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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1378**

State of Minnesota,
Respondent,

vs.

Eric Lee Green,
Appellant.

**Filed July 30, 2012
Reversed and remanded
Muehlberg, Judge***

Stearns County District Court
File No. 73-CR-11-114

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County
Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Muehlberg,
Judge.

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

UNPUBLISHED OPINION

MUEHLBERG, Judge

Appellant Eric Lee Green challenges his conviction of violating an order for protection, after he made indirect contact with his ex-wife. The contact was made on January 4, 2011, when appellant's mother called appellant's ex-wife to ask her about visitation for appellant with the parties' five-year-old son. Because the out-of-court statements made by appellant's mother to his ex-wife constituted inadmissible hearsay and because any error in admitting those statements was not harmless, we reverse and remand.

FACTS

D.G. and appellant were married in 2008 and have a five-year-old son, D. On May 20, 2010, D.G. obtained an order for protection against appellant, barring him from having any direct or indirect contact with her for a period of two years. The order specifically stated that appellant "shall have no contact, either direct or indirect, with [D.G.], whether in person, with or through other persons, by telephone, letter, or in any other way[.]"

The parties were divorced in December 2010, and under the terms of the divorce decree appellant was granted supervised visitation with D., to be arranged through a visitation agency in Redwood Falls.

D.G. testified that on January 4, 2011, she received Facebook messages from appellant's sister, asking about visitation and letting her know that appellant's mother would be calling. D.G. testified that she told the sister that appellant had to go through

the agency. D.G. further testified that she was generally on good terms with the sister, who saw D. on occasion and took care of him.

D.G. testified that later that afternoon, she received a telephone call from appellant's mother. D.G. testified that the mother stated that she was "calling for Eric. He's sitting right here. Um, he's wanting to set up a visitation for [D.]" D.G. told the mother that it was court ordered to go through the visitation agency. D.G. testified that the mother told her to hold on, and D.G. could hear the mother speaking to a man in the background, who was mumbling. When the mother got back on the phone she asked D.G. for the phone number to the agency. D.G. told the mother to find the number on the website. The mother then asked D.G. to hold on, and she again spoke with the man, who D.G. then identified as appellant. When the mother returned to the phone, D.G. testified that the mother told her that "Eric wants to know if you will let him talk to [D.] now." D.G. said no and that all visitations must go through the agency. D.G. testified that after she got off the phone, she called the sheriff's department to report that appellant had violated the order for protection.

D.G. described the two incidents leading up to her obtaining the order for protection. She testified that on July 21, 2009, appellant slammed the door to their residence, grabbed her purse, and threw her around. Appellant thereafter pleaded guilty to interfering with a 911 call, and D.G. obtained a domestic assault no contact order (DANCO) against him. D.G. further testified that on May 1, 2010, appellant sent her text messages and broke some of her windows. He was convicted of violating the DANCO

and damage to property, and D.G. obtained the order for protection that appellant was charged with violating in this case.

Appellant's mother was called by the defense to testify at trial. The mother testified that she and appellant had talked about setting up visitation through the agency, but that appellant had not heard back. The mother claimed that she decided to take it upon herself to contact D.G., that appellant did not comment about her decision to call D.G., and that he did not ask her to make the call. The mother acknowledged that during the phone call, appellant was in the same room with her and was present for part of the conversation she had with D.G.

The mother testified that she asked D.G. if they could set up visitation on Friday, but that D.G. indicated Tuesday would work better. The mother claimed that she told D.G. that she would call the agency and that she may have momentarily stopped the conversation to write down the phone number. The mother testified that appellant did not ask D.G. any questions during the conversation, and that she asked appellant if he wanted to talk to D. but that he said no.

Both parties made several pretrial motions, which the district court ruled on in a written order filed on March 21, 2011. Of importance to the issues raised here, the court denied appellant's motion to preclude the state from introducing relationship evidence under Minn. Stat. § 634.20, and granted the state's motion to admit testimony from D.G. regarding what the mother had told her on the telephone on the day of the incident.

The jury found appellant guilty of violating the order for protection, and he was later sentenced to 28 months in prison. This appeal follows.

DECISION

Appellant argues that the district court abused its discretion in denying his pretrial motion to exclude D.G.'s testimony regarding the mother's out-of-court statements. The district court ruled that D.G.'s testimony regarding her conversation with the mother was either not hearsay or was otherwise admissible as an exception to the hearsay rule. Evidentiary rulings on hearsay statements are reviewed for clear abuse of discretion. *State v. Burrell*, 772 N.W.2d 459, 469 (Minn. 2009).

"Hearsay" is defined as "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). The critical statements at issue here include the following attributable to appellant's mother through the testimony of D.G.: "I'm calling for Eric," "he's wanting to set up a visitation for D.," and "Eric wants to know if you will let him talk to D. now." When read together, the statements were offered to prove the truth of the matter asserted and constitute the gist of the offense: appellant asked his mother to call or make contact with D.G., in violation of the order for protection.

Rule 801(d)(1)(D).

Minn. R. Evid. 801(d)(1)(D) provides that prior statements by a witness are not hearsay if: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement, and (2) the statement describes or explains an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. In this case, D.G. testified that appellant's mother stated that she wanted to set up visitation on appellant's behalf and that he wanted to speak to his son. Appellant

asserts that because neither of these statements describes an exciting or startling event, rule 801(d)(1)(D) does not apply.

But the traditional exception for “excited utterances” is provided in rule 803(2). A prior statement need not be an “excited utterance” to be excluded from hearsay under rule 801(d)(1)(D). Rather, rule 801(d)(1)(D) requires a statement of a “present sense impression” or “unexcited utterance” made contemporaneously with the event or immediately thereafter so that there is little time to consciously fabricate a story. *State v. Pieschke*, 295 N.W.2d 580, 583 (Minn. 1980). Nevertheless, because the hearsay statements attributable to appellant’s mother did not describe an event or condition, the district court erred in concluding that they were admissible under rule 801(d)(1)(D).

Rule 801(d)(2)(C).

Minn. R. Evid. 801(d)(2)(C) provides that a statement is not hearsay if offered against a party and is “a statement by a person authorized by the party to make a statement concerning the subject.” Appellant argues that the statements are not admissible as statements by a party opponent under this rule because there is no evidence that he “authorized” his mother to make these statements on his behalf.¹

Appellant’s presence at the time of the call and D.G.’s testimony that the mother asked her to “hold on” at least once while she was heard speaking to a man in the background whom D.G. identified as appellant are insufficient to establish that the mother was “authorized” to make the statements on his behalf. We believe that

¹ The state concedes that the statements are not admissible under rule 801(d)(2)(D), which requires evidence that the mother and appellant were in some type of agency or employment relationship.

something more tangible or direct is necessary to show authorization. The district court therefore erred in concluding that the statements were admissible under rule 801(d)(2)(C).

Rule 803(3).

Rule 803 provides a number of exceptions to the hearsay rule, even though the declarant is available as a witness. One exception allows the admission of hearsay statements that are probative of the declarant's state or mind or emotion. *See* Minn. R. Evid. 803(3) (allowing admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition"). But the statements made by appellant's mother are not an expression of her emotions, state of mind, or physical condition. The district court thus erred in concluding that the statements were admissible under rule 803(3).

Rule 807.

Minn. R. Evid. 807, the "residual exception" to the hearsay rule, provides:

A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) 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 (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

In this case, despite defense counsel urging the court to do so, the district court failed to identify or consider any relevant factors bearing on the trustworthiness of the out-of-court statements in reaching its decision. As appellant notes, the statements lack the guarantees required by rule 807 because D.G. had a strong incentive to attribute the statements to appellant's mother and because there is a strong possibility that D.G. misheard what the mother said given the fact that D.G. was upset about any potential contact with appellant. The district court therefore erred in concluding that the statements were admissible under rule 807.

D.G.'s testimony regarding the out-of-court statements made by appellant's mother are hearsay and not admissible under any identified exception to the hearsay rule. And the parties agreed that any error in the admission of this evidence was not harmless. Appellant's conviction is therefore reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.²

² Having concluded that a new trial is required, we need not reach appellant's claim that the district court also erred in admitting the two incidents of prior bad acts as relationship evidence under Minn. Stat. § 634.20 (2010). We observe, however, that the conduct underlying the charged offense does not meet the definition of domestic abuse. *See State v. Barnslater*, 786 N.W.2d 646 (Minn. App. 2010), *review denied* (Minn. Oct. 27, 2010); *State v. McCurry*, 770 N.W.2d 553, 560-61 (Minn. App. 2009), *review denied* (Minn. Oct. 28, 2009). Under Minn. Stat. § 518B.01, subd. 2(a) (2010), "domestic abuse" is defined as "(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . , criminal sexual conduct . . . , or interference with an emergency call." Minn. Stat. § 518B.01, subd. 2(a) (2010). At no time during her telephone conversation with appellant's mother was D.G. assaulted, placed in fear of imminent physical harm, or subjected to terroristic threats. Thus, the district court's decision to admit the July 21, 2009 and May 1, 2010 incidents as relationship evidence under section 634.20 was error that was plain given this court's decisions in *McCurry* and *Barnslater*. *See State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006) (stating that error is "plain" if it is "clear" or "obvious," which is

Reversed and remanded.

usually shown if error “contravenes case law, a rule, or a standard of conduct”) (quotations omitted)). And, given the detail and breath of D.G.’s testimony regarding the two incidents, there is no question that the error in admitting this evidence prejudiced appellant and affected the outcome of the case. Thus, this too would provide a basis for reversing.