STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0921

State of Minnesota,
Respondent,

vs.

Rosco Demar Lewis,
Appellant.

Filed July 8, 2008
Affirmed
Shumaker, Judge

Stearns County District Court
File No. K4-06-4588

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Janelle P. Kendall, Stearns County Attorney, Room 448, Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

On appeal from convictions of aggravated robbery in the first degree and attempted aggravated robbery in the first degree, appellant argues that the district court abused its discretion by admitting the plea-hearing testimony of his alleged accomplice because the plea-hearing testimony constitutes inadmissible hearsay and its admission violated his rights under the Confrontation Clause. We affirm.

FACTS

On April 30, 2006, at approximately 1:15 a.m., two St. Cloud State University students, A.P. and K.A., were walking back to their dormitory from a party at a nearby residence. Both had consumed alcohol, but neither was intoxicated.

As A.P. and K.A. walked to their dorm, two young men approached them, one of whom brandished a knife and demanded A.P.'s cell phone and money. He grabbed A.P. and held the knife to the back of her neck. The other man confronted K.A. but did not display a weapon.

During the incident, K.A. was able to back away, study both individuals, and call 911. When the man who had confronted K.A. realized she was calling 911, he asked her what she was doing, walked up to her, and hit her on the side of her head. He then shouted to the man wielding the knife, "She called the cops. She called the cops. Let's go. Let's go. Let's go." The men ran away, and the two students ran in the other direction.

When police arrived, K.A. described the assailants. She explained that both were African-American men; the man with the knife was short, stocky, wore a hooded sweatshirt, and had his hair in cornrows; and the other man was taller, thinner, and wore a hat and jacket.

After a photo line-up, K.A. positively identified appellant Rosco Demar Lewis as the assailant with the knife. She identified Ishmael Ewing as Lewis's accomplice.

Lewis was charged with one count of aggravated robbery in the first degree and one count of attempted aggravated robbery in the first degree; he waived his right to a jury trial, and a bench trial was held.

Ewing, meanwhile, pleaded guilty to an amended charge of aiding and abetting simple robbery. As part of his plea bargain, he agreed to testify against the other person involved in the robbery. At Lewis's trial, however, Ewing refused to answer some of the prosecutor's questions, including those pertaining to the identity of his accomplice. Ewing attempted to rely on the Fifth Amendment to avoid answering, but the court explained to him that that protection was not available to him because he had already pleaded guilty. The court then ordered Ewing to answer the prosecutor's questions, but Ewing again refused. Accordingly, the district court held Ewing in criminal contempt of court.

In light of Ewing's refusal to answer questions, the prosecutor offered Ewing's plea-hearing testimony. The court admitted the plea-hearing testimony "under the catch-all exception to the hearsay rule," despite Lewis's objection that its admission violated his rights under the Confrontation Clause.

During the plea hearing, Ewing had testified under oath that the other person involved in that robbery was "Roscoe." But Ewing insisted, at the plea hearing and at Lewis's trial, that he did not know Roscoe's last name, and he refused to specifically identify Lewis as his accomplice.

After the plea-hearing testimony was admitted, Lewis's defense counsel cross-examined Ewing. Ewing answered questions about his interview with Lewis's attorney, the charges he faced, his plea agreement, his plea-hearing testimony, and the robbery. The following exchange between Lewis's defense counsel and Ewing took place:

> DEFENSE COUNSEL: [Y]ou told them that you were in an alley with someone named Roscoe?
> EWING: Right.
> DEFENSE COUNSEL: Is the person that you were at the alley with Roscoe Lewis?
> EWING: I didn't say that.
> DEFENSE COUNSEL: Well, who was the person that you were in the alley with?
> EWING: Some guy named Roscoe, like I said.
> DEFENSE COUNSEL: But you don't know his last name?
> EWING: (Shakes head).
> DEFENSE COUNSEL: Is it this Roscoe sitting next to me?
> EWING: (Shrugs shoulders). (Shakes head).
> DEFENSE COUNSEL: Are you refusing to answer that question?
> EWING: (Nods head). I don't know the person last name that you talking about.
> DEFENSE COUNSEL: I don't have any more questions, Your Honor.

The district court found that Ewing's plea-hearing testimony, which identified Ewing's accomplice as "Roscoe," was corroborated by K.A.'s "credible testimony" identifying Lewis as the perpetrator. On this evidence, the court found Lewis guilty of

both charges and sentenced him to 58 months on count one and 34 months on count two, to be served concurrently. This appeal followed.

D E C I S I O N

I.

The district court admitted Ewing's plea-hearing testimony under the residual, or "catch-all," exception to the hearsay rule, after finding that the statement was made under oath and had "sufficient indicia of reliability." *See* Minn. R. Evid. 807.[1] On appeal, Lewis contends there was no valid basis for admitting the plea-hearing testimony.

"A defendant claiming error in the district court's admission of evidence bears the burden of showing that the district court erred and that prejudice resulted." *State v. Marchbanks*, 632 N.W.2d 725, 730 (Minn. App. 2001). The district court has considerable discretion in admitting evidence, and we review an evidentiary ruling for abuse of that discretion. *State v. Martinez*, 725 N.W.2d 733, 737 (Minn. 2007). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Out-of-court statements made by the declarant that are offered to prove the truth of the matter asserted are hearsay. Minn. R. Evid. 801(c). Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802. One such exception is the residual exception, contained in Minn. R. Evid. 807, which allows admission of a

[1] Minn. R. Evid. 807 replaced Minn. R. 803(24) and 804(b)(5), effective September 1, 2006, and was, therefore, in effect at the time of Lewis's trial in December 2006.

statement not otherwise covered by a hearsay exception or exclusion if it has "equivalent circumstantial guarantees of trustworthiness" and

> (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. In addition, to be admitted under the residual exception, the proponent must make it 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." *Id.*

Minnesota courts examine the "totality of the circumstances" to assess whether a statement has sufficient circumstantial guarantees of trustworthiness to be admissible under the residual exception. *Martinez*, 725 N.W.2d at 737; *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006). Factors bearing on a statement's trustworthiness include the declarant's availability for cross-examination, proof that the statement was made, whether the statement was against the declarant's penal interest, and whether the statement was consistent with other evidence. *State v. Ortlepp*, 363 N.W.2d 39, 44 (Minn. 1985). These factors "provide guidance," but "are not an exclusive list of indicia of reliability." *Martinez*, 725 N.W.2d at 738.

Ewing's plea-hearing testimony had sufficient circumstantial guarantees of trustworthiness. It was given under oath, and Ewing was represented by counsel when he

made the statements. The testimony was recorded by a court reporter and the transcript was admitted as an exhibit at Lewis's trial, thus ensuring that Ewing made the statements and that he did in fact say what the record shows. In addition, as the district court found, K.A.'s "credible testimony" established Lewis's guilt.

Rule 807's other requirements do not bar admission of Ewing's plea-hearing testimony. The plea-hearing testimony was offered as evidence of a material fact and was more probative than other evidence that could be reasonably procured since Ewing refused to answer questions from the prosecution, despite the court's order. And we cannot conclude, on this record, that admission of the plea-hearing testimony did not serve the general purposes of the rules of evidence and the interests of justice. *See* Minn. R. Evid. 102 (explaining that evidentiary rules are to "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined").

Rule 807 also requires the proponent to make it 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. The record indicates that the state informed Lewis of its intent to call Ewing as a witness, that defense counsel was aware of the state's plan to call Ewing prior to the start of trial, and that defense counsel had an opportunity to interview Ewing prior to admission of the plea-hearing testimony and prior to cross-examination. *See*

Oliver v. State, 502 N.W.2d 775, 778 (Minn. 1993) (explaining that, although there was no formal compliance with the notice requirement, defense counsel appeared to have had notice because of comments made in opening statement). It is not clear from the record, however, that the state informed Lewis of its intention to use Ewing's plea-hearing testimony. But Lewis did not object on the ground of lack of notice and did not raise any argument indicating that notice was insufficient at trial. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (courts generally do not consider matters not argued and considered by the district court). Moreover, Lewis has not raised any argument on appeal indicating that notice under rule 807 was lacking. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

The district court did not abuse its discretion by admitting Ewing's plea-hearing testimony under the residual exception.

II.

Lewis next contends that the admission of Ewing's plea-hearing testimony violated his rights under the Confrontation Clause because Ewing was not subject to adequate cross-examination.

Even though a statement is admissible under an exception to the hearsay rule, it may nonetheless be inadmissible under the Confrontation Clause. *State v. Fields*, 679 N.W.2d 341, 346 (Minn. 2004). Both the United States Constitution and the Minnesota Constitution afford an accused the right to confront witnesses who testify against him. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. "[W]e apply the same analysis under

both Confrontation Clauses." *State v. Holliday*, 745 N.W.2d 556, 564 (Minn. 2008) (citing *State v. Henderson*, 620 N.W.2d 688, 695 (Minn. 2001)). "[W]hether the admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law that we review de novo." *State v. Warsame*, 735 N.W.2d 684, 689 (Minn. 2007).

The United States Supreme Court concluded, in *Crawford v. Washington*, that testimonial statements from witnesses who do not appear at trial are inadmissible unless the declarant is unavailable for trial, and the defendant has had a prior opportunity to cross-examine that declarant. 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004); *Warsame*, 735 N.W.2d at 689. But the Confrontation Clause is not implicated when the declarant testifies at trial and is subject to cross-examination. *Crawford*, 541 U.S. at 59 n.9, 124 S. Ct. at 1369 n.9 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements[.] . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."); *Holliday*, 745 N.W.2d at 565 (examining *Crawford* and the use of statements when the declarant testifies and is cross-examined); *Robinson*, 718 N.W.2d at 409-10 (concluding that the Confrontation Clause was not implicated when the declarant had "testified and was subject to cross-examination"); *Ortlepp*, 363 N.W.2d at 44 (explaining that the admission of a witness's prior statement implicating the defendant did not pose any "confrontation problem," because the witness "testified [at the defendant's trial], admitted making the prior statement, and was available for cross-examination by defense counsel").

Minnesota courts have concluded that a witness is unavailable, for purposes of the Confrontation Clause, when the witness refuses to testify or invokes the Fifth Amendment's protection. *See e.g., State v. Ford*, 539 N.W.2d 214, 227 (Minn. 1995) (declaring witness unavailability may be established by a witness invoking Fifth Amendment protection against self-incrimination); *State v. Durante*, 406 N.W.2d 80, 84 (Minn. App. 1987) ("Witnesses who invoke their Fifth Amendment privilege are unavailable for purposes of the confrontation clause."); *State v. Iverson*, 396 N.W.2d 599, 606 (Minn. App. 1986) (declaring witness unavailable because witness refused to testify), *review denied* (Minn. Jan. 16, 1987); *see also Douglas v. Alabama*, 380 U.S. 415, 419-420, 85 S. Ct. 1074, 1077 (1965) (holding that confrontation rights were violated when a witness asserted his Fifth Amendment privilege and the prosecutor, under the guise of cross-examination, read to the jury the witness's confession implicating the defendant).

But Ewing did not successfully invoke the protection of the Fifth Amendment and he did not simply refuse to testify. Even though Ewing refused to answer some of the prosecution's questions, he did answer questions posed both on direct and on cross-examination. Importantly, on cross-examination, Ewing was asked questions about his plea-hearing testimony; he responded to those questions and attempted to explain his plea-hearing testimony by indicating that he never identified the last name of the person with whom he committed the robbery. *See State v. Plantin*, 682 N.W.2d 653, 659-60 (Minn. App. 2004) (holding that the "the Confrontation Clause guarantees only an opportunity for effective cross-examination" and the defendant is not denied that opportunity even though the declarant suffers a lapse in memory (quotations omitted)),

review denied (Minn. Sept. 29, 2004). Lewis may be dissatisfied with Ewing's testimony, but dissatisfaction does not equate to denial of a defendant's constitutional right of confrontation. *See Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 2664 (1987) ("[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985))). Lewis was not denied "an *opportunity* for effective cross-examination" of Ewing. *Plantin*, 682 N.W.2d at 559-60 (quotations omitted). Thus, the admission of Ewing's plea-hearing testimony did not violate Lewis's right to confrontation.

III.

Finally, we conclude that, even if the district court erred in admitting the plea-hearing testimony or if its admission violated the Confrontation Clause, reversal is not warranted because the admission of the plea-hearing testimony was harmless. *See Holliday*, 745 N.W.2d at 568 (explaining that "reversal of appellant's convictions is not warranted because any error under the hearsay rules in admitting [the prior statements or testimony] was harmless"); *State v. Brown*, 739 N.W.2d 716, 725 (Minn. 2007) ("Violations of the Confrontation Clause are subject to harmless error analysis.").

If the district court errs in admitting evidence, the reviewing court determines whether there is a reasonable possibility that the wrongfully admitted evidence significantly affected the verdict. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). The "[e]rroneous admission of evidence that does not have constitutional implications is

harmless if there is no 'reasonable possibility that the wrongfully admitted evidence significantly affected the verdict.'" *Robinson*, 718 N.W.2d at 407 (quoting *Post*, 512 N.W.2d at 102 n.2).

And "the admission of evidence at trial in violation of the United States Constitution does not automatically require reversal of the defendant's conviction and the granting of a new trial." *State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005). "The conviction may stand so long as the erroneous admission of the evidence was harmless beyond a reasonable doubt." *Id.* at 79-80; *see also Brown*, 739 N.W.2d at 725 ("A Confrontation Clause error is harmless beyond a reasonable doubt if the guilty verdict actually rendered was surely unattributable to the error." (quotation omitted)).

The district court's findings of fact, conclusions of law, and order explain that Ewing's plea-hearing testimony identifies his accomplice as "Roscoe." The findings do not address the plea-hearing testimony in greater detail, other than to say that the testimony was given under oath. Rather, in finding Lewis guilty, the district court relied primarily on the "credible testimony" of K.A., who gave police a description of the assailant with the knife, "identified [Lewis] as the person with the knife in a photo line-up," and then "identified [Lewis] with certainty in the courtroom during trial." Thus, if we set aside Ewing's testimony in its entirety, there remains a sufficient basis in evidence adduced from an eyewitness victim to support the conviction of Lewis. If there was any error in the admission of Ewing's testimony, it was harmless beyond a reasonable doubt.

Affirmed.