STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1053

State of Minnesota,
Respondent,

vs.

Alexander NMN Taylor,
Appellant.

Filed August 25, 2009
Affirmed
Collins, Judge[*]

St. Louis County District Court
File No. 69DU-CR-07-3205

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie S. Ford, St. Louis County Attorney, St. Louis County Courthouse, 100 North Fifth Avenue West, Duluth, MN 55802 (for respondent)

John Stuart, State Public Defender, Michael F. Cromett, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, 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.

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

COLLINS, Judge

Appellant challenges his conviction of felony domestic assault, arguing that the district court erred by accepting defense counsel's stipulation on an element of the offense, and by admitting the victim's statement to police as a prior consistent statement and the victim's testimony regarding prior physical altercations with appellant. We affirm.

FACTS

Appellant Alexander Taylor and J.J. were involved in a long-term on-and-off relationship. One evening in June 2007, J.J, her friend J.C., and Taylor drove to a Duluth bar and strip club where they stayed and drank until closing time. According to J.J., after the three returned to her car, she and Taylor began arguing because she wanted to go home and Taylor did not. The argument became heated and J.J. got out of the car because she "had altercations with him before and [she] didn't want to stay in the car." Taylor followed J.J. out of the car and "went into an absolute rage." Taylor "grabbed a flower pot . . . and threw it on the car and [was] just screaming and yelling. . . . He [then] grabbed [her] by the hair and smashed [her] head numerous times into the cast iron fence . . . ." J.J. testified that Taylor smashed her head against the fence "a good three, four times."

Thereafter, J.J. called the police, and Taylor "proceeded to walk down [the street] with one of his acquaintances to get a ride with him." But when Taylor abruptly turned around and "came running after [J.J.]," J.J. and J.C. quickly got back into the car and

fled. When J.J. arrived home she again called the police because "he was there and [she] was scared."

J.C.'s trial testimony corroborated J.J.'s. However, both Taylor and A.R., Taylor's girlfriend at the time of trial, told a dramatically different story. Taylor conceded that he and J.J. had argued, but not that it progressed to physical violence. Rather, Taylor testified that A.R. was also present, she and J.J. began arguing over their relationships with him, and their argument escalated into physical violence that lasted until "a couple of the guys . . . separated both of them." Likewise, A.R. testified that she and J.J. were "fighting with each other," and Taylor was not involved. However, on cross-examination, Taylor admitted that when questioned by police that night he never indicated that A.R. had been present, much less that it was she who assaulted J.J.

Taylor was charged with two counts of felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2006)—one count alleging intent to inflict bodily harm and one count alleging intent to cause fear. Following a trial, a jury found Taylor guilty of domestic assault, intent to inflict bodily harm, and acquitted him on the other count. Taylor was convicted and sentenced by the district court to 24 months of imprisonment. This appeal followed.

D E C I S I O N

I.

An element of felony domestic assault requires proof that the alleged conduct took place "within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions . . . ." Minn. Stat. § 609.2242, subd. 4

(2006). In an off-the-record discussion prior to trial, the district court learned of the defense's willingness to stipulate to the prior-offense element. The district court stated on the record that "[w]e've agreed that—[defense counsel] wants to stipulate to the priors and they will not be an element of the—element of the offense sent to the jury." Defense counsel responded, "Yes, Your Honor." No inquiry was made to Taylor himself. On appeal, Taylor asserts his entitlement to a new trial "because a stipulation to an element of the offense must be personally made by the defendant."

The right to a jury trial in a criminal case is constitutionally assured. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant may waive a jury trial with the district court's approval if after the district court advises the defendant of the right to a trial by jury and the defendant has an opportunity to consult with counsel, the defendant personally waives the right "in writing or orally upon the record in open court." Minn. R. Crim. P. 26.01, subd. 1(2)(a). Generally, when, as here, a prior conviction is an element of the charged offense, a defendant's stipulation to the existence of the prior conviction operates as a waiver of the right to a jury trial on that element of the offense and removes potentially prejudicial evidence from the jury's consideration. *State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984). Thus, a defendant stipulating to an element of an offense, such as a prior qualifying conviction, must make an oral or written waiver based on the above procedure. *State v. Hinton*, 702 N.W.2d 278, 281 (Minn. App. 2005); *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review denied* (Minn. June 29, 2004).

This waiver cannot be delegated to the defendant's counsel. *Wright*, 679 N.W.2d at 191. Courts review such stipulations for strict compliance to assure that the defendant waived his or her rights knowingly and intelligently. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002). Whether a defendant's waiver satisfied constitutional requirements is an issue which we review de novo. *Id.* We review a district court's decision to accept a stipulation to an element of an offense under a harmless-error analysis. *Wright*, 679 N.W.2d at 191. When applying this analysis, we determine whether acceptance of the stipulation was error, and, if so, whether the error was prejudicial. *Id.* A constitutional error "will be found prejudicial if there is a reasonable possibility that the error complained of might have contributed to the conviction." *State v. Larson*, 389 N.W.2d 872, 875 (Minn. 1986) (quotation omitted). A new trial is not warranted, however, if the state can establish beyond a reasonable doubt that the constitutional error was harmless. *State v. Jones*, 556 N.W.2d 903, 910 (Minn. 1996).

It is undisputed that Taylor did not personally stipulate to the prior-convictions element of the charged offenses. The district court thus erroneously acted on the stipulation proffered by Taylor's defense counsel. But Taylor's prior convictions are undeniable and he does not dispute them. Therefore, beyond a reasonable doubt, the district court's error in failing to elicit Taylor's personal stipulation to the prior-convictions element is harmless. *See Hinton*, 702 N.W.2d at 282 (approving harmless-error analysis in such case).

II.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

A. Hearsay

Officer Brian Jones, one of the two officers responding to J.J.'s call from her home, was asked by the prosecutor at trial: "Did [J.J.] say where she was earlier that night?" Defense counsel objected, stating that "it's just a hearsay statement without any particular need for an exception or any exception applies for this. It's just . . . the officer is testifying as to what the witnesses, who already testified, told him . . . ." The state argued, and the district court agreed without analysis, that the statement was admissible under rule 801(d)(1)(B) as a "prior consistent statement that's helpful." Appellant contends that "none of the requirements for admission pursuant to [rule 801(d)(1)(B)] were satisfied and the statements were improperly admitted."

"'Hearsay' is 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); *State v. Litzau*, 650 N.W.2d 177, 182-83 (Minn. 2002). Hearsay is inadmissible unless an exception to the hearsay rule applies. Minn. R. Evid. 802. A statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's

credibility as a witness . . . ." Minn. R. Evid. 801(d)(1)(B). However, before a prior consistent statement can be admitted pursuant to rule 801(d)(1)(B), the district court must determine whether (1) there has been a challenge to the witness's credibility, (2) the prior consistent statement would be helpful to the trier of fact in evaluating the witness's credibility, and (3) the prior statement and the trial testimony are consistent with each other. *State v. Bakken*, 604 N.W.2d 106, 109 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000); *State v. Nunn*, 561 N.W.2d 902, 909 (Minn. 1997). Although the district court did not evaluate the *Bakken* factors on the record, the record in this instance is sufficient to permit appellate review on the issue of whether J.J.'s prior consistent statement was properly admitted, and each factor will be analyzed here in turn.[1]

Challenge to credibility

Appellant maintains that "[t]here was no direct challenge to the witness' credibility." Although *Nunn* does not articulate what constitutes a "challenge to credibility," a witness's credibility can be challenged either directly, through cross-examination or introduction of other evidence that illustrates inconsistencies, gaps, vagaries, memory lapses, and any other number of defects, or indirectly, through statements made during opening and closing statements. *See State v. Grecinger*, 569 N.W.2d 189, 193 (Minn. 1997) (stating that victim's credibility can be attacked during cross-examination or opening statements); *State v. Harris*, 560 N.W.2d 672, 677 n.2 (Minn. 1997) (in its opening statement defense began attacking the credibility of

[1] As we have in other cases, we caution that when the district court relies on rule 801(d)(1)(B) to support admissibility of a prior consistent statement, the risk of reversal is inherent in the failure to address each *Bakken* factor on the record.

defendant's former girlfriend); *State v. Axford*, 417 N.W.2d 88, 90 (Minn. 1987) (in opening statement defense counsel attacked victim's credibility). Here, the jury heard J.J. testify that Taylor assaulted her, while Taylor testified that it was A.R, not he, who assaulted J.J. A.R. also testified for the defense in direct contradiction to J.J.'s testimony. On cross-examination, J.J. was challenged as to whether she was certain that Taylor, not A.R., assaulted her. Thus, directly, and by implication, the defense is suggesting that J.J. is lying, or at best mistaken, about who assaulted her. This satisfies the first *Bakken* factor.

Helpful to the jury

A prior consistent statement might be helpful to a jury to bolster witness credibility by negating alleged improper influence or motive, providing a meaningful context, or demonstrating accuracy of memory, *see State v. Lucas*, 372 N.W.2d 731, 738 (Minn. 1985) (statement admitted under 801(d)(1)(B) to help jury assess memory and motivation), but it is unlikely that simply repeating a statement implies veracity. *Bakken*, 604 N.W.2d at 109. Here, because the thrust of Taylor's defense was that J.J. was lying (or mistaken) about who assaulted her, Officer Jones's testimony relating what J.J. stated on the night of the attack bolsters J.J.'s credibility by "demonstrating accuracy of memory." Moreover, because Taylor contends that it was A.R., his current girlfriend, who assaulted his then-girlfriend, Officer Jones's testimony arguably "obviate[s] an improper influence or motive" on the part of J.J.—to punish or get back at Taylor, her former boyfriend. This satisfies the second *Bakken* factor.

Prior statement consistent with trial testimony

Prior statements and trial testimony do not have to be mirror images to qualify as prior consistent statements. *See In re Welfare of K.A.S.*, 585 N.W.2d 71, 76 (Minn. App. 1998) (videotaped statement that was "reasonably consistent" with witness's trial testimony was admissible under rule 801(d)(1)(B)). Here, J.J.'s out-of-court statement varies in only two respects from her trial testimony. First, J.J. testified that she, J.C., and Taylor stayed at the bar until closing time. But she told Officer Jones that she had wanted to leave the bar earlier because she was not feeling well. Second, J.J. testified that she got out of her car after she and Taylor began arguing and, as she was walking away, Taylor "[g]rabbed a flower pot . . . and threw it on the car . . . . He [then] grabbed [her] by the hair and smashed [her] head numerous times into the cast iron fence . . . ." But she told Officer Jones that Taylor "dragged her out of the vehicle and dragged her over to a metal railing . . . , grabbed her by the head, and . . . smashed her head into the metal railing several times." Neither of these inconsistencies challenge the core of J.J.'s prior statement and trial testimony—that Taylor assaulted her. And because it is natural to have some variance between statements that are made months apart, and because trial statements do not have to replicate prior statements verbatim, we conclude that J.J.'s prior statement is amply consistent with her trial testimony. This satisfies the third *Bakken* factor.

B. Prior Bad Act

J.J. testified that she had at least four or five prior physical altercations with Taylor. Defense counsel objected on relevance ground and now asserts that the district court

erred by permitting the state to "introduce evidence of other bad acts allegedly committed by Taylor."

"Evidence of similar conduct by the accused against the victim of domestic abuse . . . is admissible unless the probative value is substantially outweighed by the danger of unfair prejudice . . . . 'Similar conduct' includes . . . evidence of domestic abuse." Minn. Stat. § 634.20 (2006). Domestic abuse, as included in the "similar conduct" definition, includes acts against a fellow family or household member encompassing the following: physical harm, bodily injury, or assault; the infliction of fear of imminent physical harm, bodily injury, or assault; terroristic threats; criminal sexual conduct; or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a) (2006). "[T]he admissibility of evidence under [this statute] depends only on (1) whether the offered evidence is evidence of similar conduct; and (2) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." *State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004); *see also State v. Bell*, 719 N.W.2d 635, 639 (Minn. 2006) (stating that relationship evidence under Minn. Stat. § 634.20 is not subject to *Spreigl* analysis). Evidence of similar conduct by the accused against an alleged victim of domestic abuse is admissible under Minn. Stat. § 634.20 without first being established by clear and convincing evidence. *McCoy*, 682 N.W.2d at 161.

It is not disputed that the prior physical altercations alluded to by J.J. meet the domestic abuse definition of similar conduct. Thus, the sole issue presented is whether the "probative value of the evidence is substantially outweighed by the danger of unfair

prejudice." Evidence is unfairly prejudicial if it "persuades by illegitimate means, giving one party an unfair advantage." *Bell*, 719 N.W.2d at 641.

Minnesota courts have recognized the inherent probative value of evidence of past acts of violence committed, as here, by the same defendant against the same victim. *Id.* The relationship evidence assisted the jury "by providing a context with which it could better judge the credibility of the principals in the relationship." *McCoy*, 682 N.W.2d at 161. Here, the evidence could help the jury understand or reconcile J.J.'s testimony with that of Taylor's. As such, the evidence is highly probative. Regarding the prejudicial nature of the testimony, at trial the state made no reference to the prior physical altercations in either its opening statement or closing arguments. The state did not elaborate on this evidence to improperly suggest the bromide "once an abuser, always an abuser." To the contrary, J.J.'s testimony on this point comprises less than a single page of more than 150 pages of trial transcript. We conclude that although any evidence of prior physical violence is prejudicial to Taylor, the probative value of J.J.'s properly limited testimony is not substantially outweighed by the danger of *unfair* prejudice.

Affirmed.