This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2162

State of Minnesota,
Respondent,

vs.

Donald James Boyd,
Appellant.

Filed December 2, 2013
Affirmed
Kalitowski, Judge

Mille Lacs County District Court
File No. 48-CR-11-553

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

KALITOWSKI, Judge

Appellant Donald James Boyd argues that the evidence submitted at his trial was not sufficient to convict him of first-degree witness tampering and of terroristic threats,

that the district court abused its discretion in admitting a witness's prior statements, and that the district court erred in denying his motion for reconsideration of the verdict. We affirm.

D E C I S I O N

I.

After a bench trial, appellant was convicted of witness tampering, in violation of Minn. Stat. § 609.498, subd. 1(a) (2010), for telling D.K. that someone was "going to pay" if B.S., D.K.'s girlfriend and a potential witness in an unrelated burglary charge against appellant, did not get the charges against him dropped. Appellant contends that the evidence presented was insufficient to prove beyond a reasonable doubt that he committed first-degree witness tampering and maintains three arguments: the plain language of the statute does not encompass his conduct, the testimony at trial was insufficient to sustain his conviction, and the evidence was insufficient to establish the requisite intent element. We consider each in turn.

First, appellant argues that the evidence was insufficient to convict him because his conduct does not fall within the plain language of the statute. We disagree.

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). When interpreting a statute, an appellate court gives words and phrases their plain and ordinary meaning. *State v. Koenig*, 666 N.W.2d 366, 372 (Minn. 2003). "If a statute is unambiguous, then we must apply the statute's plain meaning." *Larson v. State*, 790 N.W.2d 700, 703

(Minn. 2010). Because the language of the statute here is unambiguous, we apply its plain meaning.

A person is guilty of tampering with a witness in the first degree if he "intentionally prevents or dissuades or intentionally attempts to prevent or dissuade by means of force or threats of injury to any person or property, a person who is or may become a witness from attending or testifying at any trial, proceeding, or inquiry authorized by law." Minn. Stat. § 609.498, subd. 1(a). Appellant's conduct fits within the plain language of the statute. Although B.S. had not been called as a witness in the burglary trial, threatening one who *may become* a witness is a crime within the plain language of the statute. Because B.S. may have become a witness in the unrelated trial against appellant, appellant's threat towards her constitutes witness tampering within the meaning of the statute.

Appellant also argues that the evidence was insufficient to sustain his conviction for witness tampering. In considering a claim of insufficient evidence, we are limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the finder of fact to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). "We review criminal bench trials the same as jury trials when determining whether the evidence is sufficient to sustain convictions," *Davis v. State*, 595 N.W.2d. 520, 525 (Minn. 1999), and must assume the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of

innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

This court shows great deference to a fact-finder's determinations of witness credibility. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd,* 508 U.S. 366, 113 S. Ct. 2130 (1993). And, in criminal cases, it is well settled that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact. *State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997). The district court expressly found the testimony of D.K. and B.S. to be credible. And our review of the record indicates that the testimony of D.K. and B.S. established the elements of witness tampering. Therefore, the district court did not err in concluding sufficient facts existed to convict appellant of the crime.

Finally, appellant argues that the evidence was insufficient to show he possessed the requisite intent to be convicted of witness tampering. First-degree witness tampering is a specific-intent crime. *State v. Collins*, 580 N.W.2d 36, 44 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). "Intentionally" means

> that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition, . . . the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally."

Minn. Stat. § 609.02, subd. 9(3) (2010).

Appellant contends that because circumstantial evidence was used to prove the intent element of the crime, a heightened standard of review applies. Under this heightened standard, we employ a two-step analysis. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). "The first step is to identify the circumstances proved. In identifying the circumstances proved, we defer 'to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.'" *Id.* at 598-99 (quoting *State v. Andersen*, 784 N.W.2d 320, 329 (Minn. 2010)). Additionally, we "construe conflicting evidence in the light most favorable to the verdict and assume that the jury believed the State's witnesses and disbelieved the defense witnesses." *Id.* at 599 (quotation omitted). "The second step is to determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotation omitted).

Assuming that this heightened standard applies, the evidence was sufficient to convict appellant. The district court found that appellant told D.K. that D.K. needed to speak with B.S. or someone was "going to pay," that B.S. has a daughter who was a potential witness in an unrelated burglary charge against appellant, that appellant wanted D.K. to talk to B.S. and persuade her to drop the charge, and that, when appellant talked to D.K., appellant mentioned that a "weapon" could be involved. These circumstances constitute evidence sufficient to prove that appellant committed witness tampering.

II.

Appellant contends that the evidence was insufficient to support his conviction for terroristic threats, arguing that the evidence does not show appellant made a threat within the meaning of the statute or possessed the requisite intent. We disagree.

A conviction for terroristic threats is appropriate for someone who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror or inconvenience . . . ." Minn. Stat. § 609.713, subd. 1 (2010). "A threat is a declaration of an intention to injure another or his property by some unlawful act." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). A communication constitutes a threat if, in context, it "would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* at 399, 237 N.W.2d at 613 (quotation omitted). Second-degree assault is a "violent crime." Minn. Stat. §§ 609.1095, subd. 1(d), .222, subd. 1 (2010).

Appellant argues that the heightened standard of review should apply to the definition of "threat" because it incorporates a mens rea element and therefore requires circumstantial evidence to prove its existence. If such is the case, both of appellant's arguments—that he did not make a threat and that he lacked the requisite intent to be convicted of terroristic threats—involve this heightened standard.

Respondent argues that the heightened standard does not apply. But even assuming that this standard applies, the evidence is sufficient to support appellant's conviction. The district court found that appellant told D.K. that D.K. needed to speak

with B.S. and persuade her to drop the burglary charge or someone was "going to pay." The district court also found credible D.K.'s testimony regarding the following facts: appellant told D.K. that appellant had recently purchased an AK-47 assault rifle, D.K. believed appellant would hurt his girlfriend, and D.K. left the conversation with appellant because D.K. was "upset." These findings are consistent with guilt and inconsistent with any other rational hypothesis except guilt. We therefore affirm appellant's conviction for terroristic threats.

III.

Appellant argues three prior statements of D.K. were improperly admitted as prior consistent statements under Minn. R. Evid. 801(d)(1)(B) and under the residual hearsay exception of Minn. R. Evid. 807. We disagree.

The admission of evidence rests within the broad discretion of the district court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion. *State v. Stevens*, 580 N.W.2d 75, 78 (Minn. App. 1998), *review denied* (Minn. Aug. 18, 1998).

Appellant contends that the district court erred in admitting, as a prior consistent statement, Officer Wall's testimony that D.K. told him that appellant asked D.K. to talk to B.S. about getting a charge dropped and, if he did not, someone would "have to pay." Appellant also argues that the admission of a transcript of a telephone conversation between Officer Wall, D.K., and B.S. as a prior consistent statement was erroneous.

Minnesota Rule of Evidence 801(d)(1)(B) provides that

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing 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.

In considering whether to admit a statement as a prior consistent statement, the district court must determine whether the witness's credibility has been challenged, whether the prior statement would be helpful to the fact-finder in evaluating the witness's credibility, and whether the prior statement and trial testimony are consistent. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Because appellant concedes that D.K.'s credibility was challenged and that a prior consistent statement would be helpful to the trier of fact in evaluating D.K.'s credibility, we need only determine whether the statements were sufficiently consistent to withstand abuse of discretion review.

Trial testimony and prior statements need not be verbatim to be considered consistent. *Id.* at 109; *see also State v. Zulu*, 706 N.W.2d 919, 924 (Minn. App. 2005) (stating that trial testimony and the prior statement need not be identical). Admission of "reasonably consistent" statements does not constitute reversible error. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). But where inconsistencies directly affect the elements of the criminal charge, the consistency requirement is not satisfied, and the prior inconsistent statements may not be received as substantive evidence. *Bakken*, 604 N.W.2d at 110.

Although minor discrepancies exist between the testimony of D.K. and of Officer Wall and between D.K.'s testimony and the contents of the transcript, the statements

were generally consistent. Thus, the district court did not err in considering them reasonably consistent to admit as prior consistent statements.

Appellant also argues that the transcript of D.K.'s January 28, 2011 phone call to Officer Wall was improperly admitted under the residual exception. We disagree.

The Minnesota Rules of Evidence provide that:

> A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (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. "In considering the reliability of statements offered under the residual exception, courts follow the totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of trustworthiness equivalent to other hearsay exceptions." *State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (quotation and citation omitted). The party seeking admission of an out-of-court statement bears the burden of showing that "the totality of the circumstances surrounding the making of the statements show[s] the statements were sufficiently trustworthy—that is, that it is particularly likely that the declarant was telling the truth at the time of making the statements." *Id.* at 260-61 (quotation and citation omitted).

We conclude that the transcript meets these criteria. Although D.K.'s testimony was not necessarily against his penal interest, D.K. was declared a hostile witness to the state. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004) (noting that a statement may be admissible under the residual exception "if the declarant is hostile to the state and supportive of the defendant"). The statements related to D.K.'s personal knowledge. *See State v. Her*, 750 N.W.2d 258, 275 (Minn. 2008) (identifying as a factor whether the statement relates to the declarant's personal knowledge). Under the totality of the circumstances, the district court did not abuse its discretion by admitting the transcript under the residual exception.

IV.

Appellant argues that, if we do affirm his conviction, we should reverse the district court's denial of his motion for reconsideration of the verdict based on the alleged recantation by witness D.K. We disagree.

"Courts have traditionally looked with disfavor on motions for a new trial based on recantations unless extraordinary or unusual circumstances exist." *Daniels v. State*, 447 N.W.2d 187, 188 (Minn. 1989). "When assessing the merits of a claim based on false or recanted testimony, we apply the test set forth in *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928)." *Roby v. State*, 808 N.W.2d 20, 27 n.6 (Minn. 2011). The "*Larrison* test" provides that a new trial may be granted on the grounds of false testimony where (1) the court is reasonably well satisfied that the testimony was false; (2) the jury might have reached a different conclusion without the testimony; (3) the petitioner was surprised by the testimony and was unable to counteract it or did not know

it was false until after the trial. *State v. Nicks*, 831 N.W.2d 493, 511 (Minn. 2013); *Dobbins v. State*, 788 N.W.2d 719, 733 (Minn. 2010).

Here, the procedural posture of appellant's motion is unusual. Appellant's counsel received a fax from D.K. purporting to recant his testimony on the morning of appellant's sentencing hearing. Because more than 15 days had passed since appellant was convicted, the time for filing a motion for a new trial under Minn. R. Crim. P. 26.04, subd. 1(3), had passed. But, at the time appellant brought D.K.'s statement to the district court's attention, appellant had not been sentenced, so postconviction relief was not proper. Nevertheless, the district court analyzed appellant's claim under *Larrison* and concluded an evidentiary hearing on the matter was not necessary because the court was not reasonably well satisfied that D.K.'s testimony was false. Because we conclude that the district court's analysis and conclusion were based on its credibility determination and were supported by the record, we affirm the district court's denial of appellant's motion for reconsideration of the verdict.

V.

In his pro se supplemental brief, appellant requests that the court reverse his conviction. "Claims contained in a pro se supplemental brief with no argument or citation to legal authority in support of the allegations are deemed waived." *State v. Palmer*, 803 N.W.2d 727, 741 (Minn. 2011) (quotation omitted). We do not consider arguments a defendant has waived in this way "unless 'prejudicial error is obvious on mere inspection.'" *Id.* (quoting *State v. Bartylla*, 755 N.W.2d 8, 23 (Minn. 2008)).

Because appellant fails to cite to the record or any legal authority in support of his argument, the argument raised in his pro se brief is deemed waived.

Affirmed.