STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0251

State of Minnesota,
Respondent,

vs.

Tamarlus Onta Hutto,
Appellant.

Filed April 14, 2014
Reversed and remanded
Hooten, Judge

St. Louis County District Court
File No. 69-DU-CR-12-2640

Lori Swanson, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant challenges his conviction for aiding and abetting aggravated first-degree robbery, claiming that the district court erred by admitting the victim's recorded

statement taken by police on the night of the robbery as a prior consistent statement. Because we conclude that the district court erred by admitting the recorded statement and the error substantially affected the jury's verdict, we reverse and remand for a new trial.

FACTS

According to the record, which includes trial testimony and a recorded statement given by the victim, DLB, the following events took place on August 7, 2012. At around 2:00 a.m., while driving in Duluth, DLB saw people hanging around a tan Toyota Corolla with the driver's side headlight burnt out. Because he thought one of the persons was his friend, DLB stopped and agreed to give him a ride.

A man dressed in a black hooded sweatshirt got in DLB's car, and DLB realized that the man was not his friend. The man told DLB to "hold on one second" and got out of the car. Because his door was still open, DLB stayed in the car and waited. The man in the sweatshirt then got back in DLB's car, turned off the car, and took the keys from the ignition. Another man came to the driver's window, put an airsoft gun to DLB's chin, and demanded that DLB "up everything," which DLB interpreted as "give me everything." Two other men got out of the Corolla and joined the gunman. DLB got out of his car, and the men took DLB's earrings, pants, sweatshirt, shoes, cell phone, baseball hat, glasses, and about $200 cash. When the men demanded that DLB open his trunk, he responded that he needed his keys to do so. One of the men returned his keys, at which point DLB jumped back in his driver's seat, started his car, and sped away.

Shortly thereafter, DLB located Officer Carla Josephson at a nearby gas station and told her about the robbery. She recorded a statement from DLB at approximately

2:25 a.m., in which DLB described the robbery, the suspects, and the belongings that had been taken from him. One of the suspects, identified by DLB as the driver of the Corolla, was described as wearing an "all red shirt with blue jeans . . . and a baseball cap." Officer Josephson alerted other officers to look for a tan Corolla with a burnt out headlight.

Officer Joel Olejnicak saw a car matching the Corolla's description at about 3:00 a.m. in a gas station parking lot, so he blocked the car from leaving and waited for back up. When Officer Josephson arrived, she observed that one passenger was wearing shoes that matched the description of the shoes that DLB had reported as stolen. Police also found other belongings matching DLB's descriptions, an airsoft gun and a black hooded sweatshirt in the car. Appellant Tamarlus Hutto, who was wearing a red shirt and jean shorts, was observed by police as the driver of the car. Hutto denied knowing anything about a robbery and claimed that he was simply the designated driver for the other passengers. He also denied knowing DLB.

During the time period between the robbery and DLB's conversation with Officer Josephson, DLB was driving around, looking for the people who robbed him so he could recover his belongings. Upon arriving at the gas station where the Corolla was found by police, DLB told police that he was "100 percent" sure that he recognized Hutto and two other passengers as being involved in the robbery.

Hutto was arrested and charged with aiding and abetting aggravated robbery in the first degree. At a jury trial, the state called DLB as its first witness. DLB acknowledged that he did not want to testify but was only there because he had been subpoenaed. He

claimed that he could not recall many details of the incident or describe the suspects, and he refused to confirm that he had been robbed that night by appellant or anyone else. But the state did not request that DLB be treated as a hostile witness. Instead, the state introduced, and the district court admitted, over the objection of Hutto's attorney, the entire recorded statement DLB gave Officer Josephson. The state then called three police officers, who testified that DLB identified Hutto as one of the men involved in the robbery and that DLB's belongings were found in the car that Hutto was driving. The state also called one of Hutto's passengers, Jermaine Fuller. Fuller testified that he knew Hutto exited the Corolla during the robbery, but he knew very little about the robbery or Hutto's role in it. Hutto decided not to testify but called a codefendant, Jamichael Ramey. Ramey testified that Hutto played no role in the robbery.

The jury convicted Hutto, and the district court sentenced him to 90 months in prison. Hutto brought this appeal.

D E C I S I O N

Hutto asserts that the district court abused its discretion by admitting DLB's recorded statement because there was no challenge to DLB's credibility, the statement was not similar to DLB's trial testimony, and its admission substantially affected the verdict. We reverse a district court's evidentiary rulings only when it has clearly abused its discretion. *State v. Nunn*, 561 N.W.2d 902, 906–07 (Minn. 1997). A district court abuses its discretion when it misapplies the law. *Kronig v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). Even if evidence was admitted erroneously, however, we will reverse a conviction only if the error "substantially influence[d] the jury's decision."

Nunn, 561 N.W.2d at 907. On appeal, the defendant bears the burden of showing that the district court abused its discretion and that the error influenced the jury's decision. *Id.*

A declarant's prior consistent statement is admissible as substantive nonhearsay evidence if the declarant testifies at trial, is subject to cross-examination, and the statement is "helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B); *State v. Bakken*, 604 N.W.2d 106, 108–09 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). A prior consistent statement is "helpful" in the legal context only if the declarant-witness's credibility has been challenged and the statement bolsters the aspect of the declarant-witness's credibility that has been challenged. *Nunn*, 561 N.W.2d at 909. So before admitting such a statement, a district court must first determine whether the credibility of the declarant-witness has been challenged and then determine whether the out-of-court statement was consistent with the declarant-witness's trial testimony. *Bakken*, 604 N.W.2d at 109.

Here, the district court admitted DLB's prior recorded statement as an exhibit and allowed it to be played to the jury. The district court explained that in light of DLB's "significant hesitation" in testifying, it was admitting his prior recorded statement under rule 801(d)(1)(B) because the statement had "enough of the essential elements to make it a consistent statement" with DLB's trial testimony. Hutto claims that the district court erred because there was no defense challenge to DLB's credibility and the prior recorded statement was not consistent with DLB's testimony and therefore was inadmissible hearsay. We agree.

First, the state has not shown that the defense challenged DLB's credibility before the district court admitted DLB's recorded statement. Because the recorded statement was admitted during DLB's direct examination, without any cross-examination by defense counsel, the state claims that such challenge arose during Hutto's opening statement, citing *State v. Grecinger*, 569 N.W.2d 189 (Minn. 1997). But *Grecinger* is distinguishable. In *Grecinger*, there was a direct attack on the credibility of a witness with an assertion in opening statement that the witness was "blackmail[ing]" a party. *Id.* at 194 n.9. Also, in *Grecinger*, the consistent statements of the witness were admitted only after the witness was cross-examined and her credibility was attacked a second time. *Id.* at 194. Here, all that defense counsel said in her opening statement was: "Things are not as they seem. Every time that I do a case I try to give it a name and that's the name of this case. Things are not as they seem." She then appropriately explained that the state has the burden of proof and that a presumption of innocence resides with her client. She never mentioned DLB's name. This casual reference in Hutto's opening statement is not the type of statement that the supreme court determined was an attack on a witness's credibility in *Grecinger*.

Second, the assertions in DLB's recorded statement are not consistent with the assertions in his trial testimony. In DLB's direct examination before the admission of the recorded statement, he stated that in the early morning hours of August 7, 2012, he was driving around Duluth when he turned on 17th Avenue East and saw some "kids." He then claimed one of the kids asked him for a ride. When he was asked if one of the kids stopped him, he responded: "Yeah, kinda. I don't know, not really not—I just—really

nothing much else to say. Kind of done with this." When asked if he was robbed, DLB answered, "I got my stuff back, so I don't know if you'd call it robbed, but kinda want this to be over." He later claimed, "I don't really know who took it or what was the deal," but he later admitted that "they" took his money, hat, watch, earrings, and phone. He testified that he did not know how many people were there at the time his belongings were taken but knew it was more than one and less than ten. When asked how it was that these people took his belongings, he responded that there "was a lot of commotion" and that his belongings "just kinda got took." He further claimed that he later retrieved his belongings, explaining that "[i]t was more or less kinda like taking it myself," thereby minimizing any assistance that he received from law enforcement officers in locating and retrieving his belongings. Counsel for the state, attempting to lay foundation for the admission of DLB's recorded statement, asked DLB: "Does that statement fairly and accurately represent the statement you gave back on August [7]th?" DLB responded: "It was really late at night, I was kind of shook up a little bit as far as what happened, so I'm really not too clear."

In his recorded statement, DLB's version of the incident was significantly different. Contrary to his direct testimony, DLB claimed in his statement that he was robbed by four persons, one of whom pointed an airsoft gun at him. He then described in detail the actions of the suspects during the robbery, their clothing, their car, and the things they took from him.

The state, faced with an uncooperative primary witness, attempted to prove the elements of the charge against Hutto through the admission of DLB's prior recorded

statement. But rule 801(d)(1)(B) does not allow this "means to prove new points not covered" in the trial testimony of a witness. *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007) (quotation omitted). "[W]hen a witness' prior statement contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule." *Id.*

Before the admission of the statement, all that the state had established through DLB's direct examination was that (1) DLB was driving around in east Duluth in early morning hours of August 7, 2012, when he stopped to pick up someone; (2) when he stopped, he saw between one and ten people; (3) there was a commotion during which his belongings were "kinda" taken; and (4) he got the belongings back. Moreover, during his direct testimony, DLB insinuated that there was no robbery. There was no mention of a weapon in his testimony. But DLB's recorded statement was significantly different in that he described a "robbery," made detailed observations regarding each person's role in the robbery and the clothing each was wearing, and described the weapon that was used in the robbery.

While it is well settled under Rule 801(d)(1)(B) that a prior statement does not have to be exact in every detail and may have minor inconsistencies, the prior statement must be "reasonably consistent" with the witness's trial testimony. *Bakken*, 604 N.W.2d at 109 (quotation omitted). Based on this record, the differences between DLB's trial testimony and his recorded statement are not minor inconsistencies. His trial testimony accused no one of a crime, did not support the state's claim that there was a robbery,

much less a robbery with a weapon, and suggested that due to a commotion, he was unsure how his belongings were taken. Moreover, the admission of the recorded statement was significant because, if it was believed by the jury, DLB was the victim of an aggravated first-degree robbery and he was able to identify and explain the roles of each person in the robbery. "Where inconsistencies directly affect the elements of the criminal charge, the Rule 801(d)(1)(B) requirement of consistency is not satisfied and the prior inconsistent statements may not be received as substantive evidence under that rule." *Id.* at 110.

Notwithstanding our conclusion that the district court erred in admitting DLB's statement under rule 801(d)(1)(B), we must review such an evidentiary ruling for harmless error. *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009). Part of the harmless-error test with respect to erroneously admitted hearsay evidence is determining whether the evidence was otherwise admissible. *See State v. Robinson*, 718 N.W.2d 400, 407–10 (Minn. 2006) (exploring whether error was harmless when evidence admitted under an improper hearsay exception was nevertheless admissible under a different exception not mentioned by the district court); *State v. Ortlepp*, 363 N.W.2d 39, 43 (Minn. 1985) (affirming where a statement was inappropriately admitted under an impeachment exception but was admissible under catchall exception); *State v. Hogetvedt*, 623 N.W.2d 909, 913–14 (Minn. App. 2001) (upholding district court's admission of out-of-court statements because it found, contrary to the district court's ruling, the evidence was not hearsay), *review denied* (Minn. May 29, 2001). We can affirm a conviction if the alleged

erroneously admitted evidence was admissible on other grounds. *State v. Robinson*, 699 N.W.2d 790, 799 (Minn. App. 2005), *aff'd* 718 N.W.2d 400 (Minn. 2006).

At oral argument, the state argued that even if we find that DLB's recorded statement was inadmissible as a prior consistent statement under rule 801(d)(1)(B), it was nonetheless admissible as a present sense impression under rule 801(d)(1)(D). We disagree. A declarant's prior statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter" is not hearsay provided that the declarant testifies at trial and is subject to cross-examination. Minn. R. Evid. 801(d)(1)(D). A statement is contemporaneous for purposes of this rule so long as "there is little time to consciously fabricate a story." *State v. Pieschke*, 295 N.W.2d 580, 583 (Minn. 1980). The trustworthiness of these statements is paramount, but the rules committee was satisfied that the opportunity to cross-examine a witness about the statement would ensure fairness. Minn. R. Evid. 801 1989 comm. cmt. The supreme court has limited this exception. In *Pieschke*, the supreme court did not find error when defense counsel failed to object to lack of foundation and the district court admitted comments made to police officers after a car accident when "the police officers were close enough to the scene to have heard the collision [and t]hey responded immediately" under the present sense impression rule. 295 N.W.2d at 584. It held, however, that written reports made about an hour after the accident were too disconnected to fall under the rule. *Id.*

DLB's statements were made almost half an hour after he was stopped and his belongings were taken. Although his belongings were taken around 2:00 a.m., his

recorded statement was not taken until approximately 2:25 a.m. at a different location, outside the view of the suspects and well after any perceived danger had passed. Because DLB had time to fabricate a story during this almost half-hour interval, the recorded statement is not a present-sense impression.

Another part of the harmless-error test is whether the erroneously admitted evidence substantially affected the jury's verdict. *Nunn*, 561 N.W.2d at 907. We reverse a conviction for an evidentiary error only if the defendant can show that there is a "reasonable possibility that the wrongfully admitted evidence significantly affected the verdict." *State v. Ness*, 707 N.W.2d 676, 691 (Minn. 2006). In doing so, we must determine whether the verdict might have been more favorable to the defendant if the evidence had been excluded. *State v. Post*, 512 N.W.2d 99, 102 n.2 (Minn. 1994). We examine whether the verdict was "surely unattributable" to the disputed evidence. *State v. Courtney*, 696 N.W.2d 75, 79 (Minn. 2005). In determining whether a jury verdict was "surely unattributable" to an erroneous admission of evidence, we consider (1) the manner in which the evidence was presented, (2) whether it was highly persuasive, (3) whether it was used in closing argument, (4) whether it was effectively countered by the defendant, and (5) whether other evidence of guilt was overwhelming. *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005).

Hutto argues that without DLB's recorded statement, the state could not prove its case. To find Hutto guilty of aiding and abetting aggravated robbery in the first degree, the state had to prove beyond a reasonable doubt that Hutto aided someone who "having knowledge of not being entitled thereto," took another's property and in doing so made

the victim "reasonably believe" that he was using a dangerous weapon. Minn. Stat. §§ 609.05, subd. 1, .24, .245 (2012). Aiding and abetting requires more than mere presence at a crime scene; inaction or acquiescence is insufficient to convict a defendant. *State v. Crow*, 730 N.W.2d 272, 280 (Minn. 2007). Rather, a defendant must "play[] a knowing role in the commission of the crime." *Id.*

In weighing the factors addressed in *Al-Naseer*, we conclude that the jury verdict was likely attributable to the erroneous admission of DLB's recorded statement. DLB was the state's first, and primary, witness. Prior to the admission of DLB's recorded statement, the state was unable to establish the elements supporting its charge against Hutto. After the recorded statement was admitted and played for the jury, the state followed up with an extensive direct examination of DLB, asking that he expand on his statements as set forth in the recording. For example, the prosecutor asked, "[Y]ou said that there was a male in a red shirt?" When DLB was struggling with specific details, the prosecutor directed him back to the recording, asking, "You listened to the recording here in the courtroom . . . [d]id it happen like you said in there?" The defense was unable to effectively counter the recorded statement. The state had only one other eyewitness who gave very few details about the robbery and could not recall Hutto's role. The state, recognizing that the recorded statement was highly persuasive and that there was little testimony from other witnesses who were at the scene, also emphasized DLB's recorded statement in its closing argument, frequently directing the jury's attention to specific statements that DLB made in the recording. And, during its deliberations, the jury asked to hear DLB's recorded statement again, and the statement was replayed for the jury.

Because the jury's verdict was attributable to the district court's error in admitting DLB's recorded statement as a prior consistent statement under rule 801(d)(1)(B) and the recording was inadmissible under any other rule, we reverse Hutto's conviction and remand for a new trial.

Reversed and remanded.