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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-226**

State of Minnesota,  
Respondent,

vs.

William Troy Weaver,  
Appellant.

**Filed January 26, 2010  
Affirmed  
Klaphake, Judge**

Polk County District Court  
File No. 60-CR-08-1746

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,  
Crookston, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Michael F. Cromett, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and  
Halbrooks, Judge.

**UNPUBLISHED OPINION**

**KLAPHAKE**, Judge

Appellant William Troy Weaver was convicted by a Polk County jury of felony  
domestic assault under Minn. Stat. § 609.2242, subds. 1(2), 4 (2006), following a

drunken altercation with his live-in girlfriend, E.P., on June 24, 2008. In this appeal, he asks for a new trial, claiming that the prosecutor committed misconduct during closing argument by addressing E.P.'s prior inconsistent statement about appellant's conduct on the night of the assault as substantive evidence, rather than impeachment evidence. Because the evidence was offered and admitted as substantive evidence during the testimony of another witness, Deputy Michael Norland, the prosecutor did not commit misconduct by referring substantively to E.P.'s prior inconsistent statement during closing argument, and we affirm.

## **DECISION**

On a claim of prosecutorial misconduct, an appellate court will grant a new trial if the misconduct "impaired the defendant's right to a fair trial." *State v. Graham*, 764 N.W.2d 340, 347 (Minn. 2009) (quotation omitted); *see State v. Wahl*, 296 N.W.2d 408, 420 (Minn. 1980) (stating that conviction should be reversed for prosecutorial misconduct only when, in view of whole record, misconduct was inexcusable, serious and so prejudicial that it denied defendant's right to fair trial). For misconduct that was not objected to at trial, "the plain error doctrine applies. Plain error is error that is clear or obvious, usually shown by an error that contravene[s] case law, rules, or a standard of conduct. If the defendant can show plain error, the burden shifts to the state to prove that the misconduct did not affect the defendant's substantial rights." *State v. Pendleton*, 759 N.W.2d 900, 913 (Minn. 2009) (citation omitted). "While a prosecutor must not personally endorse a witness's credibility, the [s]tate may, in closing argument, argue that a witness was or was not credible." *State v. Martin*, 773 N.W.2d 89, 106 (Minn. 2009).

The parties disagree about whether the prosecutor committed misconduct because they disagree about whether the district court admitted a recording of E.P.'s statement to police as substantive evidence or solely for impeachment purposes. The recording was offered during the testimony of Deputy Norland, who recorded E.P.'s statement during a formal interview following the assault. It is clear from the trial transcript that E.P.'s statement was offered as substantive evidence: the prosecutor moved to admit the statement into evidence without objection after he elicited testimony from Deputy Norland that the statement was an accurate recording of what E.P. told him about the assault. When appellant later questioned the district court's basis for admission of the statement, the district court stated that "it was admitted for substantive purposes as well as impeachment."

The district court properly exercised its discretion in admitting the recorded statement as both substantive and impeachment evidence. The statement constituted hearsay because it was "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Such evidence is admissible under the residual exception to the hearsay rule, Minn. R. Evid. 807, in cases that have "circumstantial guarantees of trustworthiness," as shown by a statement that is "offered as evidence of a material fact" and "more probative on the point for which it is offered than any other

evidence.” The rule also requires that admission of the statement will further the purposes of the rules and the interests of justice. *Id.*<sup>1</sup>

The requirements of rule 807 are served in this case. E.P.’s recorded statement, taken soon after the altercation at a formal police interview, had the requisite guarantees of trustworthiness typically considered for admissibility. E.P. was available to testify; she admitted making the statement to Deputy Norland; and the statement was consistent with the testimony of L.M., an eyewitness to the assault. Although the statement was not against E.P.’s penal interest, it had other guarantees of trustworthiness because it was made during a formal police interview and was made by a hostile witness, as evidenced by E.P.’s reluctance to appear at trial and her personal stake in having the charges against appellant dropped. *See State v. Plantin*, 682 N.W.2d 653, 659 (Minn. App. 2004) (admitting under prior residual hearsay rule a hearsay statement made by victim of attempted murder who later recanted; victim admitted to making statement, testified at trial, and made statement consistent with evidence of defendant’s guilt), *review denied* (Minn. Sept. 29, 2004). The specific requirements of rule 807 are also met in this case: E.P.’s statement included material facts because it addressed the essential elements of appellant’s assault; as the evidence came from the victim, it was more probative on the points for which it was offered than other evidence; as E.P. later attempted to alter the substance of her statement on two occasions, admission of the statement was useful to establish E.P.’s credibility as a witness. Finally, admission of the statement otherwise

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<sup>1</sup> Effective September 1, 2007, Minn. R. Evid. 803(24) was combined with rule 804(b)(5) in new rule 807. Minn. R. Evid. 807 cmt.

further the purpose of the rules and the interests of justice. For these reasons, we conclude that the district court did not abuse its discretion by admitting E.P.'s recorded hearsay statement as substantive evidence. Therefore, the prosecutor did not commit misconduct by referring to this substantive evidence during closing argument.

Even if the prosecutor committed misconduct by referring to the statement substantively during closing argument rather than just for impeachment purposes, we also conclude that appellant's right to a fair trial was not violated. L.M.'s testimony, which was consistent during a 911 call and at trial, clearly establishes that appellant assaulted E.P. on June 24. That testimony alone would support a guilty verdict. *See State v. Barnes*, 713 N.W.2d 325, 337 (Minn. 2006) (ruling error in admission of evidence harmless when other evidence on same point properly admitted).

**Affirmed.**