**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-102**

State of Minnesota,
Respondent,

vs.

Jon Alan Halling,
Appellant.

**Filed September 12, 2011**
**Affirmed; motion granted**
**Minge, Judge**

Dakota County District Court
File No. 19HA-CR-08-752

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Hastings, Minnesota (for respondent)

Elise M. Chambers, Minnesota Law Collective, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Minge, Judge.

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

**MINGE**, Judge

Appellant challenges his convictions on two counts of first-degree driving while impaired, Minn. Stat. §§ 169A.20, .24 (2006), and one count of driving after cancellation, Minn. Stat. § 171.24 (2006). He argues that the district court erred in allowing a witness

to testify in violation of the hearsay rule and the Confrontation Clause of the Constitution. In addition, appellant argues that the state violated its witness-list-disclosure obligation and that the district court made several evidentiary errors. Respondent moves to strike portions of appellant's brief and appendix as containing matters outside the record on appeal. Because we agree that appellant's appendix contains matters outside the record, we grant respondent's motion to strike. Because appellant elicited the statements that he objects to as hearsay and testimonial, because the district court did not abuse its discretion in making the other complained-of rulings on evidentiary matters, and because the state did not violate its disclosure obligation, we affirm appellant's convictions.

## FACTS

Early in the morning on May 18, 2007, a minivan crashed into the center median on Interstate 35W. An eyewitness observed a man, later identified as appellant Jon Halling, exit from the driver's side of the vehicle and a woman, later identified as Cynthia Cassidy, exit from the passenger's side. The vehicle only had one door on the driver's side.

When questioned by the police at the scene, Halling denied driving the vehicle; instead, he identified Cassidy as the driver. Cassidy also denied driving the vehicle, but she gave inconsistent statements regarding who the actual driver was. She first identified a black male as the driver and stated he had fled the scene after the crash, but she later identified Halling (a white male) as the driver. Both Halling and the eyewitness to the

crash denied that there was a third person inside the car. Because both Halling and Cassidy exhibited signs of intoxication, police evaluated each for driving while impaired.

Test results indicated that Halling had a blood-alcohol content of 0.18 grams per 100 milliliters of blood. Halling was thereafter charged with several offenses, including two counts of first-degree driving while impaired, Minn. Stat. §§ 169A.20, .24; one count of driving after cancellation, Minn. Stat. § 171.24; and one count of criminal vehicular injury, Minn. Stat. § 609.21 (2006).

Halling pleaded "not guilty" to the counts against him. On the day of trial, the state dropped the charge of criminal vehicular injury. To defend against the remaining charges, Halling presented evidence that he was not the driver of the vehicle. He sought to qualify Donn Peterson as an accident-reconstruction expert. Peterson was to testify regarding conditions affecting eyewitness identification of the driver of the vehicle and that the relative position of the seats indicated the smaller of the possible occupants was driving. The district court refused to allow Peterson to testify as an expert regarding these matters. Another of Halling's witnesses was Ms. Kim-Munoz, a victim-witness specialist and employee of the Dakota County Attorney's Office. Kim-Munoz stated that Cynthia Cassidy, who did not appear at trial, told her during a telephone call that she (Cassidy) was the driver, thought Halling had a drinking problem, and would say whatever the state wanted her to say to ensure that Halling received treatment for his drinking problem. During cross-examination by the prosecution, Kim-Munoz admitted that she was aware Cassidy had previously stated both that a black man had been driving

and that Halling had been driving. In addition, Halling called his wife to testify. She said that Cassidy had previously admitted to being the driver of the vehicle.

A jury found Halling guilty of the three remaining charges. The district court ordered Halling to serve 30 days in the Dakota County jail and stayed the remainder of his 42-month sentence for a period of seven years. This appeal follows.

Halling submitted a brief and appendix to this court containing various documents that were not part of the trial court record, including photographs taken by his proposed expert witness and Cassidy's medical records. The state moved this court to strike the nonrecord portions of Halling's appendix and portions of the brief relying on that material.

## D E C I S I O N

### I. Hearsay/Confrontation

The first issue is whether the district court erred by admitting the testimony of Kim-Munoz regarding out-of-court statements made to her by Cassidy. Halling argues that the statements were inadmissible hearsay and that admission of the statements violated his right to confront the witnesses against him. The state argues that the invited-error doctrine bars both of Halling's arguments.

In Minnesota, the "general rule is that a party cannot avail himself of invited error." *Majerus v. Guelsow*, 262 Minn. 1, 11, 113 N.W.2d 450, 457 (Minn. 1962) (quoting *McAlpine v. Fidelity & Cas. Co.*, 134 Minn. 192, 199, 158 N.W. 967, 970 (Minn. 1916)). The supreme court has held that, as a general rule in criminal cases, "[w]here, as a part of his trial strategy, a defendant does not object to and in fact elicits

evidence otherwise inadmissible, he cannot on appeal raise his own strategy as a basis for reversal." *State v. Helenbolt*, 334 N.W.2d 400, 407 (Minn. 1983). However, the invited-error doctrine does not apply in cases of plain error. *State v. Everson*, 749 N.W.2d 340, 349 (Minn. 2008).

A plain-error analysis requires us to ask "(1) whether there was error, (2) whether the error was plain, and (3) whether the error affected the defendant's substantial rights"; if each of the first three questions is answered in the affirmative, we assess whether we "should address the error to ensure fairness and the integrity of the judicial proceedings." *State v. Jenkins*, 782 N.W.2d 211, 230 (Minn. 2010) (quotation omitted).

Here, Halling called Kim-Munoz as a witness and elicited the testimony regarding Cassidy's statements leading to the cross-examination now challenged on appeal. When the state objected to Kim-Munoz's testimony as hearsay, Halling argued successfully for its admission under the residual exception to the hearsay rule, Minn. R. Evid. 807. Therefore, Halling invited the error he now challenges. But because the invited-error doctrine does not apply to plain errors, we examine Halling's arguments for such error.

*1. Hearsay*

Hearsay is "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). Hearsay is inadmissible unless it falls within one of several exceptions to the general rule. *See* Minn. R. Evid. 802–04, 807; *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (noting that hearsay exceptions "generally reflect the recognized reliability of statements made in certain situations").

Under the plain-error analysis, we first determine whether it was error to admit Kim-Munoz's testimony. In determining if statements fit under the residual exception to the hearsay rule, "courts follow the 'totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness' . . . equivalent to other hearsay exceptions." *State v. Ahmed*, 782 N.W.2d 253, 260 (Minn. App. 2010) (quoting *State v. Robinson*, 718 N.W.2d 400, 408 (Minn. 2006)). In addition, to be admissible: (1) the statement must relate to a material fact; (2) the statement must be more probative on that point than any other evidence that can be secured by reasonable methods; and (3) the admission of the statement must serve the interests of justice and the general purpose of the rules of evidence. Minn. R. Evid. 807; *see also Ahmed*, 782 N.W.2d at 259.

Here, Cassidy's out-of-court statements to Kim-Munoz did not have sufficient indicia of trustworthiness to be admissible under the residual exception. Cassidy made several conflicting statements as to who was the driver of the vehicle, despite there being no evidence supporting her claims that she was the driver or that an unknown black man was the driver. Also, the record indicates that Cassidy made several other false statements to the state and to Halling. We conclude that it was error to admit Cassidy's statements to Kim-Munoz as substantive evidence.

The state argues that the statements by Kim-Munoz in cross-examination were admissible because they recounted prior inconsistent statements by a declarant under Minn. R. Evid. 613(b) and 806. Rule 806 states that "the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if declarant had testified as a witness." Because Halling's wife had earlier testified that

Cassidy admitted to driving the vehicle at the time of the crash, Cassidy's contrary statements to Kim-Munoz were admissible as impeachment testimony. *See State v. Jackson*, 655 N.W.2d 828, 836 (Minn. App. 2003) (concluding that rule 806 offers the opportunity to impeach a declarant when deprived of the opportunity to cross-examine due to the declarant's absence from trial). However, impeachment testimony is not admissible as substantive evidence. *State v. McDonough*, 631 N.W.2d 373, 388 (Minn. 2001). Therefore, it was still error to admit the testimony as substantive evidence.

We next determine whether the error was plain. "An error is plain if it is clear and obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct." *State v. Matthews*, 779 N.W.2d 543, 549 (Minn. 2010). Cassidy was clearly an unreliable and untrustworthy source of information. She identified three people, including a nonexistent black male, as the driver, accused Halling of threatening her to testify at trial, and admitted she would testify to whatever the state wanted her to. Any statement by Cassidy did not carry the evidence of trustworthiness necessary "to overcome the general prohibition against admitting out-of-court statements." *See State v. Morales*, 788 N.W.2d 737, 760 (Minn. 2010) (concluding out-of-court statements were not sufficiently reliable despite being under oath because declarant "had much to gain from bending the truth and implicating others in the crime"). However, because the cross-examination of Kim-Munoz and her direct testimony regarding her discussions with Cassidy were permissible impeachment evidence and because the statements were not offered as proof of Halling's guilt, we conclude that the

error by the district court was not plain and that Halling does not meet the plain-error test needed to overcome an invited error.

*2. Confrontation Clause*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See also* Minn. Const. art. I, § 6. "Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt." *Cruz v. New York*, 481 U.S. 186, 190, 107 S. Ct. 1714, 1717 (1987); *see also Lilly v. Virginia*, 527 U.S. 116, 123–24, 119 S. Ct. 1887, 1893–94 (1999). Out-of-court, testimonial statements from a declarant who does not testify are inadmissible in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *State v. Bobo*, 770 N.W.2d 129, 143 (Minn. 2009) (citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369 (2004)).

Halling argues that his right to confront the witnesses against him was violated when his attorney elicited the testimony of Kim-Munoz regarding statements made by Cassidy. However, Cassidy's out-of-court statements were initially introduced on Halling's behalf. Defense counsel attempted to use Cassidy's statements to Kim-Munoz to establish that Halling was not the driver of the vehicle. In this context, because the statements made by Cassidy were elicited through questioning by Halling, Cassidy was not a witness *against* Halling and her statements were not subject to the Confrontation Clause. On cross-examination, the prosecution elicited statements from Kim-Munoz

which damaged Cassidy's credibility. These cross-examination statements were not part of the state's proof that Halling was driving. In this critical sense, these statements were not made to establish guilt. As such, we conclude that the Confrontation Clause does not apply.

**II. Disclosure/Calling Witness**

The second issue is whether the state violated its disclosure obligation by not notifying Halling until after the trial began that it did not intend to call Cassidy as a witness. "Whether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). A new trial is appropriate "only when the prosecutor's misconduct, viewed in the light of the whole record, appears to be inexcusable and so serious and prejudicial that the defendant's right to a fair trial was denied." *Id.* (quotation omitted).

Here, the prosecutor and Halling each disclosed to the other their respective intention to call Cassidy as a witness at trial. The state requested that the district court issue a subpoena to ensure that Cassidy testified at trial. Halling did not obtain a subpoena. At some point before trial, the state determined that Cassidy was no longer necessary to establish a prima facie case and released her as a witness at trial. The state did not inform Halling of her release until after the trial began. Cassidy did not appear at trial.

Halling argues that, because he informed the state of his intent to call Cassidy as a witness at trial, the state had a continuing obligation to disclose whether it no longer intended to call Cassidy as a witness. It is true that the state had a continuing, mandatory

obligation to disclose the names of any persons intended to be called as witnesses at trial. Minn. R. Crim. P. 9.01, subd. 1(1), 9.03, subd. 2; *see also Palubicki*, 700 N.W.2d at 490 (concluding that the rules are mandatory). However, Halling also had an obligation to request his own subpoena for any essential witnesses. Although best practices encourage communication with the defense regarding witnesses, absent some indication of devious conduct or motive, the state's failure to disclose that it will not actually call a witness at trial is not misconduct.

Halling argues that the state's actions created Cassidy's unavailability. The record does not support the claim that Cassidy was unavailable. Cassidy was in contact with Halling's wife on the day of trial, and nothing prevented Halling from learning her location or arranging for transportation. If Halling felt it necessary that Cassidy testify at his trial, he should have arranged for her appearance or requested his own subpoena to ensure that she appeared. We conclude that the state did not violate its disclosure-related discovery duties.

**III. Blood Test**

The third issue is whether it was error to admit the test results of Halling's blood sample into evidence. Generally, decisions on whether to admit or reject evidence rest within the sound discretion of the district court "and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id.*

Halling argues that the district court abused its discretion by admitting the test results from his blood sample because Halling was not given an implied-consent advisory prior to administration of the test. State law provides that in driving-while-impaired cases, before a chemical test is administered, the officer is required to inform the accused that he or she has a right to consult with an attorney and that refusal to take the test is a crime. Minn. Stat. § 169A.51, subd. 2(2), (4) (2006). But if the officer has probable cause to believe the accused has committed criminal vehicular operation, the "rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw," despite not reading an implied-consent advisory. *State v. Shriner*, 751 N.W.2d 538, 540, 549 (Minn. 2008); *see also* Minn. Stat. § 169A.51, subd. 2.

Here, Halling admits that the state had probable cause to believe he had committed criminal vehicular operation. Therefore, the officers were not required to complete an implied-consent advisory prior to acquiring the blood sample. Nonetheless, Halling argues that the blood sample became inadmissible when the state dropped the criminal-vehicular-operation charge. This argument lacks merit. When an officer has probable cause to search a suspect based on one crime and finds evidence of a different crime, the evidence of the second crime is admissible provided the initial search was valid. *See, e.g.*, *State v. Doebel*, 790 N.W.2d 707, 709 (Minn. App. 2010) (wherein evidence that person was driving while impaired and in possession of controlled substances resulted from a simple traffic stop for failing to signal a lane change). Therefore, because the state had probable cause to believe Halling committed criminal vehicular operation, the

administration of the blood test was valid and the evidence was admissible, despite the later dismissal of the criminal-vehicular-operation charge.

**IV. Expert Witness**

The fourth issue is whether the district court erred in excluding testimony of Donn Peterson, Halling's proffered expert witness. "The admission of expert testimony is within the broad discretion accorded a [district] court, and rulings regarding materiality, foundation, remoteness, relevancy, or the cumulative nature of the evidence may be reversed only if the [district] court clearly abused its discretion." *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999) (quotation and citations omitted).

In a criminal proceeding, "expert testimony is admissible if: (1) the witness is qualified as an expert; (2) the expert's opinion has foundational reliability; [and] (3) the expert testimony is helpful to the jury." *State v. Obeta*, 796 N.W.2d 282, 289 (Minn. 2011) (citing Minn. R. Evid. 702). To be helpful, the expert testimony must "assist the [jury] to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702.

Here, Halling sought to qualify Peterson as an expert witness to testify regarding the position of the vehicles involved in the accident, conditions affecting an eyewitness's view of the driver of Halling's van, and the physical characteristics of the van. The district court rejected his testimony because it lacked foundation and would not be helpful to the jury. In addition, the district court concluded that Peterson did not have the qualifications to testify as to seat placement or its relationship to any injuries or the size of the occupants.

There is evidence in the record supporting the district court's conclusions. Peterson indicated that he would testify that the state's eyewitness to the accident could not properly identify the driver of Halling's vehicle based on the final resting position of both vehicles and the shadows of the moon. But the eyewitness testified that she identified the driver as she drove past the accident, not when she came to a stop. In addition, there is no evidence in the record that Peterson was conversant with the level of light provided by the moon or with the highway lighting in the area of the accident. Therefore, we conclude that Peterson could not offer information helpful to the jury.

Peterson also concluded that Halling was sitting in the passenger's seat and Cassidy in the driver's seat based on their respective heights and the relative positions of the seats when he viewed the vehicle in the police lot 30 months after the accident. At that inspection of the vehicle, Peterson discovered that the driver's seat was three-fourths of an inch further forward than the passenger's seat and "uncomfortably close to the steering wheel" for him. Given the 30-month time lapse, the work done to transport the vehicle to the police lot, and the minimal difference in seat positions; we conclude that the district court did not abuse its discretion in deciding that Peterson's observations were not necessary or reliable expert evidence that would provide helpful information to the jury.

**V. Trooper Testimony**

The fifth issue is whether the district court erred by allowing a state trooper to testify as to his opinion that Halling was guilty of driving while impaired. A nonexpert witness can testify as to any opinion or inference that is "rationally based on the

perception of the witness" and "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Minn. R. Evid. 701. Halling argues that the state trooper testified that it was his opinion that Halling was guilty. However, the record does not indicate that the trooper so testified. Instead, the trooper described why he investigated both Halling and Cassidy for driving while impaired despite the eyewitness report that Halling was driving. "Evidence is admissible to give jurors the context for an investigation." *State v. Griller*, 583 N.W.2d 736, 743 (Minn. 1998). The trooper's testimony provided the context for why both Cassidy and Halling were investigated. Therefore, the district court did not abuse its discretion in admitting such testimony.

**VI. Record on Appeal**

The final issue is whether to strike any portions of Halling's brief or appendix as being outside the record on appeal. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. As a general rule, "an appellate court may not base its decision on matters outside the record on appeal, and . . . matters not produced and received in evidence below may not be considered." *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Although exceptions exist, the production of evidence from outside the record "is never allowed in an appellate court for the purpose of reversing a judgment." *Id.* at 584. The appropriate remedy for a violation of this rule is to strike the documents in a brief that are not part of the appellate record. *State v. Dalbec*, 594 N.W.2d 530, 533 (Minn. App. 1999).

Here, numerous documents contained in the appendix are not part of the record on appeal, including various police reports, Cassidy's medical records from after the accident, and photographs taken by Peterson, Halling's proposed expert witness. Because Halling produced these documents for the first time on appeal and is seeking reversal of his convictions, we grant the motion to strike these pages from the appendix, references to such documents in the brief, and arguments based on such excluded material. We have not relied on any such material in reaching our decision.

**Affirmed; motion granted.**