STATE OF MINNESOTA

IN SUPREME COURT

A18-1530

Court of Appeals — Anderson, J.

State of Minnesota,

Respondent,

vs.

Filed: April 15, 2020
Office of Appellate Courts

Brian Ven Vangrevenhof,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

The district court did not abuse its discretion by admitting out-of-court statements under Minnesota Rule of Evidence 807, the residual exception to hearsay.

Affirmed.

O P I N I O N

ANDERSON, Justice.

Appellant Brian Ven Vangrevenhof was convicted of first-degree sale of a controlled substance and second-degree possession of a controlled substance. The charges were based on a transaction in which Vangrevenhof sold approximately one ounce of methamphetamine to L.P. Although law enforcement observed the meeting between Vangrevenhof and L.P., they did not observe the actual exchange of drugs or money. After the meeting, law enforcement arrested L.P. and Vangrevenhof and found approximately one ounce of methamphetamine on L.P. and $791 on Vangrevenhof. After her arrest, L.P. made several statements, during a recorded interview with law enforcement, regarding her meeting with Vangrevenhof and the drug transaction. During Vangrevenhof's jury trial, the State sought to introduce L.P.'s statements under Minn. R. Evid. 807, the residual hearsay exception, and the district court admitted the statements into evidence. The jury found Vangrevenhof guilty on both counts, and the court of appeals affirmed his convictions. We granted Vangrevenhof's petition for review on the issue of whether the district court abused its discretion by admitting L.P.'s statements under Minn. R. Evid. 807. Because we hold that the district court did not abuse its discretion by admitting L.P.'s statements under the residual hearsay exception, we affirm the court of appeals.

FACTS

In November 2017, law enforcement received a tip that Vangrevenhof would be meeting with L.P. at his personal storage unit. At the time, L.P. was the subject of an active felony arrest warrant. While conducting surveillance of the storage unit, a narcotics

investigator observed Vangrevenhof and L.P. talk for approximately 5 minutes but did not observe an exchange of drugs or money. After the meeting, law enforcement arrested Vangrevenhof near the storage unit and searched him. On his person they found keys to the storage unit, $791 in cash, and a small butane torch that can be used to light a methamphetamine pipe. The cash found on Vangrevenhof was in the form of four $100 bills, several $20 bills, and some smaller denominations.

Law enforcement subsequently obtained a warrant to search Vangrevenhof's storage unit. During the search, officers found a digital scale with methamphetamine residue on it, a tool chest containing small plastic bags, and two glass containers with methamphetamine residue.

Following the meeting, law enforcement also arrested L.P. at a nearby restaurant. When asked whether she had drugs in her purse, L.P. admitted that she had "white stuff." When law enforcement searched L.P.'s purse, they found a plastic bag containing several other plastic bags, a digital scale with methamphetamine residue on it, and a plastic container holding approximately one ounce of methamphetamine, along with another small bag containing a smaller amount of methamphetamine. L.P. also had $163 in cash and a phone in her purse. During their search, law enforcement observed that L.P. was visibly sweating; when they inquired, L.P. responded that she had consumed drugs "a minute ago."

In a recorded interview following her arrest, one law enforcement investigator implied, without promising, that he would ask for leniency for L.P. if she cooperated and explained what happened during her meeting with Vangrevenhof. When the investigator asked who she was meeting at the storage unit, L.P. responded, "Brian [Vangrevenhof]"

and confirmed that Vangrevenhof gave her the methamphetamine that was found in her purse. L.P. also confirmed that she had purchased methamphetamine from Vangrevenhof two or three times in the past. L.P. also stated that she paid "$700" to buy the ounce of methamphetamine from Vangrevenhof. When she was asked how she paid Vangrevenhof, she responded, "four $100 bills" along with smaller bills.

L.P. was charged with first-degree possession of a controlled substance. Before pleading guilty, L.P. wrote a letter to Vangrevenhof's attorney and claimed that, during her law enforcement interview, the investigator pressured her into incriminating Vangrevenhof. L.P. also asserted that she had been "severely intoxicated" with "an astronomical amount of methamphetamine" in her system and her statements to the investigator were "not accurate."

Before Vangrevenhof's trial, the State provided notice that it would introduce the statements L.P. made during the interview as substantive evidence under the residual hearsay clause, Rule 807 of the Minnesota Rules of Evidence. Vangrevenhof moved the district court to preclude any testimony regarding L.P.'s statements to investigators. At a pretrial hearing, the court heard arguments on the motion. In opposition to the motion, the State argued that L.P.'s statements to the investigator related to a material fact because those statements implicated Vangrevenhof in the sale of methamphetamine. These statements were also more probative than other evidence because the State anticipated that L.P. would recant and testify that Vangrevenhof did not sell her methamphetamine. The State argued that the hearsay statements were against L.P.'s penal interest as they were an admission of her crime. The State also argued that the statements were consistent with

other evidence, in particular, that L.P.'s statements about the currency denominations she used to purchase the methamphetamine aligned with the denominations found in Vangrevenhof's possession. In support of his motion, Vangrevenhof argued that the recording was difficult to hear, that the questions were leading, that L.P. was intoxicated, and that L.P. was looking to "pass the buck" to somebody else.

After hearing arguments, the district court ruled that L.P.'s statements to the investigator were admissible as substantive evidence under Rule 807. The court found that the State gave proper notice and the existence of a sale between L.P. and Vangrevenhof was a material fact. Based on its review of the audio recording, the court stated that while there was some suggestive questioning, other questioning was not suggestive. The court noted, in particular, that when L.P. was asked, "So who were you to see at the storage units?", L.P. responded, "Brian [Vangrevenhof]." The court found other evidence that was consistent with her statements, specifically, that law enforcement observed L.P. and Vangrevenhof at the storage unit and that there was similarity in monetary denominations, as argued by the State. The court also stated that it did not "note any obvious impairment by [L.P.]" The court found the statements to be against her penal interest. Finally, the court noted that in her recantation, L.P. did not deny making the original statements. Accordingly, the court allowed L.P.'s statements to the investigator to be admitted.

L.P. testified at trial, recanting her statements to the investigator and testifying that, although she did smoke methamphetamine in the storage unit, she did not purchase any methamphetamine from Vangrevenhof. L.P. testified that the ounce of methamphetamine that she had in her purse was purchased earlier in the day from someone other than

Vangrevenhof. The State called the investigator who interviewed L.P. He testified regarding the interview and L.P.'s recorded statements, which were introduced as substantive evidence.

The jury found Vangrevenhof guilty of both charges. The district court sentenced him to 107 months for first-degree sale of a controlled substance under Minn. Stat. § 152.021, subd. 1(1) (2018).

Vangrevenhof appealed on several grounds. The court of appeals affirmed his convictions. *State v. Vangrevenhof*, No. A18-1530, 2019 WL 3293788, at *1 (Minn. App. July 22, 2019). We granted Vangrevenhof's petition for review on the issue of whether the district court abused its discretion by admitting L.P.'s statements during the law enforcement interview under Minn. R. Evid. 807, the residual exception to hearsay.

ANALYSIS

Vangrevenhof argues that the district court's decision to admit L.P.'s recorded statements to the law enforcement investigator under Rule 807 was an abuse of discretion because (1) L.P.'s statements lacked circumstantial guarantees of trustworthiness and (2) the district court failed to make all of the necessary findings required by the rule. Vangrevenhof asserts that a new trial is warranted because the erroneous admission of L.P.'s statements was prejudicial to him during the jury trial. We review a district court's evidentiary ruling on hearsay for an abuse of discretion. *Holt v. State*, 772 N.W.2d 470, 483 (Minn. 2009). "A district 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." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). "A defendant claiming error in the district court's

reception of evidence has the burden of showing both the error and the prejudice resulting from the error." *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981).

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. The use of hearsay evidence generally is prohibited during a trial unless one of several exceptions applies. Minn. R. Evid. 802. Rule 807 is the residual exception, otherwise known as a "catchall." *State v. DeRosier*, 695 N.W.2d 97, 105 (Minn. 2005); *see also* Minn. R. Evid. 807. Rule 807 permits the admission of hearsay "not specifically covered by Rule[s] 803 or 804 but having equivalent circumstantial guarantees of trustworthiness." Minn. R. Evid. 807.

A.

When deciding whether to admit hearsay evidence under Rule 807, the first consideration is whether the proffered statement has circumstantial guarantees of trustworthiness. *State v. Hallmark*, 927 N.W.2d 281, 292 (Minn. 2019). Historically, district courts have relied on our decision in *State v. Ortlepp*, which established four factors that, when present, contribute to the trustworthiness of a statement.[1] *Id.* at 293 (citing *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985)). We have stated—and reiterate here—that

[1] The four *Ortlepp* factors that, when present, contribute to the trustworthiness of a statement are (1) there is no Confrontation Clause issue because the declarant testifies, admits to making the prior statement, and is available for cross-examination by the defense counsel; (2) the statement is recorded, removing any real dispute about what the declarant said; (3) the statement is against the declarant's penal interest; and (4) the statement is consistent with the State's other evidence that "point[s] strongly toward" the defendant's guilt. *Id.*

the four *Ortlepp* factors are not the *only* relevant factors to consider but merely represent " 'an application of the totality of the circumstances approach to satisfy the equivalent circumstantial guarantees of trustworthiness element of' the residual hearsay exception." *Id.* (quoting *State v. Robinson*, 718 N.W.2d 400, 409 (Minn. 2006)). Other relevant circumstances include, but are not limited to, the extent to which the statement was made voluntarily; whether the statement was made under oath and subject to cross-examination under penalty of perjury; the declarant's relationships to the parties in the litigation; "the declarant's motivation to make the statement"; "the declarant's personal knowledge" of the statement; whether the declarant recanted the statement; "the existence of corroborating evidence"; and "the character of the declarant for truthfulness and honesty." *State v. Davis*, 820 N.W.2d 525, 537 (Minn. 2012).

Hallmark, our most recent opinion addressing Rule 807, sets out examples of circumstances that weaken the trustworthiness of a statement. 927 N.W.2d at 293. Examples include whether the declarant has a strong motivation to deceive or implicate others, whether there was "an extended gap in time between the event and the statement being made," whether the declarant lacked first-hand knowledge of the statement, and whether the declarant made the statement in exchange for a reward. *Id.*

A district court must balance the totality of the circumstances surrounding the statement at the time it was made, and we encourage district courts to consider all relevant factors. *Id.* at 292. If a district court fails to consider all relevant circumstances under Rule 807, however, it is "not automatically an abuse of discretion." *Id.* at 294. When a district court fails to consider "any other relevant factors bearing on trustworthiness," we

independently evaluate whether the statement at issue is admissible under Rule 807. *Id.* (citation omitted).

A review of the record here shows that the district court balanced all of the relevant factors related to circumstantial guarantees of trustworthiness, including the *Ortlepp* factors. Specifically, the district court found:

> (1) Some of the investigator's questions were leading or suggestive, but the interview was not "entirely leading or suggestive";
> (2) L.P. was not obviously impaired, although the recording was difficult to hear clearly;
> (3) the statement was against L.P.'s penal interest; and
> (4) L.P. was available for cross-examination at trial.

Regardless, Vangrevenhof asserts that the district court erred by admitting L.P.'s statements because the statements did not have circumstantial guarantees of trustworthiness for four reasons.

First, Vangrevenhof argues that the hearsay statements were made when L.P. was impaired, which weighs against trustworthiness. Vangrevenhof acknowledges that the conversation was recorded, which weighs in favor of admitting the evidence, but argues that many parts of the interview are difficult to hear on the recording. But a review of the recording of the law enforcement interview confirms the district court's findings that although L.P. is difficult to hear at times, she does not appear to be impaired. For much of the interview, although L.P. is hesitant and responds only by short affirmations, when L.P. speaks, her speech is clear. The district court heard the arguments, reviewed the recording, and concluded that no obvious signs of L.P.'s impairment were present. In our view, the court's finding was not an abuse of discretion, and we see no reason to disturb it.

Second, Vangrevenhof argues that L.P. was coerced into making the statements, which weighs against trustworthiness. In a letter sent to Vangrevenhof's attorney, L.P. asked that her statements not be used at trial because she was pressured into making them by the law enforcement investigator. The district court listened to the recording, weighed the arguments, and found that while parts of the interview were leading or suggestive, other parts were not. The district court specifically noted the open-ended question, "So who were you to see at the storage units?" to which L.P. responded, "Brian," as an example of a question that was not suggestive. The district court also noted that, although the law enforcement investigator suggested different dollar amounts for the transaction in an attempt to entice L.P. to respond to his question, in response to an open-ended question of what denominations she used to pay Vangrevenhof for the methamphetamine, L.P. independently responded, "four $100 bills." The district court found this particular statement to be trustworthy because it was corroborated by evidence that four $100 bills were found on Vangrevenhof when he was searched by law enforcement after his arrest.

Our review of the interview reveals that the law enforcement investigator took a measured and calm tone with L.P., did not threaten L.P., and informed her multiple times that she did not need to answer any of his questions. We see no reason to disturb the district court's finding that L.P. was not coerced during the interview.

Third, Vangrevenhof argued that L.P. had a motive to fabricate statements by "pass[ing] the buck" to another person because law enforcement found an ounce of methamphetamine on her person. The district court concluded that this argument was not persuasive because L.P.'s statements were against her penal interests rather than an attempt

to "pass the buck." L.P. knew, early on, the nature of the charges against her. During the interview, she admitted, through an adoptive admission in response to the law enforcement investigator's question, that she went to the storage unit to purchase methamphetamine from Vangrevenhof. Specifically, the investigator asked: "Now, I'll just stop beating around the bush, all right? Obviously you went there to buy the ounce from Brian, all right? You probably paid him, like you said, $700." L.P. agreed with the statement. After a series of questions, the law enforcement investigator asked L.P. about the cash denominations she used to pay Vangrevenhof for the methamphetamine. Rather than deny that she purchased the methamphetamine, L.P. responded: "I think it was four $100 bills." We agree with the district court that this statement does not suggest that L.P. was trying to "pass the buck" or otherwise fabricate a lie to avoid being incriminated. A statement adverse to penal interests is another factor that *Hallmark* discussed as contributing to trustworthiness. 927 N.W.2d at 292–93 (quoting *Ortlepp*, 363 N.W.2d at 44).

Finally, Vangrevenhof argues that L.P.'s subsequent recantation is more trustworthy than her previous statements to law enforcement because, among other things, she had no motive to falsely recant. At the pretrial hearing, Vangrevenhof argued that L.P.'s subsequent recantation lessens the trustworthiness of her statements because "[t]here is no reason for [L.P.] to recant other than she has sobered up and realized what she had done." We have acknowledged that a recantation *may* lessen the trustworthiness of a statement. *Id.* at 293. Factors to be used when assessing the trustworthiness of a recanted statement include whether "other uncontroverted evidence discredits the recantation," whether there is "a motive to falsely recant," whether there is an inconsistency in the recanted version of

the statement itself, and whether the prior hearsay statements are strongly corroborated. *Id.* (citation omitted) (internal quotation marks omitted). But these factors are not dispositive. Rather, they should be balanced against other factors as part of a totality of the circumstances analysis. *Id.* at 296.

L.P.'s recantation occurred after a friend of Vangrevenhof wrote her a letter that suggested that Vangrevenhof wanted to repair his relationship with her. Here, the trustworthiness factors are likely neutral, some weighing toward trustworthiness, others weighing against it. L.P.'s statement that she paid Vangrevenhof with four $100 bills is strongly corroborated by the fact that four $100 bills were found on Vangrevenhof after he was arrested. The recantation by L.P. came only after Vangrevenhof's friend urged her to recant. L.P. had a prior intimate relationship with Vangrevenhof, which could give her motive to falsely recant, and the letter suggested reconciliation as one reason to recant. The district court remarked that in her letter to Vangrevenhof's attorney, L.P. did not actually deny that she had purchased drugs from Vangrevenhof. Ultimately, we cannot say that the district court abused its discretion by deciding that L.P.'s subsequent recantation did not render her statements untrustworthy and therefore inadmissible under Rule 807.

In conclusion, we find no abuse of discretion because the district court properly balanced all of the relevant circumstances of trustworthiness and the decision accords with our case law. Therefore, L.P.'s statements to law enforcement were properly admitted into evidence under Rule 807.

B.

Vangrevenhof also claims that the district court failed to make all of the findings necessary to admit a statement under Rule 807. The requirements of Rule 807 are that (1) "the statement is offered as evidence of a material fact," (2) "the statement is more probative on the point for which it is offered than any other evidence" procurable "through reasonable efforts" by the proponent, and (3) the general purpose behind the Minnesota Rules of Evidence and the interests of justice are served by the admission of the statement into evidence. Minn. R. Evid. 807.

The district court discussed the enumerated requirements of Rule 807 before admitting L.P.'s statements into evidence under the rule. Although the court made explicit findings regarding the first two enumerated requirements of the rule, it did not make an explicit finding regarding the third requirement of the rule. We have said that a district court should make findings regarding the enumerated requirements "on the record unless there is a waiver, explicitly or by silence, or the basis of the ruling is obvious." *DeRosier*, 695 N.W.2d at 105–06 (citations omitted) (internal quotation marks omitted). But the failure to make an explicit finding does not automatically require a reversal of a conviction and a new trial. *See id.* at 106 (upholding a conviction even though explicit findings regarding the enumerated requirements were not made). Instead, when a district court fails to make explicit findings under Rule 807, we will independently evaluate the record.

As mentioned above, the district court explicitly made findings on the first two enumerated requirements of Rule 807: whether the fact is material and whether the fact is more probative of the fact to be established than other evidence that can be procured. The

parties do not dispute that the district court made explicit findings regarding these two requirements. For the third requirement of the rule, we hold that the admission of L.P.'s statements was in accordance with the general purpose of the rules, which is to "secure fairness and 'to promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.' " *Hallmark*, 927 N.W.2d at 294 (quoting *State v. Aubid*, 591 N.W.2d 472, 479 (Minn. 1999)). L.P.'s statements provide the only first-person account from someone involved in the sale of the methamphetamine by Vangrevenhof. Letting the jury hear the statements allowed it to ascertain truth by weighing the relative credibility between L.P.'s unsworn, recorded statements and L.P.'s sworn testimony during trial, which recanted those recorded statements. Admission of the statements serves the purpose of the rule along with the interests of justice.

Accordingly, we hold that the district court did not abuse its discretion by admitting L.P.'s statements under Rule 807 because admission of the statements satisfied the enumerated requirements of the rule.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.