STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1345

State of Minnesota,
Respondent,

vs.

Andrew Billingsley,
Appellant.

Filed October 21, 2008
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 06085496

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

Following his convictions of unlawful possession of a firearm, second-degree assault, and terroristic threats, appellant Andrew Billingsley argues that the district court abused its discretion by admitting, as substantive evidence, prior statements to police by the victim that conflicted with her testimony at trial. We affirm.

D E C I S I O N

On December 13, 2006, the victim, K.L., went to a shelter for battered women and stated that she had been assaulted and threatened by appellant. K.L. subsequently gave two statements to police officers wherein she said that appellant came to her apartment, choked her, held a gun to her head, and threatened to kill her. The police obtained a search warrant for K.L.'s apartment. Prior to obtaining the warrant an officer observed appellant taking a garbage bag and setting it on the apartment balcony. When police later searched K.L.'s apartment, they found a gun in a garbage bag on the balcony.

At trial in March of 2007, K.L. testified that appellant never touched or threatened her. She further testified that she had lied in her statement to the police because the police told her she would lose her daughter if she failed to cooperate and to "say everything that [they] want[ed]." The district court instructed the jury that it could consider K.L.'s prior inconsistent statements as substantive evidence.

"Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion . . . 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) (citations omitted). A witness's prior inconsistent statement is admissible to impeach the witness, but it is generally not admissible as substantive evidence. *State v. McDonough*, 631 N.W.2d 373, 388 (Minn. 2001); Minn. R. Evid. 613(b). But the residual hearsay exception allows admission of a statement not otherwise covered by an exception or exclusion if it has "equivalent circumstantial guarantees of trustworthiness" and 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. We examine the "totality of circumstances" to assess whether a statement has sufficient circumstantial guarantees of trustworthiness to be admissible under the residual exception. *State v. Martinez*, 725 N.W.2d 733, 737-38 (Minn. 2007) (citing *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006)).

In *State v. Ortlepp*, the Minnesota Supreme Court considered four factors in deciding whether to admit the confession of a co-conspirator, who later recanted and repudiated his statement at trial, as substantive evidence of the defendant's guilt under the residual hearsay exception. 363 N.W.2d 39, 44 (Minn. 1985). Specifically, the supreme court examined whether (1) the witness was available for cross-examination regarding the statement, thereby assuaging any confrontation problems; (2) there was proof that the

prior statement was made; (3) the statement was against the declarant's penal interest, a fact that increases its reliability; and (4) the statement was consistent with all the other evidence introduced. *Id*. These factors "provide guidance," but "are not an exclusive list of the indicia of reliability." *Martinez*, 725 N.W.2d at 738 (discussing *Ortlepp* factors). In *State v. Plantin*, we applied these factors to a domestic abuse case. 682 N.W.2d 653, 658-59 (Minn. App. 2004).

Appellant does not challenge the district court's conclusion that the first two *Ortlepp* factors were established. Thus, we must determine whether (1) K.L.'s prior statement was against her penal interests, and (2) the statement was consistent with other evidence introduced at trial.

Against penal interests

In *Plantin*, we held that even though the victim's statement was not against her penal interests, the third *Ortlepp* factor was satisfied because the statement was against her interest in a relationship with the defendant. 682 N.W.2d at 659. Here, appellant contends that when K.L. gave the prior inconsistent statement to the police, there were "two conflicting 'relationship interests' involved": one with appellant and the other with her daughter by appellant. Although appellant acknowledges that K.L.'s statement was against her interest in her relationship with appellant, appellant argues that it should also be "considered consistent with maintaining custody of her child."

This argument was not raised by defense counsel at trial and was not explicitly addressed by the district court in determining whether the prior statement was admissible. Moreover, it is essentially a credibility determination whether the police officer who took

K.L.'s statement actually told her she was required to make a statement against appellant in order to retain custody of her daughter. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that this court defers to the district court's credibility determinations), *review denied* (Minn. July 15, 2003). And although the victim testified at trial that she felt pressured to "say everything [the police] want[ed]," the officer stated that she never threatened to take the victim's daughter away from her. Thus, on this record we cannot say the district court erred in determining that, as in *Plantin*, K.L.'s statement was against her interest in having a relationship with appellant.

Consistent with other evidence

Appellant contends that K.L.'s statement to the police was not consistent with all the other evidence. The district court found otherwise:

> I do find that [K.L.'s] statement is certainly consistent with evidence of, for example, and most strikingly, the presence of a gun and the use of a gun in the commission of this alleged offense. The witness most incredibly stated that she did not recall a gun or did not -- that there was not a gun used, and yet she certainly described the circumstances to the police and the credibility of that statement was borne out by the fact that the . . . [p]olice ended up calling a SWAT team, that she was upset that her daughter was in the apartment, that the daughter was potentially in harm's way all because there was a gun that was in the apartment with [appellant]. Her denial of that was not credible and certainly her insistence that there was a gun and all of the evidence that followed that, including discovery of a loaded, cocked gun in the bag that [appellant] was seen placing on the deck, all of that makes this statement credible, consistent with the evidence, and admissible as substantive evidence.

We are persuaded by the district court's reasoning.

Appellant's contention that there was no physical evidence to corroborate K.L.'s original allegation that appellant choked her is immaterial because there was other evidence consistent with her prior statement. Although there was no physical evidence tying appellant to the gun, a police officer testified that he saw appellant, acting suspiciously, place a garbage bag on the balcony. Shortly thereafter, a gun was found in a garbage bag on the balcony. Therefore, the police officer's testimony ties appellant to the gun, and was consistent with K.L.'s earlier statements. In addition, K.L. made the same allegations against appellant to two different officers, both of whom testified at trial. Accordingly, the district court properly found that the prior statement was consistent with the evidence presented at trial. And because all four of the *Ortlepp* factors were present, we conclude that the district court did not abuse its discretion by instructing the jury to consider the statement as substantive evidence.

Finally, appellant argues that "it is questionable whether [the *Ortlepp*] factors are restrictive enough" and urges this court to adopt any of several approaches taken by courts in other jurisdictions. Because we are an error-correcting court, and will make new law only when there are no statutory or judicial precedents, we reject appellant's argument. *See St. Aubin v. Burke*, 434 N.W.2d 282, 284 (Minn. App. 1989); *State v. Traylor*, 641 N.W.2d 335, 341 (Minn. App. 2002) (noting that the Minnesota Court of Appeals is "compelled to follow the standards established by the supreme court [of Minnesota]").

Affirmed.