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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1405**

State of Minnesota,
Respondent,

vs.

Eugene Sylvester Redday,
Appellant.

**Filed July 16, 2012
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27-CR-10-32636

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant
Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Charles Clippert, Special
Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and Willis,
Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his convictions of two counts of criminal sexual conduct in the first degree, arguing that the district court improperly admitted hearsay evidence, that the remaining evidence was insufficient to support one of the convictions, and that the district court abused its discretion by admitting evidence that appellant made no claim of innocence after his arrest, entitling him to a new trial. We affirm.

FACTS

In July 2010, seven-year-old N.M. told his mother that appellant Eugene Sylvester Redday “put his private part . . . in my butt” that morning and the day before. Redday is N.M.’s uncle (mother’s brother), and the sexual contact occurred in the apartment of N.M.’s aunt (mother’s and Redday’s sister) where N.M. and his mother were staying.

N.M.’s mother contacted the police and relayed to the dispatcher what N.M. had told her about the incidents. His mother then took N.M. to the hospital. He was examined by Dr. Brian Mahoney, who later testified that N.M. told him that he was hurt and that a person N.M. identified as his uncle had told N.M. to go into a room, after which his uncle locked the door and then told N.M. to go into a closet and pull his pants down. N.M. told Dr. Mahoney that he then had something painful “in his butt,” a penis, and then he “felt a liquid on his leg.” Dr. Mahoney testified that he had to sedate N.M. to complete the physical examination because N.M. would not allow him to collect evidence from his anus. Dr. Mahoney did not find any tearing, fissures, or blood in or on N.M.’s anus, but he testified that this is not unusual even when there has been a sexual assault.

Dried secretions found by a sexual-assault-resource-services nurse on the inside of the back of N.M.'s underwear were later identified as Redday's semen. No semen was detected on the rectal swab taken from N.M.

After the medical examination, N.M. was taken to Cornerhouse for a forensic interview. During the video-recorded interview, N.M. told the forensic interviewer that Redday "[p]ut his private in [N.M.'s] butt . . . [y]esterday and the other day." He also told her that Redday touched N.M.'s penis and wanted N.M. to touch his penis.

Redday was arrested and taken to Hennepin County Medical Center for a physical examination and to provide DNA samples. Redday consented to providing the samples, but Officer Deanna Rivard told him that they had to wait for a search warrant. Redday spontaneously told Officer Rivard that N.M.'s mother did not pay much attention to her children and that N.M. might be making up the allegations to get attention. He also told her that N.M.'s mother had been sexually abused as a child. Before trial, the district court excluded any reference to mother's alleged childhood sexual abuse.

At trial, N.M. testified about the incident that took place on the day he reported it to his mother; he did not testify about any other incident. The district court permitted the Cornerhouse interview to be played for the jury, holding that the description of the day-of-reporting incident was consistent with N.M.'s testimony and that the description of an earlier incident was admissible under a totality-of-the-circumstances analysis as "a very reliable piece of evidence that the jury ought to hear."

Over Redday's objection, the district court also allowed the prosecutor to ask Officer Rivard whether Redday, while suggesting that N.M. was fabricating the

allegations, ever proclaimed his innocence. The district court concluded that Redday had opened the door to this questioning by eliciting testimony from Officer Rivard that Redday was very willing to talk to her and had consented to a physical examination and taking of DNA samples. The officer answered the question, “No.”

Redday testified that the only time he had seen N.M. on the weekend in question was briefly on the morning of the day that N.M. reported the abuse. He denied sexually abusing N.M. His sister, in whose apartment the incidents occurred, testified that Redday was never alone with N.M. on the day N.M. reported the abuse.

The jury convicted Redday of both counts of first-degree criminal sexual conduct, and he was sentenced to concurrent guideline sentences of 234 months and 320 months. This appeal followed.

D E C I S I O N

A. Sufficiency of evidence

Redday argues that N.M.’s statements to his mother, the doctor, and the Cornerhouse interviewer that he had been sexually abused on the day before he reported the abuse were inadmissible hearsay statements erroneously admitted. Redday asserts that the evidence is insufficient to support his conviction of that offense because the erroneously admitted out-of-court statements are the only evidence of that offense.

“Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was

thereby prejudiced.” *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citation omitted).

A prior statement by a witness is not hearsay if (1) the witness testifies at trial and is subject to cross-examination concerning the statement; (2) the statement is helpful to the jury in evaluating the credibility of the witness; and (3) the statement is consistent with the witness’s testimony. Minn. R. Evid. 801(d)(1)(B). To be admissible as a prior consistent statement, a witness’s prior statement must be “reasonably consistent” and need not track his trial testimony verbatim. *In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998). But “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.” *State v. Bakken*, 604 N.W.2d 106, 110 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). Because N.M. did not testify about sexual abuse occurring on the day before he reported sexual abuse, the district court correctly concluded that N.M.’s out-of-court statements about that incident of abuse were not admissible as prior consistent statements.

The district court nonetheless found that the statements about the first incident of abuse were admissible under the residual exception to the rule excluding hearsay.

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.

Minn. R. Evid. 807. “In considering the reliability of statements offered under the residual exception, courts follow the ‘totality of the circumstances approach, looking to all relevant factors bearing on trustworthiness to determine whether the extrajudicial statement has circumstantial guarantees of 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)).

Relevant circumstances under Minn. R. Evid. 807 “are those circumstances actually surrounding the making of the statements.” *Id.* These circumstances include

whether the statement was spontaneous, whether the questioner had a preconceived idea of what the child should say, whether the statement was in response to leading questions, whether the child had any apparent motive to fabricate, whether the statements are of the type one would expect a child of that age to fabricate, whether the statement remained consistent over time, and the mental state of the child at the time of the statements.

Id.

The district court found that the Cornerhouse videotape was “more probative . . . than any other evidence certainly with respect to the [challenged] incident” and that the videotape evidence “clearly” served the interests of justice “because these kinds of interviews of children . . . ha[ve] really become a staple of child sex investigations. It is something that . . . police agencies and other law enforcement agencies rely on for getting the most accurate account of what happened.” In its analysis of the totality of the circumstances bearing on the trustworthiness of the statements, the district court found

that “the questions posed by the forensics [investigator] were good questions. They were not leading questions, especially not getting into this second incident. . . . [B]oth incidences were brought out with proper questions.” The district court also found that N.M.’s statements during the Cornerhouse interview were consistent with his statements to his mother, especially with respect to the number of times Redday abused him, and that his statements to his mother were made “when he was still under the trauma of this event” Finally, the district court determined that no one demonstrated that N.M. had any motive to lie and that the corroborating evidence was “as strong as it gets.”

On appeal, Redday questions whether N.M.’s statements about the first incident to his mother and her subsequent statements to the 911 operator were admissible as a hearsay exception. But Redday did not object to the admission of these statements through the 911 recording and mother’s testimony, and he does not argue on appeal that admission of these statements constituted plain error. The district court noted that the statements were made while N.M. was still under the trauma of the event, which is supported by the fact that N.M. was having a difficult time walking, leading to his disclosure of the events to his mother. Because N.M.’s statements to his mother are not obviously inadmissible hearsay and Redday’s failure to object to the statements when they were admitted deprived the state of the opportunity to establish that the statements were admissible under an exception to the hearsay rule, we reject Redday’s argument on appeal that those statements were erroneously admitted.

The district court’s findings regarding the reliability of the statements N.M. made in the Cornerhouse interview are supported by the record. The district court did not

abuse its discretion by admitting into evidence the portions of the videotaped Cornerhouse interview concerning the first incident of abuse under the residual exception to the hearsay rule. *See Robinson*, 718 N.W.2d at 410 (listing as sufficient circumstantial guarantees of trustworthiness: the voluntariness of a statement; consistency in statements and identification of attacker; lack of motivation to lie; and evidence corroborating the out-of-court statements). And the statements constitute evidence sufficient to support Redday's conviction of the charge of criminal sexual conduct for the incident that occurred on the day before N.M. reported the sexual contacts.

B. Question about whether Redday claimed innocence

Redday challenges his conviction of both counts of criminal sexual conduct on the grounds that the district court violated his Fifth Amendment rights and committed reversible error when it allowed the prosecutor to ask Officer Rivard if Redday asserted his innocence when he was talking to her while they waited at the hospital for the search warrant authorizing the taking of DNA samples. The prosecutor argued, and the district court agreed, that Redday "opened the door" to the question by asking Officer Rivard whether Redday had been willing to talk to her at that time.

The core protections of the Fifth Amendment provide that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *State v. Johnson*, 811 N.W.2d 136, 151 (Minn. App. 2012), *review denied* (Minn. March 28, 2012), we held that a defendant's post-arrest, pre-*Miranda* silence can be used in the state's case-in-chief without implicating the Fifth Amendment when the defendant, although arrested, is under no government-imposed compulsion to speak at the time of

his silence. *Johnson* involved silence in the face of a direct accusation and therefore is distinguishable from the circumstances of this case in which there was no direct accusation. Nevertheless, we conclude that when, as here, there is no government-imposed compulsion to speak at the time a statement is made or not made, the *constitutional* analysis is the same, and the Fifth Amendment is not implicated.

Additionally, under the circumstances of this case, any error in the district court's decision to allow the prosecutor to ask if Redday proclaimed his innocence to Officer Rivard was harmless beyond a reasonable doubt. *See State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005) (stating that a conviction following a district court's error in admitting evidence unconstitutionally will stand if the error was harmless beyond a reasonable doubt). An error is harmless beyond a reasonable doubt if the jury's guilty verdict was surely not attributable to the error. *Id.*

Immediately following the testimony about Redday's failure to specifically assert his innocence, the district court permitted Redday to re-examine Officer Rivard. The following exchange occurred:

COUNSEL: Officer Rivard, did Mr. Redday tell you that [N.M.'s mother] didn't give her children much attention?

.....
RIVARD: . . . Yes, he did.

COUNSEL: And did he say that he thought [N.M.] might be saying this in order to get attention?

RIVARD: Yes, he did.

Additionally, during Redday's testimony, the prosecutor and Redday had an exchange during which it was clear that Redday proclaimed his innocence while speaking to a different police officer. Because the DNA evidence, N.M.'s testimony and

statements, and testimony corroborating N.M.'s testimony and statements strongly support Redday's conviction, we conclude that any error related to the relatively isolated questions about what Redday said or failed to say to Officer Rivard did not influence the verdict and is harmless beyond a reasonable doubt.

C. Prosecutorial misconduct

Redday asserts that the prosecutor committed reversible prosecutorial misconduct when the prosecutor asked Officer Rivard whether Redday proclaimed his innocence. Redday argues that this question shifted the burden to Redday to prove his innocence. *See State v. Martin*, 773 N.W.2d 89, 105 (Minn. 2009) ("Prosecutors improperly shift the burden of proof when they imply that a defendant has the burden of proving his innocence."). Redday does not explain how the question shifted the burden of proof. We find no merit in this claim, and because we have held that any error regarding this question was harmless beyond a reasonable doubt, any prosecutorial misconduct involved in asking the question is not reversible error.

We also find no merit in Redday's assertion that the prosecutor committed misconduct by requiring Officer Rivard to testify about the previously excluded statement that N.M.'s mother had been sexually abused as a child. The record reflects that the prosecutor refrained from asking the officer exactly what Redday said to avoid soliciting the excluded statement.

D. Redday's pro se supplemental brief

In a pro se supplemental brief, Redday asserts that the prosecutor intimidated N.M. and "manipulated [N.M.'s] thoughts" during direct examination of N.M. Redday's

assertions are not supported by citation to the record, argument, or authority. An assignment of error in a brief based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006) (citing *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997)), *aff’d on other grounds*, 728 N.W.2d 243 (Minn. 2007).

Redday also asserts that he was denied effective assistance of counsel and deprived of his right to confront his accuser when his attorney declined to cross-examine N.M., but “[w]hat evidence to present to the jury . . . lie[s] within the proper discretion of trial counsel and will generally not be reviewed later for competence. . . . [A] defendant must show that his counsel’s errors so prejudiced the defendant at trial that a different outcome would have resulted but for the error.” *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (citations omitted). An attorney’s trial tactics should not be reviewed by an appellate court, which, unlike counsel, has the benefit of hindsight. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Redday had the opportunity to confront N.M. in court, so his confrontation right was waived, not denied. And Redday has failed to produce any evidence that failure to cross-examine N.M. rendered his counsel’s assistance ineffective or had any effect on the outcome of this trial.

Affirmed.