STATE OF MINNESOTA
IN COURT OF APPEALS
A10-175

State of Minnesota,
Respondent,

vs.

William Antonio McClendon,
Appellant.

Filed December 28, 2010
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-09-31530

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Huspeni, Judge.[*]

[*] 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

LARKIN, Judge

Appellant challenges his convictions of first- and second-degree assault and two counts of attempted murder, arguing that the district court erred by denying his motion to suppress the results of a photographic line-up and by admitting hearsay evidence regarding a recanting witness's prior out-of-court identification of appellant. Appellant raises additional claims of error in a pro se brief. Because the photographic line-up was not unnecessarily suggestive, the district court's hearsay rulings were not an abuse of discretion, and appellant's pro se claims are without merit, we affirm.

FACTS

On May 31, 2009, appellant William Antonio McClendon and his brother, M.B., attended a barbeque in the front yard of the home of their cousin and her fiancé, M.T. At some point, McClendon exchanged words with individuals who were present at a barbeque in the front yard of the house next door. M.T. told McClendon and M.B. that they needed to leave and offered to give them a ride to avoid further trouble. M.T. and M.B. got into M.T.'s vehicle. As McClendon approached the vehicle, the earlier altercation resumed. M.T. exited the vehicle and attempted to de-escalate the situation. At this point, M.T. saw McClendon pull a gun out from under his shirt, and he heard multiple gunshots. M.B. drove away in M.T.'s car, and McClendon ran from the scene. Two people had been shot: C.W. and D.H.

Soon after the shooting, Minneapolis police officer Mathew Heger arrived and questioned M.T. M.T. told Officer Heger what he had seen and identified McClendon

and M.B. by name. A few days after the shooting, M.T. provided a recorded statement to Minneapolis police sergeant Mark Osland, again identifying McClendon and M.B. as suspects.

The day after the shooting, while C.W. recovered in the hospital, Sergeant Osland showed C.W. a photographic line-up that included McClendon's photograph. When C.W. saw McClendon's photograph, he said, "[T]hat's him," and, according to the testimony of Sergeant Osland, identified McClendon as the person who shot him. The police arrested McClendon, and he admitted that he was present at the barbeque on the day of the shooting.

McClendon was charged with one count of first-degree assault and one count of second-degree assault. McClendon pleaded not guilty and moved to suppress C.W.'s identification. The district court denied the motion after a contested evidentiary hearing. The state later amended the complaint to include two counts of second-degree attempted murder, and the case was tried to a jury.

Both C.W. and D.H. testified at trial. Neither identified McClendon as the shooter. C.W. testified that he remembered giving Sergeant Osland a statement at the hospital, but he did not remember viewing the photographic line-up. After he was shown a transcript of his statement to Sergeant Osland, C.W. testified that he did not remember making the statement. When the state called M.T. as a witness, he recanted his earlier identification of McClendon as the shooter and asserted that the shooter was not McClendon but rather another man named "William." M.T. further testified that McClendon was not at the barbeque. In response, the state called Officer Heger who

testified regarding M.T.'s identification of McClendon at the crime scene. The state also read the transcript of M.T.'s recorded statement to Sergeant Osland into the record.

The jury found McClendon guilty on all counts. The district court entered judgments of conviction on the attempted murder counts and sentenced McClendon to concurrent terms of 203 and 216 months. This appeal follows.

D E C I S I O N

I.

McClendon claims that the district court erred by denying his motion to suppress C.W.'s photographic identification, arguing that the identification procedure was impermissibly suggestive and the resulting identification unreliable.

The admission of pretrial identification evidence, such as a photographic line-up, violates a defendant's right to due process if the procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968). "Reviewing courts apply a two-part test to determine whether a pre-trial identification created a substantial likelihood of irreparable misidentification." *State v. Booker*, 770 N.W.2d 161, 168 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). First, the reviewing court must determine whether the identification procedure was impermissibly suggestive, an inquiry which "turns on whether the defendant was unfairly singled out for identification." *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). If so, the reviewing court must determine whether the identification is nonetheless reliable under the totality of the circumstances. *Id.* A district court's ruling on a motion to suppress a pretrial

identification on constitutional grounds is reviewed de novo. *See State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999) ("[W]hen reviewing a pretrial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." (quotation omitted)); *State v. Hooks*, 752 N.W.2d 79, 83 (Minn. App. 2008) ("[D]espite the district court's general discretion to make evidentiary decisions, we review de novo whether a defendant has been denied due process.").

At the hearing on the suppression motion, Sergeant Osland testified that he created a photographic line-up containing McClendon's photograph and the photographs of five other individuals. Sergeant Osland entered data regarding McClendon's physical characteristics into a computer, and the computer generated photographs of individuals with similar physical characteristics. Sergeant Osland selected the five other photographs from those generated by the computer. The computer then shuffled the six photographs, assigned numbers to the photographs, and printed out the numbered photographs.

Before showing C.W. the photographs, Sergeant Osland read him the following paragraph:

> You will be viewing a series of photographs. The person in this case may or may not be present in these photographs. Take as much time as you need, but only look at one photograph at a time. Please remember that the photograph may not be current-clothing, facial hair, length of hair, etc., may have changed. Each photograph is assigned a number that appears on the bottom of the photo. If you are able to identify the person, inform me using the number assigned to that photograph.

Sergeant Osland then gave C.W. a packet that contained the six photographs. C.W. removed the photographs himself and looked at them one at a time. Upon viewing McClendon's photograph, C.W. said "[T]hat's him." Sergeant Osland testified that he did not say or do anything to influence C.W.'s choice.

McClendon asserts that the photographic line-up was unnecessarily suggestive solely because it deviated from a Hennepin County Police Department policy. The police department policy states that someone other than the person who created the photographic line-up should display it in order to minimize the risk of inadvertently influencing the viewer. Because Sergeant Osland created and displayed the photographic line-up, the identification procedure did not comply with the policy.

But McClendon provides no authority to support his assertion that failure to follow a departmental policy regarding photographic-identification procedures results in an impermissibly suggestive procedure. Moreover, the record contains no evidence that Sergeant Osland unfairly singled out McClendon for identification during the creation or administration of the photographic line-up. In fact, the computer program selected the other five photographs. Finally, the procedure in this case in no way resembles those previously held to be impermissibly suggestive. *See, e.g.*, *Ostrem*, 535 N.W.2d at 921 (stating, "[s]ingle photo line-up identification procedures have been widely condemned as unnecessarily suggestive"). We therefore conclude the photographic line-up was not impermissibly suggestive. Accordingly, the district court did not err by denying McClendon's motion to suppress the identification.

II.

McClendon claims that the district court erred by admitting M.T.'s out-of-court statements identifying McClendon at trial. McClendon argues the statements are unreliable hearsay and that no hearsay exception justifies their admission. The district court's evidentiary rulings will generally not be reversed absent a clear abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999) (reviewing hearsay ruling).

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 provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature." Minn. R. Evid. 802.

The district court ruled that M.T.'s prior statements were not hearsay under Minn. R. Evid. 801(d)(1)(C) (statement of identification made after perceiving the person) and Minn. R. Evid. 801(d)(1)(D) (present sense impression). The district court further held that M.T.'s prior statements were admissible under the following exceptions to the hearsay rule: Minn. R. Evid. 803(2) (excited utterance); Minn. R. Evid. 803(3) (then existing mental, emotional, or physical condition); and Minn. R. Evid. 807 (residual exception).

The district court concluded that M.T.'s statement to Officer Heger at the crime scene was an excited utterance. Minn. R. Evid. 803(2) provides that a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible as an exception to the hearsay

rule. "For a statement to be admitted under the excited utterance exception to the hearsay rule, there must have been a startling event or condition, the statement must relate to the event or condition, and the statement must be made under the stress caused by the event or condition." *State v. Gates*, 615 N.W.2d 331, 337 (Minn. 2000).

McClendon argues that M.T.'s statement was not an excited utterance because Officer Heger did not testify regarding the amount of time that passed between the shooting and his interview of M.T. McClendon also argues that the statement was not an excited utterance because it was made in response to Officer Heger's questions. While the record does not indicate exactly how much time elapsed between the shooting and the statement, the record indicates that both victims were still present at the scene when M.T. made the statement. M.T. had witnessed the shooting and was in the proximity of the injured victims when he made the statement. And Officer Heger testified that M.T. was "really worked up" when the officer arrived at the scene. Moreover, "an excited utterance is not necessarily rendered inadmissible by the fact that the declaration was made in response to a question [or] by the fact that it was not made until a short time after the act which caused the excitement." *In re Welfare of Chuesberg*, 305 Minn. 543, 546, 233 N.W.2d 887, 889 (1975). Under these circumstances, the district court did not abuse its discretion by admitting M.T.'s statement to Officer Heger as an excited utterance.

The district court also concluded that M.T.'s statement to Officer Heger at the scene was not hearsay under Minn. R. Evid. 801(d)(1)(D). This rule provides that a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination regarding the statement and the statement is "a statement describing or

explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter." Minn. R. Evid. 801(d)(1)(D). The timing requirement exists to ensure that the declarant had little time to fabricate a story. *See State v. Pieschke*, 295 N.W.2d 580, 583 (Minn. 1980) (stating, "[r]ule 801(d)(1)(D) requires . . . a statement of a 'present sense impression' or 'unexcited utterance' made contemporaneously with the event or immediately thereafter so that there is little time to consciously fabricate a story") M.T. witnessed the shooting, and according to Officer Heger's testimony, he was still "worked up," "upset," and "scared" when Officer Heger questioned him regarding the shooting. M.T.'s emotional state at the time of the statement suggests that the statement was made shortly after the shooting. The district court did not abuse its discretion by admitting the statement under Minn. R. Evid. 801(d)(1)(D).

We next review the district court's ruling regarding M.T.'s recorded statement to Sergeant Osland. The district court concluded that this statement was admissible under the "residual" hearsay exception, which provides:

> 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. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing, to provide the adverse party with a fair opportunity to prepare

> to meet it, the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant.

Minn. R. Evid. 807.

When a witness recants an out-of-court statement at trial, the state may present the witness's out-of-court statement as substantive evidence under the residual exception to the hearsay rule so long as the statement has sufficient guarantees of trustworthiness. *See, e.g.*, *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993) (determining that a prior statement recanted at trial is admissible under the "catchall exception" because multiple factors ensured the reliability of the statement), *State v. Ortlepp*, 363 N.W.2d 39, 43-44 (Minn. 1985) (affirming the admission of a prior statement that was later recanted under the "catchall exception" because the statement contained circumstantial guarantees of trustworthiness), *State v. Soukup*, 376 N.W.2d 498, 501 (Minn. App. 1985) (affirming the admission of prior statements later recanted at trial under the "catchall exception" because the statements contained circumstantial guarantees of trustworthiness"), *review denied* (Minn. Dec. 30, 1985).

A court applies a totality-of-the-circumstances approach when determining whether a hearsay statement has "circumstantial guarantees of trustworthiness." *State v. Keeton*, 589 N.W.2d 85, 90 (Minn. 1998). In doing so, a reviewing court should look "to all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). The relevant factors include

> [t]he character of the witness for truthfulness and honesty, and the availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross-

> examination and a penalty for perjury; the witness' relationship with both the defendant and the government and his motivation to testify . . . ; the extent to which the witness' testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness' unavailability.

Keeton, 589 N.W.2d at 90 (quotation omitted). A reviewing court must bear in mind that a district court has "considerable discretion" in determining admission of statements under the residual exception. *Stallings*, 478 N.W.2d at 495.

M.T. identified McClendon in his statement to Sergeant Osland. The statement was offered as evidence of a material fact—whether McClendon shot C.W. and D.H. M.T.'s statement identifying McClendon is more probative on this point than any other evidence the state could procure through reasonable efforts. As McClendon asserts in his brief, M.T. was "certainly the most important" witness to testify for the state. M.T. was an eyewitness to the shooting and was in close proximity to McClendon when the shooting occurred. Most importantly, M.T.'s identification is more probative than C.W.'s in that M.T. identified McClendon as the shooter, shortly after the shooting, at the scene, and by name; whereas C.W. identified McClendon the day after the shooting, while in the hospital recovering from a gunshot wound, and via a photographic line-up.

Moreover, M.T. testified at trial and was available for cross-examination. He admitted making the statement to Sergeant Osland. Although M.T. testified that when he told the officers that "Will" or "William" shot the victims, he didn't mean William McClendon, M.T.'s statement to Sergeant Osland was recorded and demonstrates that M.T. clearly referred to McClendon. M.T. told Sergeant Osland that he intended to drive

McClendon, who he referred to as both "Will" and "William," away from the scene. Sergeant Osland asked M.T. "[a]nd that's when William McClendon came walking up?" M.T. replied, "Right." M.T. then described how Will just "started shooting." And although M.T.'s statement was not against his penal interest, he did implicate his fiancé's cousin in an attempted murder. Even though the statement did not tend to subject M.T. to criminal liability, it certainly could have damaged his relationship with his fiancé and her family. This fact lends credibility to the statement and may explain M.T.'s later recantation. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (concluding that the district court did not abuse its discretion by admitting victim's statement to the police officer, which she later recanted because she wanted to reconcile a romantic relationship with the defendant), *review denied* (Minn. Sept. 29, 2004). Finally, M.T.'s statement to Sergeant Osland was consistent with other evidence implicating McClendon, such as M.T.'s earlier identification of McClendon at the crime scene, C.W.'s identification of McClendon, and McClendon's admission that he was present at the scene.

Moreover, the purposes of the rules of evidence and the interests of justice were best served by allowing the jury to hear M.T.'s statement to Sergeant Osland, which differed significantly from his testimony at trial. One of the purposes of a trial is to ascertain the truth. In order to determine the truth in this case, it was proper for the jury to evaluate M.T.'s testimony in light of his prior statement to determine where the truth lay. *See* Minn. R. Evid. 102 (stating one of the purposes of the rules of evidence is to ascertain the truth); *State v. Master*, 312 Minn. 596, 597, 252 N.W.2d 859, 860 (1977)

(discussing whether certain evidence was relevant to the "truth-seeking process" of a trial).

> The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

McClendon argues that he did not receive sufficient notice that the state intended to offer M.T.'s statement to Sergeant Osland as substantive evidence. However, there is no indication in the record that the state knew it would need to admit the statement as substantive evidence until M.T. recanted at trial. Moreover, McClendon was aware of M.T.'s statement long before trial, having received the police reports containing the statement. McClendon was therefore not surprised by the existence and substance of the earlier statement. The only surprise was M.T.'s recantation at trial and the state's resulting need to offer as substantive evidence M.T.'s statement to Sergeant Osland. Under these circumstances McClendon received sufficient notice. *See Oliver*, 502 N.W.2d at 778 (holding, under a prior version of the residual exception, that, despite lack of formal compliance with the notice requirement, defense counsel had sufficient notice when he referred to the challenged statement in his opening statement).

In summary, the district court's ruling reflects a proper application of the totality-of-the-circumstances approach. The district court did not abuse its discretion by

admitting M.T.'s statement to Sergeant Osland under the residual exception to the hearsay rule. *See Soukup*, 376 N.W.2d at 501 (finding, where the prior statement was trustworthy and the declarant admitted to making the statement, the district court did not err by introducing the statement as substantive evidence of the defendant's guilt).

Because the district court's admission of M.T.'s statement to Officer Heger under Minn. R. Evid. 803(2) and 801(d)(1)(D), and M.T.'s statement to Sergeant Osland under Minn. R. Evid. 807 was not an abuse of discretion, we do not review the district court's conclusions regarding application of Minn. R. Evid. 801(d)(1)(C) and 803(3).

III.

In his pro se brief, McClendon asserts multiple claims of error. He primarily argues that he impermissibly received two convictions and sentences for conduct that arises from a single behavioral incident, relying on Minn. Stat. § 609.035 (2008).

That statute states, in relevant part:

> [I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

Minn. Stat. § 609.035, subd. 1. However, when crimes are committed against different persons in the same incident, the district court has discretion to impose one sentence per victim so long as such sentencing does not exaggerate the criminality of the defendant's conduct. *State v. Lee*, 491 N.W.2d 895, 901 (Minn. 1992).

The net result of the district court's imposition of concurrent sentences of 203 and 216 months on McClendon's attempted murder convictions is that McClendon will serve an additional 13 months for his criminal conduct. We hardly think that the additional 13 months, which results because McClendon was convicted of attempting to murder not one but *two* people, exaggerates the criminality of his conduct. Accordingly, the district court did not abuse its discretion by sentencing McClendon to concurrent prison terms for both of his attempted murder convictions.

McClendon also argues that he received ineffective assistance of counsel. In order to prevail on an ineffective-assistance-of-counsel claim

> [t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). But McClendon's ineffective-assistance-of-counsel claim is based on his attorney's failure to investigate or defend his argument under Minn. Stat. § 609.035. And as explained above, McClendon's convictions and sentences do not violate section 609.035. McClendon therefore fails to establish that his counsel's representation fell below an objective standard of reasonableness.

We have reviewed the remaining claims in McClendon's pro se brief and find them to be without merit. *See Ture v. State*, 681 N.W.2d 9, 20 (Minn. 2004) (rejecting pro se arguments without detailing consideration of each argument).

Affirmed.

Dated:

Judge Michelle A. Larkin