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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0483

State of Minnesota,
Respondent,

vs.

Christopher E. Coleman,
Appellant.

Filed July 14, 2009
Affirmed
Stauber, Judge

Olmsted County District Court
File No. 55CR065799

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

Mark Ostrem, Olmsted County Attorney, Olmsted County Government Center, 151 Southeast Fourth Street, Rochester, MN 55904-3710 (for respondent)

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Considered and decided by, Stoneburner, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his convictions of terroristic threats and fifth-degree assault, appellant argues that the district court committed reversible error when it allowed the state to play the complainant's tape-recorded statement to police at appellant's trial because the statement (1) was unreliable hearsay and (2) contained references to inadmissible assaults and threats. Because the admission of the tape-recorded statement was not an abuse of discretion, we affirm.

FACTS

On July 3, 2006, Officer Brent Petersen was dispatched to C.A.'s residence. Upon his arrival, Officer Petersen noted that C.A. seemed frightened and upset and looked as if she had been crying. In a recorded statement, C.A. told Officer Petersen that she had been outside walking her dog when she was confronted by appellant Christopher Coleman, a friend of hers with whom she had a brief sexual relationship. According to C.A., appellant was upset because he thought C.A. may have given him a sexually transmitted disease (STD). C.A. claimed that she told him to leave, but appellant responded by pushing her to the ground, and choking her. C.A. claimed that appellant told her that he had an appointment the next day and that if he found out that he had a STD, he was going to shoot and kill her.

Appellant was charged with terroristic threats and two counts of domestic assault stemming from the July 3, 2006 incident. At trial, C.A. testified that she and appellant had been friends and that the two had a brief sexual relationship. When questioned about

the assault, however, C.A. stated that she did not remember the details of the assault because it occurred two years ago. Although C.A. agreed that she was assaulted on July 3, 2006, C.A. testified that she did not remember being choked, having neck pain, or seeing appellant on that date. A break was subsequently taken to allow C.A. to review her prior statement to Officer Petersen. After reviewing the statement, C.A. testified that she still could not remember the details of the assault, but that she believed she told Officer Petersen the truth.

C.A. was also questioned regarding an application that she filled out for a harassment restraining order against appellant. C.A. claimed that she could not remember when she filled out the application, but conceded that she must have filled it out shortly after the assault because it was dated July 2006. The affidavit and petition for harassment restraining order were subsequently admitted into evidence. In the affidavit, C.A. claimed that appellant assaulted her and threatened to kill her.

Officer Petersen testified that he was dispatched to C.A.'s residence on July 3, 2006, and that his conversation with C.A. was recorded. Over defense objection, the recording was played to the jury. In addition to her statements concerning the events that occurred on July 3rd, the tape played to the jury included statements by C.A. that appellant had engaged in threatening behavior before the July 3, 2006, incident. Officer Petersen also testified that on the afternoon after he spoke with C.A., he arrested appellant at his job. According to Officer Petersen, appellant stated that he had been in a relationship with C.A. and that he had been tested for a STD that morning. Officer

Petersen further testified that appellant claimed that he and C.A. had an amicable breakup and that he had not seen her for weeks.

C.A.'s neighbor, B.H., testified that on the night of July 3, 2006, she heard a man and a woman arguing in front of her house. B.H. testified that she could not tell what the people looked like because it was dark, but that it sounded like the man was pretty upset. According to Haas, the man was complaining about the woman being out with somebody and said something like: "If you caught something, I'll kill you. . . . I'm going to the doctor tomorrow. And if I caught anything you're dead." B.H. recalled that the woman's voice sounded "very scared," and that she said something to the effect of: "Let me alone. Cut it out. You're choking me." B.H. testified that she then went to the window and yelled: Do I need to call 911?" According to B.H., the man replied that it was not necessary and that she looked out the window a few minutes later and saw the couple down by an apartment building talking.

At the close of the state's case, the district court directed a verdict for the defense on the domestic assault charges. The court then permitted the state to amend the complaint to charge appellant with fifth-degree assault. The jury subsequently found appellant guilty of terroristic threats and fifth-degree assault. The district court stayed imposition of appellant's sentence on terroristic threats for five years, and ordered appellant to serve 60 days in jail. Appellant received a 60-day concurrent sentence for fifth-degree assault. This appeal followed.

D E C I S I O N

Appellant argues that the district court committed reversible error when it allowed the state to play the victim's tape-recorded statement to police at trial because the statement (1) was unreliable hearsay and (2) contained references to inadmissible prior assaults and threats. "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) (citation omitted).

I. Reliability of victim's statement

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. This court examines 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.*

Appellant concedes that most of the *Ortlepp* factors have been satisfied here. But appellant argues that C.A.'s statement lacked indicia of reliability because the statement (1) was not a sworn statement; (2) was not a statement against her interest; and (3) was of questionable reliability in light of her sworn testimony that she could no longer accuse appellant of being her assailant due to a failing memory. Thus, appellant argues that the district court abused its discretion in admitting C.A.'s recorded statement to law enforcement.

We disagree. The supreme court has noted that the *Ortlepp* factors "provide guidance," but "are not an exclusive list of the indicia of reliability." *Martinez*, 725 N.W.2d at 738 (discussing *Ortlepp* factors). Here, the following circumstances indicate that C.A.'s statement was sufficiently trustworthy: (1) C.A. admitted making the

statement, testified that she believed she was telling the truth when she made the statement, and was available for cross-examination; (2) there was no dispute that she made the statement; (3) the statement was very detailed and made shortly after the assault; (4) C.A. had no apparent motive to lie to Officer Petersen: (5) the statement was consistent with B.H.'s testimony concerning the events on the evening of July 3, 2006; (6) C.A.'s statement about being choked was corroborated by the pictures taken by Officer Petersen, which show red marks on C.A.'s neck; and (7) the statement was consistent with the sworn affidavit in support of her application for a harassment restraining order against appellant that C.A. submitted a few days after the assault. Accordingly, given the totality of the circumstances, we conclude that the statement was sufficiently trustworthy.

Appellant also argues that the admission of the statement violates the rule set forth in *State v. Dexter*, 269 N.W.2d 721 (Minn. 1978).

> [A *Dexter*] problem arises when 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. "However, . . . if the prior statement is admissible as substantive evidence of the defendant's guilt, then the *Dexter* problem is not present and defendant has no legitimate cause to complain." *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993) (quotation omitted).

In this case, as discussed above, C.A.'s statement to Officer Petersen was admissible as substantive evidence under Minn. R. Evid. 807. Thus, there is no *Dexter* problem, and the district court did not abuse its discretion in admitting C.A.'s statement.

II. Prior bad acts

Appellant also contends that the district court abused its discretion by admitting C.A's statement because it contained several references to his alleged prior acts of violence, which was inadmissible character evidence. Testimony of prior bad acts is generally inadmissible to show character under Minn. R. Evid. 404(b). "The danger in admitting such evidence is that the jury may convict because of those other crimes or misconduct, not because the defendant's guilt of the charged crime is proved." *State v. Ness*, 707 N.W.2d 676, 685 (Minn. 2006).

Here, C.A.'s statement contained the following references to other alleged bad acts committed by the appellant: (1) when C.A. had company at her home, appellant came over and threatened to shoot the person in the house and also threatened to hurt C.A. and (2) police responded after appellant allegedly threw C.A. against her car and broke her cell phone. But appellant concedes that although he objected to the admission of the statement on hearsay grounds, he failed to object to the statement on the basis of the inadmissible character evidence.

Generally, failure to object to evidence at trial constitutes waiver of those issues on appeal. *State v. Beard*, 288 N.W.2d 717, 718 (Minn. 1980). "An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993), *review denied* (Minn. Oct. 19, 1993). In *Rodriguez*, this court

concluded, "Rodriguez's objection to the word 'kidnapping' on grounds of a 'legal conclusion' could not have alerted the trial court to the detailed hearsay and confrontation clause arguments Rodriguez now raises on appeal." *Id.*

In this case, because appellant's objection to the statements was based on hearsay grounds and not on the basis of inadmissible character evidence, the district court was not alerted to the character evidence arguments appellant has now raised on appeal. Therefore, the issue should be reviewed for plain error. *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). "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.* (quoting *State v. Crowsbreast*, 629 N.W.2d 433, 437 (Minn. 2001)).

The state argues that it was not error to admit the evidence because the statements constitute admissible relationship evidence. We agree. Rule 404(b) provides that the district court may admit the evidence if the state (1) provides "notice of its intent to admit the evidence consistent with the rules of criminal procedure"; (2) "clearly indicates what the evidence will be offered to prove"; (3) shows that the other incident and the defendant's participation "are proven by clear and convincing evidence"; (4) shows that "the evidence is relevant to the case"; and (5) shows that the evidence's probative value "is not outweighed by its potential for unfair prejudice to the defendant." Minn. R. Evid. 404(b). Where relevant to show a strained relationship, evidence of past abuse of or

threats against the victim by the defendant has generally been deemed admissible against 404(b) challenges. *See, e.g.*, *State v. Bauer*, 598 N.W.2d 352, 364-65 (Minn. 1999); *State v. Buggs*, 581 N.W.2d 329, 336-37 (Minn. 1998).

Here, the state provided notice of its intent to admit C.A.'s statement as substantive evidence that appellant committed the alleged crimes against C.A. Although the notice had nothing to do with relationship evidence, appellant was on notice of the state's intent to admit the recorded statement, and appellant knew or should have known that the statement contained references to his prior bad acts. Moreover, C.A.'s testimony about the prior bad acts demonstrates by clear and convincing evidence that appellant participated in the prior acts, and the evidence was relevant to show the parties' strained relationship. Finally, appellant has not pointed to anything so inherently prejudicial about the relationship evidence admitted in this case as to distinguish it from other cases affirming the admission of such evidence. Accordingly, based on our review of the rule 404(b) factors, we conclude that the admission of the statements pertaining to appellant's prior bad acts was not plain error.

Affirmed.