This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0988

State of Minnesota,
Respondent,

vs.

Tibitha Nyamuoch Both,
Appellant.

Filed May 31, 2022
Affirmed
Connolly, Judge

Nicollet County District Court
File No. 52-CR-20-102

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

Michelle M. Zehnder Fischer, Nicollet County Attorney, Megan E. Gaudette Coryell, Assistant County Attorney, St. Peter, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges her conviction of malicious punishment of a child, arguing that the district court abused its discretion by admitting recorded statements of the complainant and his brother, and that the jury's verdict that she was guilty of malicious

punishment, but not of domestic assault and fifth-degree assault, were legally inconsistent. Because we see no abuse of discretion and no legal inconsistency in the jury's verdicts, we affirm.

FACTS

Appellant Tibitha Both is the mother of three sons, G.B., born in 2005, W.B., born in 2007, and B.B., born in 2009, and a daughter, N.B., born in 2010. In February 2020, a police investigator and a social worker interviewed B.B., W.B., and appellant concerning an incident in which B.B. had received a cut on his face from a broken plastic hanger (the incident). The interviews were recorded.

During the interviews, both B.B. and W.B. said that appellant disciplined them by "whooping" them, which meant hitting them with a hanger. B.B. said that two days earlier, appellant hit him with a plastic hanger on his back and his knee, on his wrist, and twice on his face, leaving a mark. He also said that only his face still hurt, that the pain he felt from being hit was a nine on a one-to-ten scale, and that he screamed and cried. He answered "No" when asked if he loved appellant and if he felt safe with her.

W.B. answered "[W]hat do you get for consequences?" with "Usually a whooping," which he defined as "just like hit with a hanger." When asked where on his body he got hit, he answered, "[a]nywhere" and said he got a whooping"[u]sually [for] disobeying." He remembered that B.B. had gotten a whooping two days earlier, when he was swearing at appellant; W.B. said he did not see the whooping, but he could hear B.B. crying when he was with appellant in the bathroom.

Appellant said in her interview that she was holding a broken hanger when B.B. ran into her and cut himself on it. She said she never deliberately hit her children with a hanger. The police investigator asked appellant what she did to discipline her children. She said that she did not feel like sharing how she disciplined her children, and then asked the police investigator how he disciplined his children. He said that sometimes he spanked them, with an open hand, on the butt. Appellant then said that she also spanked her children, with an open hand, on the bottom.

Following an investigation, appellant was charged with gross misdemeanor malicious punishment of a child, misdemeanor domestic assault, and fifth-degree assault. Before trial, respondent State of Minnesota filed a *Spreigl* notice and a notice under Minn. Stat. § 634.20 (2020) (permitting the admission of evidence of domestic conduct by the accused against the victim of domestic conduct, or against other family or household members), seeking to introduce at trial evidence of appellant's other crimes or bad acts. Appellant objected to the introduction of both the *Spreigl* and the Minn. Stat. § 634.20 evidence. Following a hearing, the district court issued tentative rulings that B.B. could testify about other times appellant had hit him with a hanger and that, if appellant testified that B.B.'s injury resulted from an accident, the other children could testify about appellant's use of the hanger on themselves or on B.B.

In March 2021, the night before trial, appellant permitted the state's attorney to meet with B.B. B.B. recanted what he had said during the February 2020 recorded interview and adopted appellant's account of the incident, saying he had run into a hanger appellant was holding.

The children, the police investigator, the social worker, and a paraprofessional testified at trial, and the jury heard the recordings of the February 2020 interviews of B.B. and W.B, both of whom contradicted what they had said in the interviews. B.B. testified that he had lied when he spoke to the social worker and the police investigator, that he was upset and angry when he spoke to them, that he ran into the hanger, that he loved appellant and did not want her to get into trouble, and that he forgot what appellant did to him for discipline.

W.B. testified that he had told the investigator a lot of lies, but couldn't remember what they were; that he lied about getting whoopings because he felt pressured, that B.B. did not get a whooping on the day of the incident and W.B. could not remember if B.B. was crying that day, and that a whooping was talking to someone.

Appellant was found guilty of malicious punishment of a child but not guilty of domestic assault and fifth-degree assault. She was sentenced to serve 365 days in jail, stayed, conditioned on her following a probation agreement, having no further violations of the law, allowing the probation officer access to her home and her children upon request, not engaging in threatening or assaultive behavior with the children, and paying a $200 fine.

On appeal, she argues that the admission of B.B.'s and W.B.'s recorded statements into evidence was an abuse of discretion and that the jury's verdicts were legally inconsistent.

DECISION

1. Admission of Recorded Statements

The admission of evidence under Minn. R. Evid. 807, the residual exception to the hearsay rule, is reviewed under an abuse-of-discretion standard. *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019). The same standard applies to review of similar-conduct or relationship evidence under Minn. Stat. § 634.20. *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004). The district court here admitted into evidence B.B.'s and W.B.'s recorded statements made to a social worker and a police investigator two days after the incident.

To admit evidence under Minn. R. Evid. 807, the district court must first consider whether it has indicia of trustworthiness, then address the factors stated in the rule. *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020). A determination of trustworthiness is based on four nonexclusive criteria: (1) whether the declarant is available for cross-examination; (2) whether the defendant admits making the prior statement; (3) whether the statement was against the declarant's penal interest; and (4) whether the statement was consistent with other evidence the state introduced that pointed toward the defendant's guilt. *Id.* at 736 n.1 (citing *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985)).

Here, B.B. was available for cross-examination and was cross-examined as to the recorded statement; he admitted making the recorded statement; and the recorded statement was consistent with the recorded statement of W.B. The recorded statements were made shortly after the incident, B.B. was clear as to where he was hit and what hurt, and the recorded statement was also consistent with his visible injury. Thus, the first, second, and

fourth criteria are explicitly satisfied. As to the third criterion, B.B. had no penal interest, but, insofar as he later said he did not want to get appellant into trouble, the recorded statement was not consistent with that desire. But the third criterion "may be satisfied even when a declarant's statement is not against the declarant's penal interest if the declarant is hostile to the state and supportive of the defendant." *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004). B.B.'s recorded statement, made shortly after the incident and not recanted until he was speaking to the state's attorney the night before trial about a year later, is trustworthy.

W.B.'s statement was admitted only after the jury had heard appellant's recorded statement that the hanger had struck B.B. by accident while she was holding it. W.B. was also available for cross-examination and admitted making the prior statement; his recorded statement was consistent with the statement of B.B., and, although he had no penal interest in the matter, he, like B.B., later testified that he did not want to get appellant into trouble. His statement also meets the trustworthiness factors.

Having found B.B. and W.B.'s recorded interview statements trustworthy, the district court addressed the three factors Minn. R. Evid. 807 sets out for admitting evidence: (A) whether the statement is offered as evidence of a material fact; (B) whether the statement is more probative on the point for which it is offered than any other evidence which the proponent can offer; and (C) whether the purposes of the rules of evidence and the interests of justice will be served by admitting the statement. The district court concluded that the statements were evidence of a material fact: whether appellant used a hanger to discipline B.B. during the February 2020 incident. No other evidence was

equally probative of this fact: B.B. was the victim and the only person, other than appellant who really knew what happened and could testify to it, while W.B. was nearby and could testify to having heard B.B. crying when appellant was with him. The district court concluded that the recorded interview statements would assist the jury in making its decision and the interests of justice would be served by admitting them. There was no abuse of discretion in the admission of B.B. and W.B.'s recorded statements.[1]

2. Inconsistent Verdict

"Whether verdicts are legally inconsistent is a question of law reviewed de novo." *State v. Laine*, 715 N.W.2d 425, 434-35 (Minn. 2006). If a "case involves only logical inconsistencies—between a verdict of acquittal on one count and a verdict of guilty on another count—we hold that the verdicts are not legally inconsistent and [the defendant] is not entitled to a new trial." *State v. Leake*, 699 N.W.2d 312, 326 (Minn. 2005); *see also State v. Salazar*, No. A21-1046, 2020 WL 4517291, at *3 (Minn. App. Oct. 4, 2021) (holding that defendant who established only logical inconsistencies between verdicts that he was guilty of malicious punishment of a child and was not guilty of domestic assault was not entitled to a new trial under *Leake*).[2]

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[1] W.B.'s recorded statement was also found to be admissible under Minn. Stat. § 634.20 (permitting evidence of conduct by the accused against the victim or other family members unless its danger for unfair prejudice outweighs its probative value or it is likely to mislead the jury). The district court said it would "allow the unredacted version [of the statement] where [W.B.] also talks about [appellant] using a hanger to hit him . . . given the presentation of evidence [i.e., appellant's statement that she never hit the children with a hanger] at this point it's appropriate to admit [W.B.'s statement] under that evidence of domestic conduct."

[2] Appellant attempts to distinguish *Salazar*, arguing that in that case the jury bifurcated the offense and found that having a child squat and hold a ladder was malicious punishment,

"Verdicts are legally inconsistent if proof of the elements of one offense negates a necessary element of another offense." *State v. Crowsbreast*, 629 N.W.2d 433, 440 (Minn. 2001). "A parent . . . who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child . . . ." Minn. Stat. § 609.377, subd. 1 (2018). Whoever intentionally inflicts or attempts to inflict bodily harm upon another is guilty of fifth-degree assault. Minn. Stat. § 609.224, subd. 1(2) (2018). Whoever intentionally inflicts or attempts to inflict bodily harm upon a family or household member commits domestic assault. Minn. Stat. § 609.2242, subd. 1(2) (2018).

Appellant was found guilty of malicious punishment and not guilty of misdemeanor domestic assault and fifth-degree assault. She argues that this guilty verdict is legally inconsistent, violates double jeopardy, and requires reversal of her conviction.

The jury had heard appellant's recorded statement in which she said that "I did hit him with a hanger, but it was an accident"; "I didn't mean to hit him, but I did hit him with a hanger"; "It wasn't on purpose but I did hit him with the hanger"; and "the [B.B.] thing on the eye, that was not done purposefully." Thus, the jury's verdict that appellant did not intend to inflict bodily harm on B.B. and therefore did not commit assault or domestic assault is supported by her own evidence. Moreover, that verdict does not negate the jury's verdict that appellant used either unreasonable force or cruel discipline under the

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while hitting the child with the belt when she moved was not domestic assault. But nothing supports the bifurcation or indicates that hitting the child with a belt was not part of the malicious punishment or that forcing her to squat while holding a ladder was not part of an assault.

circumstances and therefore did commit malicious punishment. There was no legal inconsistency in the jury's verdicts.

Affirmed.