2000).

Hilborn argues that he never challenged J.B.'s credibility, thus the HRO petition and affidavit is not admissible as a prior consistent statement. But Hilborn did challenge J.B.'s credibility. In his opening statement, Hilborn's attorney stated,

[T]here's two sides to every story. In this particular circumstance, there's also two people who know that story. . . . The difference is that [Hilborn] wasn't drinking; [he] was sober that night. He remembers everything. He's going to take the stand . . . and he is going to testify. . . . He's going to look you guys in the eyes, he's going to tell you exactly what happened. The only other person who was in the room that knows what happened is [J.B.]. [J.B.] will admit she had a lot to drink that night and she barely remembers anything. At points of that night, she was blacked out drunk.

Hilborn implied that J.B.'s testimony was not credible about what happened during the incident because she drank too much to recall it accurately. Thus, the HRO petition and affidavit was helpful to the jury in evaluating J.B.'s credibility.

In continuing our analysis regarding whether the HRO petition and affidavit qualifies as a prior consistent statement, the requirements that J.B. testified at trial and was subject to cross-examination concerning the statement have been met. *See* Minn. R. Evid. 801(d)(1). Finally, we must decide whether the statement is "consistent with the declarant's testimony." *See id.*, 801(d)(1)(B). Hilborn argued that J.B.'s testimony was not credible about what occurred on the night of July 25 because she was intoxicated that night. But the HRO petition and affidavit is consistent with J.B.'s testimony regarding the incident. In the HRO petition and affidavit, J.B. stated that Hilborn was "physically aggressive towards [her] and encouraging [her] to have sexual intercourse with [his] brother." And J.B. testified that she had sex with Hilborn's brother and then got into a

“shoving match” with Hilborn when he would not sleep on the couch. These statements are consistent. Thus, the district court did not abuse its discretion by admitting the HRO petition and affidavit as a prior consistent statement.

Prior inconsistent statement

An out-of-court statement is not hearsay when it is a prior inconsistent statement. Minn. R. Evid. 801(d)(1)(A). A prior inconsistent statement is not hearsay if (1) the declarant testifies and is subject to cross-examination concerning the statement, and (2) the statement is inconsistent with the declarant’s testimony and was given under oath. *Id.* J.B. testified and was subject to cross-examination. And the HRO petition and affidavit is a sworn statement made just two days after the incident. Finally, J.B.’s testimony was inconsistent with her sworn statement in some ways.

In the HRO petition and affidavit, J.B. stated that on July 25, 2018, Hilborn encouraged her to engage in sexual intercourse with his brother. But when J.B. testified, the prosecutor showed her the HRO petition and affidavit and asked if Hilborn encouraged her to have sexual intercourse with his brother, and she replied: “No. . . . [T]hat would be a lie.” In the HRO petition and affidavit, J.B. detailed an incident that occurred in June 2018, when she “may have been under the tire of [Hilborn]’s vehicle.” But J.B. testified that she could not remember “very much” about that incident. In the HRO petition and affidavit, J.B. also described an incident that occurred in July 2017, when Hilborn “flung” her into a baseboard and she hit her head, and claimed that Hilborn showed nude photographs of her to others. But when J.B. testified, she read through the HRO petition and affidavit and stated that it was not “consistent with the past,” and she could not recall

claiming that Hilborn shared photographs of her. In some areas, J.B.'s testimony was inconsistent with the HRO petition and affidavit. Thus, the district court did not abuse its discretion by admitting the HRO petition and affidavit as a prior inconsistent statement.

Residual exception

A statement not specifically covered by [an exception] 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. To determine whether a statement possesses circumstantial guarantees of trustworthiness requires an examination of the totality of the circumstances. *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019). Relevant circumstances include (1) whether the declarant made the statement voluntarily, under oath, and was subject to cross-examination; (2) the relationship between the declarant and the party; (3) whether the statement is against the declarant's penal interest; (4) whether the declarant had personal knowledge of the incident; (5) whether the declarant recanted the statement; (6) the existence of corroborating evidence; (7) the declarant's truthfulness; (8) whether the statement is recorded; and (9) the declarant's motivation for making the statement. *Id.* at 292-93.

Here, J.B. made the statement voluntarily, under oath, and she was subject to cross-examination. J.B. had personal knowledge. J.B.'s injuries corroborated her statement. And J.B.'s motivation for making the statement was to secure a protective order against

Hilborn. These circumstances support the determination that the statement had circumstantial guarantees of trustworthiness. Further, the district court curbed any prejudice to Hilborn by instructing the jury that evidence of Hilborn's conduct on other occasions served the limited purpose of demonstrating the nature of his relationship with J.B.

Finally, the interests of justice were served by admission of the HRO petition and affidavit. J.B.'s testimony was inconsistent with the HRO petition and affidavit; she testified that she lied in the HRO petition and affidavit and could not remember certain incidents or making claims in her statement. J.B.'s memory difficulties could be due to the lapse of time between the incident and the trial, in which case the HRO petition and affidavit would be reliable because it was made just two days after the incident. But J.B.'s testimony that she lied in the HRO petition and affidavit could be due to "counterintuitive victim behavior." A counselor at a rape and abuse crisis center testified as an expert on domestic violence and stated that "counterintuitive victim behavior" is behavior opposite of how you expect a person to act and leads to victims recanting, changing, and minimizing their stories, and taking on responsibility for the abuse. Because J.B. may have recanted or changed the claims she made in the HRO petition and affidavit due to this victim behavior, the interests of justice were served by admission of the HRO petition and affidavit. Thus, the district court did not abuse its discretion by admitting the HRO petition and affidavit under the residual exception.

Statement to law enforcement

Hilborn also argues that the district court abused its discretion by admitting J.B.'s statement to the deputy. J.B.'s statement to the deputy was admitted in more than one way: the prosecutor used the statement during J.B.'s direct examination to refresh her memory, and the district court admitted the audio recording to assist the jury in judging J.B.'s credibility because J.B. testified that she had lied or made misrepresentations to the deputy.

Under the rules of evidence, a statement is admissible if it is a “record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’ memory and to reflect that knowledge correctly.” Minn. R. Evid. 803(5). In *State v. Stone*, this court stated that a victim’s prior audio-recorded statement to police “may be used to supplement incomplete memory when a witness cannot fully remember an incident and, therefore, cannot ‘testify fully and accurately’ about it.” 767 N.W.2d 735, 740 (Minn. App. 2009), *aff’d* 784 N.W.2d 367 (Minn. 2010).

Here, J.B. testified several times that she could not remember details. And she testified that if she forgot details in her testimony, the recorded statement she gave the deputy provided an accurate description of events. Based on this record, the district court did not abuse its discretion by admitting J.B.'s statement to the deputy.

Affirmed.