STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1094

State of Minnesota,
Respondent,

vs.

Brian Keith Swenson,
Appellant.

Filed August 13, 2012
Affirmed
Wright, Judge

Stearns County District Court
File No. 73-CR-10-5112

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Toussaint, Judge.*

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

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

WRIGHT, Judge

Appellant challenges his conviction of first-degree burglary, arguing that the district court abused its discretion by admitting witnesses' out-of-court statements to the police as substantive evidence under Minn. R. Evid. 807, the residual exception to the hearsay rule. Appellant also argues that the jury's verdict is against the weight of the evidence. We affirm.

FACTS

On June 13, 2010, at approximately 9 p.m., J.T. called 911 to report that her mother's "ex-boyfriend is starting a fight with his cousin" at a residence in Brooten. J.T. reported that the assailant put his hands around his cousin's throat and threatened to kill him. Police officers arrived at the residence within minutes and took appellant Brian Swenson into custody. That evening, police officers recorded interviews with witnesses who were present during the incident, including C.G.; J.T., C.G.'s 17-year-old daughter; S.T., C.G.'s 19-year-old daughter; S.N., J.T.'s boyfriend; B.M., S.T.'s friend; and C.C., S.N.'s friend.

In her statement, C.G. referred to Swenson as her "ex-boyfriend" and explained that she and Swenson had dated for approximately 16 years. But they had been separated since March 2010, when she moved out of a home that they shared. She subsequently moved into the residence where the June 13 incident occurred. C.G. explained that Swenson did not have permission to be at her home on the evening of June 13. Although Swenson comes to the home to visit their three children, he does not stay there. C.G. told

the police that Swenson appeared very angry when he arrived at the home on the evening of June 13. She asked him to leave and then returned inside, locking the door behind her. She stated that first Swenson was yelling and swearing outside the home. Next, Swenson "busted the door down" by kicking it, entered the home, "grabbed [S.N.] by the throat," and picked S.N. up off of the ground. C.G. also stated that, after J.T. called 911, C.G. told Swenson that the police were coming and to "get the f**k off my property now." C.G. told the police that she was scared for herself and her children, who were in the home at the time.

In her statement to the police, J.T. said that she lived at the home with S.N., their daughter, C.G., and several of C.G.'s other children. J.T. stated that, when Swenson arrived, C.G. locked the doors; and J.T. closed the blinds because Swenson was yelling through the windows. J.T. called 911 after Swenson forcefully opened the door and "went after" S.N. by grabbing his neck with both hands. J.T. told police that Swenson followed S.N. out of the house after the physical altercation, saying, "I'm gonna f**kin' kill you."

S.T. told the police that C.G. locked the doors when Swenson arrived at the home because Swenson was mad. Either C.G. or J.T. shut the curtains because Swenson was walking around the outside of the home near the windows. S.T. heard Swenson break the door open, and she observed Swenson grab S.N.'s throat with both hands for approximately 10 seconds. S.T. attempted to separate Swenson and S.N., but Swenson again grabbed S.N. by the neck and pushed him up against a wall. S.T. also told the police that she was scared that Swenson was going to hurt S.N. or someone else present.

In his statement to police, S.N. said that he lived at the home with J.T., C.G., and C.G.'s other children. C.G. locked the door when Swenson arrived, Swenson kicked in the door and grabbed S.N. by the throat, and S.T. pushed Swenson away from S.N. S.N. also told the police that Swenson grabbed him by the throat a second time and lifted him. Swenson let go of S.N. and said, "[Y]ou better run you p***y."

B.M. told the police that, when Swenson arrived, C.G. told him "you need to get off my property you don't live here, please leave." From outside the home, Swenson pointed through the windows at S.N. and said, "I have your number, I'll kill you . . . let me in, or I'll kill you." B.M. told the police that J.T. closed the blinds, then Swenson kicked in the locked front door and choked S.N. by placing his hands around S.N.'s neck and holding him in the air against a wall.

C.C. told the police that, after Swenson arrived, he said through a window to C.C. and several others that "he's got our number" and "we'd better be watching our backs." Swenson pounded on the door and threatened to kick the door open. When Swenson kicked the door open, he "went straight for [S.N.]." According to C.C., Swenson grabbed S.N., pushed him into a corner, and put his hands around S.N.'s neck two times. The second time, Swenson lifted S.N. off of the ground with his hands clenched around S.N.'s neck for five to ten seconds. C.C. told the police that Swenson approached C.C. and stated that he was going to "put [C.C.] in a coffin if [C.C.] didn't leave right now." This statement scared C.C.

The state charged Swenson with first-degree burglary, a violation of Minn. Stat. § 609.582, subd. 1(c) (2010). Six days before the jury trial, the state moved the district

court to admit the hearsay statement of any testifying prosecution witness under Minn. R. Evid. 807, the residual exception to the hearsay rule, if any of the state's witnesses testified inconsistently with their prior statements. At trial, C.G., J.T., S.T., B.M., C.C., and S.N. testified. Swenson also testified, as did his brother-in-law.

C.G. testified that portions of her statement to the police on June 13 were not true, the police made her provide a statement, and the police may have fabricated portions of her statement. According to C.G.'s trial testimony, she and Swenson were romantically involved and lived together in June 2010 at the home where the incident occurred. The couple remained romantically involved and lived together at the time of trial. C.G. also testified that she did not recall telling the police that Swenson was her "ex-boyfriend," and she was not afraid of Swenson on June 13. C.G. denied telling the police that Swenson did not have permission to come into the home, and she claimed not to remember seeing Swenson kick in the door. When shown a transcript of her prior statements, she maintained that it did not refresh her recollection.

J.T. testified that her mother locked the door of the house when Swenson arrived and that she closed the curtains. But J.T. claimed that she was not concerned about anything and did not recall anything specific that Swenson said. J.T. testified that Swenson kicked in the door and entered the home, but she said that she did not know whether Swenson touched S.N. and did not remember whether Swenson threatened to kill S.N. After reviewing a transcript of her statement to the police, J.T. continued to maintain that she did not remember details of what happened on June 13.

S.T. testified that she heard Swenson enter the home and Swenson and S.N. yelling at each other. She initially testified that she did not know whether Swenson placed his hands on S.N. But after reviewing a transcript of her interview with police on June 13, she recalled that Swenson had both of his hands around S.N.'s neck for approximately ten seconds. S.T. testified that, after she separated the men, Swenson placed his hands on S.N.'s neck a second time.

S.N. testified that Swenson came to the home because he kept his clothing and "everything else" there. After he arrived, the occupants of the home told Swenson to leave. Swenson became angry because they would not let him in the home. S.N. testified that the door to the home was locked, but he did not recall who locked it. Even after reviewing a transcript of his recorded statement to the police to refresh his recollection, he testified that he did not recall. He claimed that he did not know how Swenson gained entry to the home. But he testified that the door was "junky" and somehow "popped open." S.N. testified that Swenson put both hands around S.N.'s neck for a short time, but Swenson was not choking him and did not hurt him. According to S.N., Swenson placed his hands around S.N.'s neck a second time and lifted him off the ground. But Swenson did not hurt him. After reviewing portions of a transcript of his recorded statement to the police, S.N. testified that he did not recall Swenson telling him, "[Y]ou better run."

B.M. testified that she did not recall what Swenson said when he arrived at the home. She testified that Swenson kicked the door down and pushed S.N. against a wall for two seconds. Swenson's hands were in S.N.'s "[s]houlder area," but B.M. did not

recall that Swenson choked S.N. After she reviewed a transcript of her police interview on June 13, B.M. testified that she was forced to provide the statement and she could not recall what she told the police that evening. But she testified that her statement must have reflected what she thought at that time.

According to C.C.'s testimony, he thinks that Swenson was knocking on the locked door when the door "popped open." C.C. testified that Swenson put his hands around S.N.'s throat twice without choking S.N. Swenson said nothing to C.C. After reviewing a transcript of his June 13 statement to the police, C.C. testified that he could not recall the details of the events that transpired that evening.

Swenson testified in his defense. He admitted that he did not possess a key to C.G.'s home and that he kicked in the door on June 13. Swenson testified that he believed he had a right to enter the home and that he paid half of the rent. He admitted grabbing S.N. twice, but he testified that he did not intend to hurt S.N.

After the eyewitnesses to the altercation testified, the state offered the witnesses' recorded statements to the police as substantive evidence under Minn. R. Evid. 807, the residual exception to the hearsay rule. The district court admitted the statements, and the recordings were played for the jury. The jury found Swenson guilty of first-degree burglary. Following sentencing, Swenson appealed.

D E C I S I O N

I.

Swenson challenges the district court's admission of the witnesses' recorded statements to the police on June 13 as substantive evidence, arguing that the evidence

was inadmissible hearsay. Evidentiary rulings rest within the district court's sound discretion and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). When challenging an evidentiary ruling, the burden rests with the appellant to establish that the district court abused its discretion and that the appellant was prejudiced. *Id.*

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 inadmissible unless it falls within one of several exceptions. Minn. R. Evid. 802 (barring admission of hearsay), 803 (listing 22 exceptions to hearsay exclusion), 807 (stating residual exception to hearsay exclusion); *see also State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (observing that hearsay exceptions "generally reflect the recognized reliability of statements made in certain situations").

The district court admitted the recorded statements of the six witnesses as substantive evidence under Minn. R. Evid. 807, finding that (1) Swenson had the opportunity to cross-examine all of the witnesses, (2) the witnesses acknowledged making statements to the police, (3) the witnesses were hostile based on their testimony and behavior in the courtroom, and (4) the hearsay statements were consistent with each other and other evidence. Swenson contends that the district court erred because there is insufficient evidence of the hearsay statements' reliability for admission under Minn. R. Evid. 807.

A hearsay statement is admissible under rule 807 if (1) it has circumstantial guarantees of trustworthiness equivalent to other admissible hearsay statements, (2) the

statement is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, (4) admission of the statement best serves the general purposes of the rules of evidence and the interests of justice, and (5) the proponent of the statement gives the adverse party sufficient notice that it intends to offer the statement. Minn. R. Evid. 807. Generally, a witness's prior statement can be admitted as substantive evidence under the residual hearsay exception if there are "circumstantial guarantees of trustworthiness" surrounding the statement. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). A district court "has considerable discretion in determining admission" of statements under "catch all" exceptions to the hearsay rule. *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991).

The state provided notice of its intent to offer the statements as substantive evidence approximately one week before trial by filing a motion in limine seeking admission of the police interviews with the witnesses in the event that any witness testified in a manner inconsistent with his or her prior statements to the police. The hearsay statements are evidence of material facts concerning Swenson's allegedly assaultive behavior and unauthorized presence in the home on June 13, 2010. These statements are more probative than other evidence for two reasons. First, they reflect the personal knowledge of eyewitnesses to the charged offense on the evening of the incident. Second, the statements were made before the witnesses, who retracted their statements to varying degrees at trial, had any contact with Swenson following the incident. Such evidence cannot be procured through other efforts because these

statements are from the only witnesses known to possess the personal knowledge relevant to the state's case. The admission of the statements also serves the general purposes of the rules of evidence and the interests of justice by assisting the jury in ascertaining the truth through evaluating the probative value of the witnesses' trial testimony in light of their prior statements to the police about the altercation. *See* Minn. R. Evid. 102 (stating that the rules shall be construed "to the end that the truth may be ascertained"). Thus, the second, third, fourth, and fifth requirements of rule 807 are satisfied here.

In *Ortlepp*, the Minnesota Supreme Court determined that a hearsay statement had circumstantial guarantees of trustworthiness because (1) admission of the statement did not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution since the declarant was available for cross-examination and admitted making the prior statement, (2) it was undisputed that the declarant made the statement and it was recorded, (3) the statement was against the declarant's penal interest, and (4) the statement was consistent with all of the other evidence that the state introduced. 363 N.W.2d at 44.[1] These factors do not constitute a strict test for determining admissibility of evidence under rule 807; rather, we examine the totality of the circumstances. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007).

Swenson challenges the application of *Ortlepp*, arguing that a prior out-of-court statement that a witness repudiates at trial is categorically inadmissible as substantive evidence of guilt. In support of this argument, Swenson relies on *State v. Mlynczak*, in

[1] The *Ortlepp* court analyzed whether statements qualified for admission under rule 803(24). *Id.* Rule 803(24) was replaced by rule 807 in 2006; but for these purposes, the analysis is substantively unaltered. Minn. R. Evid. 807 & cmt.

which the Minnesota Supreme Court reversed the district court's admission of prior statements that a witness repudiated at trial, which were offered as substantive evidence of guilt. 268 Minn. 417, 420-21, 130 N.W.2d 53, 55-56 (1964). But the *Mlynsczak* court observed that the record contained no competent evidence corroborating the witness's out-of-court statements. *Id.* More recently, in *Ortlepp*, the Minnesota Supreme Court affirmed the admissibility of a hearsay statement to the police even though the declarant later testified at trial that his statement was false, reasoning that the circumstances in which the statement was given established that it was trustworthy. 363 N.W.2d at 42, 44. Both the Minnesota Supreme Court and this court subsequently have applied the *Ortlepp* analysis to consider the admissibility of the prior out-of-court statements of a declarant who later repudiated the statement. *See, e.g.*, *Oliver v. State*, 502 N.W.2d 775, 777-78 (Minn. 1993) (concluding that declarant's out-of-court statement is admissible based on consideration of *Ortlepp* factors); *State v. Soukup*, 376 N.W.2d 498, 500-01 (Minn. App. 1985) (holding that declarant's out-of-court statements were reliable even though declarant testified at trial that the statements were false because record demonstrated that hearsay statements had circumstantial guarantees of trustworthiness), *review denied* (Minn. Dec. 30, 1985). Our research has not produced any cases after *Ortlepp* was decided that relied on *Mlynsczak* to exclude evidence under rule 803(24) or rule 807. Therefore, our analysis is guided by *Ortlepp*.

Here, each of the *Ortlepp* factors is present. The Confrontation Clause is not violated by admission of the hearsay statements as substantive evidence because all of the witnesses whose hearsay statements were admitted testified at trial and were available for

cross-examination by the defense. *See Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) (holding that Confrontation Clause prohibits admission of testimonial statements of a witness who did not appear at trial unless witness was unavailable to testify and defendant had a prior opportunity to cross-examine witness). The second *Ortlepp* factor also is present here; it is undisputed that all of the witnesses actually made the hearsay statements because each statement was recorded.

The third *Ortlepp* factor generally requires the hearsay statement to be against the declarant's penal interest, but this consideration is satisfied if the declarant is hostile to the state and supportive of the defendant. *State v. Whiteside*, 400 N.W.2d 140, 146 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987); *see also State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (holding that the witness's statement satisfied third *Ortlepp* factor because it was against her interests in maintaining a relationship with the defendant), *review denied* (Minn. Sept. 29, 2004). Here, the witnesses' statements to the police were against their personal and familial interests because the statements implicated Swenson in a crime and each witness had a personal or familial relationship with Swenson or C.G., who was Swenson's longtime girlfriend and the mother of Swenson's three children. This is ample support for the conclusion that the witnesses were hostile to the state and supportive of Swenson.

Finally, the hearsay statements are consistent with each other and with the other evidence. Photographs in evidence depict damage to the door of C.G.'s home, which is consistent with the hearsay statements. Additionally, certain aspects of the hearsay statements are consistent with aspects of the witnesses' testimony. For example, several

of the witnesses testified that Swenson placed his hands on S.N.'s throat, a fact that all of the witnesses reported to the police in their June 13 statements. Moreover, the hearsay statements are largely consistent with each other. Thus, the final *Ortlepp* factor is satisfied here.

Under the totality of the circumstances, we conclude that these hearsay statements have circumstantial guarantees of trustworthiness. Accordingly, the requirements of rule 807 are satisfied, and the district court did not abuse its discretion by admitting the statements as substantive evidence. Because the hearsay statements were properly admitted under the residual exception to the hearsay rule, the jury could consider the statements as substantive evidence of guilt.

Swenson also contends that admission of the hearsay statements violates the rule that otherwise inadmissible hearsay evidence cannot be introduced under the guise of impeaching a witness. *State v. Dexter*, 269 N.W.2d 721, 721-22 (Minn. 1978). But this legal standard is violated only if the prior inconsistent statement is otherwise inadmissible. *See id.* at 721 (observing that state was "seeking . . . to present, in the guise of impeachment, evidence which is not otherwise admissible"). When a prior statement is admissible as substantive evidence under the residual exception to the hearsay rule, its admission for impeachment purposes does not violate *Dexter*. *Ortlepp*, 363 N.W.2d at 43-44; *Oliver*, 502 N.W.2d at 777-78. The challenged statements at issue here were properly admitted as substantive evidence. Therefore, *Dexter*'s proscription does not apply.

II.

Swenson also argues that the evidence is insufficient to support his conviction of first-degree burglary. When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the jury reasonably could find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences that can be drawn from those facts. *State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999). In doing so, we view the evidence in the light most favorable to the verdict and assume that the jury believed the evidence supporting the guilty verdict and disbelieved any evidence to the contrary. *Id.* We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, reasonably could conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

To convict Swenson of first-degree burglary based on assault, the state was required to prove beyond a reasonable doubt that Swenson entered C.G.'s home without consent and assaulted a person within the home. Minn. Stat. § 609.582, subd. 1(c). "Assault" is "(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another." Minn. Stat. § 609.02, subd. 10 (2010).

Although it is undisputed that Swenson entered C.G.'s home on June 13, Swenson argues that he did not require consent to do so because he has a possessory interest in the home. In her statement to the police, however, C.G. explained that she and Swenson separated in March 2010 and that Swenson did not live with her in the home where the

incident occurred. Nor did he have permission to be in the home on the evening of June 13 according to Swenson's statement to the police. This fact is corroborated by the statements of J.T. and S.N. to the police, which do not identify Swenson as one of the residents of the home. C.G. also advised the police that she locked the door to prevent Swenson's entry on June 13, which is corroborated by other witnesses' statements to the police that the home's door was locked to prevent Swenson's entry. Moreover, all of the witnesses told the police shortly after the altercation that Swenson gained entry only after forcefully kicking or breaking the door open; and photographs in evidence depict damage to the door that is consistent with the forceful entry described to the police. Viewing this evidence in the light most favorable to the verdict and assuming that the jury believed the witnesses' statements to the police and disbelieved the witnesses' contradictory testimony, there is ample evidentiary support for the jury's determination that Swenson entered the home without consent.

To convict Swenson of burglary, the jury also must have found that Swenson committed an assault in the home. Assault includes "an act done with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.02, subd. 10(1). Intent "means that the actor either has purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result." *Id.*, subd. 9(4) (2010). Because intent is a state of mind, generally it is proved by circumstantial evidence. *Davis v. State*, 595 N.W.2d 520, 525-26 (Minn. 1999). And "the jury may infer that a person intends the natural and probable consequences of his actions." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

The testimony and hearsay statements of the witnesses demonstrate that Swenson threatened and forcefully touched S.N. Several witnesses advised the police that, when Swenson was outside the home, he repeatedly threatened to kill S.N. The witnesses also stated to the police that, after kicking open the door, Swenson entered and proceeded directly to S.N. At trial, C.C., B.M., S.N., and S.T. testified that Swenson placed his hands in the area of S.N.'s neck or shoulders, and Swenson testified that he grabbed S.N. twice. All of the witnesses advised the police that Swenson grabbed S.N. with both hands by the throat twice, and four of the witnesses told the police that Swenson lifted S.N. in the air. Several of the witnesses described this action as "choking" S.N. Moreover, several witnesses testified that Swenson's actions caused them to fear that he would harm them or others in the home. The jury reasonably could infer from this evidence that the natural and probable consequence of Swenson's conduct was to cause fear of immediate bodily injury or death.

Swenson argues that S.N.'s testimony that he was not frightened of Swenson and that Swenson did not hurt him contradicts the jury's conclusion that Swenson committed assault. We disagree. Assault requires an act committed "with intent" to cause fear of bodily harm or actual bodily harm; it does not require actual fear or actual bodily harm. *See* Minn. Stat. § 609.02, subd. 10(1). Because the jury reasonably could conclude from all of the circumstances established by the evidence that Swenson intended to cause fear of bodily harm or death or intended to actually inflict bodily harm or death, any evidence suggesting that the victim lacked fear or injury does not undermine the jury's verdict. When viewed in its entirety in the light most favorable to the verdict, the evidence

supports the reasonable inference that Swenson acted with intent to cause fear in another of immediate bodily harm or death.

Swenson's reliance on trial testimony favorable to his defense theory is unavailing. The jury was under no obligation to credit testimony at trial that favored Swenson, and we are not permitted to reweigh the evidence on appeal. *See State v. Franks*, 765 N.W.2d 68, 73 (Minn. 2009) (stating that appellate review does not permit reweighing of evidence); *State v. Wright*, 679 N.W.2d 186, 190 (Minn. App. 2004) (stating that assessing witness credibility and weight to be given witness testimony is exclusive province of jury and jury may accept some aspects of witness's testimony and reject others), *review denied* (Minn. June 29, 2004).

Because the record contains ample evidence that Swenson entered the home without consent and committed an assault on someone in the home, Swenson is not entitled to relief on the ground that the evidence is insufficient to prove beyond a reasonable doubt that he is guilty of first-degree burglary.

Affirmed.