STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1112

State of Minnesota,
Respondent,

vs.

Paul David Lightfoot, Jr.,
Appellant.

Filed July 18, 2022
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Lyon County District Court
File No. 42-CR-19-1165

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

Rick Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges his convictions of first- and second-degree criminal sexual conduct, arguing that the district court (1) committed plain error in admitting 22 hearsay statements, (2) abused its discretion by admitting the victim's forensic interview, (3) abused its discretion by admitting the victim's out-of-court statements about appellant's prior abuse, and (4) erred by entering four convictions for a single incident. Because we discern no trial error, we affirm in part. But because the district court erred by entering multiple convictions, we reverse and remand for vacation of the duplicative convictions.

FACTS

On October 18, 2019, police officers responded to a 911 call about a sexual assault underway at the home of appellant Paul Lightfoot. They knocked at the front door, but nobody answered. They began walking around the house and noticed an open basement window. Lightfoot's 13-year-old stepdaughter, H.H., appeared at the window wearing only underwear. She looked "terrified" and said that her "dad" was trying to hurt her and she was afraid he was trying to enter her bedroom. One of the officers helped her crawl out the window and took her to a squad car, while other officers continued trying to make contact with Lightfoot.

In the squad car, H.H. told the officer, "This has been happening for a long time." She explained that friends had been at her house earlier, and she told them that Lightfoot had been sexually abusing her and she would text them if he "tried to do anything." When he came to her room, she texted her friends for help. She thought Lightfoot would "rub

[her] boobs" as he had before, but he took her pants off. He then removed his own pants, unsuccessfully tried to put a condom on, and was going to go upstairs for a different condom when they heard the officers knocking. He told H.H. to cover up and left her room. When the officer asked H.H. if Lightfoot had penetrated her, she said that "he tried like licking it and stuff down there but no he didn't put it in."

After nearly eight minutes, Lightfoot came to the door. He was wet and wearing only a towel. The officers permitted Lightfoot to dress and arrested him. As he was being taken into custody, he told his ten-year-old sons not to talk to the police. A search of the home revealed an empty condom wrapper on the floor of H.H.'s basement bedroom and a condom floating in the toilet in the upstairs bathroom.

While the officers were on site, H.H.'s friends, K.B. and M.H., came to the residence. K.B. was crying, but M.H. "seemed okay." The officers transported the girls to the police station and interviewed them. They both related a plan to call the police if H.H. texted them that Lightfoot was assaulting her. Police also interviewed H.H.'s brothers. One of the boys reported that Lightfoot asked him to retrieve a "piece of paper" from H.H.'s room and got in the shower shortly after the police started knocking.

Later that day, H.H. met with a forensic interviewer. She told the interviewer that Lightfoot had sucked on her breasts and licked her "down there," with his tongue going inside her vagina. H.H. also underwent a physical examination, which included collection of swabs from her mouth, breasts, and genitals. Subsequent testing revealed that the swab from her left breast was consistent with Lightfoot's DNA. Swabs from her genitals (both external and internal) matched Lightfoot's Y-chromosome profile, meaning that neither he

nor any of his male relatives could be excluded as the source. One of the external genital swabs also tested positive for amylase, which is consistent with the presence of saliva.

Lightfoot was charged with two counts each of first- and second-degree criminal sexual conduct. H.H. and her brothers were placed in foster care about 30 minutes away from home. H.H. initially seemed to do well in foster care but expressed feelings of guilt about disrupting the family. And she grew frustrated as distance and pandemic restrictions left her unable to continue normal activities with friends.

In January 2020, H.H. noticed that Lightfoot had changed an emoji in their social media chat to a face with two Xs for eyes. She showed the "death face" to her foster mother and appeared "very upset." Thereafter, she told the social worker she was afraid and seemed "leery of being alone."

In May, H.H. called her guardian ad litem and recanted her abuse allegations. She stated that she had been upset with Lightfoot for making her friends go home on the day in question and hatched a plan to lie about him assaulting her to get back at him. But she did not provide any details of the plan. Around the same time, H.H. told her therapist she believed Lightfoot had "learned what he was doing was not okay" and would not harm her again. The following week, she told her therapist she had lied about Lightfoot assaulting her. The therapist said she did not believe her, and H.H. stopped attending therapy.

H.H. did not recant to her foster mother or the social worker assigned to the family, whom H.H. saw almost daily. But on June 29, the social worker contacted H.H. to ask about her recantation. She asked H.H. if she recalled the swabs being taken; H.H. responded that she knew the breast swab had revealed a connection to Lightfoot but the

vaginal swab had not. The social worker knew this was inaccurate. H.H. said she had rubbed Lightfoot's toothbrush on her breasts to plant his DNA; she denied rubbing the toothbrush anywhere else. The social worker then told H.H. that the vaginal swab had also revealed a connection to Lightfoot. H.H. did not respond for a moment, then suggested it was from Lightfoot handling her underwear while doing laundry.

That same day, H.H. asked her mother for the phone number of defense counsel's investigator. She explained to the investigator that she made a plan with her friends to falsely report Lightfoot, obtained a condom from a friend, and took Lightfoot's toothbrush and rubbed it on her breasts and genitals to plant his DNA.

After learning of H.H.'s recantation, police contacted K.B. to set up another interview. Before the interview, K.B. spoke to H.H., who told her to say she did not remember or know anything. H.H. also told K.B. to say that H.H. rubbed a toothbrush on herself to frame Lightfoot. But K.B. told police she did not believe H.H.'s recantation. H.H. then "blocked" or "unfriended" K.B. on social media.

At trial in late March 2021, H.H. testified that she lied about Lightfoot abusing her because she felt that Lightfoot loved her brothers—his biological children—more than her, and "wanted a break from being—him being in the house" but "didn't think this was gonna get this far." She said that she and M.H. devised a plan to get Lightfoot's DNA on her by rubbing his toothbrush on her breasts and "downstairs area," including inside her vagina. She also stated that, while in the bathroom getting the toothbrush, they noticed a condom and placed the condom in the toilet and the wrapper in her bedroom. K.B. was not part of this plan. H.H. testified that she texted her friends to call the police, then took her clothes

off, and when she heard police arrive she "screamed for help" and "acted like he was doing things to [her]." She acknowledged giving a statement to the forensic interviewer and stated that her life changed "drastically" after that. She said that she misses Lightfoot and feels "really guilty about the whole situation."

The state presented expert testimony about "myths" associated with sexual violence. The expert explained that the trauma of intrafamilial sexual assault increases upon disclosure. She also stated that approximately a quarter of child victims recant. This is particularly true if the child is placed in foster care because they may feel they have "blown everything up" and think "maybe if I just say it didn't happen then this will all go away."

The jury found Lightfoot guilty on all four counts. The district court entered four convictions and sentenced him to 187 months' imprisonment. Lightfoot appeals.

DECISION

I. The district court did not commit plain error by admitting H.H.'s hearsay statements.

Where, as here, a defendant fails to object to the admission of evidence at trial, we review for plain error. *State v. Fraga*, 898 N.W.2d 263, 276-77 (Minn. 2017). To succeed on a claim of plain error, an appellant must establish (1) error, (2) that is plain, and (3) that affects his substantial rights. *Id.* at 277. An error is plain if it is "clear or obvious." *State v. Sanchez-Sanchez*, 879 N.W.2d 324, 330 (Minn. 2016) (quotation omitted). And it impairs the appellant's substantial rights if there is a "reasonable likelihood that it substantially affected the verdict." *Fraga*, 898 N.W.2d at 277.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). An out-of-court statement offered for another purpose is not hearsay. *State v. Moua*, 678 N.W.2d 29, 37 (Minn. 2004). And there are many instances in which hearsay is admissible, such as to show the declarant's state of mind. *See* Minn. R. Evid. 803 (listing this and 21 other exceptions). Our supreme court has recognized that "[t]he number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record of the [district] court's decision-making process in either admitting or excluding a given statement." *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006). When a defendant does not object at trial, the state is unable to show a basis for admitting the statement. *Id.*

Lightfoot argues that the district court plainly erred by admitting 22 out-of-court statements H.H. made to K.B., the guardian ad litem, her therapist, the social worker, the defense investigator, and her foster mother.[1] The statements include: H.H. told her friends that Lightfoot abused her and asked for their help, she was initially happy to be in foster care because she felt safe, her mother did not believe Lightfoot abused her, she felt guilty about consequences for Lightfoot, she was afraid after Lightfoot sent her the "death emoji," she became unhappy in foster care in early 2020 and wanted to go home, she felt Lightfoot learned his lesson and would not harm her again, she had coordinated a frame-up with her friends and was going to recant, and her friends should support her claim to have fabricated the story.

[1] Lightfoot also asserts plain error in the prosecutor's elicitation of these statements. The essence of both arguments is the same—that the statements are inadmissible hearsay.

Lightfoot contends these statements are clearly inadmissible hearsay. But he merely recites the rule that hearsay is generally inadmissible. *See* Minn. R. Evid. 802. He advances no argument why the challenged statements are hearsay, let alone clearly inadmissible hearsay. Examination reveals that they are not.

While Lightfoot did not contemporaneously object to the admission of the challenged statements, the district court considered the gist of the hearsay argument before trial. The state moved in limine for permission to introduce "evidence relating to why [H.H.] may have recanted," including H.H.'s out-of-court statements about her mother disbelieving her and her increasing desire to return home. The state explained that its expert would provide context for evaluating whether the statements are consistent with a false recantation. The district court granted the state's motion, reasoning that the statements are not hearsay because they were "not being elicited for the truth of the matter asserted" but "to fit in with" the expert's anticipated testimony about recantation.

Our careful review of the record confirms that the state presented the out-of-court statements for this non-hearsay purpose—to demonstrate an evolution in H.H.'s behavior consistent with false recantation. Many of the statements also describe how H.H. was then feeling; to the extent they serve to prove the truth of her state of mind, they are admissible hearsay. *See* Minn. R. Evid. 803(3). Accordingly, we conclude the challenged statements are not clearly inadmissible hearsay and Lightfoot's plain-error challenge fails.

II. The district court did not abuse its discretion by admitting H.H.'s forensic interview.

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 when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). To win reversal, an appellant must demonstrate both error and resulting prejudice. *State v. Vangrevenhof*, 941 N.W.2d 730, 736 (Minn. 2020).

As noted above, hearsay statements are generally inadmissible. Minn. R. Evid. 802. If a hearsay statement is not subject to one of the various exceptions to that rule, it may nonetheless be admitted if it (1) has "circumstantial guarantees of trustworthiness" and (2) satisfies three other enumerated criteria. Minn. R. Evid. 807. The analysis of this "residual" exception includes consideration of (1) the proffered statement's trustworthiness, and (2) the three other criteria. *Hallmark*, 927 N.W.2d at 292-93. Lightfoot challenges only the district court's determination that H.H.'s statements to the forensic interviewer are trustworthy.

Factors bearing on trustworthiness include, but are not limited to: (1) whether the declarant testifies, admits making the prior statement, and is available for cross-examination; (2) whether the statement is recorded, establishing what the declarant said; (3) whether the statement is against the declarant's penal interest; (4) the extent of evidence corroborating the statement; (5) the extent to which the declarant made the statement voluntarily; (6) whether the declarant made the statement under oath and subject to cross-examination; (7) the declarant's relationships to the parties in the litigation; (8) the

declarant's "motivation to make the statement"; (9) the declarant's "personal knowledge" of the statement; (10) whether the declarant recanted; and (11) the declarant's character for truthfulness and honesty. *Vangrevenhof*, 941 N.W.2d at 736 & n.1 (quotations omitted).

As this list suggests, recantation may but does not necessarily reduce a statement's trustworthiness. *Id.* at 738. When considering a recanted statement, a court should consider the totality of the circumstances, including whether (1) other "uncontradicted" evidence discredits the recantation, (2) the declarant has a motive to recant falsely, (3) the recantation is inconsistent, and (4) the prior statement is "strongly corroborated by evidence admitted at trial." *Hallmark*, 927 N.W.2d at 293 (quotation omitted).

The district court considered all of these factors, finding that H.H.'s statement to the forensic interviewer is trustworthy because H.H. was expected to (and did) testify at trial, she gave the statement voluntarily, the statement was recorded, the statement was based on personal knowledge, and there is corroborating evidence. The court further found that H.H.'s recantation does not undermine the statement's trustworthiness because the DNA evidence discredits the recantation and H.H. had a motive to recant falsely.

Lightfoot contends the district court's reasoning is flawed because it overlooked factors weighing against trustworthiness—that H.H.'s statement to the forensic interviewer was not against her penal interest or given under oath and she had a motive to fabricate it. We disagree. The presence of contrary factors—in and of itself—does not negate the district court's findings as to positive factors, particularly when the number of factors indicative of trustworthiness exceeds the number of contrary factors.

Lightfoot's challenge to the district court's decision to admit the forensic interview despite H.H.'s recantation is similarly unpersuasive. He suggests that a recantation must be deemed more trustworthy than the original statement unless the recantation is entirely discredited. But that is inconsistent with the supreme court's guidance. *Vangrevenhof*, 941 N.W.2d at 738 (stating that recantation "*may* lessen the trustworthiness of a statement"). The record supports the district court's assessment that the recantation was less trustworthy than the original statement. The DNA evidence is uncontradicted and tends to discredit H.H.'s recantation, particularly since her claim to have planted the evidence is far less plausible than her original statement and changed over time. And the expert's testimony about false recantations—combined with evidence that H.H. increasingly expressed feelings of isolation, anxiety, and guilt as the case proceeded—demonstrate ample motive to recant falsely.

In sum, the district court did not abuse its discretion by determining, after careful examination of the totality of the circumstances, that H.H.'s forensic interview is sufficiently trustworthy for admission under rule 807 despite her recantation.

III. The district court did not abuse its discretion by admitting out-of-court statements about Lighthouse's prior abuse.

We review evidentiary rulings for an abuse of discretion and will not reverse unless the appellant demonstrates both error and resulting prejudice. *Moua*, 678 N.W.2d at 37. Out-of-court statements are generally inadmissible when offered to prove the truth of the matter asserted. *Id.*

The district court did not permit evidence of specific instances of Lightfoot's prior abuse of H.H. But it allowed the state to offer two types of out-of-court statements generally referencing the prior abuse: (1) references in H.H.'s recorded statements to the officer in the squad car and the forensic interviewer, and (2) testimony from H.H.'s friends recounting conversations with H.H. The court reasoned that these statements were not being offered for their truth but to provide context for H.H.'s "behaviors and conduct" and that of her friends. The court reinforced that reasoning by giving limiting instructions when the evidence was introduced.

Lightfoot contends the district court exceeded its discretion in several ways by admitting this evidence. First, he argues the evidence is improper other-acts evidence under Minn. R. Evid. 404(b). We disagree. Evidence of an accused's prior intrafamilial sexual abuse of the victim is presumptively admissible as relationship evidence. *See* Minn. Stat. §§ 634.20, 518B.01, subd. 2(a) (2020); *State v. Bell*, 719 N.W.2d 635, 639 (Minn. 2006) (stating that relationship evidence is not subject to Minn. R. Evid. 404(b)).

Second, Lightfoot asserts that evidence of context was not necessary for the jury to understand H.H.'s text asking her friends to call the police and that the statements could provide context only if taken for their truth. The evidence defeats these arguments. H.H. texted her friends: "Do it plz" and "Help." They then immediately called the police and reported that a sexual assault was underway. For the jury to understand this sequence, it needed the context that H.H. had told her friends that Lightfoot had abused her, she expected it to recur, and she would text them if she needed them to call the police. The jury did not need to accept the truth of the prior abuse to understand this sequence of events.

Lightfoot's third challenge fails for the same reason. He contends the district court contradicted itself by admitting general references to prior abuse but excluding evidence of specific prior acts. As noted above, general references were necessary so the jury could understand the actions of H.H. and her friends. Excluding unnecessary details mitigated the risk of unfair prejudice to Lightfoot and was well within the district court's discretion.

Finally, Lightfoot contends the volume of the prior-abuse evidence made it unduly prejudicial. We are not persuaded. Evidence concerning H.H. and Lightfoot's relationship is presumptively admissible unless the risk of unfair prejudice "substantially" outweighs its probative value. Minn. Stat. § 634.20. Lightfoot did not ask the district court to limit the number of references to prior abuse because of their prejudicial impact, only to exclude them. And the district court's exclusion of specific references kept the focus of the trial appropriately on the events of October 18, 2019, not any prior abuse.

IV. The district court erred by entering four convictions.

If the state successfully prosecutes multiple offenses based on a single incident, and all offenses are the same or an included offense, a district court may convict the defendant of only one offense. Minn. Stat. § 609.04, subd. 1 (2018). Other guilty verdicts should be left unadjudicated but available for formal adjudication if the controlling conviction is ever reversed. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). Whether a defendant may lawfully be convicted of multiple offenses is a question of law, which we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

At sentencing, the district court imposed a sentence only on count one because the other charges for which the jury found Lightfoot guilty were "part of the same behavioral

incident." But the warrant of commitment lists convictions for all four charges. The state concedes this is error. We agree and reverse the convictions for the three unsentenced offenses (counts two, three, and four) and remand for their vacation.

Affirmed in part, reversed in part, and remanded.