STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1468

State of Minnesota,
Respondent,

vs.

Travis Kadel,
Appellant.

Filed December 9, 2008
Affirmed
Crippen, Judge[*]

Otter Tail County District Court
File No. K8-07-340

Lori Swanson, Attorney General, Kristi Ann Nielsen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

David J. Hauser, Otter Tail County Courthouse, 121 W. Junius Avenue, Suite 320, Fergus Falls, MN 56537 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Karin Gaitas, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Minge, Judge; and Crippen, Judge.

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[*] 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

CRIPPEN, Judge

Appellant Travis Kadel was charged with first- and third-degree assault for hitting his girlfriend, K.A., in the face. The district court jury found appellant guilty on both counts, and the court sentenced him to an executed term of 189 months.

On appeal, appellant raises a number of evidentiary issues, including a challenge to the admissibility of several out-of-court statements made by K.A. that contradicted her trial testimony. Because these statements are admissible under the residual exception to the hearsay rule, and because appellant's additional claims are without merit, we affirm.

FACTS

In the early morning hours of February 28, 2007, Fergus Falls police officer Paul Peterson was dispatched to the hospital emergency room to meet with K.A. K.A. was reluctant to call the police, but hospital personnel believed that her injuries, which included broken facial bones, were severe enough to require a mandated report. She told Peterson that three unknown individuals had assaulted her behind a house in Fergus Falls.

The next day, Peterson received information from others that appellant had assaulted K.A. When Peterson confronted K.A. with these reports, she stated "Well, you guys aren't dumb." On March 1, K.A. provided police with tape-recorded and written statements in which she indicated that appellant had punched her in the face. Toward the end of the taped statement, K.A. asked about getting an order for protection against appellant. Later that day, K.A. assisted police by luring appellant to the motel where they

had been staying so that police could arrest him. K.A. obtained a protection order against appellant several days later, on March 5, 2007.

On March 7, K.A. called Peterson to report that she was worried about Jose Gonzalez's behavior. Gonzalez lived in the basement of the residence where the assault had occurred. K.A. reported that Gonzalez had a gun, which he had been firing at road signs and animals, and that she was afraid of what Gonzalez might do. Gonzalez, a convicted felon, was arrested and charged with a weapons offense. Thereafter, K.A. made statements to a defense investigator that it was Gonzalez, not appellant, who had hit her in the face on February 27.

The district court denied a defense motion to preclude the prosecutor from calling K.A. to testify. K.A. testified that she was a heavy methamphetamine user who had several prior convictions. She stated that she worked as Gonzalez's driver and that in exchange, he gave her drugs and a room at a motel, where she and appellant stayed. She claimed that Gonzalez had a gun and that she was afraid of him, but that she continued to associate with him because of her drug habit. K.A. testified that on the day of the assault, appellant made a few attempts to get her to leave Gonzalez's apartment, and that after appellant's final visit to the apartment, Gonzalez struck her in the face.

K.A. testified that she was not sure what to tell Officer Peterson when he came to the emergency room that night, so she made up the story about three attackers. She explained that she later blamed appellant for the assault because Gonzalez told her to do so. K.A. claimed that she continued to implicate appellant because she was afraid and dependent on Gonzalez, but that once Gonzalez was arrested she could tell the real story.

D E C I S I O N

1.

Appellant asserts that the district court committed reversible error when it allowed the prosecutor to call K.A. to the stand solely to impeach her with her prior inconsistent statements. *See State v. Dexter*, 269 N.W.2d 721, 721-22 (Minn. 1978) (per curiam) (holding that state is not entitled to impeach "its own witness with extrinsic evidence of prior inconsistent statement[s] [witness] allegedly made to friends").

The prosecutor was allowed to introduce the statements that K.A. provided to Officer Peterson several days after the incident. In addition, K.A.'s parents testified that K.A. told each of them that appellant had hit her, and her father testified that she was considering blaming Gonzalez for the attack. Gonzalez also testified that immediately after the assault, K.A. told him that appellant hit her in the face.

Generally, a witness's prior inconsistent statements that are not made under oath are admissible only for impeachment purposes, and not to prove the truth of matters asserted in them. *See* Minn. R. Evid. 613(b); 801(d)(1)(A). But a witness's statements may be admitted as substantive evidence if they come within an exception to the hearsay rule. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). The district court determined that K.A.'s statements were admissible under the residual exception to the hearsay rule.

"Appellate courts largely defer to the [district] court's exercise of discretion in evidentiary matters and will not lightly overturn a [district] court's evidentiary ruling." *State v. Kelly*, 435 N.W.2d 807, 813 (Minn. 1989). The trial court's "determination that a statement meets the foundational requirements of a hearsay exception will not be found

erroneous absent a clear showing of abuse of discretion." *State v. Buggs*, 581 N.W.2d 329, 334 (Minn. 1998).

The district court did not err in determining that K.A.'s statements are admissible under the residual exception, which allows evidence of a statement not otherwise covered by an exception or exclusion if it has "equivalent circumstantial guarantees of trustworthiness." Minn. R. Evid. 807. Under the rule, the admission of the statements must serve "the interests of justice," and the statement must be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." *Id*. The court must examine the "totality of the circumstances" to assess whether a statement has sufficient circumstantial "guarantees of trustworthiness to be admissible under the" residual exception. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007); *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006).

In *Ortlepp*, 363 N.W.2d at 44, the supreme court reviewed whether the confession of a co-conspirator, who later recanted and repudiated the confession at trial, was admissible under Minn. R. Evid. 803(24), which is a prior version of rule 807. The court considered whether the witness was available for cross-examination, whether there was proof that the prior statement was made, whether the statement was against the witness's penal interest, and whether the statement was consistent with all the other evidence introduced. *Ortlepp*, 363 N.W.2d at 44. These factors "are not an exclusive list of the indicia of reliability." *Martinez*, 725 N.W.2d at 738.

Appellant asserts that when K.A. made her statements she did not perceive them to be against her interest because she explained that she was afraid of Gonzalez. Appellant

also asserts that K.A.'s statements were not necessarily consistent with all the other evidence, but were just as consistent with her trial testimony that Gonzalez was her assailant. But we conclude that the district court did not abuse its discretion in determining that K.A.'s out-of-court statements had sufficient circumstantial guarantees of trustworthiness.

K.A. testified at trial, was subject to cross-examination, and conceded that she met with Officer Peterson even though she did not initially recall making any statements to him. Although K.A. was not specifically asked about the statements she made to her mother, father, or Gonzalez, she did not deny that she had implicated appellant for a period of time or otherwise deny that she made statements to these individuals during that period of time. *See State v. Jones*, 755 N.W.2d 341, 353 (Minn. App. 2008) (holding that "there [was] no meaningful dispute as to the statements or their content" when girlfriend merely offered explanation of statements and did not directly refute that she had made them), *pet. for review filed* (Minn. Oct. 2, 2008). K.A.'s prior statements were consistent with each other and with other evidence presented by the state during trial. And K.A.'s statements were against her interest because they incriminated her boyfriend and she was openly hostile to the prosecution by the time she testified at trial. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (holding that girlfriend's prior statements incriminating boyfriend were against her interest "because she was clearly hostile to the prosecution and supportive of her boyfriend"), *review denied* (Minn. Sept. 29, 2004).

The statements also present other circumstantial guarantees of trustworthiness. The taped and written statements were given within days of the assault, after K.A. knew

the true extent of her injuries, and without inducement by either leading questions or coercion. Because K.A. requested and then obtained an order for protection, the court could infer that she was afraid of appellant. And K.A. admitted that she assisted police in arresting appellant. Finally, K.A.'s statements to Peterson were ratified by statements she made to others. Because substantive evidence of K.A.'s prior inconsistent statements was properly elicited under rule 807, the district court did not err in allowing the prosecutor to call K.A. to the stand and to present evidence of her prior inconsistent statements to others.

Appellant also argues that allowing K.A.'s statements to come into evidence through four different witnesses and through her tape-recorded and written statements was cumulative and influenced the jury's decision to convict. *See* Minn. R. Evid. 403 (providing that even relevant "evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). But evidence of K.A.'s statements implicating appellant, which were made to a number of different people, tended to assist the jury to understand her perspective and better judge her credibility over time. *See State v. Moua*, 678 N.W.2d 29, 38 (Minn. 2004) (allowing witnesses' prior inconsistent statements to provide complete picture for jury and to determine witnesses' credibility during the proceedings). When the record is considered as a whole, the probative value of the evidence was not outweighed by any unfair prejudice.

2.

Appellant asserts that his right to confront witnesses was violated when Officer Peterson was allowed to testify about several out-of-court statements by witnesses who did not testify at trial. In particular, when asked about his initial investigation of the case, Peterson testified:

> We got information from other people that it was probably her boyfriend that had assaulted her. That was what everybody was telling us . . . I got ahold of the [couple who owned the Union Avenue residence where the assault had occurred] and I faxed them a photo of [appellant] . . .; and they confirmed that that, in fact, was [K.A.'s] boyfriend, Travis.

But Peterson did not testify to any specific conversations that he had with these witnesses, and appellant did not object to the testimony regarding his photo. Moreover, if Peterson's limited testimony regarding his encounter with the witnesses during his initial investigation violated appellant's right to confront witnesses, any error in admission of this testimony was harmless.

In analyzing whether an error was harmless beyond a reasonable doubt, we must determine whether the error reasonably could have influenced the jury's decision. *State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006). The supreme court has found an error to be harmless only after measuring its persuasiveness, having regard for "the manner in which [it is] presented," "whether it was required or was merely cumulative," whether it was referred to in closing arguments, and "whether it was effectively countered by" defense evidence. *Id.* at 314-15. This assessment of harmlessness is only "reinforced by the strength of the evidence of guilt." *Id.* at 317.

Peterson's statements regarding the information from "other people" were made near the beginning of his testimony, while he was discussing what took place during his initial investigation. Peterson's information was cumulative, because the jury had already been told that appellant was K.A.'s boyfriend. Finally, although the prosecutor referred to some of these statements during closing argument, those references were based on statements made by appellant during his taped jail conversation; Peterson's passing reference to the statements of "other people" was not repeated and played a minor role in the state's case against appellant. Under these circumstances, any violation of appellant's confrontation rights caused by Peterson's reference to statements of "other people" was harmless beyond a reasonable doubt.

3.

Appellant argues that the district court abused its discretion in admitting relationship evidence. Evidence may be admitted to establish the relationship between a defendant and the victim. *State v. Lunsford*, 507 N.W.2d 239, 242 (Minn. App. 1993), *review denied* (Minn. Dec. 14, 1993). Relationship evidence is not considered *Spreigl* evidence and is treated differently because "[d]omestic abusers often exert control over their victims, which undermines the ability of the criminal justice system to prosecute cases effectively." *State v. McCoy*, 682 N.W.2d 153, 161 (Minn. 2004).

The evidence regarding appellant's relationship with K.A. included testimony by K.A., who admitted to an ongoing relationship with appellant, letters from K.A. to appellant, pages from K.A.'s journal regarding the relationship, and an application and order for protection. In the letters and journal, K.A. had made statements referring to the

assault and to other prior threats that appellant had made to her. In one letter, K.A. referred to a comment that appellant had made to her about how he "wish[ed] [he] could pound [her] head into the cement"; in another letter, K.A. wrote about wanting a "break" from appellant because she could not be "with a man who threatens my life [and] tells me that he'd do a life sentence for killing me."

In a letter that was not addressed to any particular person and discovered by K.A.'s mother among K.A.'s belongings after the incident, K.A. referred to the intended recipient as "honey" and stated that "[w]hat hurts me the most is the fact of how hard the hit was!" And the prosecutor also played a message that K.A. had left for appellant at the jail.

> And Travis, I'm not with Jose [Gonzalez.] I haven't talked to him for days. You think I can just go to another guy after what happened? I'd have to not love you any more, and it's gonna take a while for me to fall out of love with you, even after what you did to me.

Finally, the prosecutor presented several conversations between appellant and his family members that were recorded while appellant was in the county jail. During these conversations, appellant repeatedly asked his family members to get in touch with K.A. and stressed that she only needed to tell the truth about how she had fallen on the steps.

The parties appear to agree that the evidence involving the order for protection was admissible as relationship evidence under Minn. Stat. § 634.20 (2006). And although the letters and journal include very particular references to appellant's conduct during the relationship, they were relevant to show K.A.'s state of mind. *See State v. Lindsey*, 755 N.W.2d 752, 756-57 (Minn. App. 2008) (noting that defendant's subsequent

conduct towards victim provided context for jury), *review denied* (Minn. Oct. 29, 2008). This evidence gave context for the jury to examine the credibility of the evidence presented. The district court did not abuse its discretion by admitting the evidence.

Appellant also argues that the evidence was improper character evidence under Minn. R. Evid. 404(b). The evidence was not used to show that appellant's act conformed to his character; rather, the evidence was used to demonstrate that appellant had motive, intent, and absence of mistake in his assault of K.A. The prosecutor used the letters and the actions of the victim, not appellant, to assist the jury in obtaining a complete picture of the relationship.

This relationship and character evidence was properly admitted to allow the jury to determine what evidence and which witnesses were most credible. K.A. gave three versions of the events. As evidenced by appellant's phone calls to his family from jail, appellant offered yet another version when he stated that appellant was injured when she fell. Thus, the relationship evidence was presented not to undermine appellant's character but to assist the jury in weighing the credibility of the evidence that was presented to them. *See State v. Bates*, 507 N.W.2d 847, 851 (Minn. App. 1993) (noting that prosecutor's characterizations "were not inadmissible character evidence, but instead were relevant to [defendant's] intent and credibility"), *review denied* (Minn. Dec. 27, 1993).

Finally, appellant asserts that he was prejudiced by three references to his character that were not relationship evidence. First, Gonzalez made a reference to meeting appellant in prison; second, Gonzalez testified that appellant "told a friend of

ours . . . [that] if I came over here and testified he would say I put a gun to his head"; and finally, an investigator testified that during the search of appellant's car, a one-hitter and syringes were found. These references to appellant's character were inadvertent and made in passing during each witness's testimony. When considered in the context of the entire trial, these references were harmless beyond a reasonable doubt.

4.

Appellant has filed a pro se supplemental brief in which he raises a number of issues involving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance "fell below an objective standard of reasonableness," and (2) there is a "reasonable probability" that, but for counsel's errors, the proceeding would have resulted in a different outcome. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005); *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984) (providing the standard for ineffective assistance of counsel).

Appellant argues that his counsel was ineffective because she was assigned to his case just a few days before trial, she knew that the prosecutor gave a witness access to the victim's statement, she allowed the state to coerce a witness into false testimony and failed to make objections, and she failed to make necessary psychiatric examination motions or use all defenses. But appellant has not submitted any evidence to support his bare assertions that his counsel's performance was deficient. Although defense counsel was assigned to the case only a few days before trial began, counsel was well prepared for the case, as demonstrated by the pretrial motions she made as well as her questioning

of witnesses and raising of objections throughout trial. Because appellant's pro se arguments lack supporting arguments and citations to the record, and because no prejudicial error is "obvious on mere inspection," we deem appellant's claims to be without merit. *See State v. Bartylla*, 755 N.W.2d 8, 23 (Minn. 2008) (quotation marks omitted).

Affirmed.