STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1401

State of Minnesota,
Respondent,

vs.

Elronza Delray Williams,
Appellant.

Filed October 27, 2009
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-08-3463

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

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

Marie L. Wolf, Interim 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 Ross, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

ROSS, Judge

Police rushed to an apartment building after a tenant overheard and reported a domestic assault in progress. M.W., bleeding and bruised, told responding police that Elronza Williams had beaten her and threatened to behead her with a machete. Police saw corroborating physical evidence and heard similar accounts from M.W.'s young children. But M.W. maintained contact with Williams to continue their romantic relationship while Williams was jailed awaiting trial for the assault. Over time, M.W.'s story radically changed to support Williams's innocence. At trial, M.W. substantially recanted her contemporaneous description.

This appeal concerns the admissibility of M.W.'s out-of-court tape-recorded statements to police under the residual hearsay exception. The jury convicted Williams of second-degree assault and making terroristic threats. The jury apparently disbelieved her flip-flop trial testimony that her injuries were merely accidental. Williams challenges the district court's decision to admit M.W.'s taped police interview into evidence. Because M.W.'s out-of-court statements were sufficiently reliable, the district court did not abuse its discretion by admitting them, and we affirm.

FACTS

Elronza Delray Williams and M.W. had a loud confrontation in January 2008. A neighbor called police after she heard fighting and overheard a woman say, "Stop. Don't do this to me in front of my kids." Police were greeted by M.W., who had a bloody lip and an egg-shaped lump on her forehead. One officer took M.W.'s three children aside,

and they spontaneously began describing the altercation. They explained that Williams had bitten M.W., threatened to cut her with a "knife," and damaged two mirrors and a door. The children pointed out the "knife"—a three-foot machete—in the bedroom closet.

When Officer Sara Fry asked M.W. if the children were telling the truth, M.W. said "yes" and began to cry. She gave a statement to Officer Fry, which Officer Fry recorded. M.W. explained that Williams struck her in the mouth and forehead and threatened to cut off her head with the knife. She stated that she had locked herself and her children in the bedroom and that Williams forced the knife through the locked door. He threatened to break it down if M.W. did not open it voluntarily. She recounted that she opened the door and that Williams came in, grabbed her, and broke the mirrors. She told police that Williams warned, "If I can't be with you, nobody can." Police arrested Williams, and he was charged with second-degree assault and making terroristic threats.

Between the night of the incident and the time of trial, M.W.'s version of events changed markedly in Williams's favor. She sent letters to Williams, to police, to the prosecutor's office, and to the district court retracting her contemporaneous description. She testified at trial that Williams was merely intoxicated when the incident occurred, that her injuries and the property damage were simply the result of a series of accidents, and that she made her statement to police in "anger and confusion." M.W. claimed that she put the children in the bathroom to prevent them from seeing Williams intoxicated, contradicting her original, contemporaneous statement to police that the children were in the bedroom when Williams threatened and assaulted her.

The state sought to introduce M.W.'s recorded, out-of-court statement to police under the residual exception to the hearsay rule. Williams objected. The district court accepted the statement, deeming that it was probative and sufficiently reliable. The jury apparently believed M.W.'s out-of-court allegations, disbelieved her turnabout exculpatory trial testimony, and convicted Williams on both counts. Williams challenges the district court's evidentiary ruling.

D E C I S I O N

We uphold evidentiary rulings unless the district court abused its discretion in making them. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). The district court admitted M.W.'s recorded police statement under Minnesota Rule of Evidence 807, commonly known as the residual exception to the hearsay rule.

Out-of-court statements offered to prove the truth of the matter asserted in the statement are hearsay and generally inadmissible. Minn. R. Evid. 801; Minn. R. Evid. 802. The inadmissibility of hearsay is subject to numerous exceptions, including the residual exception, which provides that a statement not admissible under another specific exception may nevertheless be admitted if (1) the statement bears "equivalent" circumstantial guarantees of trustworthiness, (2) it is offered to prove a material fact, (3) it is more probative on the point than any other evidence available to the party offering it, and (4) the purposes of the rules of evidence and the interests of justice would best be served by its admittance. Minn. R. Evid. 807. Williams objected to the introduction of M.W.'s contemporaneous statement describing the assault, arguing that it

was too unreliable to be admitted. The district court rejected this argument, and it was exactly right to do so.

The Minnesota Supreme Court has discussed the admissibility of a recanting witness's out-of-court statement. *State v. Ortlepp*, 363 N.W.2d 39, 43–44 (Minn. 1985). Addressing the central issue of reliability, the court in *Ortlepp* noted that because a hearsay statement was made against the witness's penal interest, because it was consistent with the rest of the inculpatory evidence produced by the state, and because the witness was available for cross-examination and did not deny making the statement, the statement was sufficiently reliable to be admitted for its substantive value. *Id*. at 44. This court has applied the same analysis to an assault victim's out-of-court statements after the victim decided to reconcile with the defendant and the statement was against the victim's interest in the reconciliation. *State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). We concluded that when an out-of-court statement is made "against [a witness's] interests in a relationship" with the defendant, the statement is reliable for the same reason that a statement made against a witness's penal interest is reliable. *Id.*

Although Williams concedes that "most of the *Ortlepp* factors . . . were satisfied," he contends that M.W.'s police statement "lacked any indicia of reliability." The contention seems to overlook all the facts. The neighbor's original police report was consistent with M.W.'s police statement; M.W.'s observable injuries were consistent with M.W.'s police statement; M.W.'s emotional response to and endorsement of her children's account was consistent with her police statement; the children's description of

Williams's attack and of Williams's threat is consistent with M.W.'s police statement; and the officers' observations of the physical evidence and of the apartment's condition are consistent with M.W.'s police statement. M.W. was available for cross-examination and did not deny making the statement. And the statement was made against M.W.'s obvious interest in continuing her romantic relationship with Williams. All of the *Ortlepp* factors are satisfied. M.W.'s police statement was sufficiently reliable for the district court to admit it under the residual hearsay exception.

Williams argues that M.W. had a motive to lie to police because she was angry at Williams for being intoxicated. The argument is merely an attempt to cast doubt on M.W.'s credibility, and Williams pitched it unsuccessfully to the jury. The argument does not overcome the conclusion that M.W.'s police statement exhibits the four *Ortlepp* reliability factors. We considered a similar contention in *Plantin*, 682 N.W.2d at 659. The victim there also testified that her prior statement to police was untruthful, but her statements were nonetheless deemed sufficiently reliable to be considered as substantive evidence of the defendant's conduct. *Id.* at 657-59. Williams was free to argue that M.W.'s exculpatory trial testimony was truthful and that her inculpatory police statement was not. This credibility contest does not render the police statement unreliable.

Williams also challenges the prosecutor's trial tactic of introducing M.W.'s police statement by calling and then impeaching M.W. Williams confuses out-of-court statements that are admissible only to impeach a witness with out-of-court statements that can serve both to impeach and to prove the truth of the matter asserted. He argues accurately that the practice of "a prosecutor . . . calling a witness solely for the purpose of

impeaching the witness with a prior unsworn statement that is otherwise inadmissible hearsay" was prohibited by the supreme court in *State v. Dexter*, 269 N.W.2d 721, 721–22 (Minn. 1978). But as the supreme court explained in *Ortlepp*, when an out-of-court statement is admissible as substantive evidence under the residual hearsay rule, *Dexter* does not prohibit the statement's use for impeachment purposes. *Ortlepp*, 363 N.W.2d at 44.

Williams next contends that the district court admitted the recorded statement in error because it also contained evidence of his bad character that should have been redacted. Specifically, he complains that the recording included a reference to his alleged membership in a gang and to the officer's post-assault urging of M.W. to seek a protective order and describing her relationship with Williams as life-threatening. Williams's attorney did not object to the statement as improper character evidence. This court may reverse the conviction based on the district court's allowing the statement only if we determine that the failure to exclude the evidence *sua sponte* constitutes plain error that affected Williams's substantial rights. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (describing the plain-error analysis for unobjected-to trial errors). To establish that a plain error affected his substantial rights, Williams has the "heavy burden" to show that the error affected the outcome of the case. *See State v. Tscheu*, 758 N.W.2d 849, 864 (Minn. 2008) (quotation omitted). This he certainly cannot do.

The newly complained-of portions of the audio recording constitute only a brief portion of the extended interview between Officer Fry and M.W. The interview contained extensive, detailed, and probative evidence directly pertinent to the charges

against Williams. The state did not focus any trial attention or closing argument on the extraneous information. And the jury heard M.W. report to Officer Fry that Williams threatened to cut off her head with the machete and that she believed he might carry out the threat. It is implausible on the overwhelming facts pointing to Williams's guilt that redacting the now-challenged portions of the police statement that referenced Williams's alleged gang membership or that opined about his potential dangerousness to M.W. would have improved his chances for acquittal. Williams has not shown that the jury's brief exposure to the complained-of portions of M.W.'s statement affected the trial outcome. Because the challenged evidence did not affect the trial, we need not consider whether the district court erred by failing to intervene *sua sponte* to redact the recording. Williams's plain-error challenge fails.

Affirmed.