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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1538**

State of Minnesota,
Respondent,

vs.

Erwin Carl Morris,
Appellant.

**Filed July 20, 2010
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-09-9628

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant Erwin Carl Morris challenges his convictions of terroristic threats and domestic assault, arguing that the district court (1) impermissibly dissuaded him from representing himself and (2) abused its discretion by admitting the complainant's prior consistent statements without evaluating the necessary factors for admission. Because we conclude that the district court did not err by inquiring as to whether Morris's waiver of his right to counsel was voluntary and intelligent or commit plain error in its evidentiary rulings, we affirm.

FACTS

Morris's conviction stems from a dispute with his wife, R.H., over whether she served him poisoned grape juice. The argument took place in the basement of the parties' home while R.H.'s six-year-old daughters were sleeping upstairs. According to R.H., Morris "just turned [into] a different person" and began yelling at her and hitting her. She tried to escape by running up the stairs, but Morris dragged her back to the basement. He told her that he would "slice [her] throat" and harm the children if she screamed or called the police. The two then talked, and Morris calmed down.

While making breakfast the next morning, R.H. decided to use the opportunity to get out of the house. She gathered her daughters, flagged down a passing car, and went to her friend R.W.'s house.

R.W. observed that R.H. looked unkempt and her eyes were puffy. After R.H. described the incident with Morris, R.W. called the police. When the police arrived, R.H.

was crying and her face appeared swollen. R.H. told the officers what happened the night before and the officers transported her to a shelter. Morris was arrested and charged with making terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2008), and domestic assault in violation of Minn. Stat. § 609.2242, subd. 2 (2008).

On the morning of trial, Morris stated that he wanted to discharge his lawyer and represent himself. Morris said that he was ready to begin trial that day. His lawyer advised the court that Morris appeared to be agitated, which made communications difficult. When the district court directly asked Morris if he wanted to represent himself, he responded in the affirmative. The district court then inquired about whether Morris understood his decision. The district court asked Morris if he had represented himself in the past. Morris said that he had, but he could not remember when, stating that “[m]y memory will never be good. I’ve been shot in the head, so I don’t remember a lot.”

During the district court’s questioning, Morris attempted to leave the courtroom. When asked why he was trying to leave, Morris said, “I have anxiety. That’s all I know.” The district court informed him that if he chose to represent himself he would need to be prepared and ready to begin trial immediately, and that if he attempted to leave the courtroom or was otherwise disruptive, the trial would proceed without him. While the district court was explaining the risks involved in self-representation, Morris interrupted, stating that he no longer wanted to represent himself. The trial proceeded with original defense counsel.

After R.H. testified, the state indicated its intention to offer portions of her statement to police as prior consistent statements. The district court met with counsel

outside of the jury's presence to review the contents of the police report, determining on a line-by-line basis the portions of R.H.'s statement that were consistent with her trial testimony and the portions that were inconsistent and would be redacted. Morris objected to admission of the consistent statements only on the ground that they were cumulative. Morris objected to R.W.'s testimony as to what R.H. told her about the incident on hearsay grounds. The district court overruled the objections.

The jury found appellant guilty of the charged offenses. The district court sentenced Morris to 30 months' imprisonment. This appeal follows.

D E C I S I O N

I. The district court did not err by questioning whether Morris's proposed waiver of his right to counsel was voluntary and intelligent.

A defendant has a right under the federal constitution to represent himself in a state criminal proceeding. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533 (1975); *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004). When a defendant seeks to waive the right to counsel, the court must ensure that the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998) (quotations omitted). Our supreme court has cautioned district courts to "comprehensively examine the defendant regarding the defendant's comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant's understanding of the consequences of the waiver." *State v. Camacho*, 561 N.W.2d 160, 173 (Minn. 1997); *see also* Minn. R. Crim.

P. 5.04, subd. 1(4). Whether a constitutional violation has occurred presents a question of law, which we review de novo. *State v. Bobo*, 770 N.W.2d 129, 139 (Minn. 2009).

Morris argues that the district court's lengthy questioning effectively denied him the right to represent himself. When the district court asked whether he had ever represented himself in court, Morris said that he had but could not remember when, acknowledging that his prior head injury affects his memory. His lawyer advised the court that Morris was "quite agitated" and Morris attempted to leave the courtroom during the proceeding due to anxiety. Morris acknowledged that he would not want to be represented by a lawyer who had similar anxiety attacks. The district court appropriately advised Morris that he could not repeatedly interrupt the trial to address anxiety issues and that the trial would proceed in his absence.

Morris's statements, conduct, and history of memory and anxiety issues support the district court's thorough inquiry into his expressed desire to represent himself. Under the circumstances, a cursory examination would not have been sufficient to establish that Morris's proposed waiver of his right to counsel was knowing and intelligent. *State v. Garibaldi*, 726 N.W.2d 823, 830 (Minn. App. 2007) (noting that district courts must do more than perform a "cursory examination" before finding a competent and intelligent waiver of the right to counsel). We conclude, on this unique record, that the district court's questioning, albeit lengthy, was warranted.

II. The district court did not commit plain error by admitting R.H.'s prior consistent statements.

“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).

Generally out-of-court statements are not admissible if they are offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c), 802; *see also State v. Litzau*, 650 N.W.2d 177, 182–83 (Minn. 2002). But a witness’s prior consistent statements are not hearsay if they are “consistent with the declarant’s testimony and helpful to the trier of fact in evaluating the declarant’s credibility as a witness.” Minn. R. Evid. 801(d)(1)(B).

Before a prior consistent statement can be admitted under rule 801(d)(1)(B), the district court must determine whether: (1) the witness’s credibility has been challenged; (2) the prior statement would be helpful to the trier of fact in evaluating the witness’s credibility; and (3) the prior statement and the trial testimony are consistent with each other. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000).

Morris argues that the district court abused its discretion by admitting R.H.’s prior consistent statements to the police and R.W. and by failing to make express findings on each of the *Bakken* factors. We disagree. We first note that Morris did not object to admission of R.H.’s statements to the police under rule 801. Accordingly, we review

admission of these statements for plain error. *See* Minn. R. Crim. P. 31.02; *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) (citing *Griller*, 583 N.W.2d at 740 (citing *Johnson v. United States*, 520 U.S. 461, 466–67, 117 S. Ct. 1544, 1549 (1997))).

While the district court did not specifically address the *Bakken* factors, the record shows that the *Bakken* standard for admission was met. Morris’s lawyer repeatedly challenged R.H.’s credibility. In his opening statement, counsel indicated that “[R.H.] is not consistent with her stories . . . none of it adds up.” During cross-examination, counsel repeatedly attempted to impeach her testimony. And in questioning one of the police officers, defense counsel again attempted to impeach R.H.’s earlier testimony.

Implicit in the district court’s admission of R.H.’s prior consistent statements to the police and R.W. is the determination that they would help the jury evaluate her credibility. The district court carefully reviewed the police report that contained R.H.’s statements to determine which statements were consistent with her trial testimony. Consistent with the parties’ agreement, the district court redacted the portions of the police report that differed from R.H.’s trial testimony. Because the prior statements were consistent and assisted the jury in evaluating R.H.’s challenged trial testimony, we conclude that the district court did not commit plain error by admitting the prior consistent statements.

Morris's argument that the district court abused its discretion because R.H.'s prior consistent statements are cumulative is also unavailing. The state introduced the statements in response to defense counsel's repeated efforts to undermine R.H.'s credibility. Because the prior consistent statements did more than simply restate R.H.'s testimony, we discern no abuse of the district court's broad discretion.

Affirmed.