STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1932

State of Minnesota,
Respondent,

vs.

Bradley James Weaver,
Appellant.

Filed November 14, 2011
Affirmed
Stauber, Judge

Becker County District Court
File No. 03CR10194

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael Fritz, Becker County Attorney, Gretchen D. Thilmony, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Wright, Judge.

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

STAUBER, Judge

Appellant challenges his conviction of domestic assault, intent to cause fear, arguing that (1) the district court abused its discretion by allowing the state to impeach

the assault victim with her prior statement to the police officers and (2) the substantive evidence presented at trial was insufficient to support the conviction. Because the victim's statements to the officers are admissible as impeachment and substantive evidence under Minn. R. Evid. 801(d)(1)(D), we affirm.

FACTS

On January 30, 2010, Officer Dustin Nelson of the White Earth Police Department responded to a report that a female victim was being assaulted. When he arrived at the scene, he noticed that the female—later identified as D.D.[1]—was very upset, had lost a significant amount of blood from her lip, and had blood on her shirt. Officers eventually identified appellant Bradley James Weaver as the party involved in the assault, apprehended him, and charged him with two counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2008).

At trial, the state called D.D. as a witness. She admitted to calling 911 and telling the dispatch operator that appellant had punched her in the lip, but stated that she had done so "because [she] was very angry" and that she did not remember any of the details of what she had said. Officer Nelson testified over appellant's objection that D.D. told him that she and appellant had been arguing and appellant "punched her in the mouth," forced her to the ground, and "continued to punch her in the back of the head." The state also presented the testimony of Officer Bradly Houglum of the White Earth Police

[1] D.D. and appellant married shortly before the trial. When called as a witness, D.D. identified herself by her maiden name. In order to be consistent with the police report and a majority of the trial transcript, we refer to her as D.D., her name on the date the incident occurred.

Department, who testified that D.D. had told him that appellant punched her in the face and the back of the head. Appellant did not object to Officer Houglum's testimony.

A jury found appellant guilty of felony domestic assault, intent to cause fear, but acquitted him on the charge of felony domestic assault, intent to cause harm. Pursuant to the sentencing guidelines, the district court sentenced appellant to 18 months' imprisonment, stayed for five years. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by allowing the state to impeach D.D. with her statements made to the police officers immediately following the incident. We consider this argument in two parts: (1) that the district court abused its discretion by admitting D.D.'s statements to the officers and (2) that the state's use of the statements for impeachment purposes was impermissible. We reject both arguments.

A. Admissibility of D.D.'s statements

Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of that discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id.*

Hearsay is defined as "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). As a general rule, hearsay is inadmissible. Minn. R. Evid. 802. However, a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) 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).

Here, the district court ruled that the testimony was admissible as either a prior inconsistent or consistent statement. The state suggests that the statements are admissible because they "were partially inconsistent with her testimony at trial and given under oath, and [D.D.] was subject to cross examination." However, directly contrary to the state's assertion, D.D.'s statements were *not* given under oath, and the statements therefore do not meet the requirements to be considered a prior inconsistent statement. *See* Minn. R. Evid. 801(d)(1)(A) (defining prior inconsistent statement).

Nor do the statements meet the requirements for admissibility as a prior consistent statement under Minn. R. Evid. 801(d)(1)(B). The rule applies only to prior statements that are consistent with the declarant's trial testimony. Minn. R. Evid. 801(d)(1)(B), 1989 comm. cmt. D.D.'s trial testimony related how she and appellant had a "small argument" on the way home from a casino, "started kind of pushing each other around," and that she told an officer that appellant punched her in the lip. While not necessarily *inconsistent*, this testimony is nonetheless not *consistent* with her statement to the officers that appellant punched her in the mouth while the two were in the car, forced her to the ground, and continued to punch her in the back of the head; the statements are therefore not admissible as prior consistent statements. *See id.* ("[W]hen a witness' 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 under [Minn. R. Evid. 801(d)(1)(B)].").

However, the rules of evidence also exclude from the definition of hearsay "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Minn. R. Evid. 801(d)(1)(D); *see also State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980) (holding that statements made within a few minutes of an accident were close enough in time to be admissible under Rule 801(d)(1)(D)). Officer Nelson testified that he responded to a report of an assault in progress. When he arrived on the scene, he noticed that D.D. was visibly upset, bleeding, and standing outside of her vehicle. The record therefore indicates that Officer Nelson arrived on the scene very shortly after the assault. Because D.D.'s statements describe an event immediately after she perceived the event, the statements are not hearsay, and the district court therefore did not abuse its discretion by admitting the statements. *See* Minn. R. Evid. 801(d)(1)(D).

B. Impeachment

Under the rules of evidence, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Minn. R. Evid. 607. But because Minn. R. Evid. 607 does not contain certain safeguards found elsewhere in the rules, impeachment may be misused. *State v. Ortlepp*, 363 N.W.2d 39, 42 (Minn. 1985). The supreme court addressed this problem in *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978). In *Dexter*, the supreme court affirmed a district court ruling "barring the prosecution from

impeaching one of its own witnesses with extrinsic evidence of prior inconsistent statement she allegedly made to friends." 269 N.W.2d at 721. The state conceded that the alleged prior inconsistent statement was not admissible as substantive evidence. *Id.* The supreme court rejected the state's attempt to use "the guise of impeachment" to introduce evidence that was not otherwise admissible. *Id.* at 721-22. Minnesota caselaw identifies such a situation as a "*Dexter* problem." *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993).

However, as described above, the statements here are admissible under Minn. R. Evid. 801(d)(1)(D). And evidence admissible under rule 801(d)(1)(D) is admissible as both impeachment and as substantive evidence. *Pieschke*, 295 N.W.2d at 584. Where evidence is admissible for substantive purposes, an appellant may not complain that the admission of the evidence for impeachment purposes poses a *Dexter* problem. *Ortlepp*, 363 N.W.2d at 43. We therefore conclude that the district court properly allowed the state to impeach D.D. with her prior statements to the police officers.

II.

Appellant argues that the substantive evidence presented at trial is insufficient to sustain the jury's finding of guilt. Appellate courts analyze insufficient-evidence claims by determining whether a fact finder could reasonably find that the defendant was guilty based on the facts in the record and the legitimate inferences presented thereby. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004). In reviewing such claims, we assume that the fact finder believed the state's evidence and rejected any evidence to the contrary. *State v. Brocks*, 587 N.W.2d 37, 42 (Minn. 1998).

Appellant's argument rests on his assertion that D.D.'s statements to the police, as retold by Officer Nelson, may not be considered as substantive evidence. But as described above, the statements are admissible under Minn. R. Evid. 801(d)(1)(D) as substantive evidence of appellant's guilt. *See Pieschke*, 295 N.W.2d at 584 (stating that evidence admissible under Minn. R. Evid. 801(d)(1)(D) is admissible as substantive evidence). We therefore conclude that the state met its burden of proof and presented sufficient evidence to allow the jury, acting with due regard for the presumption of innocence, to find appellant guilty. Appellant's sufficiency-of-the-evidence argument is therefore unavailing.

Affirmed.