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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-464**

State of Minnesota,
Respondent,

vs.

Jacob Joseph Spears,
Appellant.

**Filed February 8, 2011
Affirmed
Huspeni, Judge***

Ramsey County District Court
File No. 62-CR-09-14108

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

John J. Choi, Ramsey County Attorney, Mitchell L. Rothman, Assistant County
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David W. Merchant, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and
Huspeni, Judge.

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

UNPUBLISHED OPINION

HUSPENI, Judge

On appeal from his conviction of domestic assault by strangulation, appellant argues that the evidence is insufficient to prove a violation of Minn. Stat. § 609.2247, subd. 2 (2008). Because the record provides sufficient evidence of assault by strangulation, we affirm.

FACTS

A.H. was living with appellant, Jacob Joseph Spears, when the two had a physical altercation. A.H. sustained several injuries and went to Regions Hospital for medical attention. Police were dispatched to the hospital to speak with A.H., who told one officer that appellant “attempted to strangle her” and that he “choked” her. She also indicated that during the struggle she could not breathe. A second officer arrived shortly thereafter to photograph A.H.’s injuries. While photos were being taken, A.H. told the officer that her boyfriend assaulted her. In response to questions asked as part of medical evaluation and treatment, A.H. told the doctor who treated her that appellant had punched, kicked, and choked her. The following day, two officers and a domestic abuse advocate visited A.H. at her home. During this visit, A.H. told the officer that her boyfriend held his hand around her neck, during which time she had difficulty breathing.

A.H.’s account of the altercation changed dramatically at appellant’s trial, when she testified that her out-of-court statements were a lie and that she was intimidated by the officers who interviewed her. She stated that she did not remember parts of the event because she was intoxicated. She also testified that she initiated a physical altercation

during which appellant tried to restrain her, “knocked [her] on the forehead with his knuckle a couple times,” slapped her, and held her down. She claimed that appellant put his hands on her mouth in order to quiet her down, but that he did not choke her.

The three officers and the treating doctor each testified as to what A.H. told them at the time they spoke with her. One officer and the treating doctor also testified to observing petechiae¹ on A.H.’s cheeks which is consistent with choking but can also have other causes. At the close of trial, a jury convicted appellant of domestic assault by strangulation and the lesser-included offense of misdemeanor domestic assault. The misdemeanor domestic assault offense was dismissed at sentencing. Appellant challenges his conviction, arguing there is insufficient evidence to support a conviction of assault by strangulation.

D E C I S I O N

When considering a claim of insufficient evidence, this court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The reviewing court must assume “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Hurd*, 763 N.W.2d 17, 26 (Minn. 2009) (quotation omitted). “This is especially true where resolution of the case depends on conflicting testimony, because weighing the credibility of witnesses is the exclusive function of the

¹Petechiae are pin-point-sized red dots caused by the bursting of a capillary blood vessel which releases a little bit of blood under the skin.

jury.” *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The reviewing court will not disturb the verdict if the jury, 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).

The court applies a stricter standard if only circumstantial evidence is presented. “[W]hen a conviction is based *solely* on circumstantial evidence, that evidence must be consistent with the hypothesis that the accused is guilty and inconsistent with any other rational hypothesis except that of guilt.” *State v. McArthur*, 730 N.W.2d 44, 49 (Minn. 2007) (emphasis added) (quotation omitted). “However, possibilities of innocence do not require reversal of a jury verdict so long as the evidence taken as a whole makes such theories seem unreasonable.” *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002) (quotation omitted). A jury is in the best position to evaluate circumstantial evidence and its verdict is still entitled to due deference. *Webb*, 440 N.W.2d at 430.

Minnesota law makes it a crime to assault a family or household member by strangulation. Minn. Stat. § 609.2247, subd. 2 (2008). Strangulation is defined as “intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person.” Minn. Stat. § 609.2247, subd. 1(c) (2008). Appellant argues that there is neither sufficient circumstantial evidence nor sufficient direct evidence to support a conviction of assault by strangulation. We address each challenge in turn.

A. Sufficiency of Circumstantial Evidence

Circumstantial evidence is evidence “based on inference and not on personal knowledge or observation,” or “evidence that is not given by eyewitness testimony.” *Black’s Law Dictionary* 636 (9th ed. 2009). Prior statements may be admissible for impeachment purposes if they are inconsistent with present testimony. 10 *Minnesota Practice* CRIMJIG 3.15[3] (2006). Circumstantial evidence in this case includes the marks and petechiae on A.H.’s cheeks that were photographed shortly after the incident. There is also testimony regarding the relationship and past altercations between A.H. and appellant. Finally, statements A.H. made to the police officers and doctor are at least admissible for the impeachment of A.H.’s testimony. *See id.*

Applying the circumstantial-evidence standard to the facts here, and considering A.H.’s out-of-court statements to impeach her trial testimony, it is at least questionable whether conviction of domestic assault by strangulation could stand. The treating doctor testified that the petechiae could be attributed to several causes other than strangulation, including difficulty breathing due to weight applied to the chest, a problem with a person’s platelets, or a serious bacterial infection. Therefore, without any of A.H.’s out-of-court statements admissible as substantive evidence, there is only circumstantial evidence, which arguably allows for a rational hypothesis other than strangulation by appellant for how A.H. sustained her injuries.

We do not end our inquiry with a discussion of the sufficiency of circumstantial evidence, however. We note initially that at trial appellant did not object to any of the evidence received regarding out-of-court statements of A.H. Therefore, generally all of

these non-objected-to statements would qualify as substantive evidence. The Minnesota Supreme Court has directed that, “[o]bjections to possibly inadmissible evidence must be made at the time such evidence is introduced. Where an objection is not made, hearsay evidence will be admitted and has probative force.” *State v. Hamilton*, 268 N.W.2d 56, 63 (Minn. 1978) (citations omitted). “Failure to object to the admission of evidence generally constitutes waiver of the right to appeal on that basis.” *State v. Vick*, 632 N.W.2d 676, 684 (Minn. 2001).

Despite the failure to object to admission of evidence at trial, however, an appellate court may consider a challenge to such admission if there is (1) error, (2) that is plain, and (3) the error affects the defendant’s substantial rights. *Id.* at 685; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). The defendant has a “heavy burden” of persuasion under the third prong to show that “the error was prejudicial and affected the outcome of the case.” *Vick*, 632 N.W.2d at 685 (quoting *Griller*, 583 N.W.2d at 741). If the plain error test is met, “the court must then decide whether it should address the issue in order to ‘ensure fairness and the integrity of the judicial proceedings.’” *Id.* (quoting *Griller*, 583 N.W.2d at 740).

We turn first to A.H.’s statement to the treating doctor regarding how her injuries were sustained. In addressing Minn. R. Evid. 803(4) (the medical diagnosis exception to the hearsay rule) in *State v. Robinson*, the supreme court allowed statements regarding how a victim sustained an injury but excluded the portions of the testimony that identified who caused the injury. 718 N.W.2d 400, 404, 407 (Minn. 2006). Therefore, in this case, A.H.’s statement to the doctor that she was punched, kicked, and choked would be

admissible for all purposes. The assertion that her boyfriend caused the injuries would be admissible for impeachment purposes only. *See* CRIMJIG 3.15[3].

Evidence of A.H.'s statements to the doctor of how injuries were sustained was properly admitted as substantive evidence, and therefore direct evidence that appellant choked her. When added to the circumstantial evidence, sufficient evidence to convict was present. Pictures of A.H.'s injuries, A.H.'s statement that the injuries resulted from being choked, and her testimony at trial that she and appellant engaged in an altercation on the day of the injuries makes any hypothesis other than guilt unreasonable under the standards of circumstantial evidence.

B. Sufficiency of Direct Evidence

Determining that circumstantial evidence and direct evidence in the form of A.H.'s statement to the treating physician regarding the source of injury established sufficient evidence requires us to affirm appellant's conviction. In the interest of resolving all issues raised, however, we also address the possible application of the residual exception to the exclusion of hearsay evidence contained in Minn. R. Evid. 807.²

In determining if statements fit under the residual exception to the hearsay rule, "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) (quoting *Robinson*, 718

² The state also argues that the evidence could be admissible under the excited utterance exception, Minn. R. Evid. 803(2). As we find the statements admissible under Minn. R. Evid. 807, we decline to address this argument.

N.W.2d at 408). As well as examining the trustworthiness of the statement, the district court must also find that “(1) the statement relates to a material fact, (2) the statement is more probative on that point than any other evidence that can be secured by reasonable methods, and (3) the admission of the statement serves the interests of justice and the general purpose of the rules of evidence.” *Ahmed*, 782 N.W.2d at 259; *see* Minn. R. Evid. 807.

This court has previously approved the admission of out-of-court statements from a victim of domestic assault under the residual exception when her testimony at trial is dramatically different. *State v. Plantin*, 682 N.W.2d 653 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).³ In *Plantin*, the court relied on the residual-exception test the supreme court laid out in *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). Under *Ortlepp* a hearsay statement is admissible under the residual exception when:

- (1) there is no confrontation problem presented by the admission of the statement as substantive evidence because the declarant testifies, admits making the statement, and is available for cross-examination;
- (2) there is no dispute that the declarant made the statement or about what the statement contained;
- (3) the reliability of the statement is increased because it was made against the accomplice's penal interest;
- and (4) the statement is consistent with all the other evidence the state introduces, evidence which points strongly toward the guilt of the accused.

Plantin, 682 N.W.2d at 659 (quotation omitted).

In *Plantin*, the victim testified at trial, admitted to making the prior statements, and was cross-examined. *Id.* There was no dispute over the statements made or their content,

³ The residual exception was moved from Minn. R. Evid. 803(24) to Minn. R. Evid. 807 by amendment in 2006, but the substance of the rule remains the same.

and the statements were consistent with other evidence introduced that pointed strongly toward the guilt of the accused. *Id.* The court also noted that “the third *Ortlepp* factor may be satisfied even if the statement[s] [are] not against the declarant’s penal interest if the declarant is hostile to the state and supportive of the defendant.” *Id.* (citing *State v. Whiteside*, 400 N.W.2d 140, 146 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987)). The court in *Plantin* found that the victim’s statements satisfied the third factor because they were against her interests in a relationship with the defendant. *Id.*

A.H.’s statements in this case directly parallel the statements of the victim in *Plantin*. A.H. testified at trial, admitted to making the prior statements, and was cross-examined. The defense did not dispute that she made the statements or their content. Additionally, the statements were consistent with the injuries sustained and pointed strongly toward appellant’s guilt. Finally, A.H. was hostile to the state and supportive of the defendant to the extent her testimony at trial was directly contrary to the state’s case and supported the defendant. A.H.’s out-of-court statements were against her interest in a relationship with the defendant and met all the other requirements of the residual exception. Viewing the totality of the circumstances, A.H.’s statements to the officers and the doctor also relate to a material fact, are more probative than other evidence, and serve the interests of justice. Therefore, admitting the challenged statements as substantive evidence under Minn. R. Evid. 807 does not constitute plain error.

Finally, appellant argues that the prosecutor erred by referencing out-of-court statements of A.H. in the closing argument as substantive evidence. Appellant alleges that the statements could only be used for impeachment purposes and were, therefore,

improperly used in the argument. As we have concluded that all of the out-of-court statements by A.H. were properly received as substantive evidence, using those statements in closing argument was not improper.

With A.H.'s prior statements properly admitted as direct, substantive evidence, the jury could have reasonably concluded beyond a reasonable doubt that Spears committed domestic assault by strangulation.

Affirmed.