STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2285

In the Matter of the Welfare of: A. L. H., Child

Filed July 15, 2013
Affirmed
Hooten, Judge

Otter Tail County District Court
File No. 56-JV-12-3284

David W. Merchant, Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant A.L.H.)

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

David J. Hauser, Otter Tail County Attorney, Nicole S.C. Hansen, Assistant County Attorney, Fergus Falls, Minnesota (for respondent county)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Klaphake, Judge.*

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

HOOTEN, Judge

Appellant, in a juvenile delinquency proceeding, challenges the district court's decision to admit a recorded statement which had been given to police by another juvenile. Because any error in admitting the evidence is harmless, we affirm.

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

FACTS

Appellant A.L.H. was charged with theft by intent to exercise temporary control, theft of property, and carrying a weapon in a public place. At a bench trial, S.K., a witness called by the state, testified that sometime between 7:00 and 9:00 p.m. on the night of November 3, 2012, appellant, along with two other individuals, L.W. and Q.W., came into her house and "pulled a gun out of his pants leg." Recognizing the gun, she responded by asking why he had taken "that gun out of [D.A.'s] house," to which appellant stated "I'm gonna go rob me some mother f---ers." S.K. then "pushed him into the back into [her] room," told him he was "not going to do this," and demanded that he give her the gun. However, appellant "just brushed past [her] and went back out [of her] house with the gun in his hand with [Q.W.] and [L.W.]," so she called the police. S.K. testified that she recognized the gun because she was friends with a person named D.A., and had "seen [the gun] in [D.A.'s] bedroom propped against the wall by her bed." S.K. identified D.A.'s gun in the courtroom as the gun in question.

The parties stipulated to playing and admitting a recording of S.K.'s 911 call, in which S.K stated that her "little cousin is walking down the street with a shotgun," that there were two boys together, and identified appellant by name as having the gun. S.K. also stated that she was "walking down the street" to D.A.'s house to tell her that appellant took her gun. S.K. indicated that she could see one of the boys running towards D.A.'s house.[1]

[1] At the time of the incident, S.K. and D.A. lived about three blocks apart on the same street in Fergus Falls.

D.A. confirmed that appellant, L.W., Q.W., and two other individuals were at her home on November 3, 2012, and that they stayed there when she left around 7:30 or 8:00 p.m. D.A. testified that she had owned a shotgun for about a year, that she kept it "by the dresser in the corner away from the bed all of the time," and that she had never given anyone, including appellant, permission to take or use the shotgun. D.A. testified that she had spoken with police around 11:30 or 11:45 p.m. about the shotgun, but did not remember much about the conversation. D.A. testified that she got home sometime later that night. Police came to her home the next day and found the shotgun under D.A.'s bed. D.A. acknowledged that she had "no personal knowledge whether that gun left [her] house" or "who moved it from the corner to under the bed." D.A. further testified that appellant was at her home the next day because "[h]e had to turn himself in," which she helped him do.

Appellant disputed most of S.K.'s testimony. He testified that, on November 3, 2012, he was at D.A.'s house "playing a game, [and] watching a movie," with his little brother, his younger brother's friend, L.W., and Q.W. Appellant testified that his brother and his brother's friend left, and he, L.W., and Q.W. stayed there and played a game for about half an hour. At some point after that, he went into the kitchen to get something to eat, went upstairs, used the bathroom, and then told the others they should go. Appellant denied ever possessing the shotgun, knowing that D.A. owned a shotgun, or entering D.A.'s bedroom. Although he admitted that they stopped at S.K.'s house, they did not stay there because S.K. was drunk. After leaving S.K.'s house, he, L.W., and Q.W. split up, and he went to the house of his brother's friend, where he learned that the police were

looking for him. Appellant spent the night at the home of his brother's friend and returned to D.A.'s home the next morning, where he was arrested.

L.W. testified that he was at D.A.'s home that night, playing video games with appellant and Q.W. He acknowledged that he told a police officer that, as he was playing video games with Q.W., appellant walked around D.A.'s home for a few minutes. L.W. testified that they left D.A.'s home at some point and went to S.K.'s home, though he explained that they did not go there "right after but [] ended up there." L.W. testified that, at S.K.'s home, he spoke with S.K.'s boyfriend while S.K. spoke to appellant in a back room. Although L.W. initially denied that he heard an argument between appellant and S.K., he later testified that he heard S.K. yelling at appellant, but did not know what it was about. L.W. denied that he saw appellant with a gun, and stated that they left the house when appellant came out of the back room at S.K.'s house. L.W. acknowledged that he had given a recorded statement to a police officer, and that his statement was accurate. However, L.W. stated that he did not remember telling the officer that S.K. was questioning appellant about taking the shotgun from D.A.'s house. Further, L.W. denied telling the police officer that appellant "came out of the back room carrying a shotgun."

During L.W.'s testimony, the prosecutor offered the recorded statement into evidence, to which appellant's attorney objected, arguing that "the testimony he's presenting today is what he remembers and what's accurate." The district court overruled the objection and allowed the entire audio recording of L.W.'s conversation with police to be played and admitted the recording and transcript of the recording as exhibits over appellant's attorney's objection.

In the recorded statement, L.W. recounted the events of the evening leading up to leaving D.A.'s house as he did at trial. However, L.W. told the officer that as soon as he, appellant, and Q.W. arrived at S.K.'s house, S.K. yelled at appellant and "took him into a back room to talk to him and she came out yelling at him, and she says, 'Why did you take that lady's gun?'" L.W. stated that that was "how [he] found out [appellant] had it." L.W. stated that appellant put the gun in his pants and they walked back towards D.A.'s house, but that appellant separated from them thereafter.

On cross-examination, L.W. reiterated that he did not remember seeing appellant with a gun. However, L.W. testified that he heard "little bits and pieces" of the conversation between appellant and S.K., and that he and appellant "went separate ways" without any discussion after leaving the house. On re-direct, L.W. again denied that he told the officer that appellant had a gun, claiming that "they skipped stuff in that recording" because he remembered that he said he never saw a gun and did not know if appellant had a gun. L.W. admitted that he was "not excited about testifying," "didn't want to come," and had asked "what would happen if [he] didn't say anything at all."

Finally, the prosecution called the investigating police officer to testify. The officer testified that, shortly after 10 p.m. on November 3, 2012, he responded to a call about a person with a shotgun. He explained that he first encountered S.K. and then, further down the road, made contact with L.W., appellant's brother, and a friend of appellant's brother. According to the officer, they stated that "they were with the individual that had taken the firearm, but none of them were involved in the actual taking

of the firearm." Police could not locate appellant that night, but on the next day, found appellant, along with his mother and D.A., at D.A.'s home.

Appellant's mother testified that appellant was at D.A.'s home that night, but was not aware that he went to S.K.'s home. Appellant's mother stated that she had lived with S.K. for a month and that S.K. was making false allegations against her son because she was angry that she moved out. Appellant's mother complained that S.K. was "a really bad person," came home late, loudly played music, took food that appellant's mother purchased for her children, and called and left insulting voicemail messages just a week before the trial. S.K. denied that she was upset that appellant's mother moved out of her home, but indicated she "was confused at the reason why [appellant's mother] left because she was telling a lot of lies to people, but I didn't even know she left my house."

In its findings of fact, conclusions of law, and order, the district court summarized the testimony of the witnesses and noted the audio recording of L.W.'s interview only to the extent that it corroborated S.K.'s testimony that she took appellant "into a back room to talk to him," and that S.K. asked appellant "about a gun and why he took it from that 'lady.'" The district court found appellant guilty of theft with intent to exercise temporary control and carrying a weapon in a public place and found appellant not guilty of theft with intent to permanently deprive the owner of possession. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion by admitting the recording of L.W.'s interview with police. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion."

State v. Carridine, 812 N.W.2d 130, 141 (Minn. 2012) (quotation omitted). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). "[A]ppellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Holliday*, 745 N.W.2d 556, 568 (Minn. 2008) (quotation omitted).

"'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 not admissible" except as allowed by the rules of evidence or by other court rules or statutes. Minn. R. Evid. 802.

The state argues that L.W.'s interview was admissible as a recorded recollection.[2]

> 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.

Minn. R. Evid. 803(5). Three elements must be satisfied before admitting evidence under this rule: "(1) the recording [must] constitute[] a 'memorandum or record'; (2) [the declarant must have] 'insufficient recollection to testify fully and accurately'; and (3) the statement [must be] 'shown to have been made or adopted by the witness when the matter

[2] Because the state does not contest appellant's claim that the recording was inadmissible under Minn. R. Evid. 801(a)(1)(A) and (D), we decline to address these issues, or other issues relating to the use of the recording for impeachment.

was fresh in the witness' memory.'" *State v. Stone*, 784 N.W.2d 367, 370–71 (Minn. 2010) (quoting Minn. R. Evid. 803(5)). "A memorandum or record can only qualify as a recorded recollection if, upon a witness's use of 'a writing to refresh memory for the purpose of testifying,' a witness has an 'insufficient recollection to testify fully and accurately.'" *Id.* at 371 (quoting Minn. R. Evid. 612 and 803(5)) (citation omitted). However, this rule "does not require the witness to have a total absence of memory of the event about which he is testifying." *Id.* at 372.

While there is sufficient evidence that the recording of L.W.'s interview qualified as a memorandum or record and that the recording was "made or adopted" by L.W. within the meaning of rule 803(5), the district court, under the circumstances of this case, nonetheless erred in playing and admitting the entire recording at trial. First, rule 803(5) only allows a record to refresh the memory of a witness who "once had knowledge," but could not recollect his former statements. L.W. testified about the incident without indicating that he had an "insufficient recollection to testify fully and accurately," such that the recorded recollection was necessary. While the prosecutor may have disagreed with L.W.'s testimony, there was nothing to indicate that his testimony resulted from an insufficient recollection, rather than, among other possibilities, his admitted reluctance to testify at trial.

Second, the state did not attempt to use L.W.'s recorded interview as a means of refreshing L.W.'s "memory for the purpose of testifying" under Minn. R. Evid. 612. *See Stone*, 784 N.W.2d at 371 (requiring that the witness have "an insufficient recollection"

"upon a witness's use of a writing to refresh memory for the purpose of testifying" in order for a recording to be admissible under rule 803(5) (quotations omitted)).

Third, there was no reason given by the state, or the district court, for playing the entire recording in open court as part of the state's case-in-chief. Even accepting the state's arguments that the recording was utilized to refresh L.W.'s memory, his recorded statement was essentially consistent with his trial testimony except for his testimony that he did not see appellant with the gun and did not hear an argument between S.K. and appellant regarding appellant's possession of the gun.

Finally, because appellant did not offer the exhibit into evidence, and because there was no explanation for receiving the recording as an exhibit, the district court erred in admitting the recording as an exhibit under rule 803(5). Minn. R. Evid. 803(5) ("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.").

However, "'[e]ven where the district court abuses its discretion, the court's evidentiary ruling will not be reversed unless the error substantially influenced the jury's verdict.'" *Carridine*, 812 N.W.2d at 141 (alteration in original) (quoting *Stone*, 784 N.W.2d at 370). Alternatively stated, erroneously admitting evidence "is harmless if there is no reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *Holliday*, 745 N.W.2d at 568 (quotation omitted). The erroneously admitted evidence "significantly affected the verdict . . . if there is a reasonable possibility that the verdict might have been more favorable to the defendant if the evidence had not been admitted." *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994).

When compared to the evidence as a whole, L.W.'s recorded statement was a minor part of the state's case. Even more significantly, the recorded statement did not provide any evidence not present in other testimony. The most relevant statements in L.W.'s recorded statement were that he heard S.K. yell at appellant for having D.A.'s gun and that he saw appellant with the gun on November 3, 2012. But those statements were duplicative of S.K.'s testimony that she saw appellant with the gun at her home, recognized it as D.A.'s shotgun, and yelled at appellant for having the gun. L.W.'s credibility was also brought into question by the tone and content of the state's cross-examination questioning of L.W., and by L.W.'s equivocal answers.[3]

Appellant argues that, outside of L.W.'s recorded statement, the only evidence to support appellant's guilt was S.K.'s testimony, and appellant's mother testified that S.K. had a grudge against her and her family. But, in reaching its decision, the district court implicitly credited S.K.'s testimony, rather than testimony from L.W. and appellant, because it found appellant possessed the gun outside of D.A.'s home that night, despite conflicting testimony from L.W. and appellant. This court defers to this credibility determination. *State v. Watkins*, 650 N.W.2d 738, 741 (Minn. App. 2002).

Given the district court's resolution of conflicting testimony and the evidentiary support for the district court's finding of guilt, we conclude that the admission of the

[3] For example, L.W. denied that appellant and S.K. were arguing in the back room of S.K.'s house. However, he later agreed that he heard S.K. "yelling" at appellant in the back room, but claimed that S.K.'s yelling at him "doesn't mean they're arguing."

recorded statement did not significantly affect the outcome of the trial. Therefore, any error in playing and admitting the recording was harmless.

Affirmed.