

A05-0586

A05-586

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Matthew Martin Scanlon,

Appellant.

APPELLANT'S REPLY BRIEF

MIKE HATCH
State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

AMY J. KLOBUCHAR
Hennepin County Attorney
C2000 Government Center
Minneapolis, MN 55487

ATTORNEYS FOR RESPONDENT

**OFFICE OF THE MINNESOTA
STATE PUBLIC DEFENDER**

By: **THEODORA GAÏTAS**
Assistant State Public Defender
License No. 271810

2221 University Avenue SE
Suite 425
Minneapolis, MN 55414
Telephone: (612) 627-6980

ATTORNEY FOR APPELLANT

STATE OF MINNESOTA
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Appellant's Proffered Alternative Perpetrator Evidence Was Admissible Under the Minnesota Rules of Evidence.

The state argues that appellant's proffered alternative perpetrator evidence was inadmissible hearsay. Specifically, the state claims that Eliseuson's statement to three separate witnesses—to Ellen Ward, to Rodney Weiss, and to defense investigator, Jerry Larson—that Steven Kyle Anderson had confessed to killing [REDACTED] was nothing more than a prior inconsistent statement.¹ According to the state's brief, unsworn inconsistent statements are "*not* admissible as substantive evidence." (Respondent's Brief at 28) (emphasis in original).

This is only half true. There is one exception to the hearsay rule for prior inconsistent statements—an exception that was specifically argued by the defense in this

¹ The state does not argue that Anderson's statement to Eliseuson was inadmissible hearsay. This statement qualifies as a statement against interest under Minn. R. Evid. 804(b)(3), however.

case (P.T. 137-38)—that allows for the type of evidence that appellant sought to admit through Ward, Weiss, and Larson. Under Minn. R. Evid. 803(24), in conjunction with this Court’s case law, Eliseuson’s prior statements to these witnesses were admissible as substantive evidence.

Rule 607 of the Minnesota Rules of Evidence provides that the “credibility of a witness may be attacked by any party, including the party calling him.” As the state points out, under Minn. R. Evid. 801(d)(1)(A), a prior inconsistent statement may only be admitted substantively if the statement was given “under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition” and the declarant testifies at trial and is subject to cross examination.

In State v. Ortlepp, 363 N.W.2d 39 (Minn. 1985), however, this Court held that particularly reliable prior inconsistent statements may be admissible as substantive evidence under the “catchall” exception to the hearsay rule, Minn. R. Evid. 803(24). Ortlepp, 363 N.W.2d at 44. There are several requirements for admissibility under this exception. First, the declarant must testify and be subject to cross-examination. Second, the declarant must admit making the prior inconsistent statement. Third, the statement must be particularly reliable. And finally, the statement must be consistent with all of the state’s other evidence.² Id. at 44.

² The Ortlepp decision provides a fourth requirement for admitting prior inconsistent statements as substantive evidence: the evidence must be consistent with the state’s other evidence. Ortlepp, 363 N.W.2d at 44. Ortlepp concerns the prosecution’s use of this type of evidence, however. Obviously, this requirement would not apply to a defendant seeking to introduce a prior inconsistent statement substantively.

Ortlepp and its progeny have typically involved the self-inculpatory statements of codefendants or other statements against interest. In Ortlepp, for example, a codefendant made a statement that was clearly against interest, incriminating both himself and the defendant. Ortlepp, 363 N.W.2d at 44. The fact that the statement was against the codefendant's interest was critical to the supreme court's decision—"a fact that increases [the statement's] reliability." Id. See also State v. Oliver, 502 N.W.2d 775, 777 (Minn. 1993).

In State v. Soukup, 376 N.W.2d 498 (Minn. 1985), however, the Court concluded that a statement was admissible under the catchall exception because in had other guarantees of trustworthiness. There, the declarant was a child abuse victim, with no motive to fabricate, who had given several additional statements to the police repeating the hearsay allegations to the police. Id. at 501. The declarant had also testified at a neglect hearing about one of the hearsay allegations. Id.

Here, Eliseuson's prior inconsistent statements were admissible as substantive evidence under Minn. R. Evid. 803(24). First, Eliseuson was available to testify at appellant's trial. Second, he essentially admitted to making the prior statements.³ (P.T. 32, 35-43). Finally, as in Soukup, Eliseuson's statements to Ward, Weiss, and Larson had guarantees of trustworthiness even though they were not technically statements against his interest. Eliseuson made the same remarks to three separate people about Steven Kyle Anderson's confession to the murder. One of those statements was tape

³ At times during his testimony, Eliseuson claimed that his memory was poor and that he did not know exactly what he said. (P.T. 39-41).

recorded and preserved. And Eliseuson had a clear motive to change his statement when he came to court for the pretrial hearing. At the pretrial hearing, he stated that he did not want to testify at appellant's trial. In fact, one of his final remarks on the stand was, "I would have almost rather gone to jail than come to court." (P.T. 60).

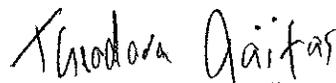
Normally, the prosecution is attempting to admit a prior inconsistent statement as substantive evidence against the defendant. On review, Minnesota courts have been generous about affirming this use of prior inconsistent statements. See Oliver, 502 N.W.2d at 776 (accomplice's statements to the police were admissible as substantive evidence against defendant under the catchall exception); State v. Robinson, 699 N.W.2d 790, 797 (Minn. Ct. App. 2005) (victim's statements to a nurse identifying defendant were admissible as substantive evidence against defendant under the catchall exception); State v. Tate, 682 N.W.2d 169, 176 (Minn. Ct. App. 2004) (accomplice's statements to the police were admissible against defendant as substantive evidence under the catchall exception); State v. Plantin, 682 N.W.2d 653, 658 (Minn. Ct. App. 2004) (victim's statement to the police was admissible as substantive evidence against defendant under the catchall exception); State v. Skjefte, 428 N.W.2d 91, 95 (Minn. Ct. App. 1988) (victim's statements to the police were admissible as substantive evidence against defendant under the catchall exception); State v. Whiteside, 400 N.W.2d 140, 146 (Minn. Ct. App. 1987) (statements of victim's mother to a social worker were admissible as substantive evidence against defendant under the catchall exception). Cf. State v. Gustafson, 379 N.W.2d 81, 85 (Minn. 1985) (taped statement of a third party confessing to the crime was inadmissible as substantive evidence when offered by the defense).

There are compelling reasons to afford the defense equal, if not greater, munificence. First, as this Court has recognized, a “criminal defendant has the right to be treated with fundamental fairness and ‘afforded a meaningful opportunity to present a complete defense.’” State v. Tovar, 605 N.W.2d 717, 722 (Minn. 2000) (citations omitted). Second, allowing the defense to present a prior inconsistent statement as substantive evidence would cause little prejudice to the state in most cases.

In the context of appellant’s case, it was critical for the defense to present evidence that someone else committed the crime. Eliseuson’s prior inconsistent statements to Ward, Weiss, and Larson, were sufficiently reliable to be admitted under Minn. R. Evid. 803(24). And ultimately, the jury should have been given the opportunity to decide whether Eliseuson was telling the truth. In denying appellant the opportunity to introduce this evidence—evidence that connected third party Steven Kyle Anderson with [REDACTED]’s murder—the trial court deprived appellant of his due process right to present a defense.

Respectfully submitted,

OFFICE OF THE MINNESOTA
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By: THEODORA GAÏTAS
Assistant State Public Defender
License No. 271810

2221 University Avenue SE, Suite 425
Minneapolis, MN 55414
Telephone: (612) 627-6980

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