

*This opinion is nonprecedential except as provided by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
A22-1104**

State of Minnesota,
Respondent,

vs.

Frank James Bigbear,
Appellant.

**Filed June 26, 2023
Affirmed
Reilly, Judge**

St. Louis County District Court
File No. 69DU-CR-20-1196

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Adam Lozeau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Reilly, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges his conviction for third-degree criminal sexual conduct, arguing that the district court abused its discretion by admitting into evidence the victim's

recorded interview with a police officer under the prior-consistent-statement and residual exceptions to the hearsay rule. We affirm.

FACTS

This appeal arises out of appellant Frank James Bigbear's conviction for sexually assaulting a 14-year-old girl, the victim, in 2019. The victim was born in January 2005. Bigbear was born in August 1988 and was 30 years old at the time of the offense. In 2019, the victim lived with her grandmother but often stayed at her mother's home with her mother, her mother's boyfriend (boyfriend), and her siblings and half-siblings. The victim shared a bedroom with her younger sister at her mother's home. Boyfriend's friend, K.S., also lived in mother's home.

Once during the summer or early fall of 2019, Bigbear visited mother's home to see K.S. and her friends. The victim, mother, and boyfriend were also at home. At one point, the victim and Bigbear went into the victim's bedroom. The victim testified that Bigbear had sexual intercourse with her in the bedroom by putting his penis into her vagina. Boyfriend noticed that the victim's bedroom door was closed and there was not a light on in her room. Boyfriend went into the bedroom and saw Bigbear lying on top of the victim on the bed. Bigbear and the victim were covered by a blanket. Boyfriend saw "sexual movement" under the blanket indicating that Bigbear and the victim were having sex. Boyfriend alerted mother and told her to look in the bedroom. Mother looked into the bedroom and saw Bigbear moving "in a back and forth motion" on top of the victim "as if they were having sex." Mother and boyfriend turned on the light and confronted Bigbear. Bigbear "immediately got off of [the victim]." The victim was naked from the waist down

and Bigbear was not wearing any clothing. Boyfriend hit Bigbear and threw him out of the apartment.

In September 2019, the Duluth Police Department received a report of a sexual assault of a child from a mandated reporter. A police officer opened an investigation and interviewed the victim, mother, and boyfriend. In April 2020, respondent State of Minnesota charged Bigbear with one count of third-degree criminal sexual conduct in violation of Minn. Stat. § 609.344, subd. 1(b) (2018).

The case went to trial in December 2021. Before trial, the state provided notice of its intent to introduce the out-of-court statements made by the victim during a police interview pursuant to Minnesota Rule of Evidence 807. The jury heard testimony from several witnesses including the victim, the officer who interviewed her, victim's mother, and boyfriend. During the officer's testimony, the state sought to introduce the officer's interview with the victim under rules 801(d)(1)(B) and 807 of the rules of evidence. The district court ruled, over the defense's objection, that the victim's interview was admissible under rule 801(d)(1)(B) as a prior consistent statement and under the residual exception in rule 807. The district court then played the recording for the jury.

Biggear testified in his own defense at trial. Bigbear acknowledged visiting mother's home but denied seeing the victim that night. Bigbear testified that he fell asleep in one of the bedrooms and woke up when boyfriend began screaming at him. Bigbear believed that boyfriend was upset because Bigbear was a stranger and had fallen asleep in the bedroom. Bigbear denied having any sexual contact with the victim.

The jury found Bigbear guilty of third-degree criminal sexual conduct. The district court sentenced Bigbear to 119 months in prison, with a 10-year conditional release term. Bigbear now appeals.

DECISION

Bigbear challenges the district court's evidentiary rulings. Evidentiary rulings are within the sound discretion of the district court and "will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). In general, "[a]ll relevant evidence is admissible." Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. "When the admissibility of evidence is challenged on appeal, [appellate courts] defer to the district court's exercise of discretion in the conduct of the trial, and we will not lightly overturn a district court's evidentiary ruling." *State v. MacLennan*, 702 N.W.2d 219, 235 (Minn. 2005).

Our standard of review varies based on whether the appellant objected during trial. If the appellant objects to the admission of evidence, we apply the harmless-error standard of review. *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). Under this standard, an appellant who alleges an error must prove that there is "a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Matthews*, 800 N.W.2d 629, 633 (Minn. 2011) (quotation omitted). If the appellant did not object, we review the issue for plain error. *State v. Vasquez*, 912 N.W.2d 642, 650 (Minn. 2018). Plain error requires the appellant to show: (1) an error, (2) that was plain, and (3) that

affected the appellant's substantial rights. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). Here, the state argues that plain-error review applies because Bigbear did not object at trial.¹ Bigbear claims the defense objected at trial and therefore a harmless-error analysis applies.

As elaborated on below, we conclude that regardless of which standard of review applies, Bigbear is not entitled to relief because he cannot establish that the admission of the challenged evidence was prejudicial under either standard. See *State v. Sontoya*, 788 N.W.2d 868, 873 (Minn. 2010) (stating that if the appellant cannot prove an alleged error affecting substantial rights, a court applying plain-error analysis “need not consider the other factors”); *State v. Hall*, 764 N.W.2d 837, 843 (Minn. 2009) (stating that even if the district court erred, “a new trial is not warranted” under harmless-error analysis unless appellant establishes prejudice).

We first analyze the admissibility of the statements to the officer under rules 801 and 807 of the rules of evidence. We then consider whether the error was harmless. While we agree with Bigbear that the district court erred by admitting the victim's police interview into evidence, there was other overwhelming testimonial evidence that supports the conviction, and we affirm.

¹ The state also argues that Bigbear forfeited this issue by failing to object at trial. We will ordinarily review an evidentiary issue for plain error, even if a party forfeits the issue by failing to challenge it at trial. *Vasquez*, 912 N.W.2d at 650.

I. Minnesota Rule of Evidence 801(d)(1)(B)

Bigbear argues the district court abused its discretion by admitting into evidence the officer's interview of the victim under Minnesota Rule of Evidence 801(d)(1)(B) in violation of the hearsay rules. 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 generally inadmissible at trial unless an exception applies. Minn. R. Evid. 802. Under one exception, a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B).

Bigbear argues that several of the victim's statements to the officer were either inconsistent with or missing from her trial testimony. We begin by considering the victim's statements to the officer. The officer opened an investigation and interviewed the victim in September 2019. The victim told the officer that Bigbear had sex with her when she was 14 years old. The victim claimed she did not tell Bigbear her age and that he must have assumed she was over 18 years old. The victim told the officer she was in the living room at her mother's home with Bigbear when he grabbed her and told her he wanted to have sex with her. The victim stated she went into the bedroom with Bigbear. Bigbear removed her pants and underwear and removed his clothing. The victim stated Bigbear then had sexual intercourse with her. The victim stated she got chlamydia from Bigbear

following this sexual encounter, and that having sex with Bigbear made her “feel gross.” She stated that Bigbear was a “pedophile” and a “pervert,” and stated she did not like him.

We next briefly review the victim’s trial testimony. The victim testified she was at her mother’s home that night. The victim shared a room with her sister when she stayed at her mother’s home. The victim testified that Bigbear came over to see K.S. and her friends. At one point, the victim went into her bedroom with Bigbear. The victim and Bigbear began “making out,” which then led to sex. The victim testified that Bigbear put his penis into her vagina and had sexual intercourse with her. She stated she did not discuss having sex with Bigbear beforehand. The victim also testified that she was 14 years old when this offense occurred, but she told Bigbear that she was over 18 years old.

Many of the victim’s statements to the officer conflicted with her trial statements. During the interview, the victim told the officer that she and Bigbear were standing in the living room and Bigbear “grabbed” her and “said he wanted to have sex” with her. The victim stated that she and Bigbear went into the bedroom and that he had sex with her. The victim told the officer that Bigbear did not know her age and must have assumed she was 18 years old. At trial, the prosecutor asked the victim if “there was any discussion between the two of you about having sexual intercourse.” The victim responded, “No.” The victim did not testify that Bigbear “grabbed” her or said he wanted to have sex with her. She also testified she told Bigbear she was 18 years old.

The victim also made statements to the officer that were absent from her trial testimony. The victim told the officer she was in the living room with Bigbear joking about sex when he “grabbed [her] and said he wanted to have sex with [her].” The victim told

the officer that once they were in the bedroom, Bigbear removed her pants and underwear and took off all of his clothes. The victim told the officer she was later diagnosed with chlamydia. The attorneys did not elicit any of this information at trial, which only came in through the recorded interview.

The district court erred in admitting the police interview, and that error was plain. An error is “plain” if it is clear or obvious, and an error is clear or obvious if it “contravenes a rule, case law, or a standard of conduct, or when it disregards well-established and longstanding legal principles.” *State v. Brown*, 792 N.W.2d 815, 823 (Minn. 2011). The victim made several statements to the officer that differed from her trial testimony or that provided information not elicited at trial. Generally, when a witness’s prior statement “contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible.” *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007). Rule 801(d)(1)(B) “should not be the means to prove new points not covered in the testimony of the speaker.” *Id.* (quotation omitted). Otherwise, “a few consistent statements in a multi-statement interview may be used to bootstrap into evidence inconsistent statements that do not qualify under the rule.” *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *rev. denied* (Minn. Feb. 24, 2000).

The interview presented evidence that differed from the victim’s trial testimony and added new information. But the district court’s evidentiary ruling permitted the entire statement to the officer to come before the jury. Because the victim’s statements in the recorded police interview were not consistent with her trial testimony or provided new

information, the district court plainly erred by admitting this interview into evidence under rule 801(d)(1)(B).

II. Minnesota Rule of Evidence 807

Bigbear also challenges the district court's determination that the interview was admissible under the residual hearsay exception, which provides that "[a] statement not specifically covered by [r]ule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule" if certain conditions are met. Minn. R. Evid. 807. District courts conduct a two-step analysis in considering whether to admit hearsay statements under rule 807. *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019). First, the district court examines the totality of the circumstances to confirm that the hearsay statement has "equivalent circumstantial guarantees of trustworthiness." *Id.* (quotation omitted). Second, the district court reviews whether the three enumerated requirements of rule 807 have been met. *Id.* at 293. The district court considers whether

- (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.

We review a district court's "determination that a statement meets the foundational requirements of a hearsay exception . . . for an abuse of discretion." *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009).

Trustworthiness of the Statements. Bigbear argues the victim’s statements to the officer were untrustworthy. Establishing circumstantial guarantees of trustworthiness involves an application of the totality-of-the-circumstances approach and “requires a careful balancing of all relevant circumstances surrounding the making of the statement.” *Hallmark*, 927 N.W.2d at 292; *see also State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (setting forth relevant trustworthiness factors involving child victims). Here, the victim’s statements to the officer were not trustworthy because she admitted during her own testimony that she had not been truthful with the officer. At trial, the prosecutor asked the victim if she had been truthful with the officer during her interview. The victim responded, “No.” The prosecutor then engaged in the following colloquy with the victim:

Q: You told us that you talked to the detective. Do you remember his name?

A: No.

Q: Okay. Um, in any event, when you talked to the . . . detective . . . were you truthful? Did you tell him the truth?

A: No.

Q: Okay. Were there things that you didn’t tell the detective?

A: The things that I didn’t tell the detective I have said in here.

Q: Okay. You’ve been . . . truthful with us today?

A: Yes.

Given the victim’s own admission that she was not truthful with the officer, we must conclude that the victim’s interview did not have “equivalent circumstantial guarantees of trustworthiness.” *Hallmark*, 927 N.W.2d at 292 (quotation omitted).

Rule 807 Factors. We also conclude that the rule 807 factors have not been satisfied. The residual exception requires the district court to engage in two sets of inquiry. *State v. Griffin*, 834 N.W.2d 688, 693 (Minn. 2013). The district court did not do so here.

The district court determined the interview was “being offered as evidence of a material fact” and was “probative and on point.” The district court did not make any findings related to the three enumerated factors in rule 807. In any event, a district court’s “failure to explicitly consider all relevant circumstances under [r]ule 807 is not automatically an abuse of discretion.” *Hallmark*, 927 N.W.2d at 294. The reviewing court may “independently evaluate[] whether the statement at issue is admissible under [r]ule 807.” *Id.*

As for the first factor, it is uncontested that the interview was offered as evidence of a material fact. But as to the second factor, we are not satisfied that the interview was more probative than other evidence presented. The victim testified at trial, under oath, that Bigbear had sex with her when she was 14 years old. The victim’s statements to the officer were not under oath and were not subject to cross-examination. Additionally, the victim’s statements to the officer were not spontaneous because the interview took place several weeks after the offense. The interview was less probative than the victim’s direct testimony. As to the third factor, the victim’s statements were not in accordance with the general purpose of the rules, which is 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). Based on our review, we conclude that the interview did not satisfy the enumerated requirements of rule 807.

III. Prejudicial Effect of Errors

While we determine the district court improperly admitted the evidence under Minnesota Rules of Evidence 801(d)(1)(B) and 807, this does not end our inquiry. Bigbear must establish that he was prejudiced as a result of the admission of this evidence. *State v.*

Nunn, 561 N.W.2d 902, 907 (Minn. 1997). In determining whether the erroneous admission of evidence was prejudicial or harmless, we consider whether there is “no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.” *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006) (quotation omitted).² An error is harmless if the jury could have reached the same “verdict based on the other evidence . . . presented.” *State v. Blasus*, 445 N.W.2d 535, 540 (Minn. 1989). The question is “whether the error substantially influenced the verdict.” *State v. Expose*, 872 N.W.2d 252, 260 (Minn. 2015). Bigbear bears the burden of showing “that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted). This is considered a “heavy burden.” *State v. Davis*, 820 N.W.2d 525, 535 (Minn. 2012).

Bigbear cannot satisfy this burden. The record contains ample evidence that Bigbear sexually assaulted the victim. The victim testified that Bigbear visited her mother’s home in the summer or fall of 2019. Bigbear and the victim went into the victim’s bedroom. The victim testified that Bigbear had sex with her in the bedroom by penetrating her vagina with his penis. Boyfriend testified he noticed the light was off in the bedroom and opened the bedroom door. Boyfriend saw Bigbear lying on top of the victim on the bed. Boyfriend noticed “sexual movement” showing that Bigbear was having sex with the victim. Boyfriend called mother to the bedroom door. Mother testified she saw Bigbear

² The “substantial rights” analysis is equivalent to a “harmless-error” analysis. *Matthews*, 800 N.W.2d at 634. Thus, the following analysis applies to and is determinative of either standard.

moving “in a back and forth motion” on top of the victim “as if they were having sex.” When mother and boyfriend confronted Bigbear, he immediately jumped off of the victim. Bigbear was not wearing any clothing and the victim was naked from the waist down. It is uncontested that the victim was 14 years old and Bigbear was 30 years old then. This evidence—which Bigbear does not challenge on appeal—substantially supports the jury’s verdict. Given this eyewitness testimony, Bigbear has not shown that the jury would have reached a different result if the victim’s interview with the officer had been excluded.

The district court also found that the defense challenged the victim’s credibility. The district court noted that defense counsel’s questions on cross-examination “highlight[ed] . . . the gaps of [the victim’s] memory,” which the district court determined constituted “a credibility challenge.” By permitting the jury to hear the recorded statement to the police officer, the jury was able to fully assess the victim’s credibility. *See State v. Scruggs*, 822 N.W.2d 631, 645 (Minn. 2012) (noting that credibility determinations are the exclusive province of the jury).

For these reasons, we conclude that the erroneous admission of the interview under Minnesota Rules of Evidence 801(d)(1)(B) and 807 did not significantly affect the verdict.

Affirmed.