STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1987

State of Minnesota,
Respondent,

vs.
Stanaley Yoeun,
Appellant.

Filed November 25, 2013
Reversed and remanded
Hudson, Judge

Dakota County District Court
File No. 19HA-CR-11-4114

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

James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Heather Pipenhagen, Assistant County Attorneys, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HUDSON, Judge

On appeal from his convictions of attempted second-degree intentional murder, first-degree assault, and second-degree assault, appellant argues that: (1) his Sixth Amendment right to confront witnesses was violated by the admission of hearsay

statements of non-testifying declarants; (2) the district court erred by admitting a recorded phone call that was not properly authenticated and also contained inadmissible hearsay; and (3) there was insufficient evidence to support his convictions. Because the admission of hearsay statements violated appellant's Sixth Amendment rights, we reverse appellant's convictions and remand for a new trial.

FACTS

At 2:15 a.m. on November 16, 2011, police received a call about a shooting at the Cherokee Tavern in West St. Paul. Upon arriving, police discovered that the victim, J.J., had been taken to the hospital with a gunshot wound to the chest. The shooter was identified as an Asian male, whereabouts unknown.

Appellant Stanaley Yoeun, his brother R.Y., D.D., and B.A. were all at the Cherokee on the evening of November 15 into the early morning of November 16. B.B. was the bartender working that evening and S.O., a server at the bar, was there celebrating her birthday. Shortly before 2:00 a.m., B.B. used the women's restroom and heard a struggle in the adjoining men's restroom. J.J. testified that he was in the restroom and another male, the shooter, wanted to fight him. J.J. claimed he defended himself, knocking the shooter to the floor and causing the shooter to bleed from the face or head. J.J. and the shooter were seen exiting the bathroom together, still involved in a struggle. B.B. and S.O. told the men to leave. As B.B. was attempting to lock up the bar, another male handed the shooter a gun. The shooter then turned around and shot J.J. in the chest. B.B. testified that the shooter also pointed the gun toward her for a few seconds, approximately two feet from her face, before he exited the bar. Months after the

shooting, a gun was found in a yard about a mile and a half from the bar, but no fingerprints or DNA were found on the gun, and it was not conclusively linked to the shooting or to appellant.

There was some confusion over the height of the shooter. In the original 911 call, B.B. identified the shooter as an Asian male, approximately 5'4" tall. However, B.B. later told police that she had been serving the shooter alcohol all evening, and that he was probably around 5'7" or 5'8", with a faint mustache. In an interview with a police investigator on December 1, 2011, J.J. said that the shooter was not short, and that he was taller than the investigator, who was 5'5", but shorter than his own height of 6'2".

The police began to focus on appellant after an investigator spoke with the victim's mother, E.J., by phone the evening of November 16. E.J. put A.A. on the phone with the investigator. A.A. told the investigator that she was the victim's current girlfriend and that she used to date appellant, "the male who shot" the victim. The investigator Curtis then requested photographic line-ups that included both appellant and his brother, R.Y. Line-up one contained a photo of appellant in the fifth position. Line-up two contained a photo of R.Y. in the first position. The line-ups were shown to B.B. and S.O. B.B. was not able to identify anyone in either line-up. S.O. identified appellant but noted she was only 50% sure he was the shooter.

At approximately 5:30 p.m. on November 17, police arrived at appellant's home to try to speak with him. Appellant did not answer the door, and officers began communicating with him by telephone. When told that a SWAT team would be sent into the apartment if he did not come out, appellant responded that he did not care if he died,

and that if the police came in, he knew what he had to do. After requesting and receiving an opportunity to speak with his attorney, appellant came out of the apartment peacefully around 8:30 p.m., and was arrested. At the police station, appellant was observed to be approximately 5'10", with a red mark on his forehead that appeared to be recent, and a sparse mustache.

Around 7:20 p.m. on November 17, A.A. informed the investigator by phone that appellant had called her while the police were outside his residence. A.A.'s aunt had recorded the conversation on her cell phone. The police created a duplicate of that recording, which was admitted as an exhibit and played over defense counsel's objection.

There was also testimony regarding Facebook messages between appellant and B.A. and D.D. B.A. testified that she exchanged Facebook messages with appellant on November 16 in which he threatened a suicidal standoff with police. D.D. testified that appellant accused her of snitching on him and again indicated he was going to "get into it" with police "if they come."

The state charged appellant with: attempted second-degree intentional murder, in violation of Minn. Stat. §§ 609.19, subd. 1(1), .17, subds. 1, 4(2), .11, subd. 5(a) (2010); first-degree assault, in violation of Minn. Stat. §§ 609.221, subd. 1, .02, subd. 10(2), .11, subd. 5(a) (2010); and second-degree assault (resulting in substantial bodily harm), in violation of Minn. Stat. §§ 609.222, subd. 2, .02, subd. 10(2), .11, subd. 5(a), .101 (2010). The jury found appellant guilty of all three counts, and he was sentenced to 225 months' incarceration.

D E C I S I O N

I

Appellant argues that his Sixth Amendment right to confront the witnesses against him was violated by the admission of statements made by S.O. and A.A. S.O. was arrested on a material-witness warrant and brought to the courthouse but did not testify. A material-witness warrant was issued for A.A., but the warrant was never executed.

A district court's evidentiary rulings are generally reviewed for an abuse of discretion. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). But this court reviews a claim that the admission of evidence violated a defendant's Sixth Amendment right to confrontation de novo. *Id*. Both the U.S. and Minnesota Constitutions guarantee a defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to confrontation is violated if testimonial hearsay statements are admitted into evidence, unless the declarant is unavailable and the defendant has had a prior chance to cross-examine the declarant. *Caulfield*, 722 N.W.2d at 308 (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004)). The state bears the burden to establish that the challenged statements are not testimonial. *Id.*

Statements of S.O.

S.O.'s statements were first admitted through an officer who testified that he administered the photo line-ups to S.O. and that S.O. identified appellant as the shooter: "[s]he said that she was about 50 percent sure that Number 5 is the shooter. And I'm reading it word for word here: But looked closely very similar appearance. She did sign

it." A document containing S.O.'s handwritten identification was also admitted as an exhibit through that officer. A second officer testified that S.O. had selected appellant's photo as someone she believed was the shooter and read S.O.'s statement verbatim from the exhibit: "I'm only 50 percent possibility that Number 5 is the shooter, but look closely – very similar appearance."

The state conceded at oral argument that S.O.'s verbal and handwritten statements are testimonial hearsay. S.O.'s statements were made in response to formal police questioning, a well-established category of testimonial hearsay. *See Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273–74 (2006) (holding that statements elicited by police are testimonial when the primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution."); *State v. Hull*, 788 N.W.2d 91, 101 (Minn. 2010) (holding that statements made to the police to assist them in the investigation of a crime are testimonial). Thus, the admission of S.O.'s statements violated appellant's Sixth Amendment right to confrontation, because S.O. did not testify. *Caulfield*, 722 N.W.2d at 308.

Harmless Error Analysis

A constitutional error requires reversal unless the error was harmless beyond a reasonable doubt. *Caulfield*, 722 N.W.2d at 314. An error is harmless beyond a reasonable doubt if the verdict is "surely unattributable" to the evidence admitted. *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013) (quotation omitted). In determining whether an error is harmless, this court considers the manner in which the evidence was presented, whether the evidence was highly persuasive, whether it was used in closing argument,

and whether it was effectively countered by the defense. *State v. Wright*, 726 N.W.2d 464, 476–78 (Minn. 2007). The strength of other evidence of the defendant's guilt is also a very important, but not controlling, factor. *Hawes*, 826 N.W.2d at 786.

First, we consider the manner in which the evidence was presented. Here, the statements were presented through the testimony of two police officers who described the line-up process and explained how S.O. picked appellant as the shooter. A written exhibit was also admitted into evidence which showed S.O.'s handwritten identification of appellant's photo as the shooter. It is particularly troubling that S.O.'s statements were admitted through two police officers, whom the jury was likely to find more credible than other lay witnesses. *See Wright*, 726 N.W.2d at 477 (notice that jurors were likely to find police officers highly credible).

The second factor requires an analysis of whether the evidence was highly persuasive. The state argues that S.O.'s identification was unpersuasive because it was qualified by her assertion that she was only 50% sure the photo of appellant was the shooter. In addition, S.O. was 75% sure that an individual in the second line-up was in the bar that evening, when in fact that individual was unrelated to the case. The state likens S.O.'s identification to "a guess." But S.O. also wrote that appellant's photo "looked closely very similar appearance" to the shooter, and the police officers testified that S.O. believed appellant was the shooter. While S.O.'s qualification of her certainty along with her misidentification of the other individual does weaken the force of her identification, her identification of appellant was the only actual eyewitness identification in the case, giving it disproportionate weight.

Third, the state specifically relied on S.O.'s identification in closing argument to bolster its case against appellant. The prosecutor referred to S.O.'s statements in its closing argument, stating,

> [c]onsider the photographic line-up in this as well. The officers assembled what they described as a double-blind photographic line-up and it was done in a sequential manner. [S.O.] was shown two line-ups, 12 photos total between the two line-ups. She picked out the Defendant's photo as the shooter and granted she said she was only 50 percent sure but then she specifically wrote on that form and you will have an opportunity to see that, but looked closely very similar appearance. Not correct grammar but it conveys what she was trying to say. Looked closely very similar appearance to the shooter. The selection of Stanaley Yoeun as the shooter by [S.O.] buttresses the evidence of an injury on his forehead and the sparse, thin mustache in showing that he in fact was the shooter.

And in rebuttal, the prosecutor stated,

> [m]embers of the jury, you may recall the line-ups were administered by the police to [S.O.] and [B.B.] on November 17th, the following date. Obviously, if [S.O.] had something to drink she was certainly sober by the 17th when she selected the Defendant's photographs as the person that she believed closely resembled the shooter. And the testimony was simply that [S.O.] had something to drink, not that she was so drunk she couldn't remember or she was even drunk at all.

The fourth factor is whether the defense effectively countered the evidence. Appellant argues that the only way he could have countered the evidence was by taking the stand. Because appellant has a constitutional right to remain silent, his failure to testify cannot be used against him in a harmless-error analysis. *See Caulfield*, 722 N.W.2d at 315. However, the defense did attempt to counter the evidence in other ways. In closing argument, appellant's attorney drew attention to the fact that S.O. had been

drinking the night of the shooting, pointed out that she was only 50% sure of her identification, and emphasized her misidentification of the other individual in the second line-up.

Finally, this court looks at the other evidence of appellant's guilt. Appellant argues that the other evidence against him was weak. Appellant argues that no other eyewitness identified him as the shooter; in particular, B.B., the bartender who testified that she had several interactions with the shooter that evening, could not identify appellant in the line-up. In addition, there were discrepancies in the reports of the height of the shooter, and no physical evidence linked appellant to the scene of the crime. Other evidence establishing appellant as the shooter was largely circumstantial: appellant refused to come out of his apartment to speak with police; told police that he was prepared to die; matched the physical descriptions of the shooter as a taller Asian male with a mustache and an injury to his forehead; and sent Facebook messages that supported an inference of guilt but did not contain direct confessions. Although the circumstantial evidence in the case was strong, this factor is not controlling. *Hawes*, 826 N.W.2d at 786.

Based on all of the factors, the state has not met its burden and we, therefore, cannot conclude that the jury's verdict was "surely unattributable" to S.O.'s statements. Identification was the key issue in the case, and the state relied heavily on S.O.'s statements to prove appellant was the shooter. S.O.'s statements were not harmless beyond a reasonable doubt, and appellant is entitled to a new trial. Because we hold that S.O.'s statements were not harmless beyond a reasonable doubt, we do not reach

appellant's argument that A.A.'s statements to police also violated his confrontation rights. But because we grant a new trial, we respond to appellant's evidentiary arguments regarding the recorded phone call to provide guidance on remand.

II

At trial, a duplicate recording of a phone conversation between A.A. and appellant was admitted as an exhibit. The conversation was originally recorded on a cell phone by A.A.'s aunt and then brought to the police station where an officer recorded the recording. At trial, two police officers were permitted to testify to what they heard on the recording before it was played to the jury. A police investigator testified:

> I did hear [A.A.] ask him what did he want, he just shot the guy that she was with. [Objection to hearsay overruled as admission of defendant] I could make out that [A.A.] had asked Stanaley—she said is this Stanaley? Stanaley said, yeah. And then I heard [A.A.] ask him what do you want? You just shot the guy that I'm with and then I hear Stanaley just say exactly.

Another officer also testified to what he heard on the tape after listening to it several times and getting A.A.'s assistance in deciphering the call:

> [A.A.] contacting the Defendant, asking if it's Stanaley, him indicating that it was him that she was speaking with, and then the conversation they had where she questioned him about, you know, why he did what he did. He asked, what do you mean? She said, you know, it's all over the fact that you had shot [J.J.]. [J.J.] is a nickname, if you will, for the victim in this case, [J.J.]. And the Defendant made some comment that that is what I live by. She further indicates that I don't get it, you know, why did you shoot the man that I'm with? The Defendant's response was, exactly.

Authentication

At the district court, appellant objected generally to the recording, but did not make any objection based on foundation or authentication. Therefore, we review appellant's claim that the recording lacked proper foundation for plain error. *See* Minn. R. Crim. P. 31.02. The plain-error standard places the burden on the complaining party to show: (1) error; (2) that was plain; and (3) that affected substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If all three prongs are met, this court "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotations omitted).

A duplicate recording "is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Minn. R. Evid. 1003. Here appellant challenges the authenticity of the original recording, and thus, the admissibility of the duplicate.

Appellant urges this court to apply the seven-factor test from *Furlev Sales & Assocs., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 27 n.9 (Minn. 1982), to determine whether the original recording was properly authenticated. *Furlev* involved the authentication of a tape-recorded conversation. *Id*. at 27–28. In that case, the district court concluded in a post-trial hearing that the recording had not been properly authenticated when the individual who participated in and recorded the conversation did not testify. *Id*. The supreme court agreed, but concluded that the error was harmless. *Id*.

The supreme court also identified "seven foundational elements that must be established before a tape recording can be admitted": (1) that the recording device was capable of taking testimony; (2) that the operator of the device was competent; (3) establishment of the authenticity or correctness of the recording; (4) that changes, additions, and deletions have not been made; (5) the manner of the preservation of the recording; (6) identification of the speakers; and (7) that the testimony elicited was voluntarily made without inducement. *Id*. at 27 n.9.

The state argues that *Furlev* has never been explicitly adopted by the supreme court, and points to *In re Welfare of S.A.M.*, 570 N.W.2d 162, 166 (Minn. App. 1997), where this court declined to apply the *Furlev* factors to the admission of a videotape. But the supreme court has continued to apply the *Furlev* factors to tape recordings; thus, they are applicable here. *See Turnage v. State*, 708 N.W.2d 535, 542 (Minn. 2006). In *Turnage*, the defendant challenged the admission of copies of digitally recorded workhouse phone conversations. *Id*. There, the supreme court found that the district court did not abuse its discretion in admitting the copies because the original tapes satisfied the *Furlev* factors, and the duplicate recordings satisfied Minn. R. Evid. 1003. *Id*. In that case, the state authenticated the original recordings by having the phone technician testify about the workhouse recording system and the standards and procedures used to record workhouse calls. *Id*.

Here, the state attempted to lay foundation for the recording through the testimony of an officer who made a second recording of the call when A.A. and her aunt brought the original to the police station. That officer testified generally that the duplicate

recording was a copy of what he heard on the original, but there was no testimony showing that the cell phone used to make the recording was reliable, or that the recording had not been altered before being brought to the police station. Although the caller identified himself as "Stanaley" on the recording, the identity of the caller only fulfills one of the *Furlev* factors. A.A., the other party to the call, and her aunt, the individual who recorded the call, did not testify. Accordingly, there was no testimony regarding the accuracy, correctness, or reliability of the original recording. In light of *Turnage*, admission of the duplicate recording without proper authentication of the original recording was plain error. *See id.*

A plain error affects substantial rights if there was a reasonable likelihood that the error substantially affected the verdict. *Strommen*, 648 N.W.2d at 688. Here, the state argued at a pre-trial hearing that the recording "is a critical piece of evidence because [appellant is] admitting . . . to the shooting." The jury heard the testimony of two police officers describing what they heard in the phone call. In closing argument, the state discussed the phone call at length, stating that during the call "[appellant] admitted shooting [J.J.], the nickname for [J.J.]." Because the contents of the call were heavily emphasized at trial, there is a reasonable likelihood that the admission of the recording substantially affected the verdict.

Hearsay Statements on the Recording

We also note that the recording contains statements made by A.A., which appellant argues are inadmissible hearsay. The state argues that A.A.'s statements and appellant's responses were, effectively, admissions of the defendant. A trial court's

evidentiary rulings are reviewed for an abuse of discretion. *Caulfield*, 722 N.W.2d at 308. For A.A.'s statements to be considered admissions of the defendant, and therefore not hearsay, they must qualify as adoptive admissions. *State v. Flores*, 595 N.W.2d 860, 867 (Minn. 1999). Hearsay statements of third parties become adoptive admissions when the party against whom they are offered has "manifested an adoption [of the statement] or belief in its truth." Minn. R. Evid. 801(d)(2)(B). The district court must make findings that the asserted adoptive admission was "manifested by conduct or statements which are *unequivocal*, *positive*, *and definite* in nature, *clearly showing* that in fact defendant intended to adopt the hearsay statements as his own." *State v. Goodridge*, 352 N.W.2d 384, 388 (Minn. 1984) (quotation omitted).

Here, it is unclear on what grounds the district court admitted the recording into evidence. Although the state argued that the recording contained adoptive admissions, there were no explicit findings by the district court to that effect. Thus, we conclude that the district court abused its discretion in admitting the recording without making the findings required by *Goodridge*. As discussed above, this error was not harmless, because the recording was a "critical piece" of evidence in the state's case. Because we reverse and remand the case for a new trial, we do not reach appellant's pro se argument that there was insufficient evidence to support his convictions.

Reversed and remanded.

Dated: _____ _____

Judge Natalie E. Hudson