STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0505

State of Minnesota,
Respondent,

vs.

Luis Gerardo Guanuchi Morocho, a/k/a Guanuchi Gerardo Luis,
Appellant.

Filed March 24, 2014
Affirmed
Connolly, Judge

Anoka County District Court
File No. 02-CR-11-5146

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

Anthony C. Palumbo, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bridget K. Sabo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Chutich, Judge; and Klaphake, Judge.[*]

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

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

CONNOLLY, Judge

Appellant challenges his convictions of fourth-degree and fifth-degree criminal sexual conduct, arguing that reports prepared by employees of the facility where the conduct occurred were admissible under the business records exception to the hearsay rule and that their exclusion deprived appellant of the right to present a complete defense. Because the reports were not admissible as business records, we see no abuse of discretion in their exclusion and therefore affirm.

FACTS

In July 2011, appellant Luis Morocho, two 13-year-old girls, A.G. and A.S., and two adult women, N.T. and C.T., were swimming in the wave pool at a water park. The two girls were friends with each other, and the two women were sisters-in-law, but the girls did not know the women, and none of them knew appellant. All four females reported to water-park employees that appellant touched them while they were in the pool.

A.G. said that appellant repeatedly dived towards her; on one dive his hands came between her legs and touched her vagina over her swim suit; on another dive, he touched her thigh. A.S. testified that appellant came up behind her and grabbed her crotch so it felt as if he was lifting her; when she and A.G. moved to another part of the pool, appellant followed them and again grabbed A.S.'s crotch, and as the girls were leaving the pool, he grabbed A.S.'s crotch a third time. The girls told A.G.'s mother what had

happened, described their assailant as having darker skin and hair and wearing a gold chain, and pointed appellant out as the assailant.

When A.G.'s mother was reporting the matter to a lifeguard, she overheard the two women reporting similar incidents involving appellant, whom they also described as having darker hair and skin and wearing a gold chain. N.T. said she had experienced a very intentional grab to her vagina; C.T. felt a hand between her legs move along her vagina from back to front.

The lifeguard radioed to the park's lifeguard supervisor (LS), who came to the wave pool with an operations supervisor (OS). LS confronted appellant, told him to get out of the pool, and said people had complained about his acts. The police were called, and appellant was placed in a squad car. Each of the four victims independently identified the man in the squad car as her assailant; each of them was interviewed by a police officer and gave an account consistent with what they had already said to the lifeguard and with their testimony at appellant's trial. LS and OS also testified at the trial; appellant did not testify.

LS and OS filled out the water park's incident-summary reports. LS's report said:

> When [OS and I] arrived [at the Wave Pool], we were told by the lifeguard that a family was complaining about a man in the Wave Pool [appellant] who was sexually assaulting four girls ages [15] to about [21]. I whistled at the man and had him come to the shallow end where I discussed how a few guests had complained about him and that we were going to keep watching him. He then resumed swimming in the Wave Pool. I told the lifeguard to watch out for this man and then I talked to the family who complained about the man. I told them that he would be watched and action would be taken if anything were to happen. [OS] and I watched the Wave Pool

> for [45] minutes or so, monitoring this man who was swimming in the three feet section of the Wave Pool. The family had also mentioned that an African American man in the deep end of the Wave Pool may be doing the same type of things. OS and I monitored both men. We didn't notice any bad behavior so we told the lifeguards to keep watching and OS and I went off to check on other things around the park. [OS] ended up in the First Aid Office where the family confronted him about the incident. I was radioed and came to the First Aid Office to help out. The family wanted Police action to be taken and [OS] was trying to let [the victims and their families] know that our policy is that we have to see the incident in order to take emergency action. We were not coming to an agreement, so I offered to go find the man [appellant] while [OS] called the police. I found him . . . . I talked to him for a while . . . . The police arrived a few minutes later and took the man for questioning. I then went back to the [F]irst [A]id [O]ffice and watched the four girls until the Police needed to talk to them.

OS's report said:

> [LS] and I went . . . to see what the radio call was about. There, we had many people come up and tell us there were some males touching their daughters inappropriately. [LS] confronted the guy and let him know we were watching him, and let him know if anything else happened he would have to leave. We watched him for probably [two] wave cycles. Eventually we both got called away to do other things. [A] while later one of the girls came up to me telling me she was upset with the way we were handling things. I told her we were following our policy and needed our own proof. She left the []First [A]id [O]ffice unhappy. She returned a few minutes later with a couple of other families with similar complaints. We put them all in the office where I tried to explain our policy. We decided that with many similar complaints to call the police because ultimately that is what these families wanted. They did not like the way we were handling it. I called the police, the park rangers showed up a few minutes later and we filled them in. While I called the police [LS] went to confront the guy again to keep him from leaving. Two more park rangers came and talked with the accusing families. [A police officer] came and I told him

> what was going on. He took the guy and brought him to his car. He went and spoke with the kids one on one. A second cop showed up just as the father of one of the daughters [actually, it was an uncle] pointed out another guy who he said was touching them. The police questioned this guy as well. The girls were brought out and told to identify from the two men who assaulted them. They all said the same guy [i.e., appellant]. He was taken away. The other guy was let go. I dealt with giving comp passes to the families . . . [or] refunds for those who'd rather [have refunds]. The families left . . . .

Appellant wanted these reports admitted as evidence under the business records exception to the hearsay rule. The district court determined that the reports were not business records, but said they could be used to refresh a witness's recollection if they were identified only as documents. Appellant's attorney did use LS's report to refresh LS's recollection as to how long he watched the pool. After the state had rested, appellant's attorney asked that the reports be admitted as recorded recollections; the request was denied. Appellant's attorney did not ask to have the reports introduced to impeach any testimony.

The jury convicted appellant on all four counts. On appeal, he challenges the district court's refusal to admit the incident-summary reports as evidence, arguing that (1) adequate foundation was offered for them, (2) the business-record exception to hearsay applied to them, (3) LS's report should have been admitted for impeachment purposes, and (4) the exclusion of the reports was not harmless error.

D E C I S I O N

1. Foundation

"Where a party makes no offer of proof at trial, a reviewing court can have no basis for holding that exclusion of evidence was reversible error." *State v. Gerring*, 378 N.W.2d 94, 96 (Minn. App. 1985); *see also Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002) (one purpose of an offer of proof is providing "a record for a reviewing court to determine whether the lower court ruling [on admitting or excluding the evidence] was correct"). Appellant argues that his attorney did not establish foundation because the district court did not allow him to do so. But the transcript of the pretrial discussion shows that appellant's attorney did not offer to provide adequate foundation to support admitting the incident-summary reports as business records.

Appellant's attorney said the reports were "statements that the witnesses themselves completed. They provided them within their course of business. . . . And we would be requesting to ask them about those statements and would offer [the statements] as exhibits." The district court replied:

> I don't see [these reports] as . . . business record[s] at all. These employees are employees of a recreational facility. . . . [I]t's not within their duties to do investigation or memorialize statements. I've never seen a statement like this offered when the witness is present and available to testify. At most I've seen them used to refresh a recollection when a witness is unclear or can't remember. But otherwise I've not seen those statements be admissible for some form of evidence separate and apart from what the witness is saying under oath. And those statements that were written at the time were not written under oath. So I don't believe there is any hearsay exception that will allow those written statements

> to come in. . . . [They] will not be received as independent pieces of evidence in this case.

Appellant's attorney, instead of offering to supply foundation to refute the district court's statement that the reports were not admissible as business records, said, "We'll be offering [the reports] to help refresh the memory of the two witnesses." Because appellant's attorney did not make an offer of proof, we have no basis to conclude that the exclusion of the records was reversible error. *See Gerring*, 378 N.W.2d at 96.

2. Business-record exception

In any event, the incident-summary reports were not business records within the meaning of Minn. R. Evid. 803(6).

> Business records are admissible under the business-records exception if the custodian or another qualified witness can testify that the records were (1) made by a person with personal knowledge of the matters recorded and a business duty to report accurately or from information transmitted by a person with such knowledge, (2) made at or near the time of the recorded event, (3) kept in the course of a regularly conducted business activity, and (4) made as part of the regular practice of the business activity.

In re Child of Simon, 662 N.W.2d 155, 160 (Minn. App. 2003) (citing Minn. R. Evid. 803(6)).

Both LS and OS were called as witnesses. "The purpose of [the business-records exception] was to make it unnecessary to call as witnesses the parties who made the entries. . . . It was never intended to make that proof which is not proof." *Brown v. St. Paul City Ry. Co.*, 241 Minn. 15, 26, 62 N.W.2d 688, 696 (1954) (holding that hearsay and self-serving statements as to how an injury occurred contained in hospital records are

not admissible to prove how an injury occurred, although the parts of the records pertaining to medical treatment are admissible). Here, the portions of the reports concerning the water park's handling of the incidents might be admissible, but the portions including hearsay evidence as to what a victim's family member said would not be admissible. *See Fairmont v. Sjostrom*, 280 Minn. 87, 93, 157 N.W.2d 849, 851-54 (1968) (relying on *Brown* and holding that hearsay statements of a bystander included in a police report "became no more reliable because they were entered in the police log" and were not admissible).

"Evidentiary rulings 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) (citation omitted). The district court did not abuse its discretion in deciding that the incident-summary reports were not admissible under the business-records exception.

3. Impeachment

Appellant argues on appeal that LS's report "was at least admissible to impeach his testimony that he received no other reports of similar conduct and did not watch anyone other than [appellant]" and that the district court "plainly erred in not admitting [LS's report] as impeachment evidence." But appellant concedes that, at trial, "[his] attorney did not specifically argue that [LS's] report was admissible impeachment evidence . . . [although] she clearly argued to the court that [LS's] report was inconsistent with his trial testimony and she made repeated efforts to use [the report] as she cross-examined him."

LS's report stated that a family member of one victim said a man in the deep end of the pool "may be doing the same type of things [as appellant]" and that LS "monitored both men [i.e., the man in the deep end and appellant]." Appellant did not call the family member as a witness.

When cross-examining LS, appellant's attorney asked him if he had received reports of any conduct similar to appellant's. He said, "No. I don't think so." She asked LS if he observed anyone in the pool who was also a cause of concern; LS answered, "No, just [appellant]." She inquired whether anyone had asked LS to observe other swimmers in any other part of the pool; LS answered, "No." Thus, LS's testimony conflicted with his report. But appellant's attorney did not attempt to impeach his testimony with his report; she tried to use the report to refresh his recollection. Because LS had not indicated that he had any difficulty in recollecting the answers to the questions, appellant's attorney was not allowed to use the reports to refresh his recollection.

The day after LS testified and the state rested, appellant's attorney again attempted to introduce his report, arguing that it was a recorded recollection admissible under Minn. R. Evid. 803(5) (listing as a hearsay exception "[a] memorandum . . . concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately . . ."). The district court did not allow this because LS "never acknowledged that he could not recall the events of that day" and appellant's attorney "did not offer that statement to him to refresh his recollection." Because the district court was never asked if the incident-summary report could be used to impeach testimony, it

never ruled on the matter, and consequently, there is nothing for this court to review. *See Thiele v. Stich*, 425 N.W.2d 580, 582 ((Minn. 1988) (holding that this court does not generally consider matters not presented to and considered by the district court).

Appellant also argues that the district court's refusal to admit the reports "unconstitutionally limited [appellant's] right to defend himself," citing *State v. Penkaty*, 708 N.W.2d 185, 201 (Minn. 2006) (holding that the right to defend oneself "necessarily includes the ability to present the defendant's version of the facts through witness testimony"). Appellant does not argue that the offenses did not occur, and he concedes that he did not have an adequate basis to assert an alternative-perpetrator defense. *See State v. Tran*, 712 N.W.2d 540, 551 (Minn. 2006) ("We have held that alternative perpetrator evidence is not relevant and therefore inadmissible absent some evidence having an inherent tendency to connect the alternative perpetrator with the crime.")

But appellant argues that the incident-summary reports would have provided evidence that he was misidentified as the perpetrator. For this argument, he relies on *Tran*, holding that:

> [the d]istrict court did not abuse its discretion when it allowed evidence regarding a third party, who did not qualify as an alternative perpetrator, for the purpose of allowing the defendant to support his claim that the police did not sufficiently investigate the third party, but the court properly excluded evidence regarding the third party's gang affiliation on the ground that this evidence was more prejudicial than probative.

Id. at 541. *Tran* affirmed in part because "We conclude that [the defendant] was able to introduce sufficient relevant evidence regarding [the third party] to make clear to the jury

[the] argument that the police had not properly investigated [the third party]." *Id*. at 551. Appellant argues that his evidence regarding a third party who was not an alternative perpetrator was excluded and that, unlike the defendant in *Tran*, he could not make his misidentification argument clear to the jury. But the third-party evidence admitted in *Tran* was admissible testimony, not inadmissible hearsay in employees' reports. Thus, *Tran* is distinguishable and does not support appellant's argument that hearsay becomes admissible if it concerns a third party who is not an alternative perpetrator. Appellant has not shown that the exclusion of the reports violated his constitutional right to present evidence inadmissible under Minn. R. Evid. 802 (prohibiting hearsay evidence).

4. Harmless error

"On appeal, the appellant has the burden of establishing that the [district] court abused its discretion [in an evidentiary ruling] and that appellant was thereby prejudiced." *Amos*, 658 N.W.2d at 203. If there is a reasonable possibility that the verdict might have been different if the evidence had been admitted, then the error is prejudicial. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

> When [an evidentiary] error implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that the error was harmless. An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error. When the error does not implicate a constitutional right, a new trial is required only when the error substantially influenced the jury's verdict.

State v. Sanders, 775 N.W.2d 883, 887 (Minn. 2009) (citations omitted). Because appellant did not have a constitutional right to present reports containing hearsay as evidence, the appropriate standard of review is whether the error substantially influenced

the jury's verdict. The amount and strength of the evidence supporting that verdict indicates that the reports would not have had substantial influence on it.

Appellant concedes that "At trial, [the four victims] expressed not only certainty that [appellant] was the person who touched them, but also near uniformity in describing the conduct that occurred." The jury heard testimony from all four victims that appellant was the man who touched them in the pool, testimony from LS that appellant was the man the victims pointed out to a lifeguard as having touched them and the man they identified in the police car as having touched them, and testimony from the police officer that each victim individually identified appellant when he was in the police car. The jurors would not have been likely to conclude that appellant had been misidentified by either LS's report that a victim's relative said another man in a different part of the pool might be engaging in similar conduct or OS's report that a victim's relative pointed out another man that he said was touching the victims. Moreover, OS's report would also have informed the jury that another man was detained with appellant in the squad car and that the victims, faced with two men, all identified appellant and not the other man as the assailant.

Any error in excluding the reports of LS and OS could not have substantially influenced the jury's verdict that appellant assaulted the four victims.

Affirmed.