STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0237

State of Minnesota,
Respondent,

vs.

Marlo Andrews,
Appellant.

Filed June 16, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-07012313

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

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

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

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

LANSING, Judge

On appeal from his convictions of second-degree assault and prohibited person in possession of a firearm, Marlo Andrews challenges three of the district court's evidentiary rulings separately and cumulatively as denying him a fair trial. Because the district court properly exercised its discretion in admitting evidence of a witness's prior inconsistent statements, in excluding evidence of a witness's previous convictions, and in admitting a booking photograph of Andrews, we conclude that Andrews received a fair trial and affirm.

F A C T S

The state charged Marlo Andrews with one count of second-degree assault and one count of prohibited person in possession of a firearm. The complaint alleged that Andrews fired a gun at LC at a Brooklyn Center Super America on February 4, 2007, between 10 p.m. and midnight. The bullet did not hit LC, but it grazed a bystander's jacket sleeve. Andrews disputed that he was the person who fired a gun at LC but did not dispute that he is legally prohibited from possessing a firearm.

At trial, the state called ten witnesses. LC testified that Andrews fired the gun at him on February 4 after LC refused to give Andrews the expensive leather coat LC was wearing. LC identified two men in a still photograph from Super America's surveillance video as himself and Andrews. LC said that he had known Andrews for five or six years, that they have "beefs" with each other, and that they were involved in a physical altercation about four years earlier. LC further testified that he knew that Andrews has a

twin brother, that he has never met Andrews's twin brother, and that the brother would not have any reason to approach him.

LC rode to the Super America with AM. AM testified that she stayed in the car while LC went inside the store. As LC walked out of the store, AM saw someone approach him and talk to him. When the prosecutor asked her to identify the person she saw talking to LC, AM said she was not sure if it was Andrews or his twin brother, because they look the same. The prosecutor then asked AM about inconsistent statements she made to the prosecutor in the hallway right before trial and to a police officer on the night of the shooting. In response to the questioning, AM said that she "[m]aybe" told the officer the other person she saw at Super America was Andrews and not his brother. When the prosecutor tried to get a more definite statement, AM retreated and said she could not remember what she told the officer. AM ultimately admitted she told the prosecutor that she could tell the twin brothers apart, that she thought the shooter was Andrews when she first saw him, that she told the 911 operator the shooter was Andrews's brother because she thought Andrews could not have been at the Super America, and that she found out later that Andrews could have been there. But she refused to admit that she told the prosecutor or the officer that Andrews was the shooter.

Later in the trial, the state called, as a witness, a case-management assistant who works in the Hennepin County Attorney's Office. The case-management assistant witnessed the conversation between the prosecutor and AM in the hallway right before trial. She said that AM admitted telling the officer that Andrews was the shooter, that AM said she had erroneously reported that the brother was the shooter based on a

mistaken belief about whether Andrews could have been at the Super America, that AM repeated her statement that Andrews was the shooter, that AM said she was scared and did not want to testify, and that AM said she would not say anything about the shooting if the prosecutor put her on the stand.

The police officer who interviewed AM at the Super America about fifteen minutes after the shooting testified that AM said that the shooter ran by her car while she was waiting for LC, that she was frightened because he looked at her, and that the shooter was Andrews. The officer noted, "[AM] was also very hesitant to speak to me for fear of retaliation."

A man who was intending to purchase gas at Super America, MB, testified that he was in his car in the store's parking lot when he heard the gunshot on February 4. As he was calling 911, he saw a person running from the front of the store and then saw the person get into a white car. MB followed the car to an apartment complex, blocked the only entrance and exit to the complex, and waited there until the police arrived.

An officer who responded to MB's 911 call testified that the police searched the apartment complex on February 4 and were unable to find the suspect. They did, however, seize the white car. The officer who executed the search warrant for the car testified that she found a black winter coat with a fur-trimmed hood in the trunk of the white car and noted that the surveillance video showed that the suspect was wearing "what appears to be a black heavy jacket with a fur hood."

The police later determined that the owner of the white car was SBB. SBB testified that she had dated Andrews and they had broken up more than once, but most

recently in July 2007. She said that on February 4 in the afternoon she noticed that her car was not where she thought it had been parked. She also said that at one point during their relationship Andrews had the spare key to her car in his possession. When she saw that her car was missing, "[t]he first thing that came to mind was to call [Andrews] and ask him if he [had] seen it." Andrews told SBB that he had not seen the car, and SBB reported the car stolen. SBB also noted that several physical differences between Andrews and his twin brother make it possible to tell them apart: "[Andrews] is fatter than [his brother]" and has a "unibrow," and his brother has tattoos.

The state's two other witnesses were the person whose sleeve was grazed by the bullet and the deputy sheriff who examined fingerprints collected from SBB's car.

Andrews called two witnesses. First, he re-called SBB, who testified that Andrews did not have any reason to steal the car because she would have let him borrow it. Then he called his twin brother, who testified that, contrary to LC's testimony, LC knew who he was and had interacted with him between twenty to thirty times.

The jury found Andrews guilty of both second-degree assault and prohibited person in possession of a firearm. Andrews appeals from his convictions.

D E C I S I O N

Andrews challenges three of the district court's evidentiary rulings as reversible error: he argues that the district court erred by allowing the state to present evidence of AM's prior inconsistent statements, by denying the defense the opportunity to impeach LC with his previous convictions, and by allowing the state to admit into evidence a booking photograph of Andrews. Andrews alternatively argues that these errors

cumulatively denied him his right to a fair trial. Evidentiary rulings will not be reversed unless the appellant can show a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). And, reversal for cumulative error is proper only when the cumulative effect of trial error results in prejudice that produces an unfair trial. *State v. Penkaty*, 708 N.W.2d 185, 200 (Minn. 2006).

I

In his challenge to the admissibility of AM's prior inconsistent statements, Andrews contends that the prosecutor improperly presented evidence of AM's prior inconsistent statements under the guise of impeachment. Through this improper impeachment, Andrews argues, the jury received prejudicial hearsay that it might impermissibly consider as substantive evidence.

Minnesota courts have long struggled to achieve a balance that prevents jurors from hearing improper hearsay that is ostensibly admitted for impeachment purposes but still allows the jury to hear "valuable, relevant evidence" that helps "place the testimony in proper perspective." *See* Minn. R. Evid. 607 cmt. (discussing competing approaches). Prior to 1977, courts addressed the problem by using the element of surprise as a screening tool and prohibited parties from impeaching their own witnesses unless they were surprised by the witness's testimony. *Id.* The supreme court abandoned this rule in 1977 by adopting Minn. R. Evid. 607, which states, "The credibility of a witness may be attacked by any party, including the party calling the witness."

Shortly after the adoption of rule 607, the supreme court upheld a district court's decision to bar the prosecution from impeaching its own witness with evidence of her

prior inconsistent statement. *State v. Dexter*, 269 N.W.2d 721, 721 (Minn. 1978). The supreme court noted that the prosecution sought "to present, in the guise of impeachment, evidence which [was] not otherwise admissible." *Id.* at 721. The *Dexter* court suggested that the preferable approach to a party's attempt to impeach its own witness with inadmissible hearsay would be for the court to scrutinize the impeaching evidence and admit it only if its potential for unfair prejudice does not substantially outweigh its probative value under Minn. R. Evid. 403. *Dexter*, 269 N.W.2d at 722. Although the supreme court has not expressly adopted this approach, it has continued implicitly to endorse it. *See State v. Ortlepp*, 363 N.W.2d 39, 43 (Minn. 1985) (quoting federal treatise that suggests invoking rule 403).

The district court determined that AM's prior inconsistent statements did not present the same problem as *Dexter* because they fell under the hearsay exceptions set forth in Minn. R. Evid. 801(d)(1) and were therefore admissible as substantive evidence. *See Ortlepp*, 363 N.W.2d at 43 (noting that *Dexter* problem is not present when evidence is admissible substantively). Specifically, the district court suggested that AM's statements to the prosecutor in the hallway before trial were substantively admissible under Minn. R. Evid. 801(d)(1)(C) as statements identifying a person after perceiving the person. And the district court suggested that AM's statements to the officer about fifteen minutes after the shooting were substantively admissible both as statements of identification under Minn. R. Evid. 801(d)(1)(C) and as statements describing an event immediately after observing the event under Minn. R. Evid. 801(d)(1)(D).

Having closely examined the record, we conclude that AM's statements to the prosecutor do not fall under Minn. R. Evid. 801(d)(1)(C). The record does not support a conclusion that AM had an opportunity to perceive Andrews in the hallway before she identified him as the shooter. Therefore, her statement to the prosecutor is in the nature of an accusation by someone who knows the defendant, not an identification, and it is not admissible under Minn. R. Evid. 801(d)(1)(C). *See State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006) (distinguishing between accusation and identification and agreeing that "'vast majority of cases' apply [r]ule 801(d)(1)(C) in the context of a police lineup, showup, or other similar procedure").

Similarly, AM's statements to the police officer after the shooting do not meet the requirements of Minn. R. Evid. 801(d)(1). Statements that qualify for admission under Minn. R. Evid. 801(d)(1)(C) and (D) are considered trustworthy because they are made immediately after the declarant observes a particular person or event and, in that short passage of time, the declarant cannot be influenced by things other than her immediate perceptions. *Cf.* 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:67, at 560 (3d ed. 2007) (noting that present-sense-impression statements are trustworthy, in part, because "immediacy precludes time for reflection"). AM's statements to the officer are not admissible under these exceptions because, after observing the shooting, she called 911 and reported that the shooter was Andrews's brother before telling the officer that the shooter was Andrews. AM's vacillation shows that her statements were influenced by her reflections and not based purely on her

observation of the event. Consequently, her statements to the officer are not admissible under either Minn. R. Evid. 801(d)(1)(C) or (D).

Although we conclude that AM's prior statements do not fall under Minn. R. Evid. 801(d)(1), we nonetheless affirm the district court's ruling on the substantive admissibility of the statements under Minn. R. Evid. 807, the residual exception to the hearsay rule. *See Ortlepp*, 363 N.W.2d at 44 (holding that *Dexter* problem was not present because statements qualified for admission under rule 803(24), which was replaced by rule 807 in 2006). A statement is admissible under rule 807 if (1) it has circumstantial guarantees of trustworthiness that are equivalent to other admissible hearsay statements, (2) the statement is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, (4) admission of the statement best serves the general purposes of the rules of evidence and the interests of justice, and (5) the proponent of the statement gives the adverse party sufficient notice that it intends to offer the statement.

In determining whether statements are sufficiently trustworthy to meet the first requirement for admission under rule 807, courts must consider the totality of the circumstances, and the pertinent considerations may include:

> whether the statement was given voluntarily, under oath, and subject to cross-examination and penalty of perjury; the declarant's relationship to the parties and her motivation to make the statement; the extent to which the declarant's statement reflects her personal knowledge; whether the declarant ever recanted her statement; the existence of corroborating evidence; availability of evidence on the issue; reasons for the declarant's unavailability; and the character of the declarant for truthfulness.

State v. Moua Her, 750 N.W.2d 258, 275 (Minn. 2008), *vacated for reconsideration on other grounds sub. nom. Moua Her v. Minnesota*, 129 S. Ct. 929 (2009).

The totality of the circumstances demonstrates substantial evidence of trustworthiness. AM admitted speaking to both the prosecutor and the officer; she also admitted most of the substance of her statements, refusing to admit only that she identified Andrews as the shooter; AM's statements to the prosecutor were consistent with her statements to the officer; AM's prior statements show that she was afraid Andrews would retaliate and that she believed making the statements to the prosecutor and the officer was against her interests; and AM's statements to the prosecutor provide a reasonable explanation for her statement in the 911 call that the shooter was Andrews's brother—the only statement she made prior to trial that the shooter may not have been Andrews. Furthermore, substantial corroborating evidence exists: LC testified that Andrews was the shooter, and the white car that fled away from the Super America was linked to Andrews through his relationship with SBB and his past possession of the car's spare key.

AM's prior statements also meet the other four requirements of rule 807. The statements were offered as evidence of the material facts that AM could tell Andrews and his twin brother apart and that she had reported to police that Andrews was the shooter. AM's own statements were naturally more probative on these points than any other evidence. Admission of the statements best served the general purposes of the rules of evidence and the interests of justice, because it helped the jury place AM's testimony "in

proper perspective." Minn. R. Evid. 607 cmt. Finally, the record indicates—and Andrews does not dispute—that defense counsel had sufficient advance notice that AM made prior inconsistent statements and that those statements would become an issue at trial.

Because AM's prior inconsistent statements are substantively admissible and the *Dexter* problem is not present, the district court did not abuse its discretion when it allowed the prosecutor to ask AM about her prior inconsistent statements, when it admitted the case-management assistant's testimony about the statements, when it admitted the officer's testimony about the statements, and when it allowed the jury to consider the statements as substantive evidence.

II

On the state's motion, the district court excluded evidence of LC's three prior felony convictions: a 1998 conviction for terroristic threats and two convictions for controlled-substance crimes for which he was sentenced in 2003. Andrews asserts that this ruling was reversible error because the convictions are admissible under Minn. R. Evid. 609, which states that evidence of a felony conviction that does not involve dishonesty is admissible if it is less than ten years old and the probative value of admitting the conviction outweighs the prejudicial effect.

We agree with the district court that the convictions for terroristic threats and controlled substance crimes are of little probative value for impeachment. *See State v. Norregaard*, 380 N.W.2d 549, 554 (Minn. App. 1986) (stating that using prior drug convictions and terroristic-threat convictions to impeach is not favored because they do

not relate to truthfulness and honesty). When determining the prejudice of admitting a state's witness's prior conviction, considerations include whether the witness will be unduly harassed or embarrassed, whether the jury will be confused and misled, and whether admission of the evidence will unnecessarily prolong the trial. *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995) (upholding denial of defendant's attempt to question state's witness about prior felony convictions).

Admission of the convictions would have been repetitive to some degree, because the jury had already learned that LC was in jail on other charges at the time of trial. The prior convictions also had significant potential to mislead the jury about the issues in this case. Introducing LC's past history as a drug offender could have suggested the content of LC's past "beefs" with Andrews or given rise to impermissible inferences about the interaction underlying the current charged crime. As the supreme court said in *Lanz-Terry*, "it might have led the jury to conclude that [the state's witness] was a bad person who deserved to be the victim of a crime." *Id.* And the district court's ruling did not affect Andrews's right to confront witnesses. *See id.* at 640-41 (rejecting defendant's argument that extrinsic evidence related to convictions should have been allowed under Confrontation Clause).

On balance, the convictions' marginal probative value was outweighed by potential prejudice, and the district court did not abuse its discretion by excluding them.

III

Finally, Andrews argues that the district court erred when it admitted his booking photograph. Photographs should not be admitted if their "probative value is substantially

outweighed by the danger of unfair prejudice under Minn. R. Evid. 403." *State v. Stewart*, 514 N.W.2d 559, 565 (Minn. 1994). "The main reason for generally excluding police photographs is that the jurors might infer from them that the defendant has been involved in prior criminal conduct." *State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983).

The record demonstrates that the booking photograph of Andrews had significant probative value. The state submitted it with a photograph of Andrews's twin brother to show that Andrews and his brother did not look exactly alike near the time the crime was committed. Because Andrews had lost weight between the time of the offense and trial, the state could not rely merely on the brothers' appearances in court to demonstrate their differences at the time of the offense.

Andrews asserts that the photograph's danger of unfair prejudice substantially outweighed its probative value because an officer testified that the photograph of Andrews was taken before the charged offense, thus allowing the jury to infer a prior arrest or conviction. Minnesota courts have suggested that a booking photograph presents less risk of prejudice when the jury is informed that the photograph was taken after the charged crime. *E.g. State v. Bellcourt*, 305 N.W.2d 340, 341 (Minn. 1981). But we nonetheless find no abuse of discretion in the admission of a booking photograph based solely on the possibility that the jury might conclude it was taken for a separate crime.

The probative value of Andrews's booking photograph was directly related to the fact that it was taken near the time of the offense and allowed the jury to compare the

appearances of Andrews and his twin brother at that time. The photographs allowed a comparison of the twins that other contemporaneous images—e.g. the surveillance video—could not provide. And the state removed all marks that would identify the photograph as a booking photograph to reduce the risk of prejudice. The district court did not abuse its discretion in admitting Andrews's booking photograph along with that of his twin brother.

Because we conclude that each of the three challenged evidentiary rulings were within the district court's discretion and did not amount to error, we do not reach Andrews's alternative argument that the cumulative effect of evidentiary error deprived him of a fair trial.

Affirmed.