STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2188

State of Minnesota,
Respondent,

vs.

Steven Moua,
Appellant.

Filed November 18, 2013
Affirmed
Stauber, Judge

Ramsey County District Court
File No. 62CR117535

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his conviction of third-degree assault, appellant argues that he did not receive a fair trial because out-of-court statements made by the complainant identifying her attacker were erroneously admitted by the district court. We affirm.

FACTS

On September 12, 2011, a witness, S.P., called the police when she saw her neighbor, A.C., being attacked by an unknown assailant. When the police arrived they saw that A.C. was bleeding from a laceration above her right eye and her eye was very swollen. A.C. reported that she was outside her apartment when an unknown "guy" approached. She ran, but he caught her, punched her in the face, and then fled. A.C. was taken to Regions Hospital to receive treatment for her injuries, and she allegedly told hospital staff that appellant Steven Moua, the father of A.C.'s two young children, attacked her following an argument. In a follow-up interview with police, A.C. again identified appellant as her attacker. Appellant was arrested and admitted to arguing with A.C. prior to the incident, but denied hitting her. Appellant was charged with third-degree assault under Minn. Stat. § 609.223, subd. 1 (2010).

In the spring of 2012, A.C. recanted and told a police officer that the person who actually attacked her was her then boyfriend, Y.L. At trial, numerous hearsay statements were admitted to show that A.C.'s initial identification of appellant as her attacker was accurate. A.C.'s neighbor, S.P., testified that immediately following the incident A.C. said that her "baby dad" hit her. Officer Michael Dollerschell, who interviewed A.C.

three days after the incident, testified that A.C. told him that appellant was the person who hit her. Dr. Eric Dahl, who treated A.C.'s injuries at Regions Hospital, stated that she would not tell him who hit her, but she did say that it was someone she knew. Social worker Rosanne Kassekert who interviewed A.C. at Regions Hospital could not remember speaking with A.C., but was allowed to read from her notes, which stated that A.C. told her that appellant struck her. A.C. testified that her boyfriend, Y.L., was the person who attacked her, and that she previously identified appellant as the assailant because she was pressured to do so by the police. Appellant objected to the admission of the statements from Officer Dollerschell, Dr. Dahl, and Kassekert, but the district court overruled the objection, concluding that the hearsay statements were admissible under various hearsay exceptions.

At the conclusion of trial, the jury found appellant guilty. Appellant was sentenced to 21 months in prison, stayed, and 180 days in the county jail. This appeal followed.

D E C I S I O N

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*. Evidentiary errors warrant a new trial "only when the error substantially influences the jury's decision." *State v. Valtierra*, 718 N.W.2d 425, 435 (Minn. 2006) (quotation omitted).

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.

I. Victim's statement to Officer Dollerschell

Appellant argues that Officer Dollerschell's statement that the victim, A.C., told him that appellant struck her was inadmissible hearsay. At trial, appellant objected to the admission of this statement, but the district court allowed the testimony as a prior inconsistent statement. Minn. R. Evid. 613(b) provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded a prior opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Such evidence is admissible for impeachment purposes. Minn. R. Evid. 613(b) 1977 comm. cmt.

Appellant argues that the statement was not admissible under rule 613(b) because the state did not comply with the requirement that the witness be given an opportunity to explain or deny the statement since A.C. was never directly confronted with her statement to Officer Dollerschell, and there was no finding that the interest of justice required the statement to be admitted. The state concedes that A.C. was never confronted with her statement to Officer Dollerschell, but argues that the rule's precondition was satisfied when A.C. testified in general about her reasons for recanting her prior identification of appellant as her attacker.

We conclude that the state should have confronted A.C. with her prior inconsistent statement, but that the failure to do so was not prejudicial. Comments to rule 613 state that the rule "continue[s] the existing practice of requiring prior disclosure to the witness and an opportunity to explain before offering a prior inconsistent statement into evidence." Minn. R. Evid. 613(b) 1977 comm. cmt. "The purposes of requiring a foundation are (1) to avoid unfair surprise to the adversary; (2) to save time, as an admission by the witness may make the extrinsic proof unnecessary; and (3) to give the witness, in fairness to him, a chance to explain the discrepancy." *Carroll v. Pratt*, 247 Minn. 198, 203, 76 N.W.2d 693, 697-98 (1956).

There are no recent Minnesota cases on point, but rule 613(b) is nearly identical to Fed. R. Evid. 613(b);[1] therefore, federal cases interpreting the rule are persuasive. The Eighth Circuit Court of Appeals has stated that "impeachment of a witness by a prior inconsistent statement is *normally* allowed only when the witness is first provided an opportunity to explain or deny the statement." *U.S. v. Schnapp*, 322 F.3d 564, 571 n.6 (8th Cir. 2003). The court concluded that, even though the witness could have been recalled to testify regarding the prior statement, it was not an abuse of discretion for the district court to disallow the statement. *Id.* at 572.

[1] Prior to the 2011 "restyling" of the federal rules of evidence, Fed. R. Evid. 613(b) was identical to Minn. R. Evid. 613(b) word-for-word, except that in the Minnesota rule the witness must be "afforded a *prior* opportunity to explain or deny" the statement, whereas in the federal rule the witness need only be "*afforded an opportunity* to explain or deny" the statement. *Compare* Minn. R. Evid. 613(b) (emphasis added) *with* Fed. R. Evid. 613(b) (emphasis added).

Moreover, the Federal Rules Advisory Committee attempted to revise the rules to allow for the admissibility of a prior inconsistent statement as substantive evidence, which would have done away with the necessity of laying a foundation for impeachment. Fed. R. Evid. 801, advisory comm. notes, 1974 enactment, note to subdivision (d)(1). But "[c]ongress balked at embracing the Advisory Committee's sweeping position," and rejected the proposed change. 1 Charles T. McCormick, *McCormick on Evidence* § 37 at 223 (Kenneth S. Broun, et. al. eds., 7th ed. 2013). "Thus, the traditional foundation requirement still serves the useful function of encouraging the jury to consider a prior inconsistent statement solely as to credibility and not as substantive evidence." *Id.* at 224. Therefore, we conclude that the state was required to confront A.C. with her prior inconsistent statement as a precondition to the admissibility of that statement.

But appellant is only entitled to a new trial if the erroneous admission of evidence was sufficiently prejudicial. The error "is harmless if there is no reasonable probability that the wrongfully admitted evidence significantly affected the verdict." *State v. Robinson*, 718 N.W.2d 400, 407 (Minn. 2006) (quotation omitted). In conducting this analysis, we consider "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether the defense effectively countered it." *Townsend v. State*, 646 N.W.2d 218, 223 (Minn. 2002). Although the prosecution made reference to A.C.'s statements to her neighbor, and to Dr. Dahl and Kassekert at Regions Hospital, the prosecution made no mention of her statement to Officer Dollerschell during closing argument. And because other admissible evidence tended to show that appellant was the assailant, we conclude that the admission

of A.C.'s prior statement to the police did not significantly affect the verdict. Because we conclude that the admission of this statement was harmless error, we do not consider the state's other theories of admissibility.

II. Victim's statement to social worker Kassekert

Kassekert was working as a social worker at Regions Hospital where A.C. was taken for treatment. Kassekert could not recall seeing A.C., but had written a report documenting her interaction with A.C. Kassekert attempted to refresh her memory with the report, but after reviewing her notes she still could not recall interviewing A.C. The district court allowed Kassekert to read a portion of her notes into the record under Minn. R. Evid. 803(5), which allows for the admission of recorded recollections. Kassekert's notes contained a statement from A.C. identifying appellant as her attacker. The district court allowed A.C.'s statement contained within Kassekert's report to be admitted as a prior inconsistent statement under Minn. R. Evid. 613(b).

Appellant argues that Kassekert's notes were not admissible under rule 803(5) because the rule requires the witness to adopt the statement, and because the notes were hearsay-within-hearsay it was A.C., not Kassekert, who was required to adopt the statement. We disagree. Minn. R. Evid. 803(5) provides that "the following [is] not excluded by the hearsay rule":

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately, shown to have been *made or adopted by the witness* when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be

> read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(Emphasis added.) As appellant correctly observed, Kasskert's statement contained hearsay within hearsay: her written notes were hearsay, and A.C.'s statements to Kassekert contained in the notes were hearsay. *See* Minn. R. Evid. 801(c). Minn. R. Evid. 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Therefore, there must be a hearsay exception that applies to Kassekert's notes and a hearsay exception that applies to A.C.'s statement to Kassekert for both to be admissible. The district court concluded that Kassekert's notes could come in under rule 803(5) for a recorded recollection, and that A.C.'s statement to Kasskert could come in under rule 613(b) for a prior inconsistent statement.

We conclude that Kassekert's notes were admissible under rule 803(5). The notes were a written memorandum that concerned a matter about which the witness, Kassekert, once had knowledge but at the time of trial had an insufficient ability to remember the events. The memorandum was made by Kassekert—they were her notes. And, the memorandum was read into evidence, but was not received as an exhibit. Thus, all the requirements of rule 803(5) were satisfied.

For A.C.'s statement contained within Kassekert's notes to be admissible as a prior inconsistent statement, the procedural requirements described previously under rule 613(b) must have been followed. In this instance, the state followed the correct procedure. During A.C.'s testimony, she was asked about what she told the "medical

staff at Regions Hospital." A.C. denied telling anyone at Regions that appellant hit her, and that all she said was that appellant was the father of her children. The prosecutor showed A.C. a document to refresh her memory, and even after reviewing the document, A.C. again denied making the statement that it was appellant who hit her. Because A.C. denied making the statement, it was appropriate to admit Kassekert's notes as extrinsic evidence of A.C.'s prior inconsistent statement. *See* Minn. R. Evid. 613(b) 1977 comm. cmt. (observing that confronting the witness with her prior statement "would obviate the necessity for proof by extrinsic evidence if the witness admits making the inconsistent statement"). Because we conclude that this statement was admissible, we decline to consider the state's other theories of admissibility.

III. Victim's statement to Dr. Dahl

Dr. Dahl was working as a resident in his second year at Regions Hospital on the night A.C. was brought in for treatment of her injuries. Dr. Dahl treated A.C. and asked her about the source of her injuries. A.C. refused to tell him who assaulted her, but did say that it was someone she knew. Appellant objected to the introduction of this statement on hearsay grounds, but the court admitted the statement as a statement for purposes of medical diagnosis or treatment under Minn. R. Evid. 803(4).

Appellant argues that the statement should not have been admitted because the identity of A.C.'s attacker was not necessary for the treatment of her injuries. Minn. R. Evid. 803(4) provides for the admissibility of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof

insofar as reasonably pertinent to diagnosis or treatment." "The rationale behind the rule is the patient's belief that accuracy is essential to effective treatment." *Robinson*, 718 N.W.2d at 404 (quotation omitted). "In contrast to the general notion that statements explaining the cause of an injury are admissible under the medical diagnosis exception, statements attributing fault, including statements identifying the accused perpetrator, are ordinarily not admissible." *Id.* However, if there is evidence that the identity of the perpetrator was necessary to the medical diagnosis or treatment, for instance where there is a demonstrated pattern of battery or psychological abuse, the identity of the perpetrator may be admissible under this exception. *Id.* at 407.

Dr. Dahl testified that he asked A.C. about the source of her injuries in order to ensure her safety. He said that, after a patient leaves the E.R., "if they go back into the same situation that the assault occurred in, what's to say it won't happen again that they sustain more injuries? So we want them safe." There was no testimony regarding a pattern of battery or psychological abuse. Therefore, it is questionable whether the statement was necessary for treatment, and thus whether it was admissible under rule 803(4).

But appellant has failed to show that the admission of the statement resulted in prejudice. Appellant's theory of the case was that A.C. was attacked by her boyfriend, Y.L., and not by appellant. A.C.'s statement to Dr. Dahl that she was attacked by someone she knew was consistent with appellant's trial strategy. Therefore, even if the

statement was erroneously admitted, the error was harmless. *See Robinson*, 718 N.W.2d at 407.

Affirmed.