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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1096**

State of Minnesota,
Respondent,

vs.

Dominic Andrew Bjerke,
Appellant.

**Filed May 21, 2012
Affirmed
Chutich, Judge**

Mower County District Court
File No. 50-CR-10-1079

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

Kristen Nelsen, Mower County Attorney, Aaron Jones, Assistant County Attorney,
Austin, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Chutich, Judge; and
Randall, Judge.*

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

UNPUBLISHED OPINION

CHUTICH, Judge

On appeal from his conviction of criminal damage to property, appellant Dominic Andrew Bjerke contends that the district court committed reversible error by admitting impeachment evidence as substantive evidence and allowing the prosecution to call Bjerke's girlfriend as a witness for the sole purpose of impeaching her with prior statements. Because we find that the trial court properly admitted the girlfriend's testimony, we affirm.

FACTS

On February 6, 2010, Bjerke was at a party at his friend J.E.'s house. Bjerke had driven his snowmobile to the party and was angry because it had broken down. Bjerke's girlfriend, S.H., arrived at the party to drive Bjerke home. As Bjerke and S.H. were leaving, Bjerke kicked the passenger door of a car, leaving a large dent that cost about \$900 to repair.

Approximately one month later, Mower County Deputy Barry Reburn interviewed S.H. and recorded the conversation. Deputy Reburn asked her if Bjerke had kicked the passenger door because he was angry and if it was just one kick. S.H. agreed that Bjerke had kicked the door and that it was one kick. She said that she asked Bjerke, "What are you doing?" S.H. further stated that Bjerke was behind her and she did not know that he had done any damage to the car. Deputy Reburn spoke with S.H. again the next day to ask her if any other cars were kicked. S.H. told him that it was just one car and reiterated that it was just one kick.

Deputy Reburn also interviewed Bjerke twice and recorded the conversations. During the first conversation, Bjerke said he was at the party, but that he did not know anything about a car being kicked. During the second conversation, Deputy Reburn asked if Bjerke was mad and kicked the car door. Bjerke said he was angry that night because his snowmobile had broken down. Bjerke claimed that he slipped on ice and stated, “I didn’t even know I did kick her car. I thought I scuffed the side of the bumper I didn’t know nothing about a door.”

At trial, the state called S.H. as a hostile witness. S.H. testified that, as they were leaving the house, Bjerke was walking ahead of her. She said that Bjerke slipped on ice and kicked a car’s front bumper but that he did not kick the car’s passenger door. The state then called J.E. as a witness who testified that he saw S.H. and Bjerke at a bar a few weeks after the incident. J.E. testified that S.H. told him that Bjerke kicked the car door because he was angry. The state also called Deputy Reburn as a witness and introduced the Deputy’s recorded conversations with Bjerke and S.H.

Bjerke testified at trial. He said he was not angry even though his snowmobile was not working properly that evening. He further testified that, as he was walking to S.H.’s car, he slipped on ice. As he was falling, he hit the front bumper of the car. Bjerke denied kicking the car door.

The district court initially stated that it would give the impeachment instruction that “evidence of any prior inconsistent statement should be considered only to test the believability and weight of the witness’s testimony.” After a recess and a discussion off the record, the court decided that the prior out-of-court statements were offered for

substantive purposes and thus it withdrew the impeachment instruction. Both parties agreed that the impeachment instruction should not be given.

The jury convicted Bjerke of criminal damage to property under Minn. Stat. § 609.595, subd. 2 (2008). He was sentenced to one year in jail, stayed, and two years of probation. This appeal followed.

D E C I S I O N

Bjerke argues that the district committed reversible error by admitting S.H.'s prior inconsistent statements as substantive evidence and by allowing the prosecution to call S.H. as a witness. We review the district court's decision under the plain error standard because defense counsel did not object at trial. *See* Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). If those three prongs are met, this court may "correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

I.

Bjerke argues that S.H.'s out-of-court statements are hearsay and inadmissible because they do not qualify as non-hearsay under rule 801(d)(1) or as an exception under rule 803. 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(c). As a general rule, hearsay is inadmissible. Minn. R. Evid. 802.

The state argues first that S.H.’s statements are not hearsay because S.H. was identifying Bjerke as the person who damaged the car. We do not agree that the identification exception applies. A statement is not hearsay if it is “one of identification of a person made after perceiving the person.” Minn. R. Evid. 801(d)(1)(C). The identification exception is generally limited to police lineups, showups, or other similar procedures. *See State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (declining to extend “identification” to include any statement identifying an offender). Here, during an informal conversation in Deputy Reburn’s car, S.H. named Bjerke as the person who kicked the car door. The statement does not qualify as an identification under rule 801(d)(1)(C).

S.H.’s statements may be admissible, however, under the residual hearsay exception. The residual exception states that,

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.

Minn. R. Evid. 807. Generally, a witness’s prior statement can be admitted as substantive evidence under the residual hearsay exception if there are “circumstantial

guarantees of trustworthiness” surrounding the statement. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985).¹

In *Ortlepp*, the supreme court found that a hearsay statement made by the defendant’s accomplice was sufficiently trustworthy because (1) the witness was available for cross examination; (2) there was no dispute that the declarant made the statement or as to what the statement was; (3) the statement was against the declarant’s penal interest; and (4) the state’s other evidence strongly corroborated the truth of the statement. *Id.* The four factors considered by the *Ortlepp* court are not exclusive; rather, courts consider the totality of the circumstances to determine whether a statement has “circumstantial guarantees of trustworthiness.” *State v. Martinez*, 725 N.W.2d 733, 737–38 (Minn. 2007) (citing *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006)).

S.H.’s prior statement to Deputy Reburn has several guarantees of trustworthiness. First, S.H. was available for cross-examination. Second, although S.H. denied making the prior statement, the conversation was taped. Thus, no credible dispute exists as to whether S.H. made the statement or what the statement was. Third, S.H. was in a relationship with Bjerke at the time of the interview and at the time of trial. Because her statement to Deputy Reburn was against her continued interest in her relationship, it satisfied the third *Ortlepp* factor. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (holding that a domestic-assault victim’s statements that are against the victim’s

¹ *Ortlepp* refers to rule 803(24). 363 N.W.2d at 44. When the rules were amended in 2006, the rule was renumbered as Minn. R. Evid. 807, to better align with the numbering of the federal rules. Minn. R. Evid. 807, 2006 comm. cmt. Other than the renumbering, the rules are substantively identical.

interest in a relationship with the accused satisfied the third *Ortlepp* factor), *review denied* (Minn. Sept. 29, 2004); *State v. Jones*, 755 N.W.2d 341, 353 (Minn. App. 2008) (reasoning that woman's statement implicating boyfriend contributed to trustworthiness).

The state's other evidence provided only limited corroboration for S.H.'s recorded statement to Deputy Reburn. At trial, S.H. testified that Bjerke was angry, which she had previously told Deputy Reburn, giving Bjerke a reason to have kicked the car. S.H. also told Deputy Reburn that there was only one kick, which was corroborated by photographs of the dent admitted at trial. Even though S.H.'s statement to Deputy Reburn was not strongly corroborated by other evidence in the record, based on the totality of the circumstances, the statement had sufficient guarantees of trustworthiness to be admissible under the residual exception.

Moreover, the purposes of the rules of evidence were best served by allowing the jury to hear S.H.'s prior statement to Deputy Reburn. One key goal of the rules of evidence is to ascertain the truth. *See* Minn. R. Evid. 102 (stating that the rules shall be construed "to the end that the truth may be ascertained"); Minn. R. Evid. 807 ("[T]he general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."). Consistent with this truth-seeking purpose, it was proper for the jury to evaluate S.H.'s testimony in light of her prior inconsistent statement. S.H.'s previous statement to Deputy Reburn was properly admitted under Minn. R. Evid. 807.

By contrast, S.H.'s prior statement to J.E. does not have sufficient guarantees of trustworthiness to be admitted under rule 807. Although she was available for cross-

examination and the alleged statement was against her interest in her relationship with Bjerke, S.H. denied making any statement to J.E. that Bjerke had kicked the car. As mentioned above, the state's other evidence did not strongly corroborate S.H.'s alleged statement to J.E. Given these circumstances, where there was a dispute about the past statement and limited corroboration, the district court erred in admitting S.H.'s statement to J.E. as substantive evidence.

To be reversible, the district court's error in admitting S.H.'s prior statement to J.E. must be one that affects Bjerke's substantial rights. *Strommen*, 648 N.W.2d at 686. An error affects a defendant's substantial rights if the error was prejudicial and affected the outcome of the case. *Griller*, 583 N.W.2d at 741. Because S.H.'s similar recorded statement to Deputy Reburn was properly admitted, S.H.'s alleged single brief statement to J.E. was only a small piece of cumulative evidence against Bjerke. The district court's error in admitting S.H.'s alleged statement to J.E. was not prejudicial and did not affect Bjerke's substantial rights.

II.

Bjerke argues that the prosecution called S.H. as a witness solely to impeach her with her prior inconsistent statements. Hearsay statements that are otherwise inadmissible cannot be introduced under the guise of impeachment. *State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978). The supreme court has referred to this situation as "the *Dexter* problem":

[A] prosecutor calls a witness who has given a prior statement implicating the defendant, but that witness has since retracted the statement and signified an intent

to testify in defendant's favor if called by the prosecutor. If the prosecutor is permitted to call this witness and use the prior statement for impeachment purposes, there is a large risk that the jury, even if properly instructed, will consider the prior statement as substantive evidence.

Ortlepp, 363 N.W.2d at 42–43. A *Dexter* problem only exists if the prior inconsistent statement is otherwise inadmissible; it does not arise if the impeachment evidence is admissible as substantive evidence. *Dexter*, 269 N.W.2d at 721; *Ortlepp*, 363 N.W.2d at 44. Thus, S.H.'s admissible statement to Deputy Reburn poses no *Dexter* issue. S.H.'s alleged brief statement to J.E., on the other hand, does present a potential *Dexter* problem.

A prosecutor may not “expose the jury to hearsay under the guise of impeachment when the sole purpose in calling the witness is to introduce the witness’ prior statement.” *State v. Thames*, 599 N.W.2d 122, 125 (Minn. 1999). Here, the transcript demonstrates that the state did not improperly call S.H. for the sole purpose of cross-examining her regarding her prior statement to J.E. The focus of the state’s cross-examination was on her prior statement to Deputy Reburn. The state asked S.H. whether she had ever talked to J.E. about the damage to any of the cars. S.H. denied speaking to J.E. and the state did not question her further about the substance of the alleged statement. Thus, we conclude that the district court did not commit plain error by allowing the prosecution to call S.H. as a witness.

III.

Bjerke finally contends that he received ineffective assistance of counsel because his trial counsel failed to object to the court's determination that S.H.'s statements were admissible as substantive evidence. Given our conclusions above, however, Bjerke cannot prove either of the necessary requirements, i.e. 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." *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)). Thus, this claim fails. See *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (stating that this court may address the *Strickland* prongs in any order and may dispose of a claim of ineffective assistance of counsel if one prong is determinative).

Affirmed.