STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1416

State of Minnesota,
Respondent,

vs.

Jason Michael Jewell,
Appellant.

Filed August 22, 2011
Affirmed
Johnson, Chief Judge

Ramsey County District Court
File No. 62-CR-09-14634

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

John J. Choi, Ramsey County Attorney, Mark N. Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Johnson, Chief Judge; and

Worke, Judge.

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

JOHNSON, Chief Judge

A Ramsey County jury found Jason Michael Jewell guilty of first-degree criminal damage to property based on evidence that he trashed his rented apartment. Jewell argues that the district court erred by permitting a police officer to testify about a prior inconsistent statement by his girlfriend, with whom he shared the apartment. Jewell contends that the prior inconsistent statement may not be introduced as substantive evidence because it is inadmissible hearsay and, furthermore, also may not be introduced under "the guise of impeachment." We conclude that the prior inconsistent statement is admissible pursuant to the hearsay exception in Minn. R. Evid. 807 and, therefore, affirm.

FACTS

Christopher Lee and his father operate an upholstery business on the first floor of a commercial building in the city of St. Paul. They also rent out two apartments on the second floor. On August 17, 2009, Lee obtained a court order to evict Jewell and his girlfriend, Jessica Hoyt, from one of the apartments. The court order provided that Jewell and Hoyt had four days in which to move out.

On the afternoon of August 19, Lee was working on the first floor of the building when he heard loud noises upstairs, including Jewell's voice. Two ceiling panels fell, and the office lights went out. He called 911. St. Paul police officers arrived promptly, and Lee directed them to Jewell and Hoyt's upstairs apartment. Two officers knocked on the door. When Hoyt opened the door, the officers saw that the apartment was trashed. Windows were broken, the living room ceiling had been torn down, and plaster covered

the floor. There were holes in the walls, burn marks on the floors, and garbage strewn about, sometimes two feet deep. Lee told the officers that the apartment was not damaged the last time he was inside, approximately one month earlier.

Two officers questioned Hoyt in the apartment. She told them that Jewell had damaged the ceiling the day before. The third officer stood outside the building, where he stopped Jewell, who denied causing damage to the apartment and said that the apartment was damaged when he moved in. The officer arrested Jewell, and Jewell became upset, shouted, and slammed his head against the police car, causing a dent. During an interview with a police investigator the next day, Jewell blamed the damage in the apartment on Lee. Lee later obtained an estimate that it would cost $3,486.00 to repair the apartment. The police department obtained an estimate of $799.40 in damage to the police car.

On August 20, the state charged Jewell with first-degree criminal damage to property, a violation of Minn. Stat. § 609.595, subd. 1(3) (2008). The case was tried to a jury over three days in March 2010. The state called eight witnesses, including Lee, two police officers, and Hoyt. One of the state's witnesses was Officer Colby Bragg, who was one of the officers who responded to Lee's 911 call. The state questioned Officer Bragg about his conversation with Hoyt. Officer Bragg testified that he asked Hoyt who caused the damage and that Hoyt answered his question. Officer Bragg did not repeat Hoyt's answer because the prosecutor asked him not to do so.

The state called Hoyt as its eighth witness. In the first part of her testimony, she testified that, on the day in question, she was preparing to move out of the apartment.

She denied that police officers asked her about damage to the ceiling of the apartment, and she denied that she told police that Jewell had damaged the ceiling. The prosecutor then requested a sidebar conference, which is not reported. Thereafter the prosecutor cross-examined Hoyt as a hostile witness. She again denied that she had stated that Jewell caused the damage. She also testified that, approximately three weeks before trial, she spoke with Jewell's attorney about her conversation with the police officers on the day of Jewell's arrest. Hoyt testified that she told the attorney that a police report was incorrect in stating that she told the officers that Jewell had damaged the apartment's ceiling.

The state then sought to recall Officer Bragg to testify that Hoyt, contrary to her testimony, had told him on the day of the incident that Jewell had damaged the ceiling. Defense counsel objected to the state's request to recall Officer Bragg. Defense counsel argued that Hoyt's prior inconsistent statement is not admissible as substantive evidence because it does not satisfy the requirements of Minn. R. Evid. 801(d)(1)(a) and that the prior inconsistent statement also cannot properly be used as impeachment evidence. The state responded by conceding that the prior inconsistent statement is inadmissible as substantive evidence but argued that it may properly be introduced as impeachment evidence. The district court allowed the state to recall Officer Bragg to impeach Hoyt's credibility. Officer Bragg proceeded to testify that he asked Hoyt who caused the damage to the ceiling of the apartment and that Hoyt responded by saying that Jewell had caused the damage. At Jewell's request, the district court later gave a limiting instruction to the effect that jurors should consider Hoyt's prior inconsistent statement "only to test

the believability and weight" of her testimony and not "as evidence of the facts referred to in the statement."

The jury found Jewell guilty. The district court sentenced him to a year and a day of imprisonment but stayed the sentence for five years and placed him on supervised probation. Jewell appeals.

D E C I S I O N

Jewell argues that the district court erred by permitting the state to elicit testimony from Officer Bragg about Hoyt's prior inconsistent statement. We apply an abuse-of-discretion standard of review to a district court's evidentiary rulings. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010). We will reverse a conviction and remand for a new trial only if "the admission of the evidence was erroneous and prejudicial" and "if the error substantially influenced the jury's decision." *State v. Loving*, 775 N.W.2d 872, 879 (Minn. 2009).

A.

"The credibility of a witness may be attacked by any party, including the party calling the witness." Minn. R. Evid. 607. If a witness made a prior inconsistent statement not under oath, the statement is admissible for impeachment purposes but inadmissible as substantive evidence. *See* Minn. R. Evid. 801(c), (d)(1)(A). A party may impeach a witness by cross-examination with a prior inconsistent statement without showing or disclosing the statement to the witness. Minn. R. Evid. 613(a). A party may use extrinsic evidence of a witness's prior inconsistent statement for impeachment purposes if "the witness is afforded a prior opportunity to explain or deny the same and

the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." Minn. R. Evid. 613(b); *see also State v. Caine*, 746 N.W.2d 339, 352 (Minn. 2008).

Notwithstanding rule 613, a party may not introduce evidence under "the guise of impeachment" if the evidence is inadmissible as substantive evidence. *State v. Dexter*, 269 N.W.2d 721, 721-22 (Minn. 1978). The supreme court has referred to this situation as "the *Dexter* problem." *Oliver v. State*, 502 N.W.2d 775, 778 (Minn. 1993). In *State v. Ortlepp*, the supreme court stated that the *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.

363 N.W.2d 39, 42-43 (Minn. 1985). A district court, however, may admit the impeachment evidence as substantive evidence in these circumstances if it is admissible under the residual exception to the hearsay rule in Minn. R. Evid. 807. *Id.* at 44.

B.

Jewell contends that the district court's admission of Hoyt's prior inconsistent statement through Officer Bragg's testimony violates the holding of *Dexter*. He asserts that *Dexter* precludes the state "from calling a witness solely for the purpose of impeaching the witness with a prior unsworn statement that is otherwise inadmissible

hearsay." In response, the state contends primarily that the state properly impeached Hoyt pursuant to rules 607 and 613(b) of the Minnesota Rules of Evidence.

The state is correct that rule 607 permits the state to impeach its own witness. And the district court did rely on rule 613, which sets forth the procedural requirements for the introduction of extrinsic evidence of a prior inconsistent statement. *See* Minn. R. Evid. 613(b). The district court stated that "all the requirements of [rule] 613 have been met" and that the state could recall Officer Bragg for the limited purpose of testifying to Hoyt's prior statement that Jewell had caused the damage to the apartment's ceiling. The district court later instructed the jury that it should consider evidence of Hoyt's prior inconsistent statement only for purposes of impeachment.

Contrary to the state's argument, the permissive nature of rule 607 and the district court's compliance with rule 613(b) do not dispose of Jewell's argument. Jewell contends that, under *Dexter*, the state may not impeach its own witness with a prior inconsistent statement, *even though* rule 607 generally permits the state to impeach its own witness, and *even if* the state has complied with rule 613. Jewell is correct in the sense that the *Dexter* problem does not disappear simply because the state's impeachment is consistent with rules 607 and 613. The supreme court in *Dexter* appears to have assumed that rules 607 and 613 were satisfied but, nonetheless, imposed a limitation on the state's ability to impeach one of its own witnesses. Accordingly, we must analyze whether the state's re-examination of Officer Bragg is consistent with *Dexter*.

The *Dexter* court was concerned about "the problem of a calling party's potential misuse of impeachment by prior inconsistent statements." 269 N.W.2d at 722 (quotation

omitted). The supreme court observed that the state in that case was "seeking . . . to present, in the guise of impeachment, evidence which is not otherwise admissible." *Id.* at 721. The *Dexter* opinion raises the question whether the state never may impeach its own witness with a prior inconsistent statement that is inadmissible as substantive evidence or, on the other hand, whether the state may do so in certain circumstances.

Subsequent opinions of the supreme court indicate that the state's ability to impeach one of its own witnesses with an inadmissible prior inconsistent statement is determined on a case-by-case basis. For example, in *State v. Thames*, 599 N.W.2d 122 (Minn. 1999), the supreme court affirmed a conviction in a case in which the prosecutor "assumed" that its witness "would testify consistent with her [earlier] statement to the police" but the witness contradicted parts of her earlier statement. *Id.* at 125. The supreme court reasoned, "There is no suggestion that the prosecutor knew that [the witness] was not going to testify consistent with that statement or that the prosecutor was attempting to expose the jury to hearsay under the guise of impeachment." *Id.* at 125-26 (footnote omitted). As another example, in *State v. Anderson*, 298 N.W.2d 63 (Minn. 1980), the supreme court affirmed a conviction in a case in which the prosecutor "was not sure" whether the witness, who apparently was romantically involved with the defendant, "would deny defendant's guilt when she took the stand." *Id.* at 65. In doing so, the supreme court noted that the prosecutor had another, legitimate purpose for calling the witness. *Id.*

In this case, the prosecutor was in possession of two conflicting statements by Hoyt—the statement she provided to police soon after the incident and the statement she

provided to Jewell's attorney a few weeks before trial. The prosecutor stated to the district court that he "had no idea what [Hoyt] was going to say." The state compares this case to *Anderson*, where the prosecutor "was not sure" whether the witness "would deny defendant's guilt when she took the stand." *Id.* But the result in *Anderson* was due in part to the fact that the prosecutor had another, legitimate reason for calling the witness. *See id.* The prosecutor in this case had reason to doubt that Hoyt would testify consistently with her police statement—more reason to doubt than in *Thames*, where the witness had previously provided only one statement. *See* 599 N.W.2d at 126.

It does not appear from a review of the trial transcript that Hoyt's testimony produced substantive evidence that supported the state's case. Before the prosecutor began cross-examining Hoyt, he simply established that she was present at the apartment on the day of the incident and then attempted to elicit testimony that the police questioned her about damage to the apartment. The transcript gives the impression that the prosecutor called Hoyt for the primary purpose of cross-examining her with her prior statement to the police, and the secondary purpose of introducing extrinsic evidence in the form of Officer Bragg's testimony. This impression is reinforced by a review of the prosecutor's closing argument, which seemingly violates the district court's limiting instruction by stating: "Jessica Hoyt said . . . that it was the defendant, Jason Jewell, that he did the damage specifically to the ceiling of the apartment."

This situation is reminiscent of the supreme court's *dictum* in *Anderson*: "If the prosecutor had planned from the inception to call the witness for the purpose of introducing her prior statements, the prosecutor would be guilty of misusing the rule to

expose the jury to hearsay under the theory of impeachment." 293 N.W.2d at 65. This case also resembles the *Ortlepp* court's description of the *Dexter* problem: "a witness who has given a prior statement implicating the defendant . . . has since retracted the statement and signified an intent to testify in defendant's favor if called by the prosecutor." 363 N.W.2d at 43. Nonetheless, for the reasons stated below, we need not determine whether the state improperly sought to introduce evidence that is inadmissible as substantive evidence under "the guise of impeachment."

C.

When confronted with the *Dexter* problem, the supreme court sometimes has resolved the problem by considering whether the impeachment evidence actually is admissible as substantive evidence. If the impeachment evidence is admissible as substantive evidence, then the *Dexter* problem fades away.

For example, in *Ortlepp,* the supreme court concluded that a witness's prior statement could be admitted as substantive evidence under the residual hearsay exception. 363 N.W.2d at 44. The supreme court reasoned that the statement was "particularly reliable" because the witness was available for cross-examination, the witness admitted making the statement, the statement was against the witness's penal interest, and the statement was consistent with other evidence introduced by the state. *Id.* Later, in *Oliver*, the supreme court followed *Ortlepp*'s analysis and reasoning by admitting a witness's prior inconsistent statement as substantive evidence under the residual hearsay exception. 502 N.W.2d at 778.

The state invokes *Ortlepp* by arguing that Hoyt's prior statement to the police officer is admissible as substantive evidence under the residual hearsay exception in Minn. R. Evid. 807. We may consider this issue even though the district court did not consider it. As demonstrated by the supreme court's opinions in *Ortlepp* and *Oliver*, the admissibility of a prior inconsistent statement as substantive evidence may be analyzed on appeal to resolve the *Dexter* problem even if the district court did not consider the residual hearsay exception at the time of the impeachment. *Oliver*, 502 N.W.2d at 778; *Ortlepp*, 363 N.W.2d at 43.

Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted in the statement. Minn. R. Evid. 801(c); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). An out-of-court statement is not admissible as substantive evidence unless it is non-hearsay or is within an exception to the hearsay rule, such as the residual exception in rule 807. *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). The residual exception provides that a hearsay statement that is not admissible under any other exception is nonetheless admissible if it has "equivalent circumstantial guarantees of trustworthiness" and the court determines that (1) "the statement is offered as evidence of a material fact"; (2) "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 (3) "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.

To determine whether a hearsay statement has "circumstantial guarantees of trustworthiness," we apply a totality-of-the-circumstances approach. *State v. Keeton*, 589

N.W.2d 85, 90 (Minn. 1998); *State v. Byers*, 570 N.W.2d 487, 492 (Minn. 1997). In doing so, we look "to all relevant factors bearing on trustworthiness." *State v. Stallings*, 478 N.W.2d 491, 495 (Minn. 1991). The relevant factors include

> [t]he character of the witness for truthfulness and honesty, and the availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross-examination and a penalty for perjury; the witness' relationship with both the defendant and the government and his motivation to testify . . . ; the extent to which the witness' testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness' unavailability.

Keeton, 589 N.W.2d at 90 (quoting *Byers*, 570 N.W.2d at 493 (internal quotation omitted) (second alteration in original)). These factors are not exclusive; a court also may consider additional factors. *See State v. Martinez*, 725 N.W.2d 733, 738 (Minn. 2007); *Ortlepp*, 363 N.W.2d at 44.

In this case, Jewell challenges only the threshold requirement that the statement have circumstantial guarantees of trustworthiness. Several factors are relevant to this analysis. First, Hoyt made the statement that Jewell had caused damage to the ceiling of the apartment based on her personal knowledge. Hoyt testified that she shared the apartment with Jewell. *See Stallings*, 478 N.W.2d at 495 (reasoning that personal knowledge is relevant to trustworthiness determination). Second, Hoyt made the statement close in time to when the damage occurred. Officer Bragg testified that Hoyt told him that Jewell had damaged the ceiling the previous day. *See State v. Tate*, 682 N.W.2d 169, 177 (Minn. App. 2004) (holding that statement made one day after assault

and robbery had circumstantial guarantee of trustworthiness), *review denied* (Minn. Sept. 29, 2004). Third, Hoyt had a romantic relationship with Jewell but nonetheless made a statement that was likely to expose Jewell to civil or criminal liability. *See State v. Jones*, 755 N.W.2d 341, 353 (Minn. App. 2008) (reasoning that woman's statement implicating boyfriend contributed to trustworthiness). In light of these factors, we conclude that Hoyt's prior statement had circumstantial guarantees of trustworthiness so as to satisfy the residual exception to the hearsay rule. Because Jewell does not challenge any other requirement of rule 807, we conclude that Officer Bragg's testimony concerning Hoyt's prior inconsistent statement is not excluded by the hearsay rule and, thus, is admissible as substantive evidence.

In sum, the district court did not err by permitting the state to impeach Hoyt by cross-examining her concerning a prior inconsistent statement and by recalling Officer Bragg to give testimony concerning Hoyt's prior inconsistent statement.

Affirmed.